

Appendices

Appendix 1

Directions To Determining Officers On Tape Recorded Evidence

APPENDIX B

LISTENING TO TAPE RECORDINGS OF POLICE INTERVIEWS WITH DEFENDANT DIRECTIONS FOR DETERMINING OFFICERS

1. These Directions tell determining officers how to deal with claims from barristers and solicitors for listening to tape recordings of their clients' interviews with the police.

Test of Reasonableness

2. There is no requirement for solicitors and or counsel to listen to the tape recording in every case. The police officer who conducts the interview is required to produce a written Record of Interview for the purpose of keeping to a minimum the occasions on which lawyers will need to listen to the tape.
3. A determining officer may ask a solicitor or barrister to justify a claim for listening to a tape where the determining officer is not satisfied that it was reasonable to do so. Some examples of circumstances where it would be reasonable are:
 - (a) where the police officer's Record of Interview was materially disputed and resolution of the dispute was relevant to the conduct of the defence
 - (b) where the defendant complained of oppression or circumstances tending to create unreliability in a confession made by the defendant
 - (c) where prosecuting solicitor and/or counsel had listened to the tape in the course of preparing the prosecution case.
 - (d) where the defendant instructed the solicitor to listen to the tape

4. The examples in the preceding paragraph are not exhaustive and each case must be considered on its own merits. Determining officers should be particularly aware of the need to avoid falling into the hindsight trap in these circumstances. For example, a claim for listening to a tape in a case in which a guilty plea was indicated from the outset may appear unreasonable. However, the solicitor or counsel might justifiably say that the decision to plead guilty was made as a result of listening to the tape in the first place.

The fact that a solicitor has listened to a tape does not mean that counsel must also do so. However where counsel has been instructed by his solicitor to listen then it would be unreasonable to disallow counsel's claim for doing so.

Paragraphs 6 to 9 omitted

Ex Post facto determinations

10. Listening to a tape or tapes is part of normal preparation in a case and should be remunerated accordingly. Whilst the length of the tape(s) is a starting point for the assessment of what is reasonable, it would not be reasonable to assume that the solicitor or counsel had only to play the tape(s) through without Interruption. The preparation time involved may have been longer than the length of the tape if, for example, the solicitor or counsel stopped the tape intermittently to make notes, or to compare what he had heard with the defendant's proof of evidence or some other statement, or to discuss it with the defendant.

Purchase of Tapes

11. Where it was reasonable for a solicitor to listen to a tape and the determining officer is satisfied that the police have charged for supplying a copy of the taped interview, that sum shall be paid by way of disbursement.
12. Where a solicitor makes no claim for the cost of purchase but nevertheless submits a claim for listening to a tape, the determining officer may require the solicitor to produce evidence of possession of the tape in support of his claim.

Appendix 2

Law Society Defence Operational Guidance On Interpreters

The Trials Issue Group Subgroup on interpreters has drafted a revised national agreement on the use of interpreters, with operational guidance issued by each agency including the Law Society, that replaced the 1997 agreement. The Subgroup contains representatives from all the agencies in the criminal justice system including the Law Society. It came into force in October 2001. Details of the new agreement were published in the Criminal Practitioners Newsletter in October 2001 and published on the crime page on the Law Society website. The new operational guidance is reproduced here by kind permission of the Law Society.

Defence Operational Guidance; Interpreters

By Sophie Thomas

The national TIG has approved subgroup, The Interpreters Working Party's draft Revised Arrangements for the Attendance of Interpreters in Investigations and Proceedings within the Criminal Justice System. This will be published shortly, and will be available on the Criminal Law page of the Law Society website with the operational guidance issued by each agency in the criminal justice system.

Operational Guidance Issued by The Criminal Law Committee of the The Law Society of England and Wales

The Law Society Criminal Law Committee and other agencies in the criminal justice system have agreed the revised arrangements for who is responsible for the attendance of interpreters in criminal investigations and proceedings. Each agency has updated the operational guidance which will be attached to the Arrangements, when published.

The Criminal Law Committee consists of defence practitioners, senior prosecutors, justice's clerks, a District Judge and an academic lawyer. Several of the Committee also sit as recorders.

Annexed to the Operational Guidance is a form which may be used as a checklist by a solicitor when organising an interpreter either for the defendant when taking instructions or for a defence witness.

Interpreters; general

Interpretation plays a far greater role in the criminal process than is realised and can potentially make all the difference between a defendant being found guilty or not guilty. An interpreter needs to have linguistic competence, a professional attitude, an understanding of the legal process and of his duties and the need for impartiality and confidentiality. The fact that a person calls himself an interpreter does not

- -In the case of a foreign language speaker, find out the person's preferred language. Be aware that there can be immense variation in dialects of a language, or within different communities so check the regional as well as national language spoken.

- In the case of a deaf person, ascertain the preferred means of communication, e.g. sign language or lip speaker.

- Discuss the person's preferences in the selection of an interpreter: sex; age; religion; ethnic origin; other.

Selecting an interpreter

Interpreters should be of a recognised quality and wherever possible taken from the National Register of Public Service Interpreters (NRPSI)¹ or the Advancement of Communication with Deaf People (CACDP) Directory. For spoken language interpreters the starting point must be full DPSI Law Option accreditation. Where this is not practicable then the interpreter should have a skill or qualification, or be on the internal firm's lists required by the Legal Services Commission contracts as being of an acceptable standard.

Where the client is vulnerable and wishes to have an initial consultation with a trusted person with no qualifications in interpreting, then the advantages in improving client confidence should be weighed against the risk of compromising the best evidence. A qualified interpreter should be used thereafter where possible.

Police station

The defence solicitor is responsible for

interpreter's services, either under existing contracting arrangements or through prior authority from the Legal Services Commission. The Lord Chancellor's Department have issued the following advice from the Legal Services Commission:

When a defence solicitor requires an interpreter to facilitate the provision of advice between a solicitor and a client a different interpreter, where practicable, should be used. Where this is not practicable the client may, through his or her defence solicitor; consent to the use of a police appointed interpreter.

As the interpreter is a prosecution witness (on client comprehension and accuracy of interpretation) it is appropriate, where feasible, to have a separate interpreter for consultation.

It may also be necessary to have a second interpreter if the client is vulnerable, or knows the interpreter personally, or by repute. Interpreters employed by the police should be selected from the NRPSI or CACDP Directory and therefore bound by the professional codes of impartiality and confidentiality but community relations can mean that the client has little confidence in the interpreter/police relationship. This may affect the quality of the solicitor/client consultation if a separate interpreter is not used.

However these issues need to be weighed against the client's interests in waiting in custody for a second interpreter. This can be a lengthy period especially if interpreters for that language are rare.

Where the police employed interpreter is used, it is good practice to advise the client of the interpreter's independence from the police.

Preparing the case

The defence is responsible for obtaining

necessarily mean that he has these qualities. How often has the interpreter spoken the language recently? Does he or she understand a particular dialect and slang words?

Identifying Interpretation needs

- Establish if a defendant has difficulty understanding or expressing themselves in English, especially formal, legal registers; or has a hearing or speech impediment.

ensuring:

- That interpretation needs of the client or appropriate adult in the police station not identified by the police are met.

- If a second interpreter is not available, that the interpreter employed by the police is appropriate for defence consultations and that the client consents to the use of the same Interpreter.

The defence should use a separate interpreter for defence consultation, in which case the defence is responsible for obtaining and paying for the

interpreters for attendance on clients and witnesses. The defence solicitor is responsible for arranging payment of the interpreter's fees, although in unusual circumstances it is advisable to obtain prior authority from the Legal Services Commission.

The key documents should be translated for the client.

In court

The following agency is responsible for arranging a foreign language or

sign language interpreter for court proceedings:

- the police or other prosecuting agency, for a defendant who is charged with an offence and first appears in court within two working days (not including Saturdays) of charge;
- the court, (magistrates' court, Crown Court or Court of Appeal) for a defendant in all other circumstances
- the prosecution, for a prosecution witness
- the defence for a defence witness.

you by the person whose evidence is to be interpreted, as well as copies of any prosecution witness Statements which are likely to be put to the witness in cross-examination.

More than one interpreter at court

Each co-defendant must have a separate interpreter. In some cases it will be appropriate to engage a separate court interpreter for the witnesses, defendant and the appropriate adult for example if there are a large number of witnesses or co-defendants to make separate interpreters necessary. Arrangements should be agreed with the court and in some cases, prior authority gained from the Legal Services Commission before hand.

Defence witnesses

The defence solicitor is responsible for arranging for interpreters for defence witnesses. The interpreter should be taken from the appropriate Register, and qualified to interpret and translate to the satisfaction of the defence solicitor.

The solicitor should inform the court and the prosecution of the name of the interpreter to be employed to interpret

16 August 2001

Appendix 1

Record of use of interpreters

Record to be attached to client's file

Name of client:

Name of court:

Unique case reference no:

Action to be Taken

Information to be sent to:

(enter 'court' or 'Interpreter')

Youth Courts

In Youth court cases parents or other appropriate adults requiring interpreters must have that facility which is provided by and at the expense of the court.

Helping the court to organise an interpreter for the defendant

The magistrates' court will usually be informed by the police before the first hearing that an interpreter is required for a defendant. If the need for an interpreter only becomes apparent after the defendant has been released from the police station or the case has been committed transferred or sent for trial the defence solicitor should inform the magistrates' court or Crown Court of this as early as practicable.

The defence solicitor should be able to help the court to appoint a suitable interpreter. The solicitor should collect relevant information about the defendant and pass this on to the court. The information to be collected is the same information which a solicitor must obtain to organise an interpreter for a defence witness. That information will have been obtained if the solicitor has already employed an interpreter to enable the solicitor to communicate with the defendant. If the solicitor considers that the same interpreter could be employed to interpret for the defendant in court (providing that the interpreter was not used at the police station), the solicitor should inform the court of the interpreter's details as early as practicable. It is the court's decision whether this or another interpreter is used in court. The court will inform the defence of the name of the person whom they have appointed.

Materials to be supplied to the interpreter

The interpreter will be helped by having sight of a copy of the statement made to

for a defence witness, to avoid duplication.

Where the solicitor considers there should be a separate interpreter for the defence for consultations during the proceedings then the solicitor is responsible for employing and paying that interpreter. In unusual circumstances prior authority should be obtained from the Legal Services Commission.

The court appointed interpreter will interpret or translate the evidence to the court during the proceedings. In some cases the defendant may wish to give evidence through the interpreter he or she has used in previous consultations rather than through the court appointed interpreter. This may be if the defendant is vulnerable or has language or speech needs and the existing communication between the known interpreter and defendant will improve best evidence. The court should be notified of this application in good time.

Keeping a record

It is good practice to keep a record on your case file of the details of the client/witness for whom an interpreter is required; a person who is instructed to interpret on the client/witness's behalf; any briefing given to an interpreter about any special terminology or procedure involved in the conduct of the case; and previous hearings when an interpreter has been involved.

For: *(type of hearing)*

On: *(date)*

Details of Person for Whom an Interpreter is Required

Use a different form for each defendant/witness

1. Defendant/defence witness
(delete as appropriate)
2. Country/region of origin:
3. Name:
4. Sex
5. Age:
6. Best language:
7. Dialect if any: *(For deaf/deafened people note whether British or other sign language or lip speaking required).*
8. Language of literacy:
Fluent/modest/elementary/nil
9. Knowledge of English:

Nil/a few words/modest
10. Above checked via
interpreter:

Y/N
11. Preferences in selection of an
interpreter: *(note both information
and strength of preference 1-5)*

Sex Age Religion Ethnic origin Other

Briefing of Interpreter Required

Date:

Time:

Place of the hearing:

Subject content: (the interpreter will be helped by having a sight of the copy of the statement made to the solicitor by the person named above, as well as copies of any prosecution witness statements which are likely to be put to him/her in cross examination)

Technical content: (the case may involve technical matters such as medical or forensic evidence, psychiatric reports, or financial transactions)

¹ Access to the NRPSI is currently through subscription to the self financing NRPSI or via NRPSI helpline. The Law Society is currently negotiating access for practitioners.

Procedures: (where other than common ones may be involved)

Terminology: (technical, formal or slang not commonly understood. It may be useful for a glossary to be compiled in both languages, checked and passed on to maintain consistency during a case)

Contact point at solicitor's firm

Name:

Address:

Tel:

Fax:

Terms of engagement

Legal Aid Board/Central Funds/Private
(the solicitor should make it clear to the interpreter what the terms of engagement are and when s/he is not responsible for the interpreters fees)

Record of Interpreters Involved in the Case to Date

Date: *(interpreter used)*

Agency: *(who instructed interpreter)*

Place: *(where interpreter used)*

Interpreter *(name and NRPSI no.)*

Record of Legal Translators Involved in the Case to Date

(DPSI holders are assessed as being competent to translate straightforward, short texts. A more complex and lengthy text, such as an extradition document, may well have to be referred to a qualified specialist and perhaps a legally qualified one.)

Date:

Agency:

Name and address of translator:

Information Given to Non-English Speaker

Method:

(enter Y/N against each item date of hearing it refers to)

(enter either 'T' if text in and own language or 'E' if explanation via interpreter)

Date, time and place of hearing:

Purpose of the hearing:

The procedures to be used:

16 August 2001

Appendix 3

Standard Fee Claims - Billing Codes

Codes to identify person attended upon:

INDIVIDUAL	CODE	INDIVIDUAL	CODE
Client	C	Other defence solicitor	D
Expert witness	E	Probation	PR
Prosecution/police	P	Witness	W
Surety	S	Other	O

Codes to identify hearing type:

HEARING TYPE	CODE	HEARING TYPE	CODE
Defence bail application	DB		
Crown Court bail application	CB	Plea	PL
		Pre-trial review	PTR
		Cracked trial	CT
High Court bail application	HB	Summary trial	ST
Varied bail conditions	VB	Sentence	SE
Prosecution bail application (including judge in chambers)	PB	Transfer to Crown Court	TR
Formal remand (in custody)	FR	S.6(1) Committal (CPIA 1996) (including discontinuance or withdrawal)	SD
Adjournment (client on bail)	AD	S.6(2) Committal (including discontinuance or withdrawal)	SW
Mode of trial	MT	Case remitted from Crown Court to magistrates' (S.51 Crime and Disorder Act 1998)	RE
New offence(s)	NO		

Appendix 4

**Home Office Circular No. 30/1999 And Memorandum Of Good Practice
Re. Early Release Of Bodies**

HOME OFFICE

Constitutional & Community Police Directorate
Animals, Byelaws & Coroners Unit
Room 980, 50 Queen Anne's Gate, London, SW1H 9AT
Tel- 0171 273 3560 Fax: 0171 273 2029

Reference: CRS/97 16/5/2 24 June 1999

To.- The Coroner

The Chief Constable

For information to:

The Chief Crown Prosecutor
The Chief Executive, relevant County Councils, Metropolitan and London Borough
Councils, and Unitary Authorities

HOME OFFICE CIRCULAR No.30/19-99

POST MORTEM EXAMINATIONS AND THE EARLY RELEASE OF BODIES

The Government has for some time been concerned that the families of victims of a suspicious death can be denied the opportunity for an early funeral for their loved ones because of the need, in the interests of justice, to offer a defendant the opportunity to arrange an independent examination of the body. Although the great majority of homicides result in an arrest within a month (police figures suggest 66 % within 14 days. 75 % within one month), delays can become acute where the police investigation does not result in an early arrest and the coroner considers himself to be under an obligation to retain the remains - in some cases for a number of months - in the hope or expectation of charges being laid.

2. The additional distress for the families in this situation can be readily appreciated. Nevertheless, the right of a defendant to have the opportunity for the primary evidence to be examined on the directions of his legal advisers needs to be respected. The practice for coroners to retain the body for this purpose has long been endorsed by the courts (*R v Bristol Coroner ex p. Kerr [1974]*).

3. There is an associated problem where there are a number of defendants charged jointly in connection with a death but who each seek separate post mortem examinations. Whilst a relatively rare occurrence, the anguish for the family, of the deceased can only be aggravated and prolonged where such requests are made.

4. Following discussions between the various interested agencies, including the Coroners' Society, the Association of Chief Police Officers, and the Law Society, the Home Office believes that steps can be taken to reduce the length of time that victims' bodies may need to be retained by the coroner pending completion of post mortem examinations (whether on behalf of the police or the defence). Authority to undertake more than a limited number of such examinations might also be granted more sparingly.

5. The result of The inter-agency discussions was an agreed memorandum of good practice, a copy of which is attached. The main features are that-

- every effort is to be made for a decision on the need for any second post mortem to be taken as soon as possible:

- where no one is charged in connection with the death within a month, provision will be made for a second, independent. post mortem for use by a defendant in the future, if required;
- the body will be released for burial or cremation at the earliest opportunity;
- requests for multiple examinations by jointly charged defendants will be considered critically;
- all the individuals and agencies involved will seek to minimise delay, with the recommended timescales to be regarded as maxima.

6. In addition, the memorandum sets out a good practice approach, and serves to stress the importance of dealing, as quickly as possible with all aspects which may otherwise delay the coroner's decision to release the body. For example, it will be critical for the pathologist's report to be completed with all expedition, for the defence to take an early decision on the need for any further examination of the remains, and for the coroner actively to manage the case throughout in order to guard against any avoidable loss of time.

7. The procedures proposed in the memorandum are broadly that, where a homicide offence is suspected, the police and coroner will work- closely together to ensure that the initial post mortem examination is undertaken straightaway. The pathologist's report and the results of any additional forensic examinations or tests will be expected to be made available at the earliest opportunity, with the report itself completed not later than within 14 days. Following the examination, the Coroner will retain the body for up to 14 days unless he is sooner advised by all interested persons that they are content for him to release the body for the funeral. It will be particularly important for copies of the reports to be supplied without delay to the defence, if anyone has by then been charged in connection with the death. The 14 day leeway is designed primarily to allow any defendant the opportunity to consider, with his legal advisers, whether there is a need for a further, independent, examination. It will also allow the police to consider the results of the first examination and to assess the prospects for apprehending a suspect. If the police have, reason to believe that a person will be charged with a homicide offence within 28 days of the discovery of the offence, the coroner will be so advised and will retain the body until a person has been charged, or until the expiry of the 28 days.

8. If the defence decide that a second post mortem is required, they will be expected to make the arrangements without delay. The body will then be released. If no one has been charged in connection with a homicide offence, and the police do not expect to make an arrest within 28 days, the coroner will arrange for a second post mortem examination by a pathologist independent of the first. The body will then be released, and the second report retained for use by the defence if, in due course, an arrest is made and charges brought.

9. If significant differences emerge between the reports of the first and second post mortem examinations, coroners may commission a third examination. Such cases, are likely to be rare.

10. If a number of persons are charged jointly with offences arising from the death, they may seek to have separate post mortem examinations conducted for each defendant. Coroners will wish to consider whether, in the particular circumstances of any such case, such arrangements would be justified.

11. It is envisaged that the number of cases in which second post mortems are commissioned by the coroner should be relatively small. The Local Government Association has been consulted about the additional costs arising, and has indicated that it is content for the costs to be absorbed by the relevant local Councils. It should be noted that the additional costs arising should in any case be in part offset by reductions the mortuary costs where bodies can be released more quickly-

12. The Home Office believes that the procedures set out in the memorandum should go a long way to assist the bereaved, while retailing essential rights for defendants. It recommends adoption of the memorandum by all Coroners and Chief Police Officers with immediate effect in the interests of-

- reducing delays (average delays are unlikely, to be reduced significantly, but the worst cases involving months of uncertainty will be curbed);
- limiting the possibility of miscarriages of justice; and
- reducing the incidence of multiple post mortems.

13. In order to assist the Home Office assess the effectiveness of the arrangements, coroners are requested to provide, until further notice, the following details of all such cases which are reported to them from 1 July 1999:

Name of the deceased:

Date of death/discovery:

Date of first post mortem, and of the report:

Date of charge, if any:

Date of any second post mortem commissioned by the defence, and of the report:

Date of any second post mortem commissioned by the coroner, and of the report:

Decision on an application for multiple post mortem examinations:

Date of release of the body.

14. Any additional information, for example, difficulties in operating the procedures or unexpected causes of delay, would also be appreciated. This will be particularly relevant for the purposes of the arrangements, as set out below.

15. In order to minimise the burden on coroners, it is suggested that a report of the details then available should be forwarded as soon as practicable after the reported death, and thereafter updates provided at monthly intervals until the body has been released. In most cases this should mean that no more than two or three reports will be required per case. (On average, coroners can expect to have no more than four or five cases per year, although we recognise that some coroners are likely to have significantly, more cases than others.)

16. Coroners' reports should be sent to: Mr Bevan Hinds, Home Office, Constitutional and Community Policy Directorate, Coroners Section. Room 972, 50 Queen Anne's Gate. London SW1H 9AT (tel: 0171 273 3776; fax 0171 2734231). Any enquiries about this circular may be directed to Mr Robert Clifford at the above address (tel: 0171 273 3560).

17. It is proposed to review the operation of these procedures after 12 months in the light of experience.

18. Copies of this circular are enclosed for the attention of coroners' deputies and assistant deputies.

Yours sincerely,

RICK EVANS

HEAD OF UNIT

MEMORANDUM OF GOOD PRACTICE RE EARLY RELEASE OF BODIES IN CASES OF SUSPICIOUS DEATH

All Agencies

1. Steps to secure the early release of the body in any suspicious death, including murder, manslaughter, infanticide and causing death by dangerous driving, will be treated as a priority by all agencies involved, subject to the interests of the criminal justice system. All agencies concerned will recognise that early release is essential to assist the victim's family in coping with their grief.
2. No national or local investigative or procedural changes should be introduced without considering the effect on the early release of bodies and ways to minimise any delays.

The Police

3. The Senior Investigating Officer (SIO) should clearly designate in the Policy Book an officer to be liaison officer with the Coroner, Defence team(s) and Pathologist(s). This officer, who may be a coroner's officer, should also be responsible for production of the necessary file relating to identification, which will allow the opening of an inquest.
4. The SIO should be proactive in pursuing early resolution of all post mortem examinations in cases where a suspect has been arrested or charged. This officer should ensure all necessary action is taken to satisfy the Coroner that all examinations are completed and the body can be released. This should include liaison with whichever agency is conducting forensic examinations associated with the post mortem to ensure early results are obtained. The SIO should have contact with the Coroner and Pathologist when the post mortem report is likely to be delayed (see under Pathologist below,).
5. The SIO should co-operate with the Coroner in meeting requests from the defence for early disclosure if this will assist in the early release of the body.
6. In all instances the SIO should ensure the victim's family are kept aware of developments, are provided with the Home Office Victims Family Pack and given appropriate support.

The Coroner

7. In all cases, a coroner will exercise his discretion judicially and with due regard to the interests of justice. A coroner is not bound to observe the procedures in this memorandum, but is recommended to do so unless he is satisfied that there is good and proper cause to do otherwise.
8. When a death is reported, the coroner will observe the provisions of the Coroners Rules 1984 (ie Rules 5, 6 and 7) so far as the arrangements for the post mortem examination are concerned. In arranging a post mortem examination the coroner will make clear to the pathologist the circumstances of the death and the need for his report to be supplied without delay and in any event within 14 days (see paragraph 20 below). Where the examination is complete the Coroner will immediately provide copies of the report when received, to all those having a proper interest including the Chief Officer of Police, and any person who has been charged in connection with the death (and to their legal advisers). Any photographic or video recording taken at such examination shall also be supplied. (These will be made available by the police.) The next of kin to the deceased should also be advised that the report is available.
9. The Coroner will not, within the fourteen days immediately following the post mortem examination release the body to those entitled to possession unless he has received written

confirmation from all such interested persons that then know no reason why such release should not take place.

10. Where the Coroner is informed by the Chief Officer of Police that a person may be charged with the murder, manslaughter or infanticide of the deceased but no person has been so charged by that date and it appears to the Chief Officer unlikely that any person will be so charged within 28 days from the date of the discovery of the homicide, he or she shall inform the Coroner who shall arrange for a further examination to take place, as soon as possible and in any event no later than 28 days after the first examination to be conducted by a suitably qualified forensic pathologist. Such a pathologist must be independent from the pathologist who performed the initial post mortem (ie normally from a different establishment), although that is not to say that they should not discuss their respective findings.

11. It will be a matter for the Coroner to decide whether to provide the police with a copy of the report from any such second post mortem examination, but it will normally be proper to do so. The second report will be retained by the coroner and, in the event that an arrest in connection with the death is subsequently made he or she will provide a copy of the second report to the defendant or his legal representatives.

12. In the event that significant discrepancies arise between the first and second post mortem reports, the Coroner will, without delay, consider whether to commission a third examination. It will not normally be appropriate to provide the third pathologist with either of the previous reports or to seek to reconcile the differences between the earlier reports. The third pathologist should again be independent of the first two pathologists (ie from a different establishment). As soon as the Coroner has decided that no further examination is necessary, the body will be released for disposal by the family/executors.

13. If the Coroner is advised by the Chief Officer of Police that it is likely that a person will be arrested in connection with any of the offences given in paragraph 10 within a period of 28 days from the date of discovery of the homicide, he or she shall not release the body until a person is charged, or until the expiration of that period, whichever is the shorter. If a person is so charged the coroner will serve on him a copy of the report of the initial examination and records in accordance with paragraph 8 above. If no charges are made, the procedures set out in paragraph 10 will apply.

14. Unless the Coroner receives written confirmation from all those having a proper interest (other than from those to whom he is proposing to release the body) that they have no objection to the body being released, the Coroner shall, not less than 5 days before the proposed release of the body, notify his intention to do so in, writing to all those persons who have not confirmed that they have no objection to the release of the body.

15. The Coroner will not normally raise any objection to a further post-mortem examination being conducted for or on behalf of any person who may have a proper interest provided that such further examinations is conducted without undue delay and after proper notice has been given to the Coroner. Any such examinations will be arranged at the expense of the person concerned, save in the cases of examinations undertaken pursuant to paragraph 4. However, the Coroner should question the necessity of a second or subsequent post mortems in all cases where it may be unnecessary (e.g. death by dangerous driving cases), it is likely to delay the release of the body, or where a single post mortem on behalf of all joint defendants would appear to suffice. Care should be taken to ensure that any decision to refuse permission for a further examination and to release the body is not likely to prejudice the interests of justice.

16. The above procedures are not applicable in cases where the identity of the body has not been established. In these circumstances the imperative will be to ascertain the identity of the body and

to contact the next of kin. Once relatives have been contacted, any outstanding enquiries and actions should proceed in accordance with the principles set out in this memorandum.

17. Coroners should ensure that the laboratories to which they or their pathologists entrust histological, toxicological or other analyses in homicide cases understand that the work should be treated as a top priority and not be allowed to unnecessarily delay the release of the body.

The Pathologist

18. The time taken for the Pathologist to produce his report is a key factor in the early release of the body. Until this report is produced. Important decisions (such as the need for a second post mortem) cannot be taken. The aim will be for the examination to take place within 24 hours, and for the report to be made available to the coroner and the police as soon as possible and in any event within 14 days of the examination even if histological or toxicological analyses are not then ready (although the reports should be qualified accordingly). Full consultation should take place with the Senior Investigating Officer and Coroner if the report is delayed because of these or for any other reasons.

19. Where further tests need to be carried out by third parties, pathologists should have regard to the approach set out in paragraph 18 above.

The Law Society

20. In most cases where a solicitor is instructed on behalf of a client charged with murder, manslaughter, infanticide (and in some cases of offences under s.1 and 3 (a) Road Traffic Act), it will be necessary to confirm the exact cause of death or to forensically examine the nature and origins of the wounds sustained by the deceased. Such investigations necessarily cause delay in the burial or cremation of the deceased and inevitably prolong the distress to relatives and friends.

21. Advice given by the Criminal Law Committee of the Law Society is designed to ameliorate the situation although in no way detracting from or undermining the solicitor's primary duty and obligation to his/her client to procure and acquire evidence in support of the client's case.

22. When the opportunity exists for the defence to have its own forensic scientist present and able to participate in the initial post mortem examination, this should be encouraged. providing the client has given sufficient instructions to make this worthwhile

23. In the vast majority of cases an initial post-mortem will have been carried out before charge. Defence practitioners are encouraged to obtain the following information as quickly as possible thereafter:

- i) The initial postmortem report (not merely a summary or oral representation);
- ii) Photographic record of the postmortem;
- iii) Any video recording of the post-mortem-

23. Even prior to the disclosure of the report of the first post mortem, arrangements should be made to identify a suitably qualified pathologist capable and willing to undertake an initial examination of the prosecution documents and such instructions as already exist from the client to see if a separate defence post-mortem is necessary.

24. Legal Aid prior authority should be obtained as soon as the appropriate expert has been identified. It will be normal for such authority to be obtained quickly over the telephone and subsequently confirmed upon a submission of a completed APP 7.

25. Where a separate defence post-mortem is required, details of the pathologist instructed by the defence should be given to the Coroner without delay so that both can liaise directly to expedite the holding of the second examination. Whether there will always be a need for a defence post mortem in all cases is a matter for consideration for defence practitioners taking advice as appropriate, from a consultant forensic pathologist (see paragraph 24 above). The number of cases in which more than two post mortems can be justified due to the number of defendants or for any other reason, is expected to be low.

June 1999

Appendix 5

Extract From The Lord Chancellor's Department "Guide To Allowances" In Criminal Cases

BANDS USED IN THE CROWN COURT

GUIDELINE RATES FROM 6 MAY 2003

NB: These bands are discretionary. See Reg. 20 Costs in Criminal Cases (General) Regulations 1986.

EXPERT WITNESS AND INTERPRETERS

1. Consultant medical practitioner, psychiatrist, pathologist

Preparation (examination/report) £70 - £100 per hour

£346 - £500

Attendance at court (full day)

2. Fire (assessor) and/or explosives expert

Preparation (examination/report) £50 - £75 per hour

£255 - £365

Attendance at court (full day)

3. Forensic scientist (including questioned document examiner), surveyor, accountant, engineer, medical practitioner, architect, veterinary surgeon, meteorologist

Preparation (examination/report) £47 - £100 per hour

£226 - £490

Attendance at court (full day)

4. Fingerprint

Preparation (examination/report) £32 - £52 per hour

£153 - £256

Attendance at court (full day)

5. Interpreter

(with effect from 1 January 2002)

£25 - £28 per hour
(with a minimum of 3
hours for those
employed regularly in
this capacity)

These guidelines bands are discretionary but should be taken into account when considering prior authorities in criminal cases as these are the bands which assist Crown Court determining officers.

The bands are merely guidelines. They do not represent “ceilings” or “floors” and are merely an aid to decision-making and not a substitute for it.

Appendix 6

Extract From Directions For Determining Officers

less for the higher grade than for the lower grade. It should be noted that the Regulations do not require the determining officer to make minor deductions of time which amount to "mere tinkering".²³

2B.13 **The Rates.** The prescribed rates of fee appropriate to the date when the work was done, as set out in para 1(c) of Part I of Schedule 1 and its subsequent amendments, must be allowed where work has been done properly and with reasonable dispatch. Exceptionally, less than the prescribed rate of fee can be allowed by virtue of para 2 of Part I of Schedule 1, where there is a failure on the part of the solicitor to carry out work with reasonable competence and dispatch. The determining officer should not use para 2 of Schedule 1 where he considers that no payment should be made at all for an item of work. In such cases he should disallow the work done under Regulation 6(2) on the grounds that the work was not actually done or not reasonably done.

2B.13A **Enhanced rates where legal aid was granted before 1 October 1994.**
Exceptionally, more than the prescribed rate of fee can be allowed for an item of work by virtue of para 3 of Part I of Schedule 1, where the prescribed rate would not reasonably reflect:

- (a) the exceptional competence and dispatch with which the work was done;
- or
- (b) the exceptional circumstances of the case.

The determining officer should apply para 3(a) of Part I of Schedule 1 only if both conditions are met, that is, exceptional competence and dispatch.²⁴

2B.13B **Enhanced rates -where legal aid was granted on or after -1 October 1994 (S.1.1994 No.2218) (Costs) (Amendment) (No. 3) Regulations. 1994**
Exceptionally, more than the prescribed rate of fee can be allowed for an item of work by virtue of para 3 of Part I of Schedule 1, where it appears to the appropriate authority, taking into account all the relevant circumstances of the case, that:-

- (a) the work was done with exceptional competence, skill or expertise; or
- (b) the work was done with exceptional dispatch; or
- (c) the case involved exceptional circumstances or complexity.

Therefore, should either exceptional competence, skill, expertise, dispatch, complexity or the exceptional circumstances be established it may be appropriate to allow an enhancement.

2B.13C In determining what is exceptional under para 3(b) (pre 1 October 1994) or para 3(1)(c) (post 1 October 1994) the determining officer may have regard to the Generality of proceedings to which the Regulations apply.

²³ (See decision R v Moss, S16)

²⁴ (See decision R v Ford-Lloyd, S6)

However, some very serious cases, eg treason, terrorism or even murder may be exceptional in their own right. A factor which is common to all cases or to a large proportion of cases cannot be regarded as exceptional; for example, the fact that a client was likely to be deprived of his liberty or his livelihood is not exceptional in many categories of legal aid cases (see Widgery Criteria for the grant of criminal legal aid which appears in the Legal Aid Handbook published annually by HMSO). Paragraph 3 should not normally need to be applied in more than a small percentage of cases. However, it is ultimately for the determining officer to decide what he might regard as being exceptional in determining whether to apply the provisions of para 3 of Part I of Schedule 1.²⁵

2B.13D The solicitor is required by Regulation 5(4)(b) to give full particulars in support of his claim if he wishes the determining officer to apply para 3 of Part I of Schedule I.²⁶ The determining officer should therefore not normally do so unless the particulars have been given by the solicitor. Where the solicitor appears to be claiming the para 3 should be applied but has not provided the particulars it may be appropriate to invite him to do so within a set time limit.

2B.13E If the determining officer decides to depart from the prescribed rates he should bear in mind any limitation placed on the powers which he can exercise without reference to a more experienced or senior officer (see IC. 1)

2B.14 **Enhanced rates where legal aid was granted before 1 October 1994**

Once the determining officer decides to apply para 3 of Part I of Schedule 1 to any item of work **in a case where legal aid was granted before 1 October 1994**, the rates provided by the Regulations for that work are of no effect and he must assess the case in the normal and approved method by which solicitors cost their work.²⁷ He should consider first the direct costs of the work at the time when it was done bearing in mind the status of the relevant fee-earner and, secondly, the burden of the relevant circumstances.²⁸ In other words he must allow a rate that represents the broad average direct cost of such work (see TONG paras 3.14-3.16) and relevant factors set out in TONG at para 1.11 (and see also TONG, para 3.17). The resultant allowance may be expressed as a single composite figure. Determining officers should note that care and conduct would not normally be payable for items which are not part of preparatory work - unless circumstances are wholly exceptional.²⁹

²⁵ (Regina v Legal Aid Board, ex parte Broudie (The Times 11 April 1994)

²⁶ (See decision R v Osagie, S10)

²⁷ (Re Eastwood (deceased). Lloyds Bank v Eastwood [1975] All ER 603)

²⁸ (See decision R v Hussain and Others, S8)

²⁹ (See decision R v Backhouse, S30 (Paragraph 5))

2B.14A **Enhanced rates where legal aid was granted on or after 1 October 1994**

Once the determining officer decides to apply para 3 of Part I of Schedule 1 to any item of work **in a case where legal aid was granted on or after 1 October 1994**, he must apply (within the limits set out in para 2B.14B) what he considers to be an appropriate percentage uplift to the prescribed legal aid rate applicable to the particular item of work. In determining the percentage by which fees should be increased above the prescribed legal aid rate the determining officer shall have regard to:-

(a) the degree of responsibility accepted by the solicitor and his staff;

(b) the weight and complexity of the case;

and

(c) the care, speed and economy with which it was prepared.

2B.14B In cases where the proceedings relate to serious or complex fraud, the percentage by which the prescribed legal aid rate for an item of work may be increased shall not exceed 200%. In all other cases where it is considered appropriate to allow more than the prescribed legal aid rate the percentage by which the prescribed legal aid rate for an item of work may be increased shall not exceed 100%.

2B.14C When considering what percentage increase should be applied to the prescribed legal aid rates, the final composite rate should not be less than that which would have been allowed had the determination been carried out in a case where legal aid had been granted prior to 1 October 1994 **subject of course to the maximum percentage increases set out in para 2B.14B.**

2B.15 The provision allowing departure from the prescribed rates applies to individual items of work. If a determining officer departs from the prescribed rate for one item of work he does not have to depart from the prescribed rate for other items.

2B.16 Where the determining officer applies para 2 or 3 of Part I of Schedule 1 he should make a note to be retained on the court file giving the reasons for his decision. The reasons should be brief and should relate specifically to the case. It is not sufficient just to say that the case is exceptional.

2B.17 The tables at para 1(1)(c) of Part I of Schedule 1 provide separate prescribed hourly rates for some classes of work done by solicitors whose offices are situated within legal aid area 1. Legal aid area 1 covers all London Boroughs as set out in Regulation 4(1) of the Civil Legal Aid (General) Regulations 1989, which are:

Appendix 7

Extracts From The Taxing Compendium

S2 *R -v- Duxbury*

S7 *R -v- Goodwin*

S16 *R -v- Moss*

S21 *R -v- Varney*

S23 *R -v- Slessor*

S24 *R -v- Arney*

S30 *R -v- Backhouse*

SJ1 *R -v- Sandhu*

SJ2 *R -v- Hudson*

SJ 3 *R -v- SCTO ex parte Singh*

CJ4 *Perry -v- Alexander*

R v Duxbury

Date of Determining Officer's Reasons	April 1983
Date of Taxing Master's Decision	November 1983

REGULATION 6: CLAIM FOR EXPENSES OF AN ENQUIRY AGENT FOR ATTENDANCE: AT COURT

- i) The solicitors claimed an amount as a disbursement for the attendance of their agent at court with counsel. The claim was disallowed, on the basis that an enquiry agent was not a fee-earner.
- ii) The Taxing Master referred to his decision in R v Pullum, and disagreed with the determining officer. There was no rule or principle which stated that a part-time employee of a solicitor, who otherwise falls within the definition of a fee-earner in Regulation 2, was disqualified from being a fee-earner for the purpose of the Regulations. It was a question of fact to be determined in each case whether the individual concerned was a fee-earner.

This enquiry agent, as part of the service offered, was prepared to provide representation at court with counsel. There was no suggestion that the solicitors did not regularly employ this method of complying with their duty to the court nor was there any suggestion that by using this method they failed to provide responsible representation for their client. The solicitors properly performed their duty to provide representation and they complied with the Regulations. The claim was allowed.

R v Goodwin

Date of Determining Officer's Reasons	May 1983
Date of Taxing Master's Decision	January 1984

REGULATIONS 5 AND 6: TRAVELLING AND WAITING AND INSTRUCTION OF A DISTANT SOLICITOR

- i) The solicitors appealed against the amount allowed for travelling and waiting time and expenses, their practice being based about a hundred miles from the defendant's home and the local court where the case was heard.
- ii) The Taxing Master held that the determining officer had correctly made his assessment on the basis of what should reasonably have been allowed to a local solicitor. The representation that the defendant had a free choice of solicitor, however, was incorrect. An assisted person was entitled to a reasonable choice of solicitors. The relevant regulations conferred on a person to whom legal aid was granted - the right to select any solicitor who was willing to act. The regulation further provided that "such solicitor shall be assigned to him" (Regulation 8 of &.he Legal Aid in Criminal Proceedings (General) Regulations 1968).

There was therefore no power to refuse to assign a selected solicitor because he did not practice in the locality where the assisted person lived or was to be tried. As a general rule, a solicitor ought, if he was able, to accept instructions from an assisted person who had selected him, but there was nothing in the legislation which compelled him to and it would be a proper reason to decline a retainer that under the regulations the costs involved in accepting could not be wholly recovered. There may be circumstances in which it was reasonable to instruct a solicitor at a distance but this case did not fall into that category.

R v Moss

Date of Determining Officer's Reasons	December 1983
Date of Taxing Masters Decision	February 1984

REGULATION 5: DISALLOWANCE OF A CONFERENCE

- i) In this matter the determining officer disallowed an attendance of 10 minutes as not being fee earners work, because it had to do with questions of listing of the trial.
- ii) The Taxing Master said that the facts are that the defendant called uninvited and asked to see the fee-earner in charge of his case. The matters discussed were relevant. A solicitor or his clerk cannot be said to have been acting unreasonably under such circumstances. The Taxing Master allowed what he considered to be a trivial sum so as to underline his view that the regulations do not require the determining officer to be astute to seek ways of snipping of, 'small amounts of time here and there in a bill of costs.

R v Varney

Date of Determining
Officer's Reasons February 1984

Date of Taxing
Master's Decision June 1984

REGULATION 5: WAITING TIME AT COURT

- i) In this case the Solicitors claimed 5 hours 10 minutes waiting time which was reduced to 31 hours. The two periods in dispute were 10 minutes waiting before the case was called on, the Solicitors arriving in good time, and the period over the luncheon adjournment.
- ii) The Taxing Master said that a court rises at mid-day to enable those appearing before it to obtain refreshment and if this time is not occupied in any meaningful work, such as attendances and short conferences with counsel, it should not be treated as time during which a solicitor would expect to be working and for which he would make a charge to his client.

He held that whilst it might be proper to allow a solicitor a small amount of time waiting for a case to come on, he did not intend to interfere with the determining officer's decision in respect of the short period of 10 minutes only.

R v Slessor

Date of Determining Officer's Reasons	May 1984
Date of Taxing Master's Decision	October 1984

REGULATION 5. TRAVELLING AND WAITING TIME**REGULATION 6.- EXPENSES OF TRAVELLING TO AND FROM COURT**

- i) In this case the solicitors claimed an allowance for travelling and waiting time on the basis of the time actually spent in accomplishing the several journeys to court from their offices by motor car. They also claimed a mileage allowance at the standard rate then prescribed by the Costs in Criminal Cases (Allowances) Regulations 1977. The determining officer rejected that claim and allowed a national amount for the time which would have been taken had the journeys been made by public transport together with the expense of train fares.
- ii) The Taxing Master in allowing the appeal set out the following rules which should be applied in assessing allowances to be made.
 - (a) prima facie the amount to be allowed is the cost of the time expended on and the expenses incurred in making the journey by public transport, provided that public transport is available and is reasonably convenient, having regard to the relevant circumstances in each case;
 - (b) a solicitor is not entitled to claim the cost of the time spent or cost incurred in travelling to his office from his home; the journey should be deemed to start from the solicitor's office, unless he in fact started from his home and that was nearer to the court than his office;
 - (c) allowances made should include the time spent and expense incurred in getting from the starting point to the railhead or coach station and also the time spent and expense incurred in getting from the terminus to the court;

- (d) a solicitor travelling by train may claim the cost of first class travel if he has actually incurred that expense;
- (e) if the journey is one which could have been made by public transport, but is accomplished by motor car purely as a matter of preference, then the allowance to be made for travelling time should be the notional time which would have been taken by public transport, or the time actually spent, whichever is the less: expenses should be calculated on the basis of the "public transport" mileage rate (that rate is calculated by reference to the average cost of public transport per mile) which is prescribed pursuant to the 1977 Regulations;
- (f) if public transport is not available or not reasonably convenient, the actual time spent in travelling should be allowed and the expenses should be calculated on the basis of the standard mileage rate prescribed by the 1977 Regulations;
- (g) what may be "not reasonably convenient" is a matter of discretion, dependent upon the relevant circumstances of each case, and what is reasonably convenient in one set of circumstances may not be in another; a factor which is always relevant is the time which may have been spent in getting from the starting point to the railhead, and from the terminus to the Court; if it is considerable, the use of a car may be justified - the Taxing Master urged determining officers to adopt a flexible and broad approach to the problem.

Per curiam: so far as expenses only are concerned these rules apply equally to members of the Bar in cases in which it is appropriate to include an element for expenses in the fees allowed, but no allowance for the cost of time spent in travelling is made to them.

R v Arney

Date of Determining Officer's Reasons	August 1984;
Date of Taxing Master's Decision	January 1965

REGULATION 2: TRAVELLING EXPENSES OF A DEFENDANT AND HIS WIFE

- i) This case related to the disallowance of the travelling expenses paid to the defendant and his wife, who was a witness as to fact on the day when this case was listed for trial. The expenditure was disallowed on the grounds that there were no provisions under the 1982 Regulations for allowing for this item.
- ii) The Taxing Master held as follows:

Regulation 2 of the 1982 Regulations, so far as it is relevant, is in the following terms.. "disbursements means travelling and witness expenses and other out-of-pocket expenses incurred by a fee earner in giving legal aid". Although the fares paid to the defendant are clearly travelling expenses they are not incurred for the purpose of giving legal aid. The defendant travels to court for the purpose of standing trial. The travelling expenses of a witness can be paid either by the solicitor and recovered by him under the Regulations or, alternatively, and as is more usual, pursuant to Regulation 11 of the Costs in Criminal Cases (Allowances) Regulations 1977. So long as there is no duplication of payment it is proper for the disbursement to be included in a solicitor's bill paid by him. The sum claimed in respect of the defendant's wife's expenses are therefore payable.

R v Backhouse

Date of Determining
Officer's Reasons: June 1985

Date of Taxing
Master's Decision: March 1986

Paragraph 3 of Schedule 1: Assessment of Enhanced Hourly Rates

1. The issue raised in this appeal was the method of assessment of a solicitor's enhanced hourly rate under paragraph 3 of Schedule 1.
2. The Solicitors claimed and the Determining Officer agreed that paragraph 3 of Schedule 1 applied to the case both because it was handled with exceptional competence and dispatch and also because of the exceptional circumstances of the case. The Taxing Master endorsed this assessment of the case.
3. Extracts from the Master's decision are as follows:-

Under Regulation 3(5) of the 1982 Regulations in determining costs the appropriate authority shall, subject to the Regulations allow fair remuneration for work actually and reasonably done and take into account all the relevant circumstances of the case including the nature, importance, complexity or difficulty of the work and the time involved. No indication is given in the Regulations as to how fair remuneration for work actually and reasonably done is to be calculated once the prescribed rates are exceeded. Mr Justice Mustill (as he then was) in Regina v. Sandhu (29th November, 1984) said "I am not persuaded that it is altogether sound to invoke a concept of care and conduct which ex-hypothesi has been rendered obsolete by the new Regulations and then to draw inferences from the fact that it does not receive specific treatment in those Regulations; nor to my mind can it safely be assumed that the entirety of the factors which compromise care and conduct has been wholly absorbed into the prescribed rates. The Regulations have nothing to say on this point which is not surprising since they create a radically different structure". In that case the Learned Judge was dealing with a claim for supervision but it is clear that the 1982 Regulations make no provisions for care and conduct.

Since the 1982 Regulations are silent as to the method of assessment of enhanced rates and since a point of principle was involved I invited the Lord Chancellor to make representations with a view to ensuring that the public interest is taken into account.

The relevant part of the representations made on behalf of the Lord Chancellor was as follows:

- "5. The Regulations make no provision for the calculation of the appropriate fees payable when the Determining Officer exercises his discretion under paragraph 3 of Schedule 1 to allow fees of more than the relevant standard rate. It is submitted, however, that this does not empower the Determining Officer wholly to disregard the 1982 Regulations and to proceed instead on

the principles which govern Common Fund taxations. All costs payable to a Solicitor under Section 37 of the Act are required to be determined in accordance with the 1982 Regulations. Since Schedule 1 does not prescribe rates for the purpose of paragraph 3, it is submitted that the correct approach is to apply the principles set out in Regulation 3(5).

- 6 The question how, once it is established that paragraph 3 of Schedule 1 should apply, to arrive at the rate other than the relevant standard rate was considered by Master Clews in R-v-Hussain in his decision dated 3 January 1984, Case No. 82049819. The Master concluded that:

"... The Taxing Officer should proceed in accordance with the general principle that where any scale of costs is avoided by reason of the exercise of a discretion so to do, the allowance to be made should be fixed without reference to the scale item because the scale has ceased to be relevant. He should accordingly make his assessment in accordance with the directions contained in Regulation 3(5)... save that he will ignore the limitation placed on his discretion by Regulation 5(3) which would otherwise require him to allow fees in accordance with Schedule 1. To carry out that task he must assess a rate which reflects first the direct cost of the work at the time when it was done bearing in mind the status of the relevant fee earner, and secondly, the burden of the relevant circumstances. The exercise is unavoidably arbitrary and can be no more than a value judgment based on experience...

It is submitted that this approach, applying the principles set out in Regulation 3(5) rather than going outside the Regulations altogether, is the correct approach to take where the discretion available under paragraph 3 of Schedule 1 is exercised."

When the Solicitors appeared before me to deal with the representations they confirmed that they felt it would be in order for me to reach a value judgment based on experience or to adopt the general principle of taxation set out by Mr Justice Robert Goff, as he then was, in Regina v Wilkinson (1981) AER 597 at p.601, following re Eastwood (deceased) Lloyds Bank Ltd v Eastwood (1975) CH 112.. [1974] 3 All E.R. 603 and Leopold Iazerus Ltd v Secretary of State for Trade and Industry [1976] 120 S.J. 268, that "... a Solicitor's remuneration should consist of two elements: first, the sum computed on the basis of an hourly rate which represents the broad average direct cost of undertaking the work; and second, a sum, usually expressed as a percentage mark up. of the broad average direct cost, for care and conduct. The first element is generally known as the A factor: the second is the B factor. The total of the A factor and the B factor (if any) constitutes the Solicitors total remuneration." Counsel for the Appellant Solicitors argued that whichever approach was adopted the same result would be achieved.

I have considered the decision in Regina v Hussain and I notice that before expressing his view the Learned Master indicated that it was necessary to assess a rate which reflects first the direct cost of the work at the time when it was done bearing in mind the status of the relevant fee earner and, secondly, to assess the burden of the relevant circumstances,

that is those circumstances set out in Regulation 3(5)) which are listed as including the nature, importance, complexity or difficulty of the work and the time involved. It seems to me that what the Master was saying was that an A plus B calculation should be made in order to reach an enhanced rate. That seems to me to be the only possible and logical approach once the rates prescribed by the Regulations cease to apply, but I would go further and say that the proper approach is to arrive at an A figure for the broad average direct cost of the work and add to that a percentage uplift (the B figure) to take into account all the relevant circumstances of the case as required by Regulation 3(5).

The Taxing Officer's Notes for Guidance at paragraph 13 recommend the Taxing Officer to take into account in every case the following factors--

- (a) The importance of the case, including its importance to each Defendant in terms of its consequence to his livelihood, standing or reputation even were his liberty may not be at stake.
- (b) The complexity of the matter.
- (c) The skill, labour, specialised knowledge and responsibility involved.
- (d) The number of documents prepared or perused with due regard to difficulty or length.
- (e) The time expended.
- (f) All other relevant circumstances.

With regard to care and conduct paragraph 92 of Tong states:

"This is an allowance made to cover matters which have not been quantified in terms of a rate per hour (such as supervision and commercial profit). It should vary according to the professional skill and responsibility involved in the Solicitors work, having regard to the factors other than time set out in paragraph 8. This allowance may be expressed as a percentage of the total allowed for preparation".

The Taxing Officers Notes give further guidance as follows:

"93. In assessing the percentage to be added the Taxing Officer should have regard to:

- (a) The degree of responsibility accepted by the Solicitor and his staff;
- (b) The weight of the case; (a complex case, or one which is protracted and time consuming, properly conducted will justify more than a simple one);
- (c) The care, skill and thoroughness, speed and economy, with which the case was prepared.

94. Where the Solicitor has exercised an unusual degree of skill, care or responsibility the percentage should be higher, but where the case has been

badly handled the allowance should be less, or no addition at all should be allowed".

In my view there is nothing in the paragraphs cited above which in any way offends against the 1982 Regulations once the determining officer has decided to exercise his discretion to allow an enhanced rate and in those circumstances the principles therein contained ought to be applied when arriving at an enhanced rate under the 1982 Regulations.

4. In allowing the appeal the Master applied the principles outlined above in assessing enhanced hourly rates for preparation and attendance at court.
5. In regard to the claim for an enhanced rate for travelling and waiting time the Master said that in normal circumstances it was difficult to see how travelling and waiting time could attract an enhanced rate but in this case it was accepted that the circumstances were wholly exceptional and a modest increase in the standard rate was allowed.

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

1984-K-NO. 303

Royal Courts Of Justice,
Thursday. 29th November 1984

A

Before:

Mr JUSTICE MUSTILL
(Sitting with Assessors)

B

IN THE MATTER of the LEGAL AID ACT 1974

And

THE LEGAL AID IN CRIMINAL PROCEEDINGS (COS-.5) REGULATIONS 1982

and

IN THE MATTER OF AN APPLICATION: BY MESSRS A.H. KURTZ & COMPANY
for a Review of Taxation of their fees under A Legal Aid Order

C

dated 22nd November, 1982 in proceedings in Kingston -upon-Thames
Crown Court, Case No.820896

B E T W E E N:

R E G I N A

Plaintiff

D

-and-

MANJIT SINGH SANDHU

Defendant

E

(Transcript of official tape recording prepared by - Harry Counsell Co., 61 Carey
Street. London. WC2A 2SG. Telephone 01-242-9346)

F

(No appearances)

G

H

J U D G M E N T

A MR JUSTICE MUSTILL: This review of taxation turns on a question of some general interest. Accordingly, with the consent of the parties, I have adjourned the matter into open court for Judgment.

B During December 1982 and January 1983 services were performed by solicitors in relation to the defence of a person appearing before the Crown Court. In due course the solicitors rendered a bill of costs for taxation. In addition to several items about which there is no controversy, there were modest sums in the bill attributed to -

C "Supervision of staff with regard to conduct of the case, allocation of counsel, listing difficulties, use of enquiry agents, evidence and other relevant matters"

D and

"Drawing Bill of Costs".

E Each of these items was disallowed in full. After representations by the solicitors, the determining officer declined to make any alteration. An appeal by the solicitors to a Taxing Master of the Supreme Court was dismissed. They have now proceeded by Originating Summons to have the order of the Taxing Master set aside.

F I will deal first with the item relating to supervision. By way of introduction, it is convenient to quote from the Taxing Master's summary of the way in which the solicitors manage their practice.

G "11 On the question of supervision, he first, explained to me the method by which he manages his specialised criminal practice. He employs a number of admitted assistants but they are committed daily to advocacy in the lower courts and not able to do much to supervise the unadmitted staff.

H He himself allocates

A the cases to fee-earners who seem to him able to do the work. Some of
these persons are used partly for secretarial work and partly for fee-earning
work in preparing cases. They are, he claims 'clerks' within the definition of
B fee-earners given in the Regulations. The senior solicitor himself reads the
brief prepared
C in each case and gives instructions for the allocation of counsel and the
grade of fee-earner who is to attend court. He does not permit the delivery of
a brief to a chambers clerk unmarked with the name of counsel and, should
D the named counsel be unable to take the brief, he insists the brief be re-
referred to him for the selection of a named replacement. The senior solicitor
reminded me that it is the principal solicitor who is assigned under the legal
aid order and that it is he who must answer to the court for any mistake. The
E senior solicitor's submission is that this active involvement in each and every
case goes beyond the general concept of supervision as a factor which is
fully taken account of in the relevant standard rate prescribed by the
F Regulations".

F Two different reasons have been assigned for the disallowance of this
item. First, it is said that the item relates to what would in the past have been
G separately assessed as care and conduct. Under the regime recently created by the
Legal Aid in Criminal Proceedings (Costs) Regulations, 1982, the concept of care and
conduct has disappeared. And remuneration for activities which would previously
H have fallen under that heading must now be taken to be subsumed in the standard
rates provided for by the Regulations.

A I would for my part feel some reservation about adopting this approach, at
least in its entirety. I am not persuaded that it is altogether sound to invoke a concept
of care and conduct which, ex hypothesi, has been rendered obsolete by the new
B Regulations, and then to draw inferences from the fact that it does not receive
specific treatment in those Regulations. Nor, to my mind can it safely be assumed
that the entirety of the factors which comprise care and conduct has been wholly
C absorbed into the prescribed rates. The Regulations have nothing to say on this
point: which is not surprising, since they create a radically different structure. The
better course, I would suggest, is simply to look at the Regulations and see what they
D have to say about the kind of activity which the solicitors have described.

E The second ground for disallowing the claim is this. If one looks at the
Regulations, one finds no express provision either in Regulation S(1) or elsewhere,
for the appropriate authority to allow any sum for supervision. The powers of the
determining officer are created and exclusively defined by the Regulations. In the
F absence of express provision. the officer cannot and must not remunerate the
services described by the solicitors, even if he thought that such a course would be
reasonable. Accordingly, he was bound to disallow the item in question.

G Again, I do not accept this argument in its entirety. Certainly Regulation
5(1) creates an exclusive code for the ascertainment of the type of work which may
properly be allowed. This does not mean, however. that nothing except what is
H explicitly described in the various sub-paragraphs can be claimed. The definitions of
the type of work are contained (so far as

concerns sub-paragraphs (a), (b) and (c)) in the words which precede the first comma. What follows thereafter is added by way of illustration. Thus, the fact that supervisory work of the type performed by the senior solicitor in this case cannot be fitted within any of the activities described in the latter part of sub-paragraph (a) does not mean that no fee can be allowed in respect of it. What matters is whether it constitutes "preparation". If it does, then the determining officer can and must allow under Regulation 5(2), (3) and (4), such fees in respect of it as he shall consider reasonable.

Plainly there are many considerations which the determining officer will have to bear in mind when deciding how to exercise this discretion. It would be undesirable to attempt in this judgment to lay down any fixed principles, or even to provide illustrations of what may or may not properly be allowed in taxation. Everything will depend on the circumstances of the individual case. It is sufficient for present purposes to say that :-

(1) Many items of what may loosely be called supervision will not fall within the framework of the Regulations at all. Every senior solicitor will wish to keep an eye on what is going on in his office, to make sure that it is operating efficiently, and that the standards set by the senior solicitor, who bears the ultimate responsibility for the proper conduct of all work carried out by the practice, are being scrupulously maintained. Again, a senior solicitor who has proper regard for his broader responsibilities will find it necessary to discuss matters with his more junior staff, as a method of

A practical instruction, with a view to making them better fitted to perform their
B allotted work. Very often in both of these spheres the solicitor may occupy
C some time on a particular case. It would not, however, by any means
D necessarily follow that this time would be attributed to the preparation of that
E case, so as to entitle the solicitor to remuneration under paragraph 5(1). It
F would simply be part of the overhead expenses incurred by the solicitor in the
G proper conduct of his practice.

(2) The determining officer could properly have regard to the nature of the
case and to the grade of fee-earner whose time is claimed for elsewhere in the
bill when deciding whether it was reasonable for time to be spent by the senior
solicitor on supervisory work. There must be many cases where once the case
has been allocated to a fee-earner of the appropriate grade, he or she can be
allowed to carry on the work unaided, without any need for intervention by
someone more senior. On the other hand, there may equally be cases where,
even when the matter is in the hands of someone who could ordinarily be
considered competent to deal with it, there might be an unexpected turn of
events where the senior solicitor's extra experience and weight would be an
essential reinforcement. Unqualified rules cannot be laid down. Thus if the
reasons given by the determining officer in the present case could be
understood as asserting that questions relating to the allocation of counsel and
the use of enquiry agents could never be the subject of a proper allowance to a
senior solicitor, I would not agree.

Often, and perhaps very often, they would not be allowable, but everything would depend on the circumstances of the individual case.

(3) The determining officer can reasonably expect the senior solicitor to provide an explanation of the reasons why the nature of the case made his participation necessary; and of the occasions, duration and circumstances of such participation. Without such particulars, the determining officer might well consider that where an allowance has been claimed for a fee-earner of a particular grade, there was no case made out for a further allowance in respect of someone more senior.

Applying these conclusions to the facts of the present case, I cannot find that the determining officer erred in disallowing the claim for supervision. The bill itself showed no grounds for concluding that, once a fee-earner of grade B had been assigned to the matter, there was any special call for the participation of a solicitor in Grade A. The determining officer invited further particulars of the "listing difficulties" referred to in the bill, but did not receive them. It seems to me that in the circumstances he was entitled to form the view as to what was reasonable, which he expressed when disallowing the item in question. What the position would have been if the claim had been thoroughly particularised is not now for me to determine.

Before leaving this part of the case, it is right to place on record that the views previously expressed do not differ, in any fundamental regard, from those advanced in helpful oral submissions made on behalf of the solicitors and the Lord Chancellor's Department. The former have not sought

A to assert that all instances of general oversight, which may have some connection with
an individual case, can be recovered under the regulations. Equally, the latter have
not contended that supervision which can be specifically identified in a particular case
can never be properly claimed under Regulation 5. No doubt if individual cases were
B argued out, in the light of full particulars, differences of opinion might arise, but no such
exercise has been possible, in the light of the information now before the court.

C I turn to the second of the disputed items: "Drawing bill of costs". This may
be dealt with very briefly. Under Section 30(1) of the Legal Aid Act, 1974, from which
the 1982 Regulations derive, legal aid in relation to any proceedings:

D ".....shall be taken.....as consisting of representation by a solicitor and counsel
assigned by the court, including advice on the preparation of the person's case
for those proceedings".

E The drawing of a bill of costs, which by its nature takes place after the proceedings are
concluded, could not possibly fall within this definition of legal aid. It is, therefore, not
surprising to find that in the subordinate regulations, by which are defined in an
exclusive manner the officer's powers to allow fees, there is no reference to time
F expended for this purpose. No doubt it has happened in the past that by statute,
regulation or concession an allowance for this purpose has been made in relation to
certain types of business. Under the new regime governing legal aid costs in criminal
G matters, no such allowance is permissible. The item was rightly disallowed by the
determining officer.

H In the result the order of the Taxing Master will be upheld.

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

A

St Dunstan's House
Fetter Lane EC4

Thursday 11th July 1985

B

Before:

Mr JUSTICE MUSTILL

C

REGINA

-V-

D

DAVID HUDSON
(Review of Taxation)

E

(Transcript of The Association of Official Shorthandwriters Ltd, Room 392 Royal
Courts of Justice, and 2 New Square, Lincoln's Inn, London WC2)

F

MR ANTHONY GIRLING, of Messrs Girling Wilson & Harvie (Herne Bay) appeared
for the Applicant.

G

H

J U D G M E N T

(Revised)

A MR JUSTICE EVANS: The applicants are a firm of solicitors who represented the
Defendant Hudson in proceedings before the Southwark Crown Court under a
Legal Aid Order No. 2641 dated 5th November 1982. They appealed to the Taxing
Master against the determination of their costs under the Legal Aid in Criminal
B Proceedings (Costs) Regulations 1982 pursuant to Regulation 11 and their appeal
was allowed in part. In relation to certain routine letters and telephone calls their
appeal was unsuccessful, and they now seek to have the decision of the Taxing
Master dated 18th January 1985 amended in this respect.

C On 22nd February 1985 the Master certified pursuant to Regulation 12(1) that
the question which the applicants wish to have decided involves a point of principle
of general importance. This is defined as follows:-

D "Having regard to the fact that routine letters written and routine telephone
calls, actually and reasonably dealt with by a fee earner, are work in respect of
which fees may be allowed under Regulation 5(e) of the Legal Aid in Criminal
E Proceedings (Costs) Regulations 1982; should letters and telephone calls of
the following nature be disallowed on the ground either, that they form part of
the solicitor's overheads or that they should be assumed to be covered by a
care and conduct element deemed to be included in the rates prescribed in
the Regulations: Correspondence with and telephone calls to and from:
F (a) Counsel's chambers dealing with matters such as the availability of
Counsel, arrangement of Conferences and listing difficulties
(b) The Crown Court in connection with the listing and other administrative
matters
(c) 'Witnesses to arrange appointments?'"

G The Lord Chancellor's Department pursuant to Regulation 11(6) was invited to
make representations at the appeal proceedings but declined to do so and
therefore did not appear at these Review proceedings. Mr. Girling who has argued
the matter most ably on behalf of the applicants, asked me to give this judgement in
open court, and I have agreed to do so, having been informed that the Lord
H Chancellor's Department does not oppose his request

A The items which have been disallowed consist of three letters written by or on
B behalf of the applicants (whom I will call the solicitors) and nine telephone
C conversations received or made by them. All were concerned with the listing of the
D case for trial and the availability of Counsel thereat. They are all within sub-
E paragraph (a) of the point of principle, as certified. It follows from this that no items
F within sub-paragraphs (b) and (c) of the Certificate arise for decision in the present
G case. I am satisfied, however, that no material distinction needs to be made, as a
H matter of principle, between the three categories of communications referred to in
the three sub-paragraphs. This judgement, therefore, is intended to apply equally
to each of the three categories described in the Certificate.

I approach the 1982 Regulations on the basis described by Mr Justice Mustill
(as he then was) in R. v. Sandhu (unreported, 1984). He referred to 'the regime
recently created by" the Regulations, which "create a radically different structure"
from what went before. The determination of solicitors' fees is provided for in
Regulation 5, sub-paragraph (1) of which, again quoting Mustill J., "creates an
exclusive code for the ascertainment of the type of work which may properly be
allowed". I should set out Regulation 5 in full:-

Determination of solicitors' fees

5.-(1) The appropriate authority may allow work done by fee-earners in
the following classes:

- (a) preparation, including taking instructions, interviewing witnesses, ascertaining the prosecution case, advising on plea and mode of trial, preparing and perusing documents, dealing with letters and telephone calls which are not routine, preparing for advocacy, instructing counsel and expert witnesses, conferences, consultations, views and work done in connection with advice on appeal or case stated;

A

- (b) advocacy, including applications for bail and other applications to the court;
- (c) attendance at court where counsel is assigned, including conferences with counsel at court;
- (d) travelling and waiting;
- (e) dealing with routine letters written and routine telephone calls.

B

(2) The appropriate authority shall consider the claim, any further particulars, information or documents submitted by the solicitor under regulation 4 and any other relevant information and allow:

C

- (a) such work as appears to it to have been actually and reasonably done under the legal aid order by a fee-earner, classifying such work according to the classes specified in paragraph (1) as it considers appropriate; and
- (b) such time in respect of each class of work allowed by it (other than dealing with routine letters written and routine telephone calls) as it considers reasonable.

D

(3) Subject to paragraph (4), the appropriate authority shall allow fees for the work allowed by it under this regulation in accordance with Schedule 1: provided that, where any work allowed was done after [30th June 1984] it may allow such fees as appear to it to be fair remuneration for such work having regard to the rates specified in Schedule 1.

E

(4) in the case of proceedings in the Crown Court and the Court of Appeal, the fees allowed in accordance with Schedule 1 shall be those appropriate to such of the following grades of fee-earner as the appropriate authority considers reasonable:

F

- (a) senior solicitor;
- (b) solicitor, legal executive or fee-earner of equivalent experience;
- (c) articulated clerk or fee-earner of equivalent experience.

G

It is important, in my judgement, to consider the Regulation as a whole, before proceeding to answer the specific question regarding routine letters and telephone calls which is raised by, the present application. Sub-paragraph (1) lists five classes

H

A or types, of work done by fee-earners, and provides that the appropriate authority
B 'may' allow (fees) for such work. Sub-paragraph (2) requires the authority to
C consider the claim and any supporting material and to allow ('shall...allow") such
D work as was actually and reasonably done under the legal aid order by a fee-
E earner. The fee to be allowed is provided for in schedule 1, and in relation to
F routine telephone calls this is a fixed, small amount per item, without reference to
G the time actually spent. There are at least two situations in which no fee may be
H paid even for work actually done. If any work is done, but by a person other than a
fee-earner, then no question of remuneration can arise. Similarly, if work is done
by a fee-earner but the taxing authority considers that it was not reasonable for that
piece of work to be done by a fee-earner, then no remuneration can be allowed
under sub-paragraph (2). Thus far, the construction of the Regulation is in my view
entirely clear.

E If this simple, straightforward approach is adopted, then the only questions
F which arise when a claim for fees is made under Regulation 5 are (1) what work
G was done? (2) Is the work within one of the classes listed in sub-paragraph (1)?
H (3) Was it done by a fee-earner? And (4) Was the work 'reasonably done under the
legal aid order' by the fee-earner? This is in effect a double requirement: was the
work itself reasonably done under the legal aid order, and was it reasonable for the
fee-earner to do it? A further, fifth, requirement under Regulation (2) (b) regarding
the time allowed for each class of work does not arise with regard to routine letters
written and routine telephone calls with which this judgement is concerned.

H Adopting this approach in the present case, the three letters and nine
telephone calls were all of a nature which

A undoubtedly should be classified as "routine" within the normal meaning of that
word. The Master has found that they were all dealt with by a fee-earner and as I
read his Decision and his Certificate he was satisfied that the work was reasonably
done by the fee-earner concerned. There is certainly no indication that it was not
B reasonable for the fee-earner to do the work in this particular case. On the face of
it, therefore, the claim for fees for this work under Regulation 5 ought to succeed,
and the items in question ought not to be disallowed.

C The Master's reasons for reaching the contrary conclusion, which I suspect
that he did only with some reluctance, are set out in detail in his Decision, and I can
only attempt to summarise them here. He sought to apply the principles laid down
D in his own judgement in R. v. Leonard & Stachini (1954, unreported) where he
allowed a claim for letters which were concerned with the arrangements for visiting
defendants in prison. These were treated, and in my respectful view properly
E treated, as routine letters, but in the course of his judgement the Master referred to
what he called "the long-standing and well settled principles relating to letters and
telephone calls exemplified by paragraph 91" of the Taxing Officers Notes for
F Guidance (1982 version)

Paragraph 91 reads as follows:-

G "Routine letters should be allowed at the standard unit cost, other letters
should be paid for according to the length and content. All routine telephone
calls irrespective of length and whether or not they are timed should be
allowed at the standard unit cost applicable at the relevant time. Only those
calls which are timed and which represent attendances whereby material
progress is made should be assessed on an hourly basis. Chargeable calls
do not include unsuccessful attempts by Secretaries or telephonists to make
H outgoing calls or incoming attempts to contact fee-earners who are not
available, all of which are part of normal office overheads."

So far as telephone calls are concerned, paragraph 91 effectively

A distinguishes "routine" calls from others which may be regarded as attendances
and which should be remunerated on an hourly basis. It excludes from taxation
what may be called "abortive calls" of the kind described in the last sentence. The
Taxing Master clearly thought that the 1982 Regulations are intended to
B remunerate all "routine" calls, excluding only abortive calls and in relation to letters
he said "The Regulations are intended, to remunerate at a standard rate the very
simplest every-day correspondence". He also referred, however, to previous
C judgements in R. v. Inniss (1982), R. v. Elliott (1983), R. v. Norman (1984) and R. v.
Pord (1984), and he concluded at the end of his judgement:-

D 'In summary, therefore, I think that the test is whether the letter or call ought to
be treated as one in respect of which it would in normal practice not be proper
for the solicitor to make a direct charge to the client and it seems to me that
the number of items to be so treated will normally be extremely small and will
fall within the compass set out by the Masters in their decisions which I have
quoted, but applied on a very narrow basis."

E It seems to me that in the present case the Master felt constrained to interpret
Regulation 5 (1) (c) in the light of paragraph 91 of TONG and of the other
judgements referred to, and to hold that sub-paragraph (e) does not permit
remuneration for certain routine letters and telephone calls, specifically those which
F were concerned with listing difficulties and the availability of Counsel. This
approach does receive some support from the other judgements referred to in R. v.
Leonard Stachini though as I read that judgement the Taxing Master was disposed
G to interpret these judgements narrowly, as indeed his own summary, quoted above,
clearly shows.

H In my judgement, however, there is no justification in the terms of Regulation
5 for excluding from paragraph (1) (c) any claim for routine letters written or for
routine telephone calls

A made or received. It is necessary of course to establish what is meant by 'routine'
letters and "routine" telephone calls. They are distinguished by the Regulation itself
B from the non-routine letters and calls referred to in sub-paragraph (a) under the
heading "preparation" and for which an hourly charge may be made. They do not
include, in my view, the kinds of abortive calls which are described in the last
C sentence of paragraph 92, either as a matter of language or of common sense. If
there is any doubt about this so far as the language is concerned then it is
permissible, in my judgement, to refer to the contemporary practice as stated in
D paragraph 91 in order to confirm the view that abortive calls are not to be regarded
as "routine telephone calls" within sub-paragraph (e). But I can see no justification
for going outside the Regulation so as to exclude. any kinds of routine calls or
E routine letters, properly so called, from the ambit of paragraph (1) (e). Moreover,
even if reference is made to paragraph 91, as I read the paragraph it supports,
rather than contradicts, the above interpretation of Regulation 5 (1). It does not
seem to justify the disallowance of any routine letter written, or any routine
telephone call, other than abortive calls which the last sentence expressly excludes.

F The contrary argument, however, is that certain kinds of routine letters and
routine calls should nevertheless be disallowed because under existing taxation
practices they are regarded as forming part of the Solicitors' office overheads or as
G being covered by the care and conduct allowance, and because the rates
prescribed under the 1982 Regulations should be deemed to include an allowance
of that sort. No doubt, the practical result of disallowing such claims would be that
H the cost of doing the item of work in question would have to be regarded by the
solicitor either as part of his office overhead expenses,

A for which no remuneration may be claimed under the Regulations, or as having to
B be borne out of the fees which are allowed for work properly claimed under
C Regulation 5. But I do not consider that this justifies disallowing an item which the
D Regulation expressly allows. Even if there is, or was, a practice in other forms of
E taxation to disallow certain kinds of routine letters and routine telephone calls it
F would nevertheless be wrong, in my judgement, to interpret Regulation 5 (1) (e) in a
G way which would contradict its express terms.

A As to whether the prescribed rates include or should be deemed to include a
B notional care and conduct allowance, I, for my part, prefer to adopt the approach
C described by Mr Justice Mustill in R. v. Sandhu. The 1982 Regulations do not
D provide for a care and conduct allowance. They establish a new regime, and one
E which is radically different from what went before. Regulation 5 permits and in my
F judgement requires the straightforward approach which I have attempted to
G describe. This means that all routine calls are within Regulation 5 (1) (e), but they
H will not be remunerated under the Regulation unless the taxing authority is satisfied
I that the work in question was actually and reasonably done under the Legal Aid
J Order by a fee-earner. In practice, the scope of such work, particularly telephone
K calls, which is entitled to remuneration under the Regulations may be little or no
L different from what is allowed under other and earlier taxation procedures. To this
M extent I am in agreement with the Taxing Master's summary at the end of his
N judgement in R. v. Leonard & Stachini, which I have quoted above, but I would
O respectfully add the important qualification that the dividing line between allowable
P and non-allowable items in cases to which the 1982 Regulations apply is
Q established by the terms of Regulation 5 rather than by the present or former
R Practices of taxation

authorities in other kinds of case.

A Regulation 5 (1) (c) refers only to 'routine letters written", and I express no
view as to whether any sum may be allowed under Regulation 5 for dealing with
B routine letters received other than, of course, the appropriate fee for writing a
routine letter in reply.

For these reasons, I answer the certified question as follows:-

C Correspondence and telephone calls of the kinds described in paragraphs (a)
(b) and (c) of the question which are "routine letters written and routine
telephone calls actually and reasonably dealt with by a fee-earner" should not
D be disallowed on the ground either that they form part of the Solicitor's
overheads or that they should be assumed to be covered by a care and
conduct element deemed to be included in the rates prescribed by the
Regulations.

IN THE SUPREME COURT OF JUDICATURE QBCOF 95/1098/D
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE (QUEENS BENCH DIVISION)
(MR JUSTICE LATHAM)

Royal Courts of Justice
Strand
London WC2

Wednesday, 31st July 1996

Before:

LORD JUSTICE ROSE
LORD JUSTICE HENRY
LORD JUSTICE SWINTON THOMAS

R E G I N A

-V-

THE SUPREME COURT TAXING OFFICE

Respondent

EX PARTE JOHN SINGH & COMPANY

Applicant

(Computer aided Transcript of the Palantype Notes of Smith Bernal Reporting
Limited, 180 Fleet Street, London EC4A 2HD
Tel: 0171 831 3183
Official Shorthand Writers to the Court)

MR R GORDON QC (Instructed by John Singh & co, London, SW9 9TN) appeared
on behalf of the applicant.

MR C WIDE QC (Instructed by The Treasury Solicitor, London, SW1H 9JS)
appeared on behalf of the respondent.

J U D G M E N T
(As approved by the Court)

A

JUDGEMENT

LORD JUSTICE HENRY: The appellant, Mr Singh is a solicitor. He acted for a Mr Sagoo who was one of five defendants in a criminal fraud trial (a mortgage fraud) at Southwark. His defence was funded by legal aid. The determination of Mr Singh's recoverable fees for that defence was under the Legal Aid in Criminal and Care Proceedings (Costs) Regulations 1989, which I will call "the Regulations".

B

C

Mr Singh was dissatisfied with the sums awarded to him on determination and redetermination by the Determining Officer, Mr Pearson. He then appealed unsuccessfully to the Taxing Master, Deputy Taxing Master Pollard who is now a full Taxing Master. He wished to appeal further to the High Court judge. Under the scheme of the Regulations, such an appeal was only possible if the Taxing Master certified that a point of principle of general importance arose. Taxing Master Pollard did not so certify and Mr Singh sought judicial review of that refusal to certify. That review was refused by Latham J and his refusal is now appealed to us.

D

E

F

A preliminary point is taken by the respondent Taxing Master on the jurisdiction of this court. The point is taken that Judicial review does not lie as the Taxing Master was acting as an officer of and the delegate of the Supreme Court whose decisions are not reviewable under section 1 of the Supreme Court Act 1981. It is clear that a Taxing Master is an officer of the Supreme Court appointed as such by the Lord Chancellor (see sections 89(1) and schedule 2 of the Supreme Court Act 1981). Under the Regulations he plays a central part in determining the

G

H

A fees payable under the legal aid scheme to solicitors and counsel acting in Criminal and care proceedings under the Regulations. He is empowered to do this by order of the Lord Chancellor who made those Regulations by authority given to him by the Legal Aid Act 1988,

B The decision complained of in this case was taken by the Taxing Master acting under the scheme laid out in the Regulations. Under that scheme. in criminal cases the initial determination and, if requested, redetermination of the fees and disbursements due
C under a legally aided defence is done by the Determining Officer, who also is appointed by the Lord Chancellor. But the appellate process proper is to the High Court, first to the Taxing Master under Regulation 15 and then, dependent on his certification of a point of general importance, to a judge of the High Court. Decisions of the High Court are, of
D course, not subject to judicial review.

It is against that statutory background that Latham J found that there was jurisdiction in the court to proceed by way of judicial review. He said at page 8 of his judgement:

E "It seems to me that the question of jurisdiction has to be resolved by looking at the function being performed by the person or body whose decision is being challenged, and not the office held by that person, or the general description of that body. In the present case, the function which was being performed by the Deputy Master was governed entirely by the special jurisdiction conferred
F on him by the Regulations which I set out in detail later in this judgement. In these circumstances, but with the greatest diffidence bearing in mind the views expressed in **Rv. Shemilt**, I consider that this court does have jurisdiction to supervise the exercise of those functions by way of judicial review."

G I do not agree with either that analysis or that conclusion. The function performed by the Taxing Master is a judicial function which is entirely within the High Court. He acts as the delegate of the Supreme Court in an appeal process restricted to the Supreme Court of which he

H

A is an officer: such was the **obiter dicta** of Russell LJ and Farquharson J In **Rv. Shemilt and Others, ex parte Buckley** 1988 COD 40. Though, strictly speaking obiter, this was reserved judgement after full argument.

B A similar conclusion was reached by Woolf J in **Rv. The Taxing Officer ex parte Bee-Line Roadways International Limited** unreported, transcript of 5th February 1982
C DC/234/81, when he held that on the then statutory scheme, not materially different for present purposes, judicial review was not available where a Taxing Master was exercising his jurisdiction as a Taxing Master of the Supreme Court. The weight of authority is against Latham J and, in my judgement, he was wrong and judicial review
D does not lie for the reasons given.

E However, Woolf J found that the High Court had an inherent jurisdiction to control the exercise of the authority of the court delegated to the Taxing Master where there was a gap in the rules. He relied on various authorities, notably **Harbin v Gordon** [1914] 2 KB 577 and **Brown v Youde** [1967] 1 WLR 1544, that are explicable only on
F the court exercising a jurisdiction apart from that provided expressly by the rules. Counsel for the Taxing Master conceded that such a jurisdiction existed but submitted that it should be restricted to cases where there had been a real injustice.

G I agree with both that concession and, in general terms with the limitation on it. In his refusal to certify, the Taxing Master was exercising a "strong" discretion entrusted
H and the statutory scheme to him. The cases where the supervisory court could reverse a failure to certify

A would in the circumstances be very rare indeed. In those circumstances, in my
judgement, we should treat the complaints made in the judicial review as a deemed
B application under the inherent jurisdiction of the court and I, for my part, would so do.

To understand the complaints made it is necessary to look at what happened.
The critical determination and redetermination of Mr-Singh's entitlement from the fund
C was done by the Determining Officer, Mr Pearson. He was experienced in the taxation
of criminal defences in mortgage frauds. He also knew how the bills of the co-
defendants had been treated on taxation. His original taxation was done on paper. This
D was a formidable exercise; he was working on a schedule of claim more than 20 pages
long, containing over 400 individual items, supported by 43 ring binders of documents.
He then heard oral submissions both on the determination and the redetermination
E under the scheme laid down in the Regulations and, finally, he gave his reasons in
writing for his decision.

F His reasons themselves are a formidable document - 13 single spaced A4 pages
long, going into much detail. For present purposes, I can summarise them thus: his
reasons show that he accepted these basic facts. First, that this was a case of some
G size and complexity; second, that Mr Sagoo was the second most deeply implicated of
the defendants; third, that the nature of a cut-throat defence being run was that all the
case had to be covered; and, fourth, that Mr Sagoo was a very difficult client.

H Mr Pearson was bound under Regulation 6 (2) (b) to allow:

A

“such time in respect of [Regulation 6 (2) specified classes of work – 15 in all as he found reasonable.”

B

He also had to consider whether the work was reasonably done in the first place and

had been done by appropriate of fee earner, but here we are interested in the hours allowed. What he did was effectively roughly to halve the claim for solicitors'

C

preparation time from approximately 1,300 hours to 600 hours. He summarised his

general reason for doing this in two passages in his written decision letter. The first is at page 124 of the bundle where he said this:-

D

"Before moving to my specific reasons it may assist if I outline my approach to the assessment of the solicitors claim in this case. The claim for preparation was percentaged in a total of 414 items, each one indicating the date, activity undertaken, grade of fee earner and time taken. Nearly all of these were supported by an attendance note, some attaching a copy of the document prepared at the attendance. This is, of course, the correct way to present the claim, and the bill and supporting papers were clearly prepared in a neat and orderly way. However, upon examination of the bill and papers, I formed the view that the time spent was excessive, a view which I based on my experience of assessment of other solicitors' claims in large cases as well as what appeared to be consistently high claims for most of the activities undertaken and given the work produced.

E

F

"This said, for several categories of work. I did not feel able to point to any particular attendance as being either unreasonable in length or unreasonably held, and I accepted that something was gained from nearly all the attendances. However, as well as examining each individual item, I felt it reasonable for me to step back and look at the totality of the time claimed in relation to each type of activity and consider, if taken as a whole, the time claimed for that activity was reasonable.

G

"To assist my task I therefore classified the activities undertaken into a total of 15 categories as listed in annex 1 to these reasons. This lays out a category number, class of activity, the total claimed and the total allowed after redetermination. A note then indicates If my allowance for the activity is based on a global figure of all the items classed in the relevant activity or whether I have made separate and specific allowances on the claim, my 'total allowed' figure on the chart being simply the allowance for each item totalled up."

H

A He then enclosed two further annexes expressing the hope that by the items in categories in this way that his task, the task of the solicitor and the Taxing Master would be eased in what could otherwise have been an unwieldy claim to analyse and assess. B It seems to me that what he did was an impressive job of work as there laid down.

He then later (at page 134 of the bundle) referred to the general theme saying this:

C "I have attempted above to give reasons for my determination of each specific area of work. Considering now the preparation time claimed as a whole, I would comment as follows:

D "Looking at the way the case was prepared I have formed the view that insufficient control was exercised over the client and the work done in preparation of his defence. Much of the preparation, including going through the evidence with the client, examining documents and instructing counsel has been done in a painstaking detail which although not unreasonable as such goes further than was required for the preparation of a proper defence of the client, and may at times have led to the key issues being lost sight of. In assessing fees in this case I had in mind the words of Sachs J in **Rv Francis v Frances and Dickenson**, (3 All ER 836 1955) where he says "when considering whether or not an item in a bill is proper, the correct viewpoint...is that of a sensible solicitor sitting in his chair and doing what in the light of his then knowledge is reasonable in the interest of his lay client...(who)...should be deemed a man of means adequate to bear the expense of litigation...and by adequate I mean neither barely adequate or super abundant."

F "In this case the client and his instructions appear to have controlled his solicitors without due constraint of costs and reasonable need. Although I accept Sagoo was a demanding client, I am still of the view that more could have been done to maintain the preparation of his defence within tighter bounds.

G I determined the claim on the basis of what I considered reasonable given the case against Sagoo and the nature and substance of his defence, my view that my assessment was not unreasonable is reinforced by comparison with the preparation times of the solicitors for the co-defendants, some of whom had clients clearly at least as involved as Sagoo on the Crown case. The four firms who acted for the co-defendants at trial claimed between them a total of 725 and a half hours in preparation, not all of which was allowed on determination. The allowance to John Singh and Co. is higher than the claim of any other individual solicitor by H

over 170 hours. I was also helped by having assessed claims in a number of the complex mortgage frauds in the last year.

"Having carefully considered all representations made to me on determination and redetermination. I am satisfied that the allowance made to John Singh and Co. in the reasonable and that I have fully taken into account all the points made."

There was then an appeal from that to the Taxing Master. The complaint made is essentially this: first, that the Taxing Master misunderstood the appellate process and so misapplied it -- that is the first question for us to consider. The question is put in this way: was the appeal to the Taxing Master an appeal **de novo** or was it rather merely a review of the legality of the Determining Officer's decision? My answer would be that it was neither and that the question as put presents a false antithesis. It was not an appeal **de novo**, such as one gets on appeal from the Magistrates under section 108 of the Magistrates' Court Act 1980 to the Crown Court judge sitting with Justices, nor as you get on appeal from the Master to the judge in Chambers in interlocutory matters. Such appeals are by way of actual rehearing. An actual rehearing in the context of a taxation appeal would be a re-taxation. In such appeals, there is no need and no requirement for a notice of appeal because, as it is an actual re-hearing, the whole matter is at large.

That is not the form of appeal laid down in the Regulations. The Regulations show that this is not an actual rehearing: first, because the scope of the appeal is limited by the notice of the appeal (see Regulation 15 (b)): second, because the question of admission of new evidence and the raising of new points are both subject to the Taxing Master's discretion (set. Regulation 15 (11)). Nor, on the other hand, is it merely a review of the Determining Officer's decision

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because no such limitation is built into the Regulations. Regulation 15 (12) makes it quite clear that it is effectively a rehearing on the documents. That Regulation reads:

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"The Taxing Master shall have the same powers as the appropriate authority under these Regulations and, in the exercise of such powers, may

"(a) alter the redetermination of the appropriate authority in respect of any sum allowed, whether by increase or decrease as he thinks fit;

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"(b) confirm the decision to allow standard fees under regulation 9(2) or allow fees in accordance with regulation 9(4) and 9(5)."

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As it is an appeal, so the Taxing Master must exercise his own judgement while giving proper weight to any advantages the Determining Officer may have had in relation to the consideration of the case over him. The extent of such an advantage is necessarily dependent on the scope of the appeal as defined and limited by the notice of appeal. Here the notice of appeal was entirely general. It extended over ten or so points and the points that emerge from it were these: first, that it was wrong to tax the time down over the board as a whole; it was said that it was wrong to tax down the time allowed for items where the items themselves had not been disallowed; it was said that the Determining Officer paid too much attention to other comparable bills and not enough to the actual work done; it was said uncontroversially that a solicitor must explain all matters to his client; it was said, though without any particularity, that much of the reading of unused material claimed for was necessary though it was not said why; the point was again taken that the cut-throat defence meant that all the case had to be considered, and attention was then drawn to difficulties caused by witnesses not speaking English. It was said that the trial

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A was complicated by many notices of additional evidence and the fact that Mr Sagoo was a difficult client was raised again. All of these matters had been covered in the decision letter.

B The hearing was listed for two days, the 16th and 17th June having been set aside. Complaint is made of the fact that the hearing took just 45 minutes. Mr Singh's costs draughtsman was not present as he had another appointment and the case
C proceeded in his absence. Mr Singh put his case (it seems this is common ground) without interruption from the Taxing Master. Seen from the Taxing Masters viewpoint, the evidence shows that he had read the main deal file over the weekend and, on the
D two days previous, he had done approximately four and a half hours work sampling the 43 files of documents against the grounds of appeal; it was clear that he was well prepared. He listened without interruption to the development of the points made in the
E grounds of appeal which, as I have said, were general points. He put the applicant under no time pressure, he was never asked to adjourn the matter and, on conclusion of the submissions, he reserved his judgement. Afterwards, he considered the matter
F afresh with the documents. He expressed his reasons in a decision letter which is to be found at page 137 of the bundle. There he set out the history of the litigation and he summarised the Determining Officer's written reasons, saying that they were very
G detailed (as they were) and he concluded in this way:

"The Determining Officer in the three Annexes to his reasons classified the activities undertaken and showed the total allowed after redetermination. I have considered these and agree with the Determining Officer.

H "The solicitors, when they appeared before me, went through each item in Annex 1 which contained details of the activities undertaken broken down into 15 categories. They made their submission in relation to each category. I have considered these carefully.

A "A Taxing Officer must judge whether the work for which payment is sought was reasonably undertaken. He must not employ hindsight. The Determining Officer has done this. I dismiss the appeal."

B Now there, in my judgement, he makes clear that he has considered these questions himself as the scheme requires him to do so. I find no support in that letter or in the evidence for the suggestion that he was merely looking at the legality of what the Determining Officer was down. It was open to him, as it is to this court, on what I might call an ordinary appeal, simply to adopt the reasons given below where the detailed work had been done; that is so because of the nature of this general appeal. In this context, we were referred to a short report of the case called **Rae v Yorkshire Bank plc** in The Times of 16th October 1989 where the short summary by way of headnote says:

E "A judge hearing an appeal from a district registrar's order striking out an action was entitled in his judgement to adopt the reasoning of the registrar without setting it out himself.

"It could not be said that in so doing there had been a failure by the judge to exercise the discretionary jurisdiction given to him by Order 18, rule 19 of the Rules of the Supreme Court."

F The authority of **Evans v Bartlam** is set out in respect of that clear proposition.

G In those circumstances. I for my part detect no error of approach by the Taxing Master in this case. What the Judge said about it (which is to be found at page 15 of his judgement) was this:

H "The ambit of the appeal will be determined by the nature of the objections. Just as Regulation 14(6) requires the Determining Officer to redetermine a case in the light of the objections, it seems to me that Regulation 15 (5) and (11) taken

A together make it plain that the Taxing Master is to approach the appeal in the same way. In other words, on an appeal, the Taxing Master is required to deal fairly and in accordance with proper principles with the issues raised on the appeal, and no more. The Deputy Master in the present case was therefore correct in his approach to the ambit of the appeal."

B I agree with that passage. The Taxing Master did what the Regulations required. So the first point falls and with it the natural justice criticism of the hearing.

C The second point taken is this: whether the Determining Officer and Taxing Master could take an overall view and reduce the hours for each individual class of work over the board in the way that they did. The task to be performed in this taxation is preserving the balance between reasonable remuneration of the legal profession for D work done on legal aid and protecting the fund against making an open-ended commitment to pay for more hours work than the task reasonably required. The judge dealt with it in this way at page 16:

E "...the notice of appeal ... essentially challenged the Determining Officer's right to stand back from the individual items in the bill and determine that the aggregate produced from those individual items, although not capable of being impugned as separate items, nonetheless produced a result which F established that the time claimed was unreasonable. It seems to me that that must be one of the necessary functions of the Determining Officer, once he has carried out what might be called the audit exercise in relation to the individual items on the bill. The Determining Officer in the first instance, and the Taxing Master on appeal, should exercise great care to ensure that the sum payable on a determination such as the one in question is kept within G reasonable bounds, whilst accepting that particular clients may pose particular problems. It is perhaps well to remember the comment of Russell LJ in **Re Eastwood (deceased)** (1974) 3 All ER 603 at page 608 where he said that the field of taxation albeit in that case an inter partes taxation was one where:

H 'Justice is in any event rough justice, in the sense of being compounded of much sensible approximation.'

"I can see nothing to recommend an approach to taxation in this field which

A merely requires some justification of each item of the claim, followed by an aggregation, without a sensible assessment of the consequence of aggregation in the light of the overall complexities of the case, and above all the experience of the Determining Officer and Taxing Master."

B I agree with that passage entirely. How else can the unreasonable claim be controlled? That is, the judge found, a point of principle but it is not a point of principle as to which there is any dispute. A fortuitous example of the point of principle is to be found in **RY Shemilt and Others, ex parte Buckley**, which I have already referred to, C where the complaint of taxing down the bill was at the time claimed by the applicant as "recklessly extravagant." The proper use of the Legal Aid Fund requires that the efficient are rewarded for the economics of time in and out of court which their efficiency D produces. It also requires that the inefficient are not over-compensated by being given an open cheque to take as long as they like. Reasonable economy and dispatch must be required while making proper allowance for matters such as a difficult client and the E dangers of hindsight in the unpredictable field of litigation. On these questions, in long trials the view of the trial judge is likely to be of value and I, for my part, would encourage Taxing Masters to frequently consult him or her under Regulation 15(11) F when dealing with a lone legally aided criminal trial.

G After these written reasons were delivered, the Taxing Master was asked to certify eight argumentative questions to be found in form 86(a) as "points of principle of general importance". The judge was disposed to accept that of those eight, two points of principle emerge: (1) the ambit of the appeal; and (2) the necessity of standing back H from the total hours claimed on each class of work done to assess whether globally it was reasonable. He was disposed to accept that

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there were points of principle. But as he says, and I agree with him, the answer to them was entirely clear in both cases. I agree with that. In those circumstances they cannot properly be called points of principle of general importance because they were resolved long, long ago. Here, in my judgement, there was a proper determination and an appeal which correctly dealt with the matters raised in the notice of appeal and no point fit for certification on which to base an appeal to the judge under the inherent jurisdiction of the court.

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Therefore, for those reasons, I would dismiss this appeal.

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LORD JUSTICE SWINTON THOMAS: For the reasons given by my Lord. I agree this appeal should be dismissed.

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LORD JUSTICE ROSE: I also agree. The appeal is therefore dismissed.

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ORDER: Appeal dismissed; costs of the appeal and in the court below for the respondent.

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

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Royal Courts of Justice

Monday, 23rd May 1994

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Before:
Mr Justice Garland
(Sitting with Assessors)

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PERRY and ALEXANDER (Applicants)

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-V-

THE LORD CHANCELLOR (Respondent)

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(Transcribed by Harry Counsell & Co., 61 Carey Street, London WC2A 2JG.
Telephone 071-242-9346)

F

MR A NEWMAN Q.C. and MR J DEIN (instructed by the General Council of the Bar) appeared on behalf of the Applicants.

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MR R DRABBLE (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

J U D G M E N T
(As approved)

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A MR JUSTICE GARLAND: This is an appeal pursuant to Regulation 16 paragraph 3 of
the Legal Aid in Criminal and Care Proceedings (Costs) Regulations on the
Certificate of the Chief Taxing Master that points of principle of general public
B importance arose from a decision of Master Prince dismissing an appeal from a re-
determination of the fees of Mr John Perry QC and Mr Edmond Alexander by the
Determining officer at the Central Criminal Court. Judgement is given in open court
at the request of the parties who take the view that a point of general public interest
C is involved, and in addition we are aware that a number of similar matters are
awaiting re-determination or appeal to a Taxing Master.

The two questions certified which have been argued before us were as
D follows:-

(1) Is the function of leading Counsel, in a case which he perceives to be beyond
E the usual ambit of the crime alleged to conduct research into the law and to
place before the court for inconsideration as full an argument as both his
knowledge and his research permit?

(2) Is a court of first instance entitled to disregard time spent on research into the
F law in an unusual and complicated case and if so, to what extent should such
disallowance be calculated?

G After argument it became apparent that the parties where agreed that there
should be remuneration for the application of the law to the particular facts of a
case. The real issue was where in addition the line should be drawn between the
ordinary incidence of 'getting up the law' (a phrase we prefer to the word 'research')
H and unusual or exceptional cases which impose an additional burden on Counsel
which

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ought properly to be reflected in the fee payable in accordance with the Act and the Regulations.

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The case which gave rise to the present appeal was Reg -v- Rafique, Sajid and Rajah which was tried at the Central Criminal Court before His Honour Judge Smedley QC between 12th and 19th February 1991. The Defendants were convicted by a majority of ten to two on a count charging "Doing Acts Tending and Intended to Pervert the Course of Public Justice, in that they, on 5th April 1990, with intent to pervert the course of public justice did a series of acts which had a tendency to pervert the course of public justice in that, knowing an investigation into the death of Mahboob Ahmed was in progress or imminent, assisted in the concealment of a shotgun and cartridges from Police officers responsible for investigating that death". They were each conditionally discharged for three years.

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The facts were that the three Appellants and two other men, C and the deceased, went by car at night to a public park in London where the deceased wanted to test his recently acquired double-barrelled shotgun. There was evidence that it was intended to be used for the commission of robberies. While Rafique was holding the gun, one barrel was accidentally discharged and the deceased was hit and died. All four men left the scene in panic in the car. Having driven C to his home, Rafique stopped the car and broke open the gun whereupon Sajid removed the spent and live cartridges which were thrown out; Rajah threw the gun into

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H | bushes near a lake. They abandoned the car in East London and went to Birmingham for twelve days. They returned and, having consulted a solicitor, gave themselves up to the

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Police. They were interviewed at length and made extensive admissions. They were committed for trial and indicted as follows:-

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Rafique for Manslaughter, Sajid and Rajah for Doing Acts Tending and Intended to Pervert the Course of Public Justice by throwing away the cartridges and gun, and all three for Possessing a Loaded Firearm. There was also a count alleging the Doing of Acts with Intent to Impede the Apprehension of Another. However, on the first day of the trial, the Crown was granted leave to add as Count 7 (later renumbered Count 3) the general count of Perverting the Course of Public Justice against all three Defendants in place of the individual counts against Sajid and Rajah. This count raised the same point as the two former individual counts, namely whether the offence doing an act tending and intended to pervert the course of public justice could take place before any investigation into a possible crime had begun.

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Of the 45 committal witnesses only five were called at the trial including C, a firearms expert and the Exhibits Officer. At the close of the Prosecution case, on submission by Mr Perry, the manslaughter and firearms counts were withdrawn from the jury. His further submission that the offence of perverting the course of public justice was not sufficiently wide to include the concealment of the shotgun and cartridges before any investigation had begun was rejected. The three

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H | Defendants gave evidence but did not call any witnesses. After their conviction they appealed to the Court of Appeal (Criminal Division) which, on 7th April 1993, dismissed the appeal on the grounds that an act was

A not beyond the ambit of those acts tending to pervert the course of public justice by
reason of its having been performed after the alleged crime had been committed
but before investigations into it had begun. On 29th July the Court certified the point
as one of general public importance but leave to appeal was refused.

B Before His Honour Judge Smedley the legal arguments occupied some 4½ hours
over two days. Mr Perry QC as the only Silk instructed in the case naturally
C assumed the burden of argument on behalf of the other two Defendants. The
Determining Officer in an admirably thorough and careful redetermination
acknowledged that the legal complexities of the case should be taken into
D consideration in assessing Counsels' fee but were not such as to merit
exceptionally high fees. When the matter came before Master Prince on appeal, he
took the view that time spent on researching the law was not preparation time for
E the purpose of assessing the basic fees: Counsel must be assumed to know the
law.

F We therefore turn to the Act and the Regulations. Section 6(2) empowers the
Legal Aid Board to pay out of the Legal Aid Fund remuneration properly incurred in
connection with the provision of advice, assistance or representation. "Advice" by
Section 2(2) means oral or written advice on the application of English law to any
G particular circumstances that have arisen in relation to the person seeking the
advice. One of the criteria for the grant of representation at trial is by Section

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22(2)(b) that:-

"The determination of the case way involve consideration of a substantial question of law".

Where representation has been so granted, fees are payable

pursuant to Section 25 in accordance with regulations made under Section 34.

Regulation 2 defines "costs" as meaning in the case of Counsel the fees payable under Section 25. Regulation 4(1) provides that costs shall be determined by the appropriate authority (the Determining officer) in accordance with the Regulations.

Regulation 4(2) provides that the appropriate authority shall:

"(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".

Regulation 9 deals with Counsels' fees; under Paragraph 5 with non-standard fees in the following terms:-

"Where it appears that owing to the exceptional circumstances of the case the amount payable by way of fees in accordance with Part 11 of Schedule 2 would not provide reasonable remuneration for some or all of the work it has allowed, it may allow such amounts as appears to it to be reasonable remuneration for the relevant work".

Schedule 2 Part II Paragraph 1 provides:-

"The appropriate authority shall allow such fee in respect of an item of work allowed under Regulation 9(5) not exceeding the maximum amount specified in respect of that item of work, as appears to it to provide reasonable remuneration."

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Mr Newman QC for the Applicants submitted that Counsels' remuneration is for advice as well as representation and that, although the former expressly includes the application of English law to the assisted person's circumstances, Regulation 4 read with Section 22(2)(b) clearly contemplates that Counsel will spend time getting up substantial or complex issues of law for which he is entitled to a reasonable amount in respect of all work actually and reasonably done. He pointed to the decision in

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Lord High Chancellor -v- Wright & Anr. [1993] 4 AER 74 at Page 81 for the proposition that the 1989 Regulations are not restrictive and simply require a reasonable remuneration to be determined.

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Mr Newman then referred to an earlier decision of Master Prince in April 1990, Reg -v- Williams [case 881760] in which Counsel claimed for "Illegal research" in a complex case on the Betting, Gaming and Lotteries Acts. The Master said:-

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"In Counsel's taxation note he refers to the time spent on legal research. He does not allocate a time spent on it, but he refers to consulting Archbold, Halsbury's Statutes, Halsbury's Laws, two books on Betting, Gaming and Lotteries and many authorities. Counsel's remuneration takes into consideration the fact that he is competent to deal with cases in which he is instructed and for being learned in the law. He is entitled of course to remuneration for applying the law to the facts of the case. I do not therefore propose to take into consideration the time which he spent on this aspect of the preparation".

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Mr Newman submitted that the last sentence was incorrect, as was the Master's decision in the present case. Other Taxing Masters have taken a different view.

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Reg -v- Reubens [Case T910094] also involved an allegation of doing acts tending and intended to pervert the course of public justice. The particular legal issues concerned the admissibility of evidence. Counsel claimed for considering the authorities and preparing his legal argument. The Taxing Master accepted that

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this was a valid head of claim. He referred to Loveday -v- Renton & Anr [No. 2] [1992] 3 AER 184 a decision of Mr Justice Hobhouse (as he then was) sitting with Assessors. The Head Note contains the following passages:-

"In assessing Counsel's brief fee it is always relevant to take into account what work that fee together with

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any refreshers has to cover. The brief fee covers all the work done by way of preparation for representation at the trial and attendance on the first day of the trial. But in heavy litigation particularly where there is a team of barristers and experts additional work is involved in ensuring that the client is properly represented and his case fully developed beyond simply appearing in court such as Counsel having to meet to consider strategy and tactics and prepare material and Meet experts prior to going into the witness box to give evidence".

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A little further on there is the passage:-

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"On a legal aid taxation the brief fee should be assessed and allowed having regard to the full history of the trial as known at the date of the taxation or of any subsequent review".

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With these broad statements of principle, bearing in mind that they were in the context of civil litigation, we respectfully agree. Reg. V. Sabaroch and Ors [Case T911004], a decision of Master Rogers, was one of the cases resulting from "Operation Herring" when undercover Police Officers opened a retail jewellers in Tottenham and bought in large quantities of stolen goods. The point was taken that evidence collected in this way was not admissible but the Court of Appeal (Criminal Division) in the case of Reg -V- Christou and Wright [1992] 95 Cr.App.R. 264 decided that it was, though not before Counsel had spent a considerable amount of time considering the point for the purposes of pre trial reviews. In his reasons, Master Rogers said:-

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"Competent junior Counsel must clearly be expected to, and would have, a general knowledge of the basic essentials of criminal law such as the definition of theft and clearly could not expect to be nor would claim to be remunerated for looking that up. However, where a new or changing field of law has to be considered, as in this case the law of entrapment or enticement, then clearly Counsel must do research into that aspect and that cannot be considered to be part of his 'stock in trade'. In any case where the law may be very straightforward, however there can be certain circumstances in which the application of the straightforward law to the facts of a particular case does need a certain amount of research and remuneration

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would therefore be justified”.

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With these observations, we agree, save that the use of the word "research" in the last sentence is not altogether appropriate: the application of the law to the particular facts is specifically embraced in the definition of "advice". We are concerned with remuneration for getting up the law which then has to be applied to the facts. In both Reg -v- Reubens and Reg -v- Sabaroch, reference was made to Reg -V- Legal Aid Board ex parte Bruce [1991] 1 WLR 1231 and a passage in the judgement of the former Master of the Rolls at Page 1237 where he said:-

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"Solicitors, like barristers and judges, are not to be expected to carry a knowledge of all the law in their heads. They have to consider rules, regulations, textbooks and authorities or get others to undertake the research for them. If the problem is difficult or outside the scope of their experience, they will wish to discuss it with others who are more qualified (whether professionally or otherwise) and in some circumstances may have to remunerate those whom they consult. But knowledge of the law, however 'acquired or recalled, is their stock in trade just as the professional ability to ascertain and record physical features involved in a boundary dispute or to ascertain how a builder has done his work and whether this is in accordance with good practice is a surveyors. In so far as expense is involved in adding to or replenishing this stock in trade it is an overhead expense and not something which can be charged to the client or the Legal Aid Board as a disbursement".

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The facts of that case were special. Solicitors giving advice on the Green Form Scheme had engaged the Applicant, an expert in welfare law who was neither a solicitor nor a barrister, to provide advice and assistance on entitlement to welfare

H | benefits. The sole issue in the case was whether Section 2(6) only permitted remuneration by the Legal Aid Board under Part III of the 1988 Act in respect of advice and assistance given by solicitors and barristers. Since the advice in respect of which remuneration was sought by way of

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a disbursement was that of the Applicant and not the Solicitor although he undertook responsibility for it, Section 2(6) precluded recovery of the Applicant's fees in this way. On Page 1238 Lord Donaldson went on to say:-

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“What matters is whether the expense is a ‘disbursement’ [falling within S. 10(3)(a)] within the scope of the green form scheme”.

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and decided that it was not. Staughton, LJ confined his judgement to consideration of Sections 2(6) and 10(3)(a). Farquharson, LJ agreed with both judgements. In both Reg -v- Reubens and Reg -v- Sabaroche the passage in the judgement of Lord Donaldson at Page 1237 was not regarded as authority for the proposition that counsel cannot be remunerated for researching the law, and Mr Drabble for the Lord Chancellor does not argue otherwise. It is our view that the combined effect of the provisions of the 1988 Act and of the Regulations to which we have referred clearly contemplate that Counsel should be so remunerated in a proper case as well as for applying the law in the particular circumstances. Mr Drabble conceded that the two certified questions should be answered in favour of the Applicants but what divided him from Mr Newman were the assumptions that should be made as to the level of Counsel's knowledge of the law in the field in which he or she practises. We are, of course, concerned with criminal proceedings which do not produce the intense specialisation to be found on the civil side. Leading Counsel will, of course, be expected to have knowledge of the more serious offences for

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H | which they are normally engaged.

We were accordingly invited to give some guidance as to where the line should be drawn. One of the Assessors

A formulated the problem in this way: 'Do we .have to assume that Counsel is a
scratch player or should we regard him as having a handicap of 12?' At one end of
the spectrum there will be cases which are so unusual or infrequent that Counsel
B will clearly require substantial preparation time for the relevant law: by way of
example, Christou and Wright, to which reference has already been made, Brown
[1993] 2 WLR 556 (sado masochism), Gotts [1992] 2 AC 412 (duress as a defence
C to attempted murder), Attorney-General's Ref. No. 3/1992 [1994] 2 AER 121 (mens
rea of attempted arson endangering life). The impact of-European law would afford
another example as would the proper construction of new legislation. We had in
D mind also the unexpected point of law which arises at the beginning of the trial or
even during the course of it and which necessitates an adjournment for research
and argument. Moving closer to the middle ground, we are very conscious that the
E Act and Regulations confer a wide discretion qualified by reasonableness. In our
view, a Determining Officer or Taxing Master must assume that Counsel, both
leading and junior, are-fully up to date in the substantive and procedural law in the
F field in which they hold themselves out as practising. We have in mind that
Counsel undertaking the ordinary run of criminal case in the Crown Court may not
necessarily regard themselves as fully equipped to deal with matters arising, for
G example, under the Control of pollution Act, the Consumer Credit Act or planning
contraventions. However, each case must fall to be decided on its own facts and
Counsel's professed expertise.

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Since we take the view that the two certified questions

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must be answered in favour of the Applicants we propose to remit the matter to a Taxing Master for reconsideration. In so doing, we observe that Pages 80-117 of the Applicants' bundle, which is their skeleton argument for the Court of Appeal (Criminal Division), was not before the Taxing Master. We give leave to include it. The offence of doing acts tending and intended to pervert the course of public justice had uncertain boundaries not least as to what was the earliest point in the course of public justice at which it could be perverted, and the extent to which the destruction or falsification of potential evidence would constitute the actus reus. We are in no doubt that this was a case where Counsel was entitled to spend time both in getting up the law and then applying it to the circumstances of the case. What was a reasonable time is a matter for the Taxing Master.

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Appendix 8

Miscellaneous Cases

R -v- Legal Aid Board ex parte R M Broudie & Co [1994], 138 SJ 94 QBD.

R -v- Highbury Corner Magistrates' Court, ex parte D J Sonn & Co (a firm) [1995] 4 All ER 57 QBD.

R -v- Seale [1997] The Times, 17 July, C.A.

Miller Gardner (solicitors) -v- Lord Chancellor's Department [1997] 2 Costs LR 29.

R -v- Cevik [1998] 2 Costs LR 1.

R -v- Crossley (Messrs Murria (solicitors)) -v- Lord Chancellor's Department [2000] 2 All ER 941.

Landau & Cohen (solicitors) -v- Lord Chancellor's Department [1999] 30 July, QBD (unreported).

Smith Graham (solicitors) -v- Lord Chancellor's Department [1999] 30 July, QBD (unreported).

A IN THE HIGH COURT OF JUSTICE
990674
QUEEN'S BENCH DIVISION
(DIVISIONAL COURT)

Case no:

Royal Courts of Justice.
Strand, London WC2A 2LL

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Date: 17th March 1994

Before:
LORD JUSTICE ROSE

C

and

MR JUSTICE WRIGHT

D

R v LEGAL AID BOARD, ex parte, R M BROUDIE & CO

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**Mr. R ALLFREY (instructed by R M Broudie & Co, 1 – 3
Sir Thomas Street, Liverpool L1 8BW) appeared on
behalf of the applicant.**

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MR N PITT (instructed by Treasury Solicitors, Queen Anne's
Chambers, 28 Broadway, London SW1H 9JS) appeared on
behalf of the Respondent

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**(Computer aided Transcript of the Stenograph notes of John
Larking, Chancery House, Chancery Lane, London
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H

Judgement
As approved by the court

Thursday, 17th March 1994

J U D G M E N T

A LORD JUSTICE ROSE: The applicants are a firm of solicitors.

B With the leave of Harrison J they seek to challenge the
C construction placed by the Costs Appeals Committee of the
D Legal Aid Board on paragraph 3 (b) of Schedule 1 Part 1 of the
E Legal Aid in Criminal and Care Proceedings (Costs)
F Regulations 1989. The point is a short one. The background
G can be briefly stated.

H First, the Regulations. Regulation 5 requires a solicitor to
submit a claim for costs in respect of work done under a legal
aid order within three months of the conclusion of the
proceedings, and that claim has to be accompanied by the
legal aid order. Regulation 10 provides, in circumstances
appertaining in the present case, for payment of costs by the
Legal Aid Board once they have been determined by the
appropriate authority. Regulation 12 provides for a review by
the appropriate Area Committee of a determination with which
a solicitor is dissatisfied. Regulation 13 provides that a
dissatisfied solicitor may apply to the Committee to certify a
point of principle of general importance. There is provision for
the Board to reverse, affirm or amend the decision of the Area
Committee reached under regulation 12. The crucial part of
the Regulations for present purposes is paragraph 3 of Part 1
of the Schedule to those Regulations, which is in these terms:

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"in respect of any item of work, the appropriate authority may allow fees at more than the relevant basic rate specified in paragraph 1 where it appears to the appropriate authority that, taking into account all the relevant circumstances of the case, the amount of fees payable at such specified rate would not reasonably reflect -

(a) the exceptional competence and dispatch with which the work was done; or

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(b) the exceptional circumstances of the case."

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The material facts in the present case are that the applicants claimed, under a legal aid order made by magistrates, fees for representing a man called Holman between June and October 1991. He was charged with robbery. There were old-style committal proceedings.

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In submitting their claim the applicants identified, notably in a covering letter, several features of the case which they said indicated that the case was exceptional and called, in consequence, for an uplift on the standard rate, having regard to the provisions of paragraph 3(b), which I have

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read. The provisional notice of assessment indicated allowance of the claim in full except for the uplift proposed in the light of alleged exceptional circumstances. On review, the Area Committee confirmed

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the provisional assessment. At the applicant's invitation the Committee certified two points of general importance, the second of which is material for present purposes, namely:

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"Whether the proper test of 'exceptional' within the phrase 'exceptional circumstances of the case' in paragraph 3 (b) of Part I of Schedule 1 of the Legal Aid in Criminal and Care Proceedings 1989 is the ordinary and natural meaning of the word 'exceptional', i.e. 'unusual or out of the ordinary' and whether in applying this test the committee should compare the case in question with an ordinary criminal case."

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The Committee's decision in the letter of 9th June

1993 was that 'exceptional' did indeed mean "unusual or out of ordinary" and "in applying this test the committee should compare the case in question with other cases of the same type". The applicants invited the Committee to reconsider the matter and, having heard further representations, including representations from the Law Society, the Committee did reconsider the matter and gave the fruits of that reconsideration in the letter of 13th August 1993. The result was the same.

Before this Court it was accepted by Mr Pitt, counsel for the respondent Legal Aid Board, that the Committee's construction of paragraph 3(b) was incorrect, and before this Court counsel on both sides have sought to agree a form of words to be incorporated in the declaration which is part of the relief which is sought. I shall return to that in a moment. It is common ground that certiorari, which is the first part of the relief sought, must go to quash the decisions of 9th June and 13th August.

The Committee referred in its letter of 13th August 1993 to the decisions of three taxing masters in R v Robinson, R v Dinc and R v Hussain and Others. In Robinson the taxing master spoke of "the usual or ordinary criminal trial"; in Dinc the taxing master spoke of "the generality of criminal cases". In each case the taxing masters were referring to the kind of case to which the instant case, the subject of taxation should be compared in deciding whether exceptional circumstances within paragraph 3(b) were made out. A

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different approach, albeit obiter, was adopted by another taxing officer in R-v Hussain and Others. In my judgement, of the two approaches, that of the masters in Robinson and Dinc is to be preferred.

It may, however, in view of the general importance of this case, be of some assistance if I indicate the reasons why I take that view. First, the words of the regulation are unrestricted. "All the relevant circumstances" are referred to in paragraph 3. The interpretation proposed by the Costs Appeal Committee would restrict the circumstances which the taxing officer can consider. In my judgement, the primary responsibility for considering all the relevant circumstances and whether any are exceptional is, and ought properly to be, upon the original taxing officer; though of course, if the review and appellate procedures are followed, the bodies charged on review and appeal must also take a view as to whether there are exceptional circumstances. But any attempt to limit the circumstances which can be considered by the taxing officer should, in my view, be discouraged. He should not, in my judgement, be restricted as to the choice of circumstances which he can properly regard as exceptional. Secondly, the Costs Appeals Committee's interpretation would, as it seems to me, lead to a curious result in that cases of a type which are inherently likely to be more difficult and demanding, such as murder or complex fraud, would only qualify for an uplift if they were even more difficult and

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demanding than other similar cases, notwithstanding that they were of exceptional difficulty compared with ordinary cases. Thirdly, unique or very rare offences, such as piracy, would not, if the Committee is right, ever qualify for an uplift because there would be no comparators.

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Accordingly, in my judgement, Mr Pitt was right to concede that the construction of the Costs Appeal Committee in this case was wrong in law. Accordingly, I would quash the decision and remit the case to the appropriate authority for reconsideration in accordance with the terms of this judgement.

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So far as a declaration is concerned, this is, in my judgement, not an appropriate case for that relief. The difficulty which counsel on both sides experienced, and indeed the difficulty which this Court has experienced, albeit assisted by the rival contentions of counsel, in formulating what would be both a helpful and correct declaration are a sufficient reason for not granting any declaration at all. In any event, as I have indicated, the primary relief here sought is certiorari. That has followed. In my judgement, the discretionary nature of the remedy of declaration which is further sought does not in the present circumstances require that a declaration should be granted. Accordingly, as I have indicated, this matter must be remitted for reconsideration. Whether, in the circumstances of this particular case, the application of the correct test will make any difference is not of

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course a matter for this Court, but is for the taxing officer.

A MR JUSTICE WRIGHT: I agree. I also agree that, as my Lord has
indicated, this is not, in my judgement, an appropriate case for a
B declaration to be granted. The words of paragraph 3(b) of
Schedule 1 to Part I of the 1989 Regulations are drafted as widely
C as they possibly can be and exhort the appropriate authority to take
into account all the relevant circumstances of the case. In such
D circumstances, in my view, it is inappropriate to seek to limit or
fetter, or even guide, the approach of the appropriate authority by
E seeking to establish the basis of any comparisons which should or
should not be drawn whether against cases of a similar type (which
for the reasons which have fallen from my Lord I agree is not the
appropriate test) or indeed by drawing comparisons with what are
described as "ordinary" criminal cases, whatever those may be. In
the circumstances, I also agree that the order should go.

LORD JUSTICE ROSE. In those circumstances the decision will
be quashed and the matter remitted for reconsideration.

F MR ALLFREY: My Lord, can I just clarify the remission would be to
the first tier, the taxing officer, as opposed to going back to the
Costs Appeal Committee

G MR JUSTICE WRIGHT: Is that not where you now are?

MR ALLFREY: Yes, I think that must be right. We have now
quashed the determination.

H LORD JUSTICE ROSE: On the face of it, the remission would be
to the body whose decision we have quashed.

MR ALLFREY: Your Lordships were indicating earlier that really the taxing officer has a ----

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MR JUSTICE WRIGHT: The decision of the taxing officer and of the Area Committee has been overtaken by the decision of the Costs Appeal Committee. That is the decision which is before us. That is the decision which has been quashed. It must go back to that, I would have thought.

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LORD JUSTICE ROSE: Is that right?

MR PITT: That is as I understand it, yes.

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MR ALLFREY: My Lord, I think I have to say that the decision quashed leaves, therefore, a gap. It must go back at least to that stage. Your Lordships did indicate earlier on that the taxing officer, as it were, had the best ----

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MR JUSTICE WRIGHT: That is for the purpose of deciding ----

LORD JUSTICE ROSE: That is in relation to the structure of taxation generally, but it does not necessarily follow that this Court should remit to the beginning of chain. This frequently arises in judicial review. There has been a chain of decisions. In the ordinary way, unless there are some wholly exceptional circumstances, one does not remit them to the beginning of the chain but one remits to the body whose decision has been quashed in order for them to reconsider, in the light of the law as we now-state it to be.

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MR ALLFREY: I follow that. I just thought your Lordship might have wanted to, as it were, send it back to the taxing officer to start the whole process to be begin again.

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The other matter is costs. In my submission, we have substantial succeeded in this case.

LORD JUSTICE ROSE: Can you resist that, Mr Pitt?

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MR PITT: Not terribly easily. I would simply say this: is it perhaps in tennis terms 15/15. Obviously

A my learned friend has succeeded in quashing the last part of the
point which I conceded. On the other hand, it is plain that the
applicant wished to go further, and persisted in seeking a
declaration ----

B LORD JUSTICE ROSE: I cannot think offhand of a judicial review in
which at least three forms of relief are not sought and the
applicant only finishes up with one. It is not usually a reason for
depriving him of his costs.

C MR PITT: I accept that, but it seems to me that my learned friend
would have persisted with the second limb even if I conceded the
first limb months ago.

D LORD JUSTICE ROSE: I do not know if he would or not. It was not
actually conceded, as I understand it, until this morning.

MR PITT: No, that is true.

E LORD JUSTICE ROSE: So that the costs are incurred in any event.

MR PITT: My Lords, those are my submissions on the matter of
costs.

F LORD JUSTICE ROSE: Thank you very much. The applicant will
have his costs.

G MR ALLFREY: Much obliged, my Lord. To be taxed if not
agreed?

LORD JUSTICE ROSE: To be taxed if not agreed. There may in fact
be an uplift, who knows, -- special circumstances.

H MR JUSTICE WRIGHT: Not under the same Regulations.

R v Highbury Corner Magistrates' Court, ex parte D J Sonn & Co (a firm)

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QUEEN'S BENCH DIVISION
SIMON BROWN LJ AND CURTIS J
11, 17 MAY 1995

f *Legal aid - Criminal cases - Refusal of legal aid - Failure to provide complete statement of means before conclusion of proceedings - Applicant solicitors applying for Legal aid for client on day of client's summary trial and conviction - Documentary evidence required to support statement of means sent two weeks later - Justices' clerk refusing legal aid on ground that supporting documentary evidence received after conclusion of proceedings - Whether legal aid order could be granted after conclusion of proceedings to cover work earlier undertaken - Legal Aid in Criminal and Care Proceedings (General) Regulations 1989, regs 11, 23, 44(7).*

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The applicant solicitors were retained on 5 January 1994 to represent a client, E, at a summary trial taking place that day for an offence of criminal damage. E was duly represented at trial by the applicants and was convicted of the offence and sentenced. On the same day the applicants applied on E's behalf for legal aid to cover the costs of their representation of him and submitted a statement of means. Under reg 11a of the Legal Aid in Criminal and Care Proceedings (General) Regulations 1989 a legal aid order could not be made until the court or justices' clerk had considered the statement of means, which had to be accompanied by supporting documentary evidence in accordance with reg 23b.

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58 E did not have the necessary evidence with him on the day of the trial but later provided it to the applicants, who sent it to the court on 18 January 1994 and requested that a legal aid certificate be provided. The justices' clerk replied that since the information necessary to complete the statement of means had been received after the case had been completed it was too late for an elective order to be made. The applicants applied for judicial review of the clerk's decision, contending inter alia that the regulations could be construed in three different ways so as to avoid the inconvenient and unjust consequences of the clerk's construction: (i) by delaying the making of a legal aid order until the supporting documentary evidence was provided and then back-dating the order so as to cover the work earlier undertaken; (ii) by making an order conditional on the subsequent provision of satisfactory supporting evidence, and (iii) by making an unconditional order once the supporting evidence was provided and then invoking reg 44(7)c to cover the work earlier undertaken.

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Held - Where a defendant applied for legal aid under the 1989 regulations for representation and advice in respect of criminal proceedings in a magistrates' court but was unable to furnish the court with the necessary supporting documentary evidence until after the single hearing which disposed of the proceedings, a legal aid order could nevertheless be made unconditionally and correctly dated at that point. Regulation 44(7) could then be invoked so as to allow earlier representation and advice to be deemed given under the order, provided that the three preconditions set out in the regulation were satisfied, namely that (i) the interests of justice required that representation be provided as a matter of urgency, (ii) there was no undue delay in the making of an application for legal aid, and (iii) representation was given by the solicitor who was subsequently assigned under the legal aid order. The alternative constructions of the regulations failed: first, because it was necessarily implicit in reg 44(7) that representation or advice given before a legal aid order was made could only be covered in the particular circumstances there specified and not by the expedient of back-dating the order and second, because it was also implicit in reg 11 (3) that the court or clerk was required to consider the statement of means as was described in reg 23, namely one accompanied at that moment by supporting documentary evidence. On the facts, since all the preconditions to reg 44(7)

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- a Regulation 11, so far as material, is set out at p.60 b, post
b Regulation 13, so far as material, is set out at p.60 c d, post

f were satisfied, the clerk should have made a legal aid order once the supporting documentary evidence was provided so as to enable the applicants to be paid under reg 44(7) for work earlier undertaken in relation to E's representation. The application would accordingly be granted (see p 62 *d h j*, p 63 *e to h* and p 64 *a c*, post).

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Notes

For nature and grant of criminal legal aid generally, see 27(2) *Halsbury's Laws* (4th edn reissue) para 2017.

h For legal aid in magistrates' courts, see *ibid* para 2021.

For the Legal Aid in Criminal and Care Proceedings (General) Regulations 1989, regs 11, 23, 44, see 11 *Halsbury's Statutory Instruments* (1995 reissue) 104, 108, 115.

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59 **Cases referred to in judgements**

R v North Staffordshire justices, ex p O'Hara (7 December 1993, unreported), QBD.

a *Welch v Redbridge justices* (1984) 148 JP 474, DC.

Cases also cited or referred to in skeleton arguments

Amand v Secretary of state for Home Affairs [1942] 2 All ER 381, sub nom *Amand v Home Secretary and Minister of Defence of Royal Netherlands Government* [1943] AC 147, HL.

Carr v Atkins [1987] 3 All ER 684, [1987] QB 963, CA.

b *Day v Grant, R v Crown Court at Manchester, ex p Williams* [1987] 3 All ER 678, [1987] QB 972, CA.

DPP v Crown Court at Manchester and Ashton [1993] 2 All ER 663, [1994] 1 AC 9, HL.

R v Legal Aid Board, ex p Bateman [1992] 3 All ER 490, [1992] 1 WLR 711, DC.

R v Clerk to the Liverpool City justices, ex p R M Broudie & Co [1994] 159 JP 330, DC.

R v North Kent Magistrates, ex p McGoldrick & Co (a firm) [1995] Times, 6 February.

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Application for judicial review

By notice of motion dated 12 July 1994 the applicants, Messrs DJ Sonn & Co, a firm of solicitors, applied with leave of Hutchison J given on 28 June 1994 for judicial review of the decision of the respondent clerk to the Highbury Corner Magistrates' Court made on 21 January 1994 whereby he refused to grant legal aid to the applicants' client, Milud Embarc, to cover their representation of him in criminal proceedings on 5 January 1994. The facts are set out in the judgement of Simon Brown LJ.

Hugh Tomlinson (instructed by *DJ Sonn & Co*) for the applicants.

e The respondent did not appear and the Crown was not represented.

Cur adv vult

17 May 1995. The following judgements were delivered.

f **SIMON BROWN LJ.** This is an application by Messrs D J Sonn & Co, a firm of solicitors, for judicial review of a decision by the clerk to the Highbury Corner Magistrates' Court on 21 January 1994 refusing to make a legal aid order in favour of their client, Milud Embarc, to cover their representation of him in criminal proceedings on 5 January 1994.

g The relevant facts can be shortly stated. Mr Embarc was arrested on 27 October 1993 for an offence of criminal damage committed that day. On his first appearance before the Highbury Corner Magistrates' Court on 24 November 1993 he appeared in person and pleaded not guilty whereupon the magistrates expressed the view that the case was suitable for legal aid.

c Regulation 44, so far as material, is set out at p 61 j, post

h On 5 January 1994 the applicants were telephoned from the court by Mr Embarc. He was a long-standing client of theirs. He told them that he was that day facing summary trial and asked them to attend to represent him. The court had already arranged for a Spanish interpreter to come. A solicitor employed by the applicants, a Mr Ouaknin, duly attended and represented Mr Embarc. After a summary trial he was convicted, conditionally discharged, and ordered to pay a contribution towards the prosecution's costs.

j That same day, whether before or after the summary trial is unclear and to my mind matters not, an application for a legal aid order was made under the provisions of the Legal Aid in Criminal and Care Proceedings (General) Regulations 1989, SI 1989/344

a Regulation 11, so far as material, provides:

'(1) An application for a legal aid order in respect of proceedings in a magistrates' court shall be made -- (a) to the justices' clerk in Form 1 ... and the justices' clerk or the court may grant or refuse the application ...

(3) ... a legal aid order shall not be made on an application under paragraph (1) until the court or the justices' clerk has considered the applicant's statement of means.'

b Regulation 23 (as amended with effect from 1 September 1993 by reg 5 of the Legal Aid in Criminal and Care Proceedings (Central) (Amendment) (No 2) Regulations 1993, SI 1993/1895), so far as material, provides:

c '(1) A statement of means submitted by an applicant ... shall be in Form 5 and shall be accompanied by supporting documentary evidence in respect of such matters as may be specified in that Form.

d (2) ... where an applicant does not submit a statement of means and supporting documentary evidence when he applies for legal aid, the proper officer or the court to which the application is being made shall -- (a) require him to do so; (b) in the case of failure to submit supporting documentary evidence, require him either to do so or to provide an explanation in writing of the reasons why it is not reasonably practicable to do so ...'

Until reg 23 was amended in 1993, there had been no requirement for the statement of means in Form 5 to be accompanied by supporting documentary evidence; the requirement was first introduced in 1993.

e On 5 January 1994 Forms 1 and 5 were duly completed and lodged with the justices' clerk. Mr Embarc did not, however, have with him at court the supporting documentary evidence now required by reg 23(1). A few days later, however, he provided it to the applicants, who on 18 January 1994 sent it to the court asking for the certificate now to be provided. That letter elicited the clerk's response dated 21 January 1994, effectively the decision letter in this case. The relevant part reads thus:

'A legal aid order cannot be made until a complete statement of means has been considered. In this case the information was received after the case had been completed, too late for an effective order to be made.'

g Further correspondence followed in which the applicants sought but failed to persuade the clerk to a different view. I need not detail it. They then obtained legal aid for their client, Mr Embarc, to challenge the clerk's decision. On counsel's wise advice, however, they decided in the end to fund and mount the challenge themselves. The application was made somewhat out of time on 25 May 1994. We nevertheless have no hesitation in extending the period to the limited extent necessary.

h The respondent's position has been clarified in an affidavit sworn on 6 September 1994 by Mr Gooch, the senior chief clerk of Highbury Corner Magistrates' Court, apparently following advice and assistance from the Treasury Solicitor's department. The respondent was not, however, represented before us and neither was the Treasury Solicitor's department nor the Lord Chancellor's department, despite both having been served by the applicants with all the papers including counsel's recent skeleton argument and despite the fact that, quite independently, the Crown office at my instigation expressly invited one or other of those departments to attend the hearing. Given that the case is one of some difficulty and that our decision will inevitably be of general application,

a I regret their absence and record that in the event we have had less assistance than we would have hoped and may have needed, ably and fairly although Mr Tomlinson has striven to present both sides of the argument.

The argument to which Mr Gooch deposes is essentially this. The proceedings in question here were concluded on 5 January 1994 and –

b 'Therefore it was inappropriate to make a Legal Aid Order on 19th January 1994. Legal Aid Orders cannot be backdated or have a retrospective effect. Legal Aid Orders take effect from the date that the Order is made.'

Mr Gooch draws attention to the fact that –

c 'if a Legal Aid Application is made after the conclusion of proceedings and the Clerk processes such an Application and forms the view that the Defendant in question should pay a Contribution, there is no provision for a Court to order that Contribution should be made. No Contribution Order can be made by the Court in such a situation as the Contribution period expires on the conclusion of the case.'

d The applicants contend that it would be most unfortunate if the clerk's stated view is correct. Not infrequently a defendant fails to furnish the court with 'supporting documentary evidence' prior to the single hearing at which criminal proceedings are disposed of. In such cases the solicitor representing the defendant at the hearing could not be remunerated under the legal aid scheme. The inevitable result would be that the hearing would have to go off to a later date to give time for a legal aid order to be made in advance. Just consider how inconvenient and inimical to justice that would be. Take the
e instant case. Not only would the witnesses on both sides have had to re-attend on a later occasion but so too would the interpreter.

f Mr Tomlinson submits that there are three different ways in which the regulations can be construed and applied so as to avoid that regrettable result. First, by delaying the making of a legal aid order until the supporting documentary evidence has been provided and then backdating it so as to cover the work earlier undertaken. Second, the order can be made as soon as Forms 1 and 5 are submitted, the order however being made conditional upon the supporting documentary evidence thereafter being provided. Third, the order can be made unconditionally and correctly dated once the supporting documentary evidence is provided, reg 44(7) then being invoked to cover the work earlier undertaken.

g These I shall call respectively the backdating argument, the conditional order argument, and the reg 44(7) argument, and I shall consider them in turn, pausing only first to set out the provisions of reg 44(7):

h 'Where in proceedings in a magistrates' court representation or advice is given before a legal aid order is made, that representation or advice shall be deemed to be representation or advice given under the order if -- (a) the interests of justice required that the representation or advice be provided as a matter of urgency; (b) there was no undue delay in making an application for legal aid; and (c) the representation or advice was given by the solicitor who was subsequently assigned under the legal aid order.'

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62 (1) *The backdating argument*

a This argument was expressly left open by this court in *Welch v Redbridge justices* (1984) 148 JP 474. It was, however, later rejected by May J in *R v North Staffordshire justices, ex p O'Hara* (7 December 1993. unreported). Whilst recognising that on the face of the statute and regulations there is 'no explicit indication whether or not the grant of legal aid can be made so as to operate from a date earlier than the date on which the order is made' (or, as he later put it, 'no clear positive answer to that question'), May J ultimately concluded that 'there is no power for a justices' clerk to backdate the effective date of a legal aid order earlier than the date on which the order is made'.

b In so deciding he was influenced in part by the word 'now' appearing in prescribed Form 11, in part because 'reg 44(7) does provide for the representation and the advice to be deemed to include earlier work in certain prescribed circumstances', in part because 'you would expect an order of this kind to take effect from the time when it was made', and in part by certain previous decisions whose general
c trend suggested to him 'that payment under the legal aid scheme in criminal proceedings should not be made earlier than the date of a certificate'.

I believe May J was right to reach that conclusion. Above all it seems to me necessarily implicit in reg 44(7) that representation or advice given before an order is made can only be covered in the particular circumstances there specified, and not by the expedient of backdating the order.

d (2) *The conditional order argument*

e In advancing this argument Mr Tomlinson points out that when in 1993 reg 23 was amended to require the statement of means to 'be accompanied by supporting documentary evidence', no amendment was made to reg 11(3) to include reference there to supporting documentary evidence. It follows, he submits, that reg 11 imposes no bar upon the making of a legal aid order in advance of the supporting documentary evidence. The clerk is merely required to consider the statement of means; he can then make the order conditionally.

f This apparently is the view taken by a number of magistrates' courts. We have been shown, for example, a letter to the applicants dated 4 May 1995 from Clerkenwell Magistrates' Court, reading as follows:

'Re: Application for legal aid by (name of client) The application for legal aid has been granted. However, documentary evidence supporting the defendant's claim that he/she is in receipt of income support or other state benefit must be provided within the next 14 days. A failure to supply this information may result in the legal aid order being withdrawn.'

g For my part I find difficulty in this approach. In the first place it seems implicit in reg 11(3) that the court or clerk is required to consider such statement of means as is described in reg 23, namely one accompanied now by supporting documentary evidence. But there is this consideration too: nothing in the regulations appears to me to authorise the withdrawal of a legal aid order once granted merely because the 'supporting documentary evidence' of the statement of means is not then provided. Regulation 41(1) (as amended by reg 8 of the 1993 regulations) specifies the circumstances in which a legal aid order may be withdrawn; they do not include the failure to provide supporting documentary evidence. And even if that be wrong, there would certainly be no sanction in a case like the present. Payment would be made in respect of work done under the order whilst it remained in force and here there was no further work to do.

63 (3) *The reg 44(7) argument*

a This argument, I should note, was not available in *ex p O'Hara*: the applicant's problem there was a very different one and insoluble by reference to reg 44(7).

This regulation itself does not of course state whether or not an order can be made after the final conclusion of proceedings simply so as to include within its scope work earlier undertaken. In this connection Mr Tomlinson very properly draws our attention to reg 29, which, so far as material, provides:

b '(1) Any contribution which is to be paid out of disposable income shall be payable by weekly (or, at the discretion of the court or the proper officer of the court, by fortnightly or monthly instalments) for the period during which a legal aid order is in force, and the first such instalment shall fall due 7 days from the making of the legal aid order or of the contribution order, whichever is the later ...

c (4) The period referred to in paragraph (1) above means the period from the grant of a legal aid order to -- (a) the final conclusion of the proceedings whether in the court in which the legal aid order was made or in another court following a committal for trial or sentence or remittal ...'

d Mr Tomlinson recognises that if for all purposes a legal aid order ceases to be in force upon the final conclusion of the proceedings, then that of itself might be thought to preclude an order being made after such final conclusion. (It will indeed equally preclude the subsequent 'withdrawal' of the order as envisaged by the conditional order argument.)

e Although clearly the problem is not a negligible one. I have come to the conclusion that good sense requires the reg 29(4)(a) definition to be confined in its application to reg 29(1). So construed, an order can indeed be made after the proceedings have been concluded specifically so as to allow earlier representation or advice to be deemed given under the order, provided always that the three preconditions set out in reg 44(7) are satisfied. Construed in this way the regulations allow the interests of justice to be served, avoid the absurd consequences that flow from the respondent's view of the law, and at the same time protect the fund against the possibility of paying legal aid in circumstances where the supporting documentary evidence is never provided (a possibility implicit in the conditional order argument).

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g One of the three preconditions under reg 44(7) is, of course, that there was no undue delay in making the application. It is difficult to imagine that where, as here, an order is sought after the final conclusion of proceedings, that condition would be found satisfied unless the application had been made before or contemporaneously with the work undertaken. Here, of course, it was and there can accordingly be no doubt that all three conditions were satisfied.

h As to the general point which Mr Gooch makes in his affidavit about contributions recoverable under reg 29, it is sufficient to note that even upon his view of the law the scheme can operate so as to defeat or at any rate severely circumscribe the possibility of recovering contributions. The later the application for legal aid is made, the less scope there is to recover contributions. Take this very case. Had the client been able to produce his supporting documentary evidence on the day of the hearing it can hardly be doubted that a legal aid order would have been made although no contribution could have been recoverable from him because of the seven-day rule under reg 29(1).

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64 It follows that in my judgement the respondent clerk here could and should have made a legal aid order so as to enable the applicants to be paid under reg 44(7) for the work that they did.

a Had this route to payment not been open, then I might well have reached a different conclusion upon the conditional order argument, less satisfactory though I believe that to be.

b One final comment. Although our decision here will, I believe, solve the problem. In magistrates' courts, and although reg 22(6) ensures that no difficulty can arise in proceedings in the Court of Appeal, there are no provisions equivalent to either reg 22(6) or reg 44(7) with regard to the Crown Court. That appears to be a lacuna in the legislation. I would express the hope that when amending regulations are next under consideration, thought will be given to it.

b **CURTIS J.** I agree

c *Application granted.*

Dilys Tausz Barrister

Court cannot grant solicitor only certificate

Regina v Seale

Lord Justice Rose, Mr Justice Holland and Mr Justice Langley.

[Judgment July 31]

There was no power to grant legal aid representation by solicitor only under regulation 44(1) of the legal Aid in Criminal and Care proceedings (General) Regulations (SI 1989 No 344).

The Court of Appeal. Criminal Division so held in dismissing an appeal by Peter Seale against his Conviction at Manchester Crown Court (Judge Sachs and a jury) of five offences of robbery and one offence of having a firearm with intent to commit an indictable offence, namely robbery. He was sentenced to concurrent prison terms of 18 years on each count.

The appellant in person, Mr Anthony Morris, QC and Mr Paul C Reid for the Crown.

MR JUSTICE ROSE giving the judgment of the court, said that at the beginning of the trial the appellant had dispensed with his counsel because, he said, of their lack of commitment but he wanted his solicitor to continue and he did not want his legal aid certificate revoked.

The judge refused to adjourn but said that he would amend the legal

aid certificate, if he had the power to provide for solicitor only representation.

On appeal, the question arose as to the effect of what the judge did and said in the light of the 1989 Regulations and the authorities.

In their Lordships judgment the following principles emerged:

1. There was no power under regulation 44(1) to grant legal aid for representation by a solicitor only (see *R v Mills* (unreported, March 21, 1997)) and in so far as *R v Kirk* ((1982) 76 Cr App. R 194) suggested otherwise their Lordships, unlike the court in *Mills* were unable to discern any difference between the old section 30(1) in the Legal Aid Act 1974 and the new regulation 44.

That lacuna in the present regulations was to be regretted and the observations of the court in *Mills* were echoed as to the desirability for urgent consideration to be given to an appropriate amendment to the regulations.

2. A judge could only withdraw a legal aid order if all legal representatives withdrew from the case (regulation 50(2)). If only some withdrew, a legal aid order could not be revoked. That too merited consideration by the

Lord Chancellor.

3. A judge could amend a legal aid order by substituting fresh legal

representatives for representatives previously assigned (regulation 50(1)) but he had a discretion. He was under no obligation to assign new legal aid representatives or to amend the order simply because the defendant chose to dismiss one or more of his legal representatives.

In *Mills* the judge purported to amend the order to provide for solicitor only representation. In the present case the judge said he amended the certificate only if he had the power to do so. As he had no such power the certificate remained and the appellant continued to be entitled but had chosen to dispense with the services.

4. In some cases it might be necessary for a judge to conduct an inquiry as to why a defendant had dispensed with counsel see *R v Chambers* (unreported December 16, 1988), *R v Davies* (The Times February 11 1987) and *R v McAllister* ([1988] Crim LR 380).

Whether such an inquiry was necessary would depend on the circumstances of the case. In the present case the judge was familiar with the circumstances and no further inquiry was, in their Lordships view necessary.

5. An irregularity in the trial judge's treatment of a defendant's legal aid representation might lead to the

quashing of the conviction as it did in *Chambers and Davies* but would not necessarily do so, (see *R v Dimech* ([1991] Crim LR 846) and would not do so when the result of the trial would inevitably have been the same.

Was the judge justified in refusing an adjournment? It seemed to their Lordships that there was ample material before the judge for him to conclude that the appellant's object in dismissing counsel was to shop around. It was pertinent to note that in connection with his trial and appeal the appellant had been successfully represented by a total of seven counsel.

It was apparent that the appellant did not accept advice from counsel which he did not like. Accordingly even if the judge had exercised his discretion in the appellant's favour the case showed that counsel would have been unlikely to survive.

In the present case there was no irregularity in relation to the appellant's legal aid. There was no reason to regard the conviction as unsafe since the evidence against him was overwhelming. to the extent that full legal representation could not have been expected to overcome.

Solicitors: Crown Prosecution Service Manchester.

IN CHAMBERS

This is a draft Judgment to be handed down on 9th May 1997 at 10 am in Court T. It is CONFIDENTIAL to counsel and their instructing solicitors, but the substance may be communicated to clients not more than one hour before the giving of judgment,

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

T93.0379

ROYAL COURTS OF JUSTICE

BEFORE: THE HON. MR JUSTICE CARNWATH

**IN THE MATTER OF AN APPLICATION BY MESSRS MILLER GARDNER FOR A
REVIEW OF TAXATION OF THEIR COSTS**

IN PROCEEDINGS BETWEEN R -v- PRONK & ORS

MILLER GARDNER, Solicitors

Applicants

-v-

THE LORD CHANCELLOR

Respondent

JUDGMENT

Mr Stephen Lloyd appeared on behalf of the applicants.

Mr E.B. Solomons, Assistant Treasury Solicitor, appeared on behalf of the respondent.

I direct pursuant to RSC Order 68 Rule 1 that no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

Signed _____

The Hon. Mr Justice Carnwath

DATED: 9th May 1997

MILLER GARDNER

-v-

THE LORD CHANCELLOR

JUDGMENT

This is a review of taxation of solicitors' costs arising under a criminal legal aid order dated 12th March 1993. It arises out of a major drugs trial in which the solicitors' client, Hans Pronk, was one of six defendants. The case was committed to the Crown Court in Leeds on 12th March 1993. Pronk was convicted on 25th May 1994, along with three of the other defendants on a charge of being knowingly concerned in the carrying of a controlled drug on ship. On 27th March 1995 he was sentenced to nine years' imprisonment and a drug trafficking confiscation order was made against him in the sum of £1,750. The other three convicted defendants received sentences -of 12, 8 and 7 years respectively. The solicitors acted for Pronk in the Crown Court proceedings from the date of his committal on 12th March 1993 until his sentence on 27th March 1995. They were also instructed by one of the other convicted defendants (Santiago-Maya) with effect from 27th June 1994 until he was sentenced on 28th October 1994. They lodged their claim for costs on 20th June 1995.

The Chief Taxing Master summarised the issues in the trial in the following, passage:-

"This prosecution arose out of the seizure of the vessel Britannia Gazelle on the high seas on 20 November 1992. The vessel was intercepted by members of the Special Services and subsequently boarded by officers of H.M. Customs & Excise. A cargo of 17.3 tonnes of cannabis resin, with a UK street value of nearly £58 million, was found on board. The factual background was not particularly complex, although it was necessary during the course of the trial to deal with the original purchase of the ship in Suffolk by Wagenaar and Pels Rycken. There was also evidence relating to the route taken by the ship prior to its seizure and in addition evidence was given relating to visits by Wagenaar and Pels Rycken to South America and in particular to Cali in Columbia. This evidence led to newspaper reports which in turn meant that the first trial had to be aborted and the jury discharged.

By far the greatest complexities in this trial were the legal implications arising out of this prosecution which was the first to be brought under the Criminal Justice (International Co-operation) Act 1990. The purpose of the Act is to enable the United Kingdom to co-operate with other countries in investigations and criminal proceedings and to implement the Vienna Convention against illicit traffic in narcotic drugs and psychotropic substances. The Act extends the United Kingdom jurisdiction to the high seas for the first time."

The determination of solicitors' fees is governed by the Legal Aid -in Criminal and Care Proceedings (Costs) Regulations 1989. Regulation 4 lays down the general principle:

"(2) In determining costs, the appropriate shall, subject to and in accordance with these Regulations –

(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."

Regulation 6 sets out the various classes under which the "appropriate authority", may allow work done by fee-earners. They include (a) preparation and (d) "travelling and waiting". By paragraph (2) the appropriate authority is to allow:

"(a) such work as appears to have been reasonably done under the legal aid order... by a fee-earner, classifying such work according to the classes specified in paragraph (1) as it considers appropriate; and

(b) such time in respect of each class of work allowed by it (other than dealing with routine letters written and routine telephone calls) as it considers reasonable."

By paragraph (3):

"Subject to paragraph (2)... the appropriate authority shall allow fees for work allowed by it under this regulation in accordance with Schedule I Part 1..."

Schedule I sets out, in paragraph (1), certain specific rates of fee for defined categories of work. They include in the Crown Court for example for preparation in respect of a senior solicitor a rate of £51.50 per hour, and for travelling and waiting £24.25 per hour. By paragraph (3):

"In respect of any item of work, the appropriate authority may allow fees at more than the relevant basic rate specified in paragraph (1) where it appears to the appropriate authority that, taking into account all the relevant circumstances of the case, the amount of fees payable at such specified rate would not reasonably reflect -

- (a) the exceptional competence and despatch with which the work was done, or
- (b) the exceptional circumstances of the case."

Regulation 5 sets out the requirements for the solicitors' claim. By paragraph (4):

"where the solicitor claims that -

...(b) paragraph (3) of Schedule I Part 1 should be applied in relation to an item of work, he shall give full particulars in support of his claim."

The appropriate authority in this case is a Determining Officer appointed under Regulation 3 (2).

Regulation 14 allows a solicitor who is dissatisfied with the costs fixed by the Determining Officer to apply to him to re-determine those costs. Such an application must be made by notice specifying the matters in respect of which the application is made and grounds of objection, and must state whether applicant wishes to appear or be represented. Following such a re-determination, the applicant may request the Determining Officer to give reasons in writing for his decision.

By Regulation 15, where reasons have been given for such a decision, a solicitor who is dissatisfied with the decision may appeal to a Taxing Master. The notice of appeal must specify separately each item appealed against showing the amount claimed and the grounds of objection, and state whether the appellant wishes to appear or be represented or whether he will accept a decision given in his absence. The Taxing Master is required to inform the Lord Chancellor and he has an opportunity to be represented. The Taxing Master may also consult the trial Judge and the Determining Officer. By paragraph (11)

"...Unless the Taxing Master otherwise directs, no further evidence shall be received on the hearing of the appeal and no ground of objection shall be valid which was not raised under Regulation 14."

By paragraph (12) the Taxing Master has the same powers as the Determining Officer and may alter the determination upwards or downwards. He must give his decision and the reasons for it in writing.

A final right of appeal to the High Court is given by Regulation 16. Paragraph (1) provides:

"A solicitor who is dissatisfied with the decision of a Taxing Master on appeal under Regulation 15 may apply to a Taxing Master to certify a point of principle of general importance."

By paragraph (3) where such a point is certified, the solicitor may appeal to the High Court, and the Lord Chancellor is made respondent. The appeal is instituted by Originating Summons in the Queen's Bench/Division, and -

"shall be heard and determined by a single Judge whose decision shall be final."
(para. (7))

By paragraph (8):

"The Judge shall have the same powers as the appropriate authority and a Taxing Master under these regulations and may reverse, affirm or amend the decision appealed against or make such other order as he thinks fit."

Thus, the appeal to the High Court is the last of a four-stage process. Although at each stage the decision maker is given wide powers to vary the determination, the procedure I have outlined envisages a refinement of the issues by requiring particulars of these items in issue, and the points of objection, at each stage. The trigger for recourse to the High Court has to be certification of a point of general importance. This implies that the single Judge is not normally expected to conduct a detailed review of the individual items. but to settle points of general importance, and only to review the merits or' the determination overall insofar as it is necessary to give effect to his decisions on those points. It would be strange if it were otherwise, since the single Judge has nothing like the same experience of the levels of fees reasonably incurred in cases such as this, as does the Determining Officer or the Taxing Master. Although I have had the benefit, as is normal, of sitting with two assessors, one a Taxing Master, Master Rogers, the other a solicitor, Mr Edwards, the decision has to be mine.

The nature of the appeal to the Taxing Master was considered by the Court of Appeal in R -v- Supreme Court Taxing Office Ex Parte John Singh and Co. Henry LJ said (transcript p7):

"The Regulations show that this is not an actual re-hearing: first, because the scope of the appeal is limited by the notice of the appeal (see Regulation 15 (5) (b)); second, because the question of admission of new evidence and the raising of new points are both subject to the Taxing Master's discretion (see Regulation 15 (1)). Nor, on the other hand, is it merely a review of the Determining Officer's decision because no such limitation is built into the Regulations. Regulation 15 (12) makes it quite clear that it is effectively a re-hearing on the documents. ... As it is an appeal, so the Taxing Master must exercise his own judgement while giving proper weight to any advantages the Determining Officer may have had in relation to the consideration of the case over him. The extent of such an advantage is necessarily dependent on the scope of the appeal as defined and limited by the notice of appeal"

Similar considerations apply in relation to the appeal to me, in the sense that the process is something between a re-hearing and a review, but with the added limitation that I am concerned with points certified as of general importance.

A specific complaint made in the Singh case was in relation to the decision of the Determining Officer roughly to halve the claim for solicitor's preparation time. Although the claim had been supported by attendance notes, he formed the view that the time spent overall was excessive, a view which he said was -

"based on my experience of assessment of other solicitors' claims in large cases as well as what appear to be consistently high claims

for most of the activities undertaken and given the work produced."

He continued:

"This said, for several categories of work, I did not feel able to point to any particular attendance as being either unreasonable in length or unreasonably held, and I accepted that something was gained from nearly all the attendances. However, as well as examining each individual item, I felt it reasonable for me to step back and look at the totality of the time claimed in relation to each type of activity and consider if, taken as a whole, the time claimed for that activity was reasonable."

He went on to conclude -

"Insufficient control was exercised over the client {and} the work done in preparation of his defence."

That view he said was -

"reinforced by comparison with the preparation times of the solicitors for the co-defendants"

Before the Court, the solicitors raised the question whether it was appropriate for the Determining Officer to take an overall view in this way. Henry LJ (following Latham J) upheld the decision. He said:

"The task to be performed in this taxation is preserving the balance between reasonable remuneration of the legal profession for work done on legal aid and the protecting the fund against making an open ended commitment to pay for more hours' work than the task' reasonably requires."

He approved the Judge's conclusions on this point, as follows:

"The notice of appeal essentially challenged the Determining Officer's right to stand back from the individual items in the bill and determine that the aggregate produced from those individual items, although not capable of being impugned as separate items, nonetheless produced a result which established that the time claimed was unreasonable. It seems to me that that must be one of the necessary functions of the Determining Officer, once he has carried out what might he called the audit exercise in relation to the individual items on the bill.... I can see nothing to recommend an approach to taxation in this field which merely requires some justification of each item of the claim, followed by an aggregation, without a sensible assessment of the consequences the consequence of aggregation in the light of the overall complexities of the case, and above all the experience of the Determining Officer and Taxing Master."

Turning to the present case, the claim was made on 14th June 1995. In that letter the solicitors stated that they were claiming "enhancement" pursuant to Schedule 1 Part 1, para. (3), and they set out the matters which they considered relevant to that claim. It is unnecessary to set out those points in detail since there has been no dispute that enhancement was appropriate for preparation time. There is an issue in relation to travelling and waiting time which was allowed at the prescribed legal aid rates, rather than enhanced rates as claimed. I shall return to this below.

On 22nd September 1995 the Circuit Taxing Director wrote giving notice that the bill had been determined. The letter indicated the approach taken in assessing the claim. The grade 'A' fee-earner had been allowed at £85 per hour with an uplift of 60% prior to conviction and 85% post conviction, and the grade 'B' fee-earner at £65 per hour with similar uplifts. The letter went on:

"The total hours spent in preparation claimed at 431 hours 30 minutes, were considered to be unreasonable, they in fact exceeded by a considerable margin the total aggregate hours spent by all the other solicitors in the case, who represented between them five defendants."

In consequence a reduction had been made following the principle contained in the Singh case.

The solicitors, by letter dated 17th October 1995, exercised their right to seek re-determination. The letter commented in detail on the reduction of the hours claimed and the application of the Singh principle. The Determining Officer gave notice of his re-determination on 12th December 1995. On 23rd February 1996 he gave his detailed reasons. In respect of the Singh reduction, he said:

"Having carefully considered the individual items I then proceeded to consider the whole claim compared to the totality of the claim submitted by the solicitors acting for all the other defendants in this case, in view of the similarity in both culpability and involvement of the main defendants. reflected, to an extent, by the sentences imposed upon them. The effect of this comparison was that the grand total of time claimed in respect of the five other defendants was 345 hours odd including 48 visits to client, whereas in respect of the solicitors-a total of 431 hours odd was claimed with 41 visits."

He continued:

"Thus it can be seen that the number of hours spent in preparation of Messrs Miller Gardner exceeded, by some considerable margin, the sum total of the preparatory work claimed by all the other experienced criminal solicitors in this case. I confirm immediately that I was unable to discover any reasonable explanation for this discrepancy."

He then referred to various Internal memos, which he had seen in his examination of the file, which gave him "some inkling of the nature and burden of the work undertaken by the solicitors". The tenor of these notes was to suggest that there was relatively little evidence against Mr Pronk, that there was little disagreement on the main facts and that his role in the trial was a minor one. He continued:

"Having considered the solicitors' claim, their file of papers and the claims by the other solicitors in the case I came to the firm view that the time spent in preparation of 431 hours and 50 minutes was unreasonable and excessive. In my judgement the grade 'B' fee-earner was allowed and encouraged, without adequate or sufficient supervision, to undertake an inordinate and quite unreasonable amount of work. This fee-earner made too many visits to the defendant in custody, one almost gets the impression that every time the defendant 'crooked a finger' he received attention. In all the circumstances and doing the best I could I allowed a total of 214 hours and 48 minutes".

He then explained the details of that analysis. The reduction of preparation time was explained as follows:-

"In respect of the grade 'B' fee-earner I considered that to spend a total of 105 hours with the client in custody was excessive and I allowed one third of this, namely 35 hours. In respect of the general preparation by the grade 'B' fee-earner I considered 122 hours to be both unreasonable and excessive and I allowed one half, namely 61 hours. In respect of conferences held by counsel with the client, I allowed the 46 hours and 39 minutes claimed without reduction.

Finally, as to the time of 66 hours claimed to have been spent by the grade 'B' fee-earner in further preparation, I also considered this to be unreasonable and excessive and I allowed one half, namely 33 hours."

On 4th March 1996 the solicitors gave notice of appeal against that determination. Their notice of appeal set out in detail, as required by the Rules, items in issue and their grounds of objection. In respect of the comparison with the time spent by other co-defendants, they commented that it was unusual in their view to see such "modest" preparation time for the co-defendants and that they were not in a position to know "how well or otherwise the preparation was carried out on behalf of other co-defendants". They suggested that the Determining Officer had adopted a "flavour of the month" attitude in considering the total time under the Singh principle, and that he had been unduly harsh.

The Chief Taxing Master had to consider not only this appeal, but also appeals by the leading and junior counsel involved for other defendants (though not the other solicitors). He made some general observations in which he reviewed the approach of the Determining Officer overall. In conclusion he said:

"The Determining Officer has given full and detailed written reasons in each case but appears to have been swayed by hindsight in relation to certain of the defendants, when the matter must be approached from the point of view of the legal

representative 'in" the light of his then knowledge'. In addition to this I take the view that the Determining Officer has not fully taken into account the legal complexities which I have set out in some detail above. Other matters which must be taken into account in arriving at a decision as to what constitutes reasonable remuneration is the gravity of the offence itself. This was at the time the biggest haul ever of cannabis. The undercurrent of involvement with international drug cartels led to issues of great delicacy

surrounding, public interest immunity and a constant threat of violence throughout the trial. A number of the defendants were clearly in fear throughout and would not permit their counsel to run their cases in what would have been their own best interest. The trial itself was conducted under conditions of maximum security with armed police inside and outside the Court and in the Judges' corridor, the jury was protected at all times. These are not factors which can be ignored. In the light of these factors I have come to the view that the figures allowed by the Determining Officer do not provide reasonable remuneration and I accordingly substitute my judgement for his in the individual appeals to which I now turn."

In his comments on the solicitors' appeal, the Chief Taxing Master referred to the judgments in the Singh case and the Determining Officer's reliance on them. He then referred to the Determining Officer's quotations from the internal memoranda and his inference that the work spent on Pronk's case was relatively limited. He continued:

"I have already dealt in the general observations with the Determining Officer's overall view of these proceedings and I feel that he has been further misled here into thinking that Pronk played a very minor role throughout. It is clear that this is the impression which Pronk wished to promote, and since the defence was that he had no knowledge of any criminal activity it was not open to him to challenge the Crown evidence. In sentencing Pronk to nine years' imprisonment the trial Judge informed him:

'You were a trusted assistant, trusted to undertake some part in the purchase and delivery ... Pels Rycken was Wagenaar's personal assistant. Although I accept that you were in Wagenaar's company less than Pels Rycken you were trusted to act independently of him and I am satisfied that he could trust you to act independently and that you would have benefited according to your usefulness.'

It is clear that Pronk was heavily implicated in this drugs importation, a conclusion borne out by the sentence of 9 years' imprisonment upon him.

The Determining Officer has also been led to the vices that the times claimed are excessive by comparison with the work done and claimed for by other solicitors. I have of course not had the opportunity to examine the work done by those other solicitors, since none appealed. I have however had the advantage of hearing from leading and junior counsel for a number of the defendants and have a very clear picture of the work involved for the legal representatives in this case. The fact that certain solicitors may have done little or no work is not a matter upon which I can properly comment.

Having said all that, I do agree with the Determining Officer that there appears to have been excessive time spent in the preparation of this case. However, I believe that the Determining Officer has under-estimated the amount of work properly

undertaken by these solicitors, with the result that the figures allowed do not provide reasonable remuneration. The Determining Officer has carried out an extremely thorough determination and re-determination and has given very full reasons which, in respect of individual items, cannot be faulted. It is only in respect of the wholesale reductions, following R -v- SCTO. Ex Parte John Singh and Co that I part company from the Determining Officer."

He then dealt with the specific grounds of appeal in relation to the hourly rate and enhancement. He said:

"Had this case been dealt with more economically I might have been persuaded that it was appropriate to increase the enhancement which has been allowed, however for the reasons which I have given above I am satisfied that the Determining Officer's approach is the correct one and I do not alter it."

Then, in relation to the hours allowed for preparation he referred to the Determining Officer's conclusion and in particular to the allowance of 6½ hours for the grade 'A' fee-earner and 208 hours 18 minutes for the grade 'B' fee-earner. He said:

"I make no alteration to the allowance for the grade 'A' fee-earner which is fully explained in the reasons. In respect to the work undertaken by the grade 'B' fee-earner the Determining Officer states:

'In respect of the grade 'B' fee-earner I consider that to spend a total of 105 hours with the client in custody was excessive. I therefore allowed one third of this namely 35 hours. In respect of the general preparation by the grade 'B' fee-earner I considered 122 hours to be both unreasonable and excessive and I allowed one half namely 61 hours.'

The balance of the time has been allowed without reduction. It is clear from the Determining Officer's workings on the original bill that the original analysis of allowable time totalled 373 hours. Bearing in mind what I have said above, I allow a further 35 hours in respect of attendances upon the client in custody and a further 30 hours in respect of general preparation, a total increase of 65 hours."

It will be seen that the principal focus of the Determining Officer's criticisms was in relation to the time spent with the client in custody and he reduced the total of 105 hours to one third. The Taxing Master increased it by 35 hours to two thirds of the amount claimed. Unfortunately, in stating that the balance of the time had been allowed without reduction the Taxing Master was mistaken. As has been seen, the Determining Officer had in fact reduced the claimed time for further preparation post conviction (66 hours) by half.

Following that decision the Chief Taxing Master was asked to, and did, certify "certain points of principle of general importance". As I understand it they were formulated by the solicitors and accepted by the Master. They were expressed as follows:

"1. Whether where a Taxing Master accepts defence solicitors' submissions that the Determining Officer has wrongly made a wholesale reduction in the amount of preparation time in purported reliance upon the decision in R -v- SCTO Ex Parte John Singh & Co the Master is bound to restore all the disallowed time unless he finds other grounds upon which some reduction is merited?

2. Whether where a Taxing Master makes a deduction from the time allowed in preparation and associated travelling and waiting in reliance upon the decision in R -

v- SCTO Ex Parte John Singh & Co and further accepts the defence solicitor's submissions that a higher mark-up on the claimed enhanced hourly expense rate is merited the Master cannot refuse to allow such increase in mark-up in reliance upon the perceived lack of economy with which the case was pursued?

3. Whether where a claim merits enhancement the Regulations require that travelling and waiting be allowed at the hourly expense rate as opposed to the prescribed legal aid rates and whether in such circumstances it is necessary to substantiate whether exceptional circumstances relate to the travelling and waiting?"

Before me Mr Lloyd on behalf of the solicitors applied for leave to put in further evidence. I allowed this in the absence of any objection from the Lord Chancellor. However, the admission of the evidence does not change the nature of the Court's task. The appeal to the Court should not be used to fill gaps in the case put to the Master. The rules are designed to ensure that the fullest consideration is given at the earlier stages, and the Court should be concerned only with points of general principle.

The evidence itself is in the form of an affidavit from Rebecca Yates, who was the assistant solicitor largely involved in the detailed work with the defendant. She gives some further detail of the problems in particular arising from the inadequate translation of the initial interviews, and seeks to justify the extent of her involvement generally. She emphasises her own experience and that of the firm and repeats that-

"Even with the benefit of hindsight I do not see how I could have avoided any of the attendances upon the defendant Pronk or after conviction upon Santiago Maya, or given the matter proper attention in less time having regard to the complications which were presented."

She observes that the invocation of the "Singh principle" in this case took place only shortly after publication of the Times Law report of the case.

She says:

"Neither before this case, nor since, have any of my cases ever been challenged by a Determining Officer adopting a wholesale reduction in time".

I was shown a note signed by Gilbert Gray QC, leading counsel in the case, submitted without objection from the Lord Chancellor's representative. He says that in this "very serious case" it was at his specific request that Miss Yates obtained the defendant's detailed instructions on each page of the deposition and on every exhibit. He refers to Miss Yates "good rapport" with Mr Pronk, whose English was not perfect. He says it was "an essential exercise" and one which shortened and simplified the case.

I turn to consider the three points identified in the certificate. The first addresses the "wholesale reduction" made in the time claimed in reliance on Singh. It notes that the Taxing Master accepted that the Determining Officer's application of the principle was open to criticism and asks whether-

"the Master is bound to restore all the disallowed time unless he finds other grounds upon which some reduction is merited?"

Put in that way, the question does not appear to raise a real issue. Clearly, the Master is not bound to restore all the disallowed time, but equally, if he is to reduce it, he must have some grounds on which to do so. In the course of Mr Lloyd's submission, for the solicitors,

it became apparent that the real challenge was to the inadequacy of the grounds stated by the Chief Taxing Master. Mr Lloyd submitted:

“The authority of Singh does not authorise a Determining Officer or a Taxing Master to make wholesale reduction without identifying sufficient grounds for doing so.”

The Taxing Master, he submitted, had properly negated the reasons given by the Determining Officer for taxing of part of the overall time claimed, but failed to identify the reasons for disallowing that part of the claim which he did not restore. More generally he submitted that the reference in Singh to "a sensible assessment of the consequences of aggregation in the light of the overall complexities of the case..." should not reduce the process of taxation to one of "impression" or "feel".

I am doubtful whether this raises the sort of point of general importance contemplated by the Rules. Certainly, it is a matter of general importance that the Master should give adequate reasons for his decision. In the time-honoured language of administrative law, this means reasons -

"which will not only be intelligible, but which deal with the substantial points that have been raised." (Re Poyser and Mills Arbitration [1964] 2 QB 467, 478).

However, this does not mean that there is an appeal to the High Court merely because the reasons in an individual case are not as fully expressed as they might have been.

The appeal does perhaps raise a general point as to the extent to which it is necessary for the Master, when following the Singh approach, to spell out his reasons in detail. However, I do not think it is possible to give a general answer. The nature of the exercise, being based on application of experience, rather than detailed analysis, inevitably involves an element of "feel", which it may not be possible to express very precisely. On the other hand it should not be seen as purely arbitrary. If for example, it is based on the Master's experience of other cases, then that should be stated, but that does not mean that it is necessary to give details of the cases involved. Similarly, if it is based on comparisons with work done for other defendants in the same case, that should be stated, as the Determining Officer did in this case. I certainly see no basis for suggesting, as Mr Lloyd appeared to do, that there is something inherently wrong in making comparisons with the work done for other defendants. Of course it cannot be assumed that all defendants required the same amount of the work, and there may be very good reasons why the work done for one defendant substantially exceeds that done for others. On the other hand it does provide some sort of benchmark and is one of the factors that the Determining Officer is entitled to take into account, provided he is aware of its limitations.

The difficulty in the present case arises because the Taxing Master has rejected elements of the Determining Officer's approach, but not made it as clear as he might have what alternative criteria he has used. He has clearly disagreed with the Determining Officer's assessment of Mr Pronk's limited role and has given his reasons for that view. It is less clear to what extent that has led him to reject entirely the comparison with the work done by other solicitors. Mr Lloyd relies on the sentence in which he says:

"The fact that certain solicitors may have done little or no work is not a matter upon which I can properly comment."

He says that this shows that the Master was rejecting that comparison entirely. I do not so read it. It is true that the Master was at a disadvantage as compared to the Determining Officer, since he did not have the other solicitor's bills directly before him. On the other hand, he says in the previous sentence that he had the advantage of hearing leading and junior counsel for other defendants and that accordingly he had –

“a very clear picture of the work involved for the legal representatives in this case.”

He is thus taking a more general view than the Determining Officer, but not excluding any comparison with the other defendants. The “very clear picture” so formed enabled him, on the basis of his experience, to reach the judgement in the following paragraph as to the “excessive time” spent by the present solicitors. He reflected this in an allowance of two thirds as opposed to the one third allowed by the Determining Officer. This is not a precise analysis, but that is not the nature of the exercise.

Accordingly, I see no grounds for altering the Taxing Master's determination, subject to one point. As I have noted, the Taxing Master was in error in believing that there had been no reduction in the post conviction preparation time. Whether or not this is strictly a point of general importance, it would be wrong to leave the decision on the basis of such a mistake. The implication is that the Taxing Master thought it fair to make no such reduction. I propose to give effect to that by adding back the 33 hours disallowed by the Determining Officer.

To summarise the position in respect of preparation time, the original claim for the grade 'B' solicitor was 421 hours 38 minutes, which after taxing of specific items not subject to appeal would be reduced to 373 hours 27 minutes. The Determining Officer allowed 208 hours 18 minutes. This was increased by the Taxing Master to 273 hours 18 minutes, and will now be increased to 306 hours 18 minutes. I accept the advice of the assessors, and allow the appeal to this extent under this head.

Under the second issue, Mr Lloyd criticises the Chief Taxing Master for having conflated the two elements relevant to enhancement, and as a result in effect penalising the solicitors twice over. He refers to Loveday -v- Renton No. 2 [19921 3 All ER 184, 187J to 188D, as illustrating the inappropriateness of adjusting for inaccuracy in one element of the taxing calculation by compensating in another.

To understand this point it is necessary to refer to the established practice as to the two-stage approach to assessment, in cases where a case is considered appropriate for enhancement under Schedule I of the Regulations. In the Taxing Officers Notes for Guidance para (3.13) reference is made to Judicial authority recognising:

“That, for the purposes of assessment, a solicitor's remuneration should be regarded as consisting of two elements –

(a) a rate per hour representing the 'direct average cost', i.e. the average expense rate of undertaking the work, referred to as the 'A' figure ..., to which should be added,

(b) a sum for care and conduct referred to as the 'B' figure...”

The A rate is explained further as follows:

“The hourly rate for preparation: what it represents. All work properly undertaken should be assessed at the average hourly expense rates for the grade of fee-earner

prevailing in the area, exclusive of profit. These rates should cover a reasonable salary for a solicitor or employee of the grade concerned, plus a share of the direct and indirect overheads attributable to him."

With regard to the B element, "care and conduct" the following guidance is given:

"3.17 This is an allowance made to cover matters which have not been quantified in terms of a rate per hour (such as supervision and commercial profit). It should vary according to the professional skill and responsibility involved in the solicitor's work, having regard to the factors, other than time, set out in paragraph 1.11. This allowance may be expressed as a percentage of the total allowed for preparation (the 'B' figure). For letters and phone calls one tenth of the hourly rate should be allowed.

3.18 In assessing the percentage to be added, the determining officer should have regard to –

- (a) the degree of responsibility, accepted by the solicitor and his staff,
- (b) the weight of the case: a complex case, or one which is protracted and time consuming, properly conducted will justify more than a simple one; and
- (c) the care, skill and thoroughness, skill and economy, with which the case was prepared.

3.19 Where the solicitor has exercised an unusual degree of skill, care or responsibility, the percentage should be higher, but where the case has been badly handled the allowance should be less, or no addition at all should be allowed..."

The implication of the Chief Taxing Master's treatment of this matter is that he would have considered a higher 'B' figure appropriate had the case been dealt with "more economically". In making this comment he is referring back to the comments on the previous page as to the excessive time taken in preparation. I see force in the criticism that he has effectively penalised the solicitors twice for this factor. This element has been reflected in his reduction of hours generally, and I must assume that he regarded that as the appropriate reduction. I agree with the solicitors that it is wrong in principle to make a separate adjustment for that factor in the "care and conduct" percentage.

The assessors advise me that it would be appropriate to increase the 60% uplift allowed by the Chief Taxing Master to 70%. I understand that at the time with which I am concerned, the normal range of uplifts in Crown Court cases was between 50% and 125%. That of course applies to cases which are considered sufficiently exceptional to take them outside the prescribed legal aid rates. I accept the assessors' assessment.

It is to be noted that for the post conviction period when there were two defendants, the Chief Taxing Master increased the percentage to 85%. The assessors consider that this figure should stand. They accept that there should be some increase, to take account of special factors not relevant before conviction, including Customs inquiries and difficult issues arising out of the Drugs Trafficking Offences Act. However, they consider this is adequately reflected in the allowance of 85% without any further increase. I agree.

The third issue concerns the claim for waiting and travelling time. The claim was at the solicitors' hourly rate plus 50%. The Taxing Master allowed only the prescribed legal aid rate. As to this, the Taxing Master said:

"The Solicitors claimed travelling time at the basic hourly rate but they have been allowed the legal aid rate, the Determining Officer states:

'I have been supplied with no reasons why these journeys were exceptional I have, therefore applied the appropriate legal aid rates.'

The Solicitors in their Grounds of Appeal submit that Legal Aid Guideline CRIMLA13 suggests that where enhancement is allowed the expense rate and the legal aid rate should be allowed for travel and waiting. The relevant paragraph, which is to be found at paragraph 18-37 of the 1996 Legal Aid Handbook, states:

'Travel and waiting would not normally be expected to attract an uplift on the A figure. Each case must be considered on its own particular merits having regard to all the relevant circumstances of the case.'

The Solicitors have not addressed the point made by the Determining Officer in the reasons and I accordingly do not alter his decision."

Contrary to what the Taxing Master says, the point about the inappropriateness of the legal aid rates was raised in the appeal to him (see p18 items 43 - 44) and reference made to the apparent support given by CRIMLA 13. That refers to a decision of the Costs Appeal Committee of the Legal Aid Board which makes decisions in Magistrate Court cases. The decisions are published in the Legal Aid Handbook and are therefore relied on in practice, although they have no binding force on the Taxing Master or the Court. The relevant citation reads as follows:

"Pre- October 1, 1994 orders

Where the criteria for paying enhanced rates in criminal proceedings under the Legal Aid in Criminal and Care Proceedings (Costs) Regulations 1989 are met, such claims will be assessed on the basis of broad average direct cost of the work (the A figure) to which is added a percentage uplift (the B figure) to take into account all the relevant circumstances of the case.

The A figure will represent the broad average direct cost of undertaking the work. Factors to be taken into account in identifying this figure may include the rate likely to be allowed in an enhanced rates case by the appropriate Crown Court for the relevant level of fee-earner at the time to which the costs claim relates and evidence of surveys of local solicitors expense rates for the locality in which the solicitor's office is situated.

As to the B figure, 35 per cent should be considered as a starting point in respect of preparation. Solicitor advocacy would normally be expected to carry an uplift of 40 - 60 per cent and attendances with counsel 20 per cent. Travel and waiting would not normally be expected to attract an uplift on the A figure. Each case must be considered on its own particular merits, having regard to all the relevant circumstances of the case.

Where enhanced rates apply, they apply to all letters written and telephone calls made or received. For letters and telephone calls which are not timed, the method of assessment is to allow them at 1/10th of the hourly rate plus uplift allowed for preparation." (Legal Aid Board reference CRIMLA 13 - as amended.)

Mr Lloyd refers to the sentence:

"Travel and waiting would not normally be expected to attract an uplift on the A figure".

This he says implies that where enhancement has been allowed in respect of preparation time, the travel and waiting should be allowed at least at the same A figure, and should not be reduced to the legal aid prescribed rates.

I was referred to a decision of Master Rogers which addresses this point. He said this:

"The solicitors rely on CRIMLA Law 13 in support of the contention that, once enhanced rates are allowed for preparation, then they must be allowed across the board. As I have had occasion to say on numerous occasions, that is quite contrary to the wording of the relevant Regulation which starts with the words 'in respect of any item of work.' It is therefore quite clear that a Determining Officer may hold that whilst preparation is such as to justify enhanced rates, travel and waiting cannot be.

In R -v- Backhouse (S30 in the Taxing Compendium) Paragraph 5 of the Summary of the Taxing Master's Decision reads as follows:-

'In regard to the claim for enhanced rate for travel and waiting time, the Master said that in normal circumstances it was difficult to see how travelling and waiting time could attract enhanced rates...

Travelling and waiting are a function of all Criminal Trials irrespective of the seriousness of the charges preferred. The solicitors say however that the travelling, here was exceptional because the Grade B fee earner was frequently summoned to Court at short notice by Leading Counsel to try to calm down the Defendants. In my judgement that does not make the travelling exceptional, and therefore, on this head, the solicitors fail and their appeal is dismissed."

I agree broadly with that analysis. In particular it is important to note that under the Regulations, the enhancement is in respect of "any item of work", and particulars of the justification need to be given. In many cases there is no reason, in relation to the items represented by travel and waiting, to allow any enhancement over the prescribed rates. The activity involved is precisely the same whatever the importance of the case. There may, however, be factors in a particular case which mean that travel and waiting has taken up a disproportionate amount of time, thus taking the case out of the norm contemplated by the prescribed rates. Of course, it may also be possible to show that the time spent in travelling, for example on the train, was used for preparation. However, in that case the appropriate approach would be to reflect it in the preparation time. In this case the time in question was spent in the car, and it is unrealistic in my view to think that the time spent in travelling made any particular contribution to the solicitor's ability to handle the case.

However in the present case, the assessors have taken the view, and I agree, that there were factors which took the case out of the ordinary. The Master has accepted that much of the time spent with Mr Pronk in preparation time was justified. Because of the constraints of the defendant's confinement at the Wolds Remand Centre, it was inevitable that there had to be frequent relatively short visits for interview. Since the solicitors were in Manchester, this inevitably involved a disproportionate amount of the overall preparation time being spent in travelling. This is the type of circumstance which, in the view of the assessors, justifies allowing for travel time at the solicitors' 'A' rate, but, not for any further enhancement over and above that to reflect care and conduct. I agree with this approach.

Accordingly, the allowance for travel and waiting will be increased to £85 and £65 for the grade 'A' and grade 'B' fee-earners respectively.

This deals with the three substantive issues, and the appeal succeeds to the extent I have indicated. In summary:

- (i) The hours allowed for the grade B fee-earner are increased to a total of 306 hours 18 minutes (p-22).
- (ii) The uplift for pre-conviction work is increased from 60% to 70% (p.25).
- (iii) The allowances for waiting and travelling time are increased to £85 (grade A) and £65 (grade B) (p.29)

Mr Lloyd indicated that he wished to amend his summons to include a point relating to the costs before the Chief Taxing Master. I indicated that I would deal with this, as well as any other issues of costs, once I had given my decision on the substantive issues.

Regina

v

Cevik

8 June 1998

Before:

Master Rogers

Headnote

This Master's decision decided two issues. First, it held that paragraph 3-11 of TONG, because of its different wording from Paragraph 85 of the previous edition, no longer justifies a determining officer paying a Grade B at a higher rate, because of the complexity of the case. Secondly, it decides that the "fraudulent" evasion on the prohibition of the importation of drugs does not bring such a case into the category of "serious or complex fraud" so as to justify up to 200% enhancement on legal aid rates. The limit on such cases is 100%.

Reasons for decision

The solicitors represented Bozurt Bulent Cevik, who, with a co-defendant, Artinyan, was charged jointly, with the fraudulent evasion of the prohibition on the importation of controlled drugs, namely 187.4 kilograms of heroin. This had an estimated street value of £22 million. Cevik alone was also charged with conspiracy to import drugs with persons unknown. The background to the matter is very clearly set out in the determining officer's written reasons and need not be repeated here. It is sufficient to say that the principal organiser, one Schubert, remained in Turkey, while Cevik was alleged to be his lieutenant. He was a Turk, who spoke virtually no English, and Messrs Offenbach found him to be a volatile client, who was often difficult to deal with, but consistently denied his guilt. His instructions were that he was involved in a legitimate business, having no knowledge of the existence of the drugs. He had been used as a dupe by Schubert who had arranged the importation, and must have known of its contents.

Both defendants were committed for trial in May 1995, both pleading not guilty, the trial lasting over 21 days in November 1995. Cevik alone was convicted, receiving a sentence of 20 years' imprisonment, though it is fair

to say that following a Court of Appeal ruling a re-trial was ordered, which took place at Knightsbridge Crown Court, and resulted in the acquittal of Cevik.

On this appeal two matters are in issue, namely whether it was correct for the determining officer to treat the principle fee earner, MR Keith Dolan, as a grade B fee earner, as he did, or whether he should have been treated as a grade A fee earner, as contended by the solicitors. The second issue was whether this is a case of "serious or Complex fraud" so as to attract an uplift on the appropriate legal aid rate of more than 100% (195% is claimed in this case for Mr Dolan's work)

There is no dispute that Mr Dolan is not a qualified solicitor, and indeed is described on the appellant's notepaper as a "legal associate", as the determining officer says, in paragraph 13 of his written reasons:

"He may have experience equal to that of many 'grade A' fee earners. The fact however remains that since he is not a solicitor, then no matter how 'senior' he is he cannot be a senior solicitor.

14. This is confirmed by paragraph M[715] of Butterworths on Costs which after quoting various authorities, continues:

'it should be noted that a legal executive, however senior, can never qualify for higher than grade B rates, although it can of course be argued that an enhanced rate should be allowed, because of the exceptional competence and dispatch displayed by the legal executive or the exceptional circumstances of the case.'

The solicitors seek to evade that result by reference to an uncertified decision of Master Pollard in the case of *R v Marshall Price*.

That was an appeal by the same solicitors as appeal in this case against the refusal to allow enhanced rates, and, at the very end of his written reasons, Master Pollard says this:

"The determining officer accepted that the case had been dealt with competence and dispatch, but did not find that they were exceptional. He did however allow a grade B fee earner at grade A rates. This he was entitled to do under paragraph 85 of TONG."

It is to be observed that that decision of Master Pollard was given on 25 October 1994, and, at that time paragraph 85 of TONG read:

'Some assistant solicitors and senior legal executives because of their great experience will conduct complex and important cases with little supervision. In such cases it may be proper to allow an hourly rate in excess of that which would otherwise be appropriate to a person of that grade, or to give an Increase in the allowance for care and conduct.'

It seems to me that, on the basis of that wording, Master Pollard was entitled to take the view that he did.

However, in 1995 TONG was extensively revised, and paragraph 85 now reappears as paragraph 3.11. and the wording is as follows:

“3.11 Some assistant solicitors and senior legal executives, because of their great experience will conduct complex and important cases with little supervision. In such cases it may be proper to bear this in mind when considering the percentage increase in the allowance for care and conduct.”

I suggest that the difference in wording is significant between paragraph 85 and paragraph 3.11. It could be argued that paragraph 85 was contrary to the Regulations, and that paragraph 3.11 now regularises the position. I suspect that Master Pollard, if he were deciding the case of *Marshall Price* at this time, would have found differently, so far as this point is concerned. I consider that the determining officer's arguments are right, and that the case of *Marshall Price* is no authority for departing from that rule because of the amendment to the wording of paragraph 85 of TONG. In any event the case of *Marshall Price* is an uncertified decision and is not binding on me, and I therefore do not follow it.

The second point concerns the issue of whether or not this case concerns “serious or complex fraud”. If it is then the determining officer is not limited to the 100% uplift which he has allowed for the preparation work done by Mr Dolan, but it is conceded by the appellants that if they cannot come within that definition then the limit of enhancement, so far as this case is concerned, must be 100%.

The determining officer, in very careful written reasons, deals with this issue in paragraphs 17 to 26 of his written reasons. Paragraphs 17 and 18 set out the regulatory background, and the reasons then continue with the following paragraphs:

- '19. The solicitors submitted that the case of Cevik should be classed as a ‘serious or complex fraud’. I concluded that this description could not be applied, I accordingly limited the level of enhancement to the maximum available to me.
20. I accept that this case can be viewed as perhaps complex, and certainly serious. I however regard the charges faced as outside the definition of ‘serious or complex fraud’. The dispute here is therefore whether this case can be described as a ‘fraud’ in the context of paragraph 3(5) of schedule 1...
21. The solicitors’ representations on this point are laid out on page 2 of each of their letters of 17 October 1996 and 25 September 1997. In the latter they submit that:

‘This was a case involving the “*fraudulent* evasion” of the prohibition on importation of enormous quantities of heroin and, indeed, by far the largest single seizure in this country, this case most certainly can be said to have been both “a serious and complex fraud”. It is submitted

that this case involved an enormous fraud element for enormous financial gain.'

22. I would draw a distinction between 'fraudulent evasion' in a serious or complex case and a 'serious or complex fraud'. Cevik was charged with involvement in a substantive drug importation rather than a substantive fraud.
23. To emphasise the fact that the word 'fraudulent' appears in the statute under which the defendant is charged does not assist. Had the act simply referred to 'evading a prohibition' then the facts of the case would in all other respects be identical. The words of the statute do not by themselves make this a case of fraud.
24. The DTOA enquiry was not a fraud enquiry, even though large sums were involved. The issue addressed by such enquiries is a narrow one. They commence only after a drug conviction. The sole issue is whether assets held represent the proceeds of illicit drugs trafficking not whether they are specifically the proceeds of fraud.
25. The phrase 'serious or complex fraud' is also used by the Criminal Justice Act 1987 to define the area of work to be dealt with by the Serious Fraud Office. The case here is not of the category which the SFO would prosecute, although this fact alone may not preclude it from receiving enhancement in excess of 100%.
26. Virtually all crime involves some degree of deceit. To define 'fraud' in such a way as to include any activity done with a dishonest intent would be to use the word 'fraud' far more broadly than can reasonably be read into the amending Costs Regulations."

In their Notice of Appeal the solicitors emphasise that there is no definition of serious fraud, and referred me to dictionary definition:

"According to the *Oxford Reference Concise Dictionary of Law* fraud is 'the false representation by means of a statement or conduct made in order to gain a material advantage'. Reference in relation to crime was also made to: 'cheat; conspiracy; defrauding; dishonesty; false pretence; forgery' in that publication. The *Oxford Dictionary* defines fraud as: 'a dishonest trick'. Fraudulent is defined as: acting with fraud, obtaining by fraud'.

The determining officer contends that virtually all crime involves some degree of deceit. We would take issue with this. However this is not the issue here as we perceive it. Here we are dealing with what constitutes 'serious or complex', both elements but elements which are applicable to this case."

I think it is regrettable that in amending the Regulation the words "serious or complex fraud" were not defined. It is also arguable that the exclusion of cases such as this may seem to be arbitrary, but I am quite satisfied in my own mind that this case is not a case which can be defined as "serious or complex fraud'. It is a serious drugs importation case and the maximum permissible uplift on legal aid rates is therefore 100%.

I think the determining officer was right to concede that merely because the case is not prosecuted by the SFO is not determinative of the question, and I follow and adopt his reasoning for coming to the conclusion that he did, and accordingly dismiss this part of the appeal.

The appeal therefore fails in toto and is hereby dismissed.

18TH CASE of Level 1 printed in FULL format.

Murria (a firm) v The Lord Chancellor

QUEEN'S BENCH DIVISION

144 SJLB 36, (Transcript)

HEARING-DATES: 14 DECEMBER 1999

14 DECEMBER 1999

COUNSEL:

M Hill QC and B Singh for the Appellant; EB Solomons for the Respondent

PANEL: BUCKLEY J, MASTER POLLARD, MR M HASLAM

JUDGMENTBY-1: BUCKLEY J

JUDGMENT-1:

BUCKLEY J (reading the judgment of the court): This is an appeal by way of originating summons from the decision of Master Rogers, who dismissed the Solicitors' (Messrs. Murria) appeal against the decision of the Determining Officer, Mr David Swift.

Master Rogers certified that a point of principle of general importance arose, pursuant to reg 16(3) of the Legal Aid in Criminal and Care Proceedings (Costs) Regulations 1989 and the matter comes before me pursuant to reg 16(7). my powers are contained in reg 16(8) and include the power to make "such other order as he (the Judge) thinks fit". I have had the benefit of assistance from Costs Judge Pollard and Mr Haslam, who sat with me as Assessors and to whom I am grateful.

The point certified by master Rogers is:

Whether the proper construction of paragraph 3 (5) to Part 1 of Schedule 1 to the Legal Aid in Criminal and Care Proceedings (Costs) Regulations 1989, which reads:

'(5) When proceedings relate to serious or complex fraud, the percentage above the relevant prescribed rate by which fees for work may be enhanced shall not exceed 200%.'

should be that the defendant must be 'charged with' an offence of serious or complex fraud before a 200% uplift can be claimed by his solicitor or whether it is sufficient if the 'proceedings' 'relate to serious or complex fraud'.

Put another way do the Regulations only apply to cases where serious or complex fraud is charged or can it be invoked in circumstances where the proceedings 'relate to serious or complex fraud'?"

The point is well illustrated by the facts of the present case. An accountant, David Wilson, was murdered in 1992 by two men who went to his home, took him to the garage and shot him at point-blank range. The murder was

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procured by one Austin through a middleman, Schepke. The motive was that David Wilson had become suspicious of a scheme which Austin had organised and in which he had become involved. The scheme involved the alleged importation of large quantities of cheap cigarettes into the USA from Mexico. In fact the cigarettes did not exist. David Wilson had spoken to the Police. Both Austin and Schepke were convicted of the murder (Austin after a re-trial) and finally the two "hit-men" Playle and Crossley were convicted.

The Solicitors represented Crossley, pursuant to a Legal Aid certificate, and urged upon the Determining Officer and Master Rogers that the murder trial related to a serious or complex fraud because not only was the cigarette fraud the background to and genesis of the murder, it was necessary both in preparing for trial and to an extent at the trial, to investigate the fraud. The more so because in Crossley's case, unlike that of his co-defendant Playle, there was no direct evidence connecting him with the murder. The case against him was circumstantial.

No one disputes that the cigarette fraud was "serious or complex". If the "proceedings", namely those arising out of the murder charge, did not "relate to serious or complex fraud", the Solicitors, uplift on charges will be limited to 100%.

The Determining Officer and Master Rogers concluded that an uplift to 200% was only permissible where fraud is charged in the indictment. The Determining Officer in his letter to the Solicitors dated 6 May 1998 noted that the only issue in dispute was as to the rate of uplift to be applied to the case and said:

It is the view of this determining officer (and it would appear, a consensus amongst determining officers generally) that for the proceedings to relate to a serious or complex fraud, the substantive charge on the indictment must be one of fraud. In this case there is no doubt that the phantom consignments of cigarettes formed the background to the murder of David Wilson, but the fact remains that the indictment against both Stephen Playle and Michael Crossley contained one count of Murder and one count of False Imprisonment. At the end of the day the defendant was not charged with fraud, but with murder. I cannot therefore go behind the clear wording of the Regulations, which limits my allowance to a maximum of 100%."

In his Reasons dated 18 May 1999 Master Rogers stated:

Ingenious though the Appellants various arguments are, at the end of the day I have come to the clear conclusion that none of them can prevail. The word 'proceedings', although not defined in the definition section of the Regulations, clearly must relate to criminal proceedings the subject matter of the charges, and, as is pointed out, this Defendant and his co-defendant Playle, were charged with only, murder and false imprisonment. Those were the proceedings, which were before the court, and whilst no doubt evidence of the underlying fraud was adduced, this was not a case where fraud was charged."

Thus the Determining Officer and Master Rogers restricted the Solicitors' uplift to 100% under the Regulations.

Mr Hill QC for the Solicitors submitted that the words "relate to" should be

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given their ordinary and natural meaning which, he submitted, was "connected with". Mr Hill conceded that the connection must be a real one and invited me to remit the matter to

the Determining Officer. He submitted that was the proper course because a more detailed scrutiny of the documents relating to the Solicitors, preparatory work and the trial was called for in order to determine whether the proceedings or a part of them were connected with serious or complex fraud. It was not necessary for there to be a charge of fraud, whatever the Determining Officer and Master Rogers had meant by that.

Mr Solomons for the Lord Chancellor, urged me to deal with the matter and not remit it to the Determining Officer. He submitted that "connected with" was not the same as "related to" and that the draftsman had used the words "relate to" in order to cover fraud cases in which the charge was one of the many commonly found charges in fraud cases such as forgery, or false accounting. He submitted the test should be whether the case was "about" fraud and that by no stretch of the imagination could Crossley's murder trial be said to be "about" fraud.

The first point to note is that there is no general offence of fraud in law. There can be no substantive charge of "fraud". There may be a charge of conspiracy to defraud or substantive charges of many other offences which can and do arise in cases which are referred to as fraud cases. For example, forgery, false accounting or obtaining by deception. Less obviously, perhaps, arson, handling or a host of other offences under the Theft Act.

I also note that s.1 of the Criminal Justice Act 1987 which provides for the constitution of a Serious Fraud Office and its Director refers, inevitably, to the investigation of:

any suspected offences which appears to him (the Director) on reasonable grounds to involve serious or complex fraud." (my emphasis)

Section 1(5)(a) provides that the Director may:

Institute and have the conduct of any criminal proceedings which appear to him to relate to such fraud . . . " (my emphasis)

It is clear that the words "when proceedings relate to serious or complex fraud" in Schedule 1 to the Regulations cannot mean "charged with an offence of fraud". At the very least the words must comprehend proceedings in which the charge may be conspiracy to defraud and/or the type of substantive offence I have mentioned when serious or complex fraud is involved. It is not clear to me whether that is what the Determining Officer and Master Rogers intended to convey, but since there is no substantive charge of "fraud", it is the inevitable conclusion. I understood Mr. Solomons, in his helpful submissions, to accept as much.

There remains the problem of the proper construction of or limit to be placed on "relate to" in the Regulations or "involve" in the cases I have identified above.

When proceedings are brought or taken over by the Serious Fraud Office, almost by definition, they will relate to fraud. The problem arises in cases which are not prosecuted by the Serious Fraud Office, and, of course, proceedings like the present murder trial.

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I agree with Mr. Hill that the ordinary or natural meaning of "relate to", or at least one of them, is "connected with", but I don't find that helpful. The question remains what type of connection or relation. I prefer Mr. Solomons' suggestion that "relate to", in context, is better understood as meaning that the trial is "about fraud". I think that is closer to a

proper construction and will cover the variety of substantive charges that may appear in a fraud trial, with or without a conspiracy charge.

However, I reject Mr Solomons' submission that, in effect, the line should be drawn there. He was, however, right to point out that "serious or complex fraud", is the only case in which the 200% uplift is allowed. It does seem to follow from that that the draftsman had in mind the peculiar complexities and expertise that serious fraud engenders and I would not therefore extend the ambit of "relate to" further than is necessary to provide reasonable remuneration to the Solicitors and/or Counsel within the overall objective of the Act and Regulations whilst giving effect to the singular treatment of serious or complex fraud.

I would, possibly, include cases in which the prosecution introduces the issue of serious fraud, albeit the charge or charges in the indictment may not themselves obviously relate to fraud, or where the Defendant reasonably does so. I say "possibly" because inevitably a question of fact and degree arises. The fraud issue may be self contained and play only a small part in the proceedings. It may or may not be necessary to investigate it fully as opposed to superficially in order to see if some fraud was afoot but where the nature or details of it do not matter.

Again, the present circumstances illustrate the point well. In Austin's case, in which the charge was "murder", I am told and accept that the fraud played a very large part. It was his only connection with the murdered Mr. Wilson. It explained his motive. I do not hold that Austin's case related to serious or complex fraud but I can see that it might have. A more detailed scrutiny of the evidence and manner in which the case was presented would be necessary before reaching a conclusion.

It is far less plain that Crossley's case could sensibly be said to "relate to serious or complex fraud". He was a hired killer. His motive was money. He had no real connection with the fraud. On the other hand, as Mr Hill pointed out, the prosecution did introduce the fraud. It was part of the "Opening", they had served many files of papers about it as "unused material" and it was only at trial that the parties agreed a number of admissions in respect of it. Paragraph 3 of Schedule 1 can apply to an "item of work" (see Regulation 5(4)(b) and Schedule 1 paragraph 3(2)) and Mr Hill submitted that even if the trial was held not to be "related to serious or complex fraud" the preparatory work was, because of the way the prosecution was running the proceedings at that stage.

Whether proceedings relate to serious or complex fraud in the end will be decided by the good sense and judgment of the Determining Officer. In my judgment the phrase "relate to" is not to be construed as narrowly as the Determining Officer and Master Rogers appear to have construed it. It is capable of comprehending proceedings which, or part of which, can sensibly be said to be "about" serious or complex fraud whatever may be charged in the indictment. For guidance, I would suggest that proceedings or a part of

Page 7 144 SJLB 36, (Transcript)

proceedings are "about" serious or complex fraud if it has been necessary for the Solicitors to investigate or prepare for the proceedings or part of them as if the proceedings did involve serious or complex fraud in the sense that the phrase is used in Section 1 of the Criminal Justice Act 1989. In other words it has been necessary for the Solicitors to prepare the fraud issue in as much detail and with as much expertise as if it was a fraud trial. That may be, for example, because the prosecution, for their own ends, set out to prove the serious or complex fraud as if it was a fraud trial. That may have happened in Austin's trial.

I hold as a matter of construction that Crossley's trial and/or the preparations for it could "relate to serious or complex fraud". I'm bound to say, I think it unlikely that the trial was so related, but Master Rogers will have to consider the material the Solicitors choose to put before him and decide, as a matter of good judgment, in light of the principles I have endeavoured to identify, whether it or the preparations for it actually did so. I'm reluctant to refer the matter back to Master Rogers but accept from Mr Hill that there is considerable volume of material that may be relevant and which I think it is more appropriate that the Master should consider.

Subject to any further submissions on behalf of the parties I also refer the question of costs of this appeal to Master Rogers who can then deal with them under Regulation 15(14).

DISPOSITION:

Judgment accordingly.

SOLICITORS:

Murria, Birmingham; Treasury Solicitor

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Case no: 990674

Royal Courts of Justice.
Strand, London WC2A 2LL

Date: 30th July 1999

Before:
THE HON. MRS. JUSTICE HALLETT DBE

BETWEEN:

LANDAU & COHEN, Solicitors
(Regina v Abraham)

Plaintiff

-and-

THE LORD CHANCELLOR'S DEPARTMENT

Defendant

Mr. Alaric WATSON (instructed by Messrs Landau & Cohen for the Plaintiff)

Mr. Nicholas HILLIARD (representing The Lord Chancellor's Department - the Defendant)

Judgement : Approved by the court for handing down.

LANDAU AND COHEN V.I.C.D

This is an appeal by Messrs Landau and Cohen from the decision of Master Rogers on 12th March 1999 refusing to allow on taxation their photocopying charges in respect of copying at their offices 41,566 sheets @ 25p per sheet. The Master certified as follows:

- “1. Whether a trial judge’s recommendation in the present case that the photocopying costs be allowed on taxation at commercial rate is binding on taxing officers and Masters.
2. Whether solicitors must send documents out of the office to be copied in order to recover their photocopying charges in relation thereto even if as in the present case, the solicitors’ photocopier charges for the period during which the copying was carried out were markedly increased. The authority of R. Zemb is challenged (s.27 in Taxing compendium)”

The appellant firm represented on of 8 accused in a very serious case of alleged VAT evasion. The case collapsed before the close of the Crown’s case but not before the appellants had incurred substantial costs over and above their normal running costs in photocopying the 41,566 pages of prosecution evidence. The trial judge, anxious to ensure that the enormous cost of the photocopying did not fall upon the defence solicitors, said as follows:

“It is recommended that the photocopying costs incurred by defence solicitors be allowed at commercial rates on legal aid taxation.”

The determining officer did not regard this recommendation as binding and refused to allow any amount for photocopying on the basis that it was done in house and was not, therefore, a disbursement within Regulation 7 of the Legal Aid in Criminal and Care Proceedings (Costs) Regulations 1989.

Both he and the Taxing Master followed the decision in R. V Zemb 1985 (Taxing Compendium s.27) in which the senior Taxing Master held that “A disbursement is a payment of money out of pocket. Accordingly, the costs of copies made in a solicitors’ office cannot be a disbursement. It can be a profit charge only if reasonably done by a fee earner but in general it is non fee earners’ work and in consequence subsumed into the solicitors overhead expenses.”

The Master went on to indicate, in his reasons, that if reasonably incurred, the costs of having copies made outside the office could be claimed as a disbursement.

In the present appeal Mr Watson on behalf of the appellant firm argues:

1. that the recommendation of the trial judge was binding upon the taxing officer and the master, unless it involved their exceeding their powers under the regulations or unless there was good reason to depart from the recommended course.

2. that the decision in Zemb was either wrong or has been overtaken by events.

Trial judge's recommendation

I am not persuaded that a trial judge's recommendation can be in any way binding upon a taxing officer or master. It is a recommendation, a highly persuasive recommendation but no more, no matter how experienced, informed or senior the judge making it. Taxing officers must decide the question of taxation in accordance with the regulations and the statutory framework. No doubt where there is room for the exercise of discretion they will wish to pay considerable attention to any recommendations emanating from a trial judge. He or she may well have been in an extremely good position to assess the reasonableness of any expenditure.

The decision of Zemb

At the time of the Master's decision in Zemb in 1985, the 1982 regulations applied.

Regulation 6(1) of the 1982 regulations, provided that:

the "appropriate authority shall allow such disbursements as appear to it to have been actually and reasonably incurred".

Mr Watson argues that the regulations have since been significantly amended.

In Regulation 7(1) of the 1989 regulations, which now apply, the word "actually" has been removed so that disbursements shall be allowed which have been "reasonably incurred"

Three subparagraphs have also been added. Subparagraphs 7(4) and 7(5) deal with the applications by a solicitor to the local area committee of the Legal Aid Board under regulation 54 of the Legal Aid in Criminal and Care Proceedings (General) Regulations 1989 for prior authorisation to incur particular costs. Under regulation 54, a solicitor may apply for prior authorisation to perform an act in preparing the case which is either "unusual in nature or involves unusually large expenditure."

No application for prior authorisation was made in the case, but it is argued on behalf of the appellant firm that the photocopying costs incurred are of the kind which could and would be given prior authorisation by the Legal Aid Board within the regulations. The new subparagraph 7(6) specifically provides for the payment on taxation of costs incurred for which prior authorisation may have been given if application had been made.

I have also referred to the Legal Aid Handbook which provides guidance for practitioners on the Legal Aid Board's approach to the Regulations. Paragraph 18-26 of the current handbook at page 251 states:

"the making of photocopies of documents is part of the solicitors normal overhead expense and thus would not normally be remunerated separately. However an

allowance may be made for copying in **unusual circumstances or where the documents copied are unusually numerous** in relation to the nature of the case, the costs should be claimed as a disbursement. If copies have been made out of the office the actual cost should be claimed. If made in the office a charge equivalent to the commercial cost should be claimed...”

It is accepted that had the appellant firm in this case sent the documents out of the office to be copied they would have been entitled to claim the actual costs incurred.

Mr Hilliard on behalf of the Lord Chancellors Department conceded that there is no reason in principle why if a solicitor can point to a specific item of expenditure over and above his ordinary overheads, it should not be claimed as a disbursement within regulation 7. He accepts that there is a distinction to be drawn between the ordinary running costs of a solicitors office and **out of pocket expenses**, provided that the solicitor can demonstrate, on evidence, that the costs incurred were a legitimate item of additional expenditure.

As far as the decision in Zemb is concerned. Mr Hilliard did not seek to rely upon it as authority for the proposition that the kind of expenditure incurred in this case could never be claimed as a disbursement. The report before me of the Master’s decision is very short and does not assist on the nature of the claim that was being made in that case. It is not clear from the decision whether or not photocopying costs incurred were of an exceptional nature.

In any event, I am satisfied that on a proper reading of the present regulations, the approach adopted by the Lord Chancellor’s Department in this case is the correct approach and one which ensures that solicitors who reasonably incur and can justify costs over and above their ordinary overheads are entitled to claim for them on taxation as a disbursement within Regulation 7.

As far as the rate to be claimed is concerned, the Legal Aid Handbook suggests that the appellant firm may claim the “commercial cost”. On that basis Mr Watson argues that they are entitled to 25 pence per sheet. I am told that firms of solicitors who regularly use the services of commercial photocopiers negotiate rates substantially lower than 25 pence per sheet, sometimes as low as 4 pence per sheet. It would be of assistance to taxing officers and practitioners alike if some guidance could be given on the rate to be properly claimed for photocopying at “commercial cost”. In this case the appellant firm has in fact provided a breakdown of the additional costs which they actually incurred in carrying out the enormous task of photocopying 41,566 sheets. In my judgement, therefore, in the exceptional circumstances of this case, it would be appropriate to allow those costs as a disbursement.

I accordingly allow the appeal to that extent and award them the sum of £1469.10 inclusive of VAT. Both questions posed by the Master should be answered in the negative.

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Case no: 990674

Royal Courts of Justice.
Strand, London WC2A 2LL

Date: 30th July 1999

Before:
THE HON. MRS. JUSTICE HALLETT DBE

BETWEEN:

SMITH GRAHAM, Solicitors
(Regina v Carr)

Plaintiff

-and-

THE LORD CHANCELLOR'S DEPARTMENT

Defendant

Mr. Christopher HARDING (instructed by Messrs Smith Graham for the Plaintiff)

Mr. Nicholas HILLIARD (representing The Lord Chancellor's Department - the Defendant)

Judgement : Approved by the court for handing down.

SMITH

This is an appeal from the determination by Master Pollard under the Legal Aid in Criminal and Care proceedings Costs Regulations 1989. The Master certified the following point as a point of principle of general importance:

“When a solicitor acting under a legal aid certificate instructs an enquiry agent to carry out an item of preparation on his behalf and the solicitor pays the enquiry agent’s account as claimed, can the solicitor claim that item of work as if it were preparation carried out by a member of his firm?”

Messrs. Smith and Graham represented a local councillor charged with offences of deception in relation to his claims for expenses. They obtained prior authorisation to spend up to a £320.00 instructing an agent to attend at the council offices with the accused and examine the expense claim forms. They instructed a Mr William Fryer an enquiry agent whom they had used before. He sent them a bill for £243.93. They then claimed for his services at an enhanced hourly rate of £90.00 as a grade B fee-earner under Regulation 6. The determining officer took no issue with the reasonableness of the work done and the time spent but allowed only the sum actually paid to Mr Fryer as a disbursement under Regulation 7.

The determining officer rejected the argument that as Mr Fryer was frequently instructed by the firm to do different kinds of work for them, he should be regarded in this instance as a fee earner. On appeal the Master adopted the same approach as the determining officer and dismissed that part of the appeal.

Regulation 2 of the Costs Regulations defines a fee earner as a "solicitor, legal executive or any clerk who regularly does work for which it is appropriate to make a direct charge to the client."

Regulation 6 authorises the payment of solicitors fees "done by fee earners" in a number of categories including:

“taking instructions, interviewing witnesses, ascertaining the prosecution case,....preparing and perusing documents...conferences...views...etc.”

Smith and Graham argue that this was an item of work that was reasonably done by a fee earner and that for the purposes of the regulations Mr Fryer was a Grade B fee earner and that they are entitled, therefore, to claim at the appropriate rates. They claim an enhanced rate on the basis that the whole case merited an enhanced rate. No attempt was made before me to justify this particular piece of work as exceptional.

Mr Hilliard on behalf of the Lord Chancellor's Department argues that the costs of instructing Mr Fryer should be treated as a disbursement. He makes three principle submissions:

1. Mr Fryer was an independent contractor and, therefore, not to be regarded as a fee earner within the definition section. He was not employed in either

a full time or part time capacity by the appellant firm. In strict legal terms he should not be regarded as an agent of the solicitors.

2. Insufficient information has been provided as to the nature of his skill and experience and the work he normally does.
3. Insufficient information has been provided as to the nature of the work done in this case.

I have been informed that Mr Fryer is a retired police officer and "litigation enquiry agent" and that he was instructed to attend at the Borough Council offices with the accused to conduct an examination of expense claim forms. Mr Harding on behalf of the appellant firm concedes that he is not in a position to provide me with the detailed information I should like to assess the work actually done. I am reminded, however, that the determining officer and the taxing master accepted that the work was reasonably done. Plainly, he regularly undertakes a variety work for the appellant firm and some of the work he does is claimed as a disbursement.

The issue for me to decide is whether in this particular case, someone in the position of Mr Fryer instructed to do this particular kind of work may properly be regarded as a fee earner within the terms of regulation 6. I have been helpfully referred to a number of authorities which establish that whether someone is to be regarded as a fee earner is a very much a question of fact to be determined in each individual case.

On the facts of this case, despite the limited nature of the information before me, I am satisfied that the nature of the work Mr Fryer was instructed to do here was work which it was appropriate for a fee earner to do. I doubt that anyone would have considered it inappropriate in a case such as this for the solicitor in charge of the case or someone similar to have carried out the work himself and to make a direct charge to the client. The fact that Mr Fryer was not actually employed by the solicitors either as a full-time or part time employee does not, in my judgement, exclude him from the definition of fee earner. No such restriction is imposed by the regulations themselves and I note that in the guidance to determining officers in 1996, full time employees, part time employees and "Persons engaged by solicitors as agents" are said to be included. I am not persuaded that the use of the word "agent" in that guidance was intended to mean a full fiduciary relationship of agent and principal as argued by Mr Hilliard. It means someone not actually employed by the firm but instructed to carry out work on their behalf.

Whatever the nature of an "agent's" contractual or legal relationship with the solicitors firm, for the appropriate test of fee earner one must return to the regulations themselves: a fee earner includes "a clerk who regularly does work for which it is appropriate to make a direct charge to the client." As was said by the Chief Taxing Master in the case of Pullum (TCS1) the use of the term "clerk" is very well known in the legal profession. many of us are familiar with the use of "outdoor clerk"

instructed to attend upon counsel at court. As I understand it, it is accepted that such work could count as fee earning work.

Having considered Mr Fryer's background and the services he offers, I have no doubt that Mr Fryer comes within the definition of someone who may be instructed to do fee earning work. Attending at Council Offices to examine important documents with the lay client is clearly "fee earning work". I am satisfied, therefore, that in the circumstances of this case Mr Fryer does come within the definition of "fee earner" within the regulations.

I turn to the level of fee which should be allowed. No information has been put before me to justify his grading as B. The onus is upon the appellant to justify such a grading. Without that information, he must be classified as a Grade C. Similarly no information has been provided to me to justify an enhanced rate for the work that he did. The fact that the appellant firm instructed an agent to carry out this work, in the absence of any explanation, leads one to assume that although important it was not exceptional. I am satisfied, therefore, that it would be inappropriate to allow his fees at an enhanced rate.

The appellant firm will, therefore, be allowed the sum of £133.87

The question posed by the Master can not be answered with a simple yes or no. The answer must be: it depends on the circumstance of the case.

Appendix 9

Guidance On Availability Of Costs From Central Funds

EXTENT OF AVAILABILITY OF COSTS FROM CENTRAL FUNDS

Proceedings	Court	Extent of availability	Authority
Information not proceeded with	Magistrates'	Defendant	S.16(1)(a) POA 1985
Decision not to commit for trial	Magistrates'	Defendant	S.16(1)(b) POA 1985
Dismissal of information	Magistrates'	Defendant	S.16(1)(c) POA 1985
Person indicted or committed for trial but not tried	Crown	Defendant	S.16(2)(a) POA 1985
Notice of transfer given but person not tried	Crown	Defendant	S.16(2)(aa) POA 1985
Acquittal on indictment	Crown	Defendant	S.16(2)(b) POA 1985
Successful appeal to the Crown Court against conviction or sentence	Crown	Appellant	S.16(3) POA 1985
Successful appeal to CACD against conviction or sentence or insanity/disability finding	CACD	Appellant	S.16(4) POA 1985
Appeal against order or ruling at preparatory hearing	CACD	Appellant	S.16(4A) POA 1985
Application for leave to appeal to House of Lords	CACD	Appellant	S.16(5)(c) POA 1985
Attorney General reference to CACD on point of law following acquittal	CACD, House of Lords	Acquitted Defendant	S.36(5) CJA 1972
Attorney General reference under s.36 CJA 1988 (lenient sentence appeals)	CACD	Convicted Defendant	Sch. 3 para 11 CJA 1988

EXTENT OF AVAILABILITY OF COSTS FROM CENTRAL FUNDS

Determination of proceedings in a criminal cause or matter in Divisional Court	Divisional Court	Defendant in criminal proceedings	S.16(5)(a) POA 1985
Determination of appeal or application for leave to appeal from CACD or DC	House of Lords	Defendant in criminal proceedings	S.16(5)(b) & (c) POA 1985
Proceedings in respect of an indictable offence	Magistrates' Crown	and Private prosecutor	S.17(1)(a) POA 1985
Proceedings before DC or House of Lords	Divisional Court and House of Lords	Private prosecutor	S.17(1)(b) POA 1985
Criminal cause or matter	All	Defence or private prosecution witness, interpreter and medical practitioner	S.19(3) POA 1985 – there are restrictions on what may be paid (see regs 18, 19, 20, 21, 24 & 25 CCC (General) Regs 1986. For example, a witness cannot claim for any legal expenses incurred by them in attending court to give evidence.
Murder case	Crown	Medical practitioner	S.35(5) MHA 1982
Criminal Procedure (Insanity) Act proceedings	Crown	Person appointed to put case for the defence	S.19(3)(d) POA 1985
Cross examination of vulnerable witnesses	Magistrates' Crown	and Person appointed to cross examine witness for the defence	S.19(3)(e) POA 1985
Compensation where a court refuses an application for a banning order	Magistrates' Crown (on appeal where compensation refused by the magistrates' court)	Person against whom a banning notice has been given (limited to £5,000)	Football Spectators Act 1989 (as amended under sch. 1 of the Football (Disorder) Act 2000)

Appendix 10

Guidance On Attending Advocates At Court - Extract From The Law Society Guide To The Professional Conduct Of Solicitors 1999

CHAPTER 20: RELATIONS WITH THE BAR, OTHER LAWYERS AND AGENTS

20.04 Attending advocates at court

Where counsel has been instructed, the instructing solicitor is under a duty to attend or arrange for the attendance of a responsible representative throughout the proceedings: save that attendance may be dispensed with in the magistrates' court or in certain categories of Crown court proceedings, where, in either case, the solicitor is satisfied that it is reasonable in the particular circumstances of the case that counsel be unattended. The solicitor will be so satisfied where it is clear that the interests of the client and the interests of justice will not be prejudiced by counsel appearing alone.

Where a solicitor advocate has been instructed in a Crown court case, the instructing solicitor should attend or arrange for the attendance of a responsible representative where this is necessary for the proper conduct of the case.

1. Attendance on counsel may be dispensed with in the Crown court only in the following categories of hearing
 - (a) trials
 - (b) hearings of cases listed for pleas of guilty;
 - (c) sentencing hearings following committals for sentence;
 - (d) hearings of appeals against conviction or sentence.
2. Attendance on counsel in the Crown court will not normally be dispensed with:
 - (a) where the client is charged with an offence included in Class 1 or 2 as determined pursuant to section 75(2) of the Supreme Court Act 1981;
 - (b) if the proceedings have been instituted or taken over by the Serious Fraud Office, or are before the Crown court by reason of a notice of transfer given under section 4 of the Criminal Justice Act 1987;
 - (c) where the client was a child or young person at the time the Crown court acquired jurisdiction;
 - (d) where the client is unable to understand the proceedings or give adequate instructions to counsel because of inadequate knowledge of English, mental illness or other mental or physical disability;
 - (e) on the last day of a trial if the client was likely if convicted to receive a custodial sentence and it is expected that sentence will then take place: and the day on which the client is in fact sentenced, whether or not it coincides with the last day of any trial;
 - (f) on days where a significant number of defence witnesses are to be marshalled;

20.04**CHAPTER 20: RELATIONS WITH THE BAR, OTHER LAWYERS AND AGENTS**

- (g) in a trial where there are a substantial number of defence documents;
 - (h) where counsel is representing more than one defendant;
 - (i) where the client was likely to disrupt proceedings if counsel were to appear alone;
 - (j) on days where counsel is likely to require notes of the proceedings to be taken for the proper conduct of the defence;
 - (k) in cases outside the above criteria where there are exceptional circumstances such that it was desirable that counsel should be attended.
3. Where it is necessary to take proof of evidence from an unexpected witness during a trial or to hold a conference at court due to a late change of advocate, attendance on counsel for that part of the preparation of a case will not normally be dispensed with.
4. Where a solicitor proposes that counsel should appear unattended he or she must:
- (a) so inform counsel and deliver a full and detailed brief sufficiently early before the hearing to enable counsel to consider the papers and to decide whether it would be appropriate for counsel to attend alone (guidelines issued by the Criminal Law Committee as to the contents and handling of such briefs and remuneration are to be found in Annex 20A. p.370); and
 - (b) inform the client that counsel will be unattended and tell the client both the name of counsel and how instructions may be given; and
 - (c) attend on counsel or send a representative where:
 - (i) counsel originally instructed or subsequently substituted informs the solicitor either before or during the proceedings, that he or she does not believe that it is appropriate for counsel to be unattended: and
 - (ii) attendance is necessary in the proper and efficient administration of justice.
5. The Council, when considering any complaint that 20.04 has not been observed, will take into account all the practical difficulties and any legal aid regulations affecting the position.
6. The Council is currently reviewing the obligation to attend counsel in civil proceedings. For further information contact Professional Ethics

Appendix 11 - Vulnerable and intimidated witnesses

By Rachel Rogers, Law Society Policy Adviser on Children and Youth Justices

Special Measures for vulnerable and intimidated witnesses are being phased into court proceedings from July 2002. The Special Measures will be available in relation to both prosecution and defence witnesses. Section 19[1][a] of the Youth Justice and Criminal Evidence Act 1999 excludes defendants from eligibility for special measures. Critics see this as susceptible to challenge under the equality of arms provisions of Article 6 of the ECHR. It is suggested that judges have inherent discretion to apply Special Measures as necessary to young defendants to meet the special needs of defendants arising from disabilities.

The Youth Justice and Criminal Evidence Act 1999 defines vulnerable [S.16] and intimidated [S.17] witnesses, and contains a number of special measures for which those witnesses will be eligible to apply. Children under 17 will be eligible to apply for Special Measures simply by virtue of their age.

Section 53[1] provides that at every stage in proceedings all persons are [whatever their age] competent to give evidence. The threshold for competence for child witnesses is a matter of capacity. S.54 provides that in determining competence [onus of proof on person calling the witness] the court is entitled to treat the witness as having the benefit of any 'Special Measures' direction the court has given or proposes to give.

All children under 17 at the time of the hearing are defined as 'vulnerable' witnesses and will automatically be eligible for Special Measures [S.16[1][a]]. The Special Measures and any criteria/conditions are set out in SS.23 to 30 inclusive. The Special Measures are

- screens or other arrangements to prevent the witness from seeing the accused whilst giving evidence
- evidence via a live link
- evidence given in private where the proceedings relate to a sexual offence or there are reasonable grounds for believing that a person other than the accused has sought or will seek to intimidate the witness
- removal of wigs and gowns
- pre recorded video interview as evidence in chief unless the court considers that it would not be in the interests of justice that the recording be so admitted
- video recorded cross or re-examination in certain circumstances where video-recorded evidence in chief admitted
- examination of witnesses through an intermediary and aids to communication.

Implementation of Special Measure provisions

The majority of the Special Measures will be implemented in the Crown Court on 24 July 2002. Every Crown Court centre will have a TV link system installed. As children are vulnerable witnesses all the Special Measures will be implemented for witnesses under 17, with the exception of intermediaries and pre-

trial cross examination which will be the subjects of pilots.

In the magistrates' courts, implementation of Special Measures in July 2002 will be restricted to TV links and video recorded evidence for child witnesses in cases involving sexual offences, violence [including threats] and cruelty. This is intended to provide protection for children in cases involving assaults, muggings and domestic violence and to bring the adult magistrates' courts into line with the provision in the Youth Court. The project is ongoing to install 135 TV links with magistrates' courts by 2003/2004 [after their evaluation in the Crown Court] to bring them in line with the Crown Court.

The use of intermediaries and video recorded pre-trial cross-examination will be piloted before full roll out. The pilot projects in relation to the use of intermediaries are likely to start later this year. On video cross-examination a scoping study needs to be carried out. The Home Office intend for scoping work to begin in the summer. Subject to the pilot projects, it is expected that all the measures will be introduced by 2003/2004 for all qualifying witnesses.

Guidance

There has been considerable amount of work on guidance for the police and CPS on Special Measures. There are real problems in terms of resources and storage, in particular

for the police. Some forces are developing protocols and earmarking resources for particular categories of vulnerability.

Defence practitioners may initially have problems in accessing Special Measures provisions. It will take time for there to be a culture change in defence practitioners identifying witnesses who are eligible, and there will be real problems for defence practitioners preparing adequate admissible videoed statements, in accordance with the Memorandum of Good Practice. The Bar are considering a training video but this unlikely to be published this year.□

The Guidance on Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable and Intimidated Witnesses including Children is available at www.cps.gov.uk and www.homeoffice.gov.uk. The guidance is advisory, but practitioners should be aware that significant departures from the guidance may have to be justified to the court.

Defence practitioners seeking practical help to access video recording facilities for vulnerable child witnesses are encouraged to contact Youth Court Users Groups since others represented on those groups may be able to offer assistance. The Youth Court issues Group, convened by the Youth Justice Board, endorses practitioners making such approaches.

Appendix 12 Criminal Points of Principle

The following table sets out the current status of all points of principle determined under the Legal Aid Act 1988 and any new points determined under the Access to Justice Act 1999 with the reference to the relevant paragraph in the Criminal Bills Assessment Manual (CBAM):

CRIMLA 1	Retain (CBAM 4.12)
CRIMLA 2	Retain (CBAM 2.7)
CRIMLA 3	Retain (CBAM 4.3)
CRIMLA 4	Retain (CBAM 7.3)
CRIMLA 5	Retain but as amended by contract (CBAM 2.5)
CRIMLA 6	Retain (CBAM 6.6)
CRIMLA 7	Retain (CBAM 3.1)
CRIMLA 8	Obsolete - superseded by CDS regulations/contract
CRIMLA 9	Retain (CBAM 2.8)
CRIMLA 10	Replaced by CRIMLA 19
CRIMLA 11	Retain (CBAM 6.7)
CRIMLA 12	Retain (CBAM 10.8)
CRIMLA 13	Applies to pre-1994 cases, but retain as still relevant to current cases re 'Backhouse' calculation (CBAM 7.2)
CRIMLA 14	Obsolete - superseded by contract
CRIMLA 15	Retain, although requires updating re regulations (CBAM 4.7)
CRIMLA 16	Retain (CBAM 2.6)
CRIMLA 17	Retain (CBAM 6.7)
CRIMLA 18	Retain (CBAM 7.2)
CRIMLA 19	Retain (CBAM 4.8)
CRIMLA 20	Retain (CBAM 7.3)
CRIMLA 21	Retain (CBAM 2.8)
CRIMLA 22	Retain (CBAM 7.2)
CRIMLA 23	Retain (CBAM 3.6)

CRIMLA 24	Retain (CBAM 7.2)
CRIMLA 25	Retain (CBAM 4.4)
CRIMLA 26	Retain (CBAM 10.9)
CRIMLA 27	Not relevant to crime = care proceedings
CRIMLA 28	Retain (CBAM 11.2)
CRIMLA 29	Obsolete - superseded by CDS regulations/contract
CRIMLA 30	Retain (CBAM 3.3)
CRIMLA 31	Retain (CBAM 2.12)
CRIMLA 32	Retain (CBAM 9.1)
CRIMLA 33	Retain (CBAM 2.13)
CRIMLA 34	Retain (CBAM 2.12)
CRIMLA 35	Retain (CBAM 2.6)
CRIMLA 36	Retain (CBAM 7.1)
CRIMLA 37	Retain (CBAM 11.4)
CRIMLA 38	Retain (CBAM 2.2)
CRIMLA 39	Retain (CBAM 2.8)
CRIMLA 40	Retain (CBAM 6.3)
CRIMLA 41	Retain (CBAM 3.7)
CRIMLA 42	Limited application to 1995 – 98 cases (CBAM 6.5)
CRIMLA 43	Retain (CBAM 4.4)
CRIMLA 44	Retain (CBAM 6.4)
CRIMLA 45	Retain (CBAM 6.1)
CRIMLA 46	Retain (CBAM 6.4)
CRIMLA 47	Retain (CBAM 7.3)
CRIMLA 48	Retain (CBAM 6.4)
CRIMLA 49	Retain (CBAM 2.8)
CRIMLA 50	Retain (CBAM 6.3)

CRIMLA 51	Retain (CBAM 7.1)
CRIMLA 52	Retain (CBAM 9.6)
CRIMLA 53	Retain (CBAM 11.2)
CRIMLA 54	Retain (CBAM 2.16)
CRIMLA 55	Obsolete - superseded by CDS regulations/contract
CRIMLA 56	Limited application to pre-1994 cases (CBAM 7.2)
CRIMLA 57	Retain (CBAM 6.3)
CRIMLA 58	Retain (CBAM 6.6)
CRIMLA 59	Retain (CBAM 7.3)
CRIMLA 60	Retain (CBAM 3.6)
CRIMLA 61	Obsolete – superseded by contract
CRIMLA 62	Retain (CBAM 2.17)
CRIMLA 63	Limited application to 1995 – 98 cases (CBAM 6.3)
CRIMLA 64	Retain (CBAM 6.5)
CRIMLA 65	Retain (CBAM 7.4)
CRIMLA 66	Retain (CBAM 9.7)
CRIMLA 67	Retain (CBAM 4.2)
CRIMLA 68	Retain (CBAM 6.2)
CRIMLA 69	Retain (CBAM 6.5)
CRIMLA 70	Retain (CBAM 6.4)
CRIMLA 71	Retain (CBAM 6.7)
CRIMLA 72	Retain (CBAM 6.5)
CRIMLA 73	Obsolete – superseded by move to process centres
CRIMLA 74	Retain (CBAM 7.4)
CRIMLA 75	Retain (CBAM 10.4)

APPENDIX 13 Law Society guidance on indictable only cases

POLICE STATION ADVICE IN INDICTABLE ONLY CASES

GUIDANCE FROM THE CRIMINAL LAW COMMITTEE OF THE LAW SOCIETY

A non-solicitor who is registered with the Legal Services Commission but who has not obtained accreditation (a probationary representative) will not be paid by the Legal Services Commission for giving advice at a police station in an indictable only case.

The Criminal Law Committee of the Law Society gives the following guidance to solicitors and their representatives.

1. Before a probationary representative accepts instructions to attend at a police station to give advice for which it is intended to claim from the Legal Services Commission, it is necessary for him or her to establish that the offence(s) under investigation are not indictable only.
2. Solicitors and their representatives are already advised by the Law Society to obtain information on the telephone from the custody officer about the offence(s) under investigation. The custody officer should be asked to indicate the most serious matter being investigated and the most reasonable charge anticipated. The Metropolitan Police have already issued guidance to custody officers to give this information to solicitors and their representatives and they have also advised officers that if during the course of an investigation into an either way offence, new information comes to light which indicates that the matter may become an indictable only offence, they will make that information known to the legal representative at the earliest opportunity. The Association of Chief Police Officers (ACPO) is considering whether to recommend that custody officers nationally are given similar advice.
3. When the investigation is continuing after the representative's first telephone contact with the police, the longer the delay before the representative attends the police station, the more up-to-date the information will be about the likely level of the suspected offence.
4. This should be balanced against the fact that the Law Society already advises that an immediate attendance on a suspect may be necessary if the suspect has already spent some time in custody, is vulnerable or complains of ill-treatment and that adequate time must be left before interview in order for the representative to prepare to attend the police station, and consult fully with the custody officer, investigating officer, client and any third party such as an appropriate adult or interpreter.
5. Where a probationary representative goes to the police station to advise on an either way case and the police subsequently decide to investigate on the basis of an indictable only case then the Legal Services Commission will pay for advice and assistance from the probationary representative. However, if there is a suitable break in the interviewing it would be good practice for the solicitor having conduct of the case then to send a person authorised to advise in indictable only cases.
6. The Legal Services Commission may request a copy of the custody record to ensure that it was reasonable for the probationary representative to have attended in the first place.

7. On arrival at the police station, the representative should immediately consult the custody record to confirm the information which he or she should have already received from the custody officer.

APPENDIX 14 ACPO Guidance (circulated 6 July 2001)

Guidance on provision of interpreters at police stations for defence solicitors

The purpose of this document is to raise awareness of an issue that may arise within the custody environment.

The Lord Chancellor's Department has issued advice from the Legal Services Commission which states:

When a defence solicitor requires an interpreter to facilitate the provision of advice between solicitor and client, a different interpreter, where practicable, should be used. Where this is not practicable the client may, through his or her defence solicitor, consent to the use of a police appointed interpreter.

This issue has been raised at the Interpreters Working Group, a sub group of the Trials Issue Group, on which both ACPO and the Law Society are represented. The following is provided as guidance on this issue and needs to be viewed against the National Agreement.

Part of the National Agreement states that by the end of 2001, only those foreign language interpreters who are registered with the National Register of Public Service Interpreters (NRPSI) and those British Sign Language interpreters and lipspeakers who are registered with the Advancement of Communication with Deaf People (CACDP) should be used.

The advantages of using interpreters from the registers maintained by these two organisations is that they are bound by a code of conduct together with associated disciplinary procedures. These provisions provide quality assurance to an individual who needs to engage an interpreter to facilitate communication. It also emphasises the importance of using an interpreter from either register for criminal investigations and proceedings.

Codes of impartiality and independence form part of the professional codes of conduct referred to above. There should not, therefore, be any ethical or professional reason why the same interpreter could not be used for police and defence interaction with a suspect.

However, defence solicitors may wish to appoint their own interpreter to facilitate legal consultation. Where this is so the defence is responsible for the arrangements for this interpreter and the terms of engagement and payment.

The Law Society also signed up to the National Agreement and any interpreter used should be a member of either the NRPSI or CACDP.

The defence interpreter should interpret for legal consultation only.

Any requirement by a defence solicitor should be recorded in the custody record log. Any delays that ensue because of this requirement should be taken into account in any PACE detention review. Given the responsibilities of a review officer the use of bail may be appropriate when the seriousness of the offence is taken into consideration. The issue of a defence interpreter must be addressed therefore at an early stage of a suspect's detention.

APPENDIX 15 Duty Solicitor Points of Principle

The following table sets out the current status of all points of principle determined under the Legal Aid Act 1988 and any new points determined under the Access to Justice Act 1999 with the reference to the relevant paragraph in the Police Station and Court Duty Solicitor Costs Assessment Manual

DS1	Obsolete
DS2	Retain (PACE 7.11)
DS3	Retain (PACE 3.2)
DS4	Retain (PACE 9.5)
DS5	Obsolete
DS6	Retain (PACE 3.2)
DS7	Retain (PACE 7.6)
DS8	Retain (PACE 7.5)

APPENDIX 16 Arrestable, Imprisonable and Non-imprisonable offences

1. Non-Imprisonable Offences

Non-imprisonable offences cannot result in an offender, who pleads guilty or is found guilty, receiving a **sentence** of imprisonment.

Such offences do not permit imprisonment as a **sentence** option by virtue of the statute or regulation that created and defines them.

There will be times when suspects or defendants are held in custody for any one of a number of reasons, before the determination of a non-imprisonable case.

Common examples of such offences are:

- Disorderly Conduct: Section 5 Public Order Act 1986.
- Speeding: (Road Traffic Regulation Act ss 81 (84 or 86) and 89).
- Driving other than in accordance with a licence: Section 87 Road Traffic Act 1988.
- Driving without a test certificate in force (MOT): Section 47(1) Road Traffic Act 1988.
- Driving without Insurance or causing or permitting the same: Section 143 Road Traffic Act 1988.
- Forging excise licence, driving licence, Insurance certificate, test certificate Section 6 Public Passenger Vehicle Act 1981, on conviction of the offences in the Magistrates Court. If the matters go to the Crown Court then on conviction imprisonment is one of the sentences that are available.
- Ticket touting: Criminal Justice and Public Order Act 1994 s166.
- Taxi touting ('touting for hire'): Criminal Justice and Public Order Act 1994 s167.
- Drunk and disorderly: Criminal Justice Act 1967, s91.

When formulating claims or auditing files for Police Station work Advice and Assistance the impact of Part B Section 8 of the General Criminal Contract must be considered as this restricts the work that the Commission will pay for when dealing with these types of offences.

Part B Section 8 Scope of Duty Solicitor Service:

Paragraph 8.2.17 defines the cases in connection with which the solicitor may provide Police Station Telephone Advice only, and should be read in conjunction with paragraph 8.2.18, which lists the exceptions to the above.

This includes a client who is detained in relation to a non-imprisonable offence.

2. Imprisonable Offences

An imprisonable offence is one that **can** result in an offender, who pleads or is found guilty, receiving a sentence of imprisonment.

Whether an individual is imprisoned can depend on one of a number of factors. In some rare cases conviction of the offence alone will mean that imprisonment is the mandatory punishment, e.g. murder.

However, for many other offences imprisonment will be one of a range of possible sentences available to the court depending on a number of other factors. For instance, drink driving can result in a number of possible sentences over and above the mandatory minimum disqualification period of 12 months. Where the offence is the defendant's first and the reading of alcohol is low, then the punishment is usually a fine. However, if for example it is a very high reading (three or four times the legal limit) or is the defendant's third such offence in 10 years then imprisonment is the much more likely punishment.

Common examples of other imprisonable offences are:

- Dangerous Driving: Section 2 Road Traffic Act 1988 (as substituted by the Road Traffic Act 1991).
- Failing to report an accident: Section 170(4) Road Traffic Act 1988 as amended.
- Driving whilst disqualified: Section 103 Road Traffic Act 1988.
- Being drunk in charge of a motor vehicle: Section 4(2) Road Traffic Act 1988.