

BME



SENIOR COURTS
COSTS OFFICE

SCCO Ref: 139/16

21 November 2016

ON APPEAL FROM REDETERMINATION

REGINA v GRATLAND

CROWN COURT AT NOTTINGHAM

APPEAL PURSUANT TO REGULATION 29 OF THE CRIMINAL LEGAL AID
(REMUNERATION) REGULATIONS 2013

CASE NO: T20151158

LEGAL AID AGENCY CASE

DATE OF REASONS: 21 JUNE 2016

DATE OF NOTICE OF APPEAL: 10 AUGUST 2016

APPLICANT: COUNSEL

MARTIN ELWICK
1 HIGH PAVEMENT

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

The appropriate additional payment, to which should be added the sum of £250 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

**JASON ROWLEY
COSTS JUDGE**

REASONS FOR DECISION

1. This is an appeal by Martin Elwick of counsel against the decision of the determining officer under the Advocates Graduated Fee Scheme.
2. Counsel was instructed on behalf of Drew Gratland who was charged with sexual offences involving a young child. The trial began on Monday, 23 November 2015. On the preceding Wednesday, the case was listed for a ground rules hearing. According to the court log the case was called on a 10:31 am and concluded at 11:25 am. During that time there was a period of roughly 40 minutes while the case was adjourned. Though the court log does not record what occurred during that period, counsel's appeal notice states that the adjournment was to enable him to sit with the intermediary in order to try and agree the questions to be asked of the two child witnesses.
3. It is common ground in this appeal that the Criminal Legal Aid (Remuneration) Regulations 2013 do not expressly deal with the appropriate fee to be paid for a ground rules hearing. It is a new procedural requirement where a vulnerable witness requires an intermediary. It is said to be good practice in any other case where the witness is vulnerable. Notwithstanding that the regulations have been revised since ground rules hearings came about, the regulations have not been amended to deal specifically with the appropriate fee to be paid. In this case, the determining officer has concluded that the appropriate fee is a Standard Appearance Fee ("SAF") of £87. Counsel says that the fee should be assessed on the basis that it relates to the admissibility of evidence and for which the half day fee would be £130.
4. It can be seen therefore that the sum in issue is comparatively modest and counsel has asked for this appeal to be considered without a hearing. This appeal was originally listed for a hearing and consequently, upon receiving an indication from counsel that he wished the case to be dealt with as a "non-attender", the Legal Aid Agency were invited to provide any further written submissions. Helpful submissions on behalf the Lord Chancellor have been submitted by Mr Rimer of the Agency.
5. The definition of a SAF in the 2013 Regulations is set out in the first paragraph of Part 1 to Schedule 1 of those Regulations:

“standard appearance” means an appearance by the trial advocate or substitute advocate in any of the following hearings which do not form part of the main hearing—

- (a) a plea and case management hearing, except the first plea and case management hearing;*
- (b) a pre-trial review;*
- (c) the hearing of a case listed for plea which is adjourned for trial;*
- (d) any hearing (except a trial, a plea and case management hearing, a pre-trial review or a hearing referred to in paragraph 2(1)(b)) which is listed but cannot proceed because of the failure of the assisted person or a witness to attend, the unavailability of a pre-sentence report or other good reason;*

- (e) custody time limit applications;
- (f) bail and other applications (except where any such applications take place in the course of a hearing referred to in paragraph 2(1)(b));
- (g) the hearing of the case listed for mention only, including applications relating to the date of the trial (except where an application takes place in the course of a hearing referred to in paragraph 2(1)(b));
- (h) a sentencing hearing other than one falling within paragraph 2(1)(b)(ii), paragraph 15(1) or paragraph 34;
- (i) a preliminary hearing; or
- (j) a hearing, whether contested or not, relating to breach of bail, failure to surrender to bail or execution of a bench warrant,

provided that a fee is not payable elsewhere under this Schedule in respect of the hearing;"

6. At paragraph 13 in the same schedule under the heading "fees for abuse of process, disclosure, admissibility and withdrawal of plea hearings" are the following provisions:

"13.—(1) This paragraph applies to—

- (a) the hearing of an application to stay the case on indictment or any count on the ground that the proceedings constitute an abuse of the process of the court;*
- (b) any hearing relating to the question of whether any material should be disclosed by the prosecution to the defence or the defence to the prosecution (whether or not any claim to public interest immunity is made);*
- (c) the hearing of an application under section 2(1) of the Criminal Procedure (Attendance of Witnesses) Act 1965(a) (issue of witness summons on application to Crown Court) for disclosure of material held by third parties;*
- (d) any hearing relating to the question of the admissibility as evidence of any material; and*
- (e) the hearing of an application to withdraw a plea of guilty where the application is—*
 - (i) made by an advocate other than the advocate who appeared at the hearing at which the plea of guilty was entered; and*
 - (ii) unsuccessful.*

(2) Where a hearing to which this paragraph applies is held on any day of the main hearing of a case on indictment, no separate fee is payable in respect of attendance at the hearing, but the hearing is included in the length of the main hearing for the purpose of calculating the fees payable.

(3) Where a hearing to which this paragraph applies is held prior to the first or only day of the main hearing, it is not included in the length of the main hearing for the purpose of calculating the fees payable and the trial advocate or substitute advocate must be remunerated for attendance at such a hearing—

- (a) in respect of any day where the hearing begins before and ends after the luncheon adjournment, at the daily rate set out in the table following paragraph 24 as appropriate to the category of trial advocate or substitute advocate; or*
- (b) in respect of any day where the hearing begins and ends before the luncheon adjournment, or begins after the luncheon adjournment, at the half-daily rate set out in the table following paragraph 24 as appropriate to the category of trial advocate or substitute advocate."*

7. According to counsel, the ground rules hearing is a substantive hearing ordered by the court to decide issues of law and procedure prior to the calling

of a young or vulnerable witness to give evidence. In this case, the hearing involved counsel providing to the court proposed questions to the witness and the court considering an argument as to the appropriate form of questioning and procedure in order to facilitate those witnesses giving evidence. The reason for the adjournment during the course of the hearing, as mentioned above, was to enable counsel to discuss with the intermediary the questions to be asked.

8. In counsel's submission, this type of hearing should not be viewed as a standard appearance since it does not fall within the definition of such a hearing as set out above. Instead it should be considered to be within paragraph 13(1)(d) as being a hearing "relating to the question of admissibility of evidence of any material" since the evidence of the vulnerable witnesses would not be admitted nor indeed the trial be able to take place without a successful conclusion to the ground rules hearing.
9. Mr Rimer's submissions for the Agency sought to uphold the determining officer's conclusion that a standard appearance fee was appropriate. His submissions did not rely upon the determining officer's original conclusion that, essentially by default, it was a standard appearance fee because it did not occur elsewhere. Instead, Mr Rimer put forward a more positive case that the nature of the hearing was most closely aligned to a case management hearing and should be categorised therefore as falling within the several descriptions of such hearings that occur within the standard appearance definition.
10. Mr Rimer described the purpose of the ground rules hearing as being to discuss and establish how vulnerable witnesses will be able to give their best evidence and any special measures required to facilitate this. In this case the court had to consider how the evidence of the two young girls would be presented and to consider issues relating to their cross-examination. That description would fit with a case management hearing.
11. Contrary to the appellant's case, in Mr Rimer's submission, the court log indicated that there were no discussions relating to the admissibility of the evidence that the two girls were to give and as such counsel's proposal of this case falling within paragraph 13(1)(d) was not appropriate. The hearing simply related to whether or not the girls were to be cross-examined and if so what questions they would be asked.
12. It seems to me that the nature of a ground rules hearing is that it is a relatively detailed enquiry into fulfilling the court's requirement that each witness is able to give his or her best evidence. Inevitably therefore there are matters of case management in terms of where and how the witness will give evidence; whether an intermediary is actually required et cetera. But it seems to me that any hearing prior to the trial itself is capable of requiring case management and the fact therefore that this occurs does not mean that the hearing should be categorised as a case management hearing as a result.

13. It is clear from a consideration of the matters which fall within the standard appearance definition that they are intended to be either relatively brief hearings or ones where a general overview of the case is all that is required. The hearings in paragraph 13 are ones where more preparation is likely to be required as they are, potentially at least, more adversarial in their nature. The hearings in paragraph 13 may fundamentally affect the continuation of the prosecution. The hearings described as standard appearances are simply designed to deal with management of either case or the accused.
14. Mr Rimer describes the ground rules hearing as relating to whether or not the girls were to be cross-examined and if so what questions they would be asked. Whilst I can see that the first part of that formulation is essentially a case management decision about whether any evidence will be given at all and if not the appropriate direction to be given to the jury as to the difficulty in which the defence is placed as a result. But the second part i.e. the questions to be asked seems to me to be very much a substantive matter to be addressed rather than a case management decision.
15. Historically, the defendant has not had to put forward any intimation of the defence that would be run if the case reached a trial nor the evidence that would be given. Procedural devices such as the defence case statement have eroded that position but essentially the defendant is entitled to keep his powder dry. Where, as here, the defendant has to produce his cross-examination questions prior to the trial, the defendant's position is potentially weakened. It must be the case that the questions have to be drafted with care and with the overall conduct of the defence firmly in mind. In my view that would require considerably more preparation than would be connoted by the phrase "standard appearance."
16. More fundamentally, the lines of questioning raised go to the heart of the evidence to be given by the witnesses. The limitations on normal cross-examination techniques envisaged by the need to protect vulnerable witnesses makes the drafting of the questions all the more important. Whilst I note from the court log that the judge said that the defendant would not be held to the questions that had been proposed, in my view this relates to the specific wording and not to the lines of questioning to be put forward. That does not seem to me to detract from the need for the questions to be carefully crafted so that they are acceptable in terms of their clarity but also put forward the points the defendant wishes to take. Consequently, have come to the conclusion that the ground rules hearing falls within the category of "any hearing relating to the question of the admissibility as evidence of any material" and counsel should be remunerated as such for his attendance on 18 November 2015.
17. Counsel originally sought a brief extension of time for filing the appeal in order to obtain advice from the Bar Remuneration Committee of the Bar Council. That extension was granted by the court and counsel indicated in his appeal notice that the nub of that advice was that the ground rules hearing should in fact be treated as the first day of trial.

18. There was nothing specifically provided from the Bar Council and as such Mr Rimer was hampered in making any submissions against that position. Once Mr Rimer's criticism of this position was made known, counsel provided further information from the Bar Remuneration Committee. Having considered those comments, it would appear that the hearing at which counsel attended would be claimed as a standard appearance by some counsel and the hearing at which the cross-examination was put would be seen as the first day of the trial even if the cross-examination took place at some point prior to the date fixed for the beginning of the trial.
19. I am not at all convinced that there is a concluded view from the Bar Remuneration Committee and I do not think that it would be appropriate to place too much emphasis on the comments made by various committee members in seeking to aid counsel in his appeal. The situation described of two hearings taking place does not fit in with the circumstances in this case and would be better left to another case on which the same court procedure was adopted for any determination to be made. Indeed the best course of action would be, it seems to me, to be for the Agency to regularise the position in the regulations at the earliest available opportunity.
20. For the reasons given up to paragraph 16 of this decision, counsel's appeal succeeds and he is entitled to have his fee recalculated accordingly together with his costs of this appeal.

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