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IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO: 201903868 B1

NCN: [2022] EWCA Crim 1894

Royal Courts of Justice  
Strand  
London  
WC2A 2LL

Tuesday 15 November 2022

Before:

VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION  
LORD JUSTICE HOLROYDE

MRS JUSTICE FOSTER

MR JUSTICE GRIFFITHS

FOR MENTION RE APPLICATION OF EXTENSION OF LEGAL AID ORDER

REFERENCE BY THE CCRC UNDER S.9 CRIMINAL APPEAL ACT 1968  
REX

v  
PETER TREDGET

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Computer Aided Transcript of Epiq Europe Ltd,  
Lower Ground, 18-22 Furnival Street, London EC4A 1JS  
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

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MR G WELLS appeared on behalf of the Applicants

MR RICHARD HOWELL appeared on behalf of the Intervener (The Lord Chancellor)

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**J U D G M E N T**

(Approved)

LORD JUSTICE HOLROYDE:

1. Can the Court of Appeal, Criminal Division retrospectively extend a representation order to include work undertaken before a case is referred to the court by the Criminal Cases Review Commission ("CCRC")? That question is raised in an acute form by this application for an extension of a representation order.
2. More than 40 years ago, Mr Tredget was accused of setting fires in which many persons died. He was charged with offences of murder and of arson with intent to endanger life or being reckless as to whether life was endangered. In January 1981 he entered acceptable guilty pleas to 26 offences of manslaughter (on the grounds of diminished responsibility) and eleven offences of arson contrary to s.1(3) of the Criminal Damage Act 1971. He was ordered to be detained in a special hospital without limitation of time pursuant to ss. 60 and 65 of the Mental Health Act 1959.
3. On an appeal in December 1983 this court quashed eleven of the manslaughter convictions and one of the arson convictions, but dismissed the appeal in relation to other charges. The sentence remained as before.
4. On 23 October 2019 the CCRC referred the remaining convictions to this court. By virtue of s.9(2) of the Criminal Appeal Act 1995 such a reference "shall be treated for all purposes" as an appeal against conviction by the person concerned under s.1 of the Criminal Appeal Act 1968.
5. In November 2019 a representation order was granted to leading counsel, Mr Timothy Barnes KC (who has subsequently retired from practice) and solicitors, Cartwright King of Nottingham, in relation to the substantive appeal. That order was backdated to the date of the reference.
6. The complexity of the appeal resulted in a lengthy hearing. As is apparent from the judgment of the court, handed down in February 2022, Mr Barnes KC presented the appeal "with consummate ability and diligence" and received able assistance from his solicitors. The court quashed three of the manslaughter convictions and two of the arson convictions. All other convictions were affirmed and the sentence again remained as before.

7. At the conclusion of that hearing, Mr Barnes KC invited the court to consider extending the representation order to cover work which he and those instructing him had undertaken before the CCRC's referral of the case on 23 October 2019. Appropriate directions were given, including provision for the Lord Chancellor to intervene if so advised. In the result, the application for a retrospective extension of the representation order to cover all the work undertaken since 25 October 2010 comes before the full court today. We have had the assistance of submissions by Mr Wells on behalf of the applicant and Mr Howell on behalf of the Lord Chancellor. We are grateful to them both.
8. Mr Wells has helpfully indicated the nature and extent of the work undertaken by Mr Barnes KC and by the solicitors. In very brief summary, the solicitors began to act in September 2009 and in the following month instructed Mr Barnes KC to give an initial advice. The solicitors were formally engaged by Mr Tredget on 25 October 2010. A substantial amount of work was undertaken, leading to an application in late November 2011 to the CCRC asking them to refer the remaining convictions to this court. Thereafter Mr Barnes KC and the solicitors continued to assist both Mr Tredget and the CCRC in what proved to be an unusually lengthy process of consideration by the CCRC over the course of about 8 years. Some, but not all, of their work was funded by the Legal Services Commission in accordance with the legal advice and assistance scheme which was then in force. However, much of the work before 2013, and all of it between 2013 and 2019, was undertaken *pro bono*.
9. The present application is, as we have said, for the representation order to be extended retrospectively to cover the work undertaken by counsel and solicitors between 25 October 2010 (the date of the solicitor's formal engagement) and 2019 (the date of the referral). We have no doubt that the work which Mr Barnes KC and the solicitors carried out and which was not remunerated by the Legal Services Commission was very extensive: hence our observation that the question which we must consider arises in an acute form. We recognise that the length of time taken by the CCRC was due to unusual circumstances relating to individual caseworkers, which made the continuing involvement of counsel and solicitors

particularly important to Mr Tredget; and we see the force of the submission that the work undertaken by counsel and solicitors was thus both prolonged and increased by factors outside their control. We must, however, first address the issue of principle.

10. We begin by referring to the material provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"), the Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013 ("the 2013 Determinations Regulations") and the Criminal Legal Aid (General) Regulations 2013 ("the 2013 General Regulations")

11. Section 14 of LASPO provides:

"14. Criminal proceedings

In this Part 'criminal proceedings' means—

- (a) proceedings before a court for dealing with an individual accused of an offence,
- (b) proceedings before a court for dealing with an individual convicted of an offence, including proceedings in respect of a sentence or order,
- (c) proceedings for dealing with an individual under the Extradition Act 2003,
- (d) proceedings for binding an individual over to keep the peace or to be of good behaviour under section 115 of the Magistrates' Courts Act 1980 and for dealing with an individual who fails to comply with an order under that section,
- (e) proceedings on an appeal brought by an individual under section 44A of the Criminal Appeal Act 1968 (appeal in case of death of appellant),
- (f) proceedings on a reference under section 36 of the Criminal Justice Act 1972 on a point of law following the acquittal of an individual on indictment,
- (g) proceedings for contempt committed, or alleged to have been committed, by an individual in the face of a court, and
- (h) such other proceedings, before any court, tribunal or other person, as may be prescribed."

12. Pursuant to s.14(h) of LASPO, reg 9 of the 2013 General Regulations prescribes certain

further categories of proceedings which come within the definition of "criminal proceedings". However, none of those categories relates to an application to the CCRC.

13. Section 15 of LASPO contains provisions relating to advice and assistance for criminal proceedings. We are primarily concerned, however, with representation for criminal proceedings. That is dealt with by s.16 of LASPO, which provides:

"16. Representation for criminal proceedings

(1) Representation for the purposes of criminal proceedings is to be available under this Part to an individual if—

- (a) the individual is a specified individual in relation to the proceedings, and
- (b) the relevant authority has determined (provisionally or otherwise) that the individual qualifies for such representation in accordance with this Part (and has not withdrawn the determination).

(2) Representation for the purposes of criminal proceedings is to be available under this Part to an individual if—

- (a) the proceedings involve the individual resisting an appeal to the Crown Court otherwise than in an official capacity, and
- (b) the relevant authority has determined (provisionally or otherwise) that the individual qualifies for such representation in accordance with this Part (and has not withdrawn the determination).

(3) Where an individual qualifies under this Part for representation for the purposes of criminal proceedings ('the principal proceedings'), representation is also to be available to the individual for the purposes of—

- (a) any related bail proceedings, and
- (b) any preliminary or incidental proceedings.

(4) Regulations may—

- (a) make provision specifying whether proceedings are or not to be regarded as preliminary or incidental for the purposes of subsection (3), and
- (b) make provision for exceptions from subsection (3).

(5) Regulations under subsection (4)(b) may, in particular, make exceptions for proceedings taking place more than a prescribed period of time before or after the principal proceedings.

(6) In this section—

'The relevant authority', in relation to a specified individual and criminal proceedings, means the person who is authorised by or under section 18, 19 or 20 to determine (provisionally or otherwise) whether the individual qualifies under this Part for representation for the purposes of the proceedings;

'Specified individual' means—

- (a) in relation to criminal proceedings mentioned in any of paragraphs (a) to (g) of section 14, an individual mentioned in that paragraph in relation to those proceedings, and
- (b) in relation to criminal proceedings prescribed by regulations under section 14(h), a description of individual specified in the regulations in relation to those proceedings."

14. Pursuant to s.16(4), regs 19 and 20 of the 2013 General Regulations prescribe proceedings which are or are not to be regarded as incidental proceedings. Again, however, none of those categories relates to the CCRC.

15. By section 18(1) of LASPO, the "relevant authority" who may determine whether an individual qualifies for representation for the purposes of criminal proceedings is the Director of Legal Aid Casework "except in circumstances in which a court is authorised to make the determination under regulations under s.19".

16. Section 19(1) provides:

"(1) Regulations may—

- (a) provide that a court before which criminal proceedings take place, or are to take place, is authorised to determine whether an individual qualifies under this Part for representation for the purposes of criminal proceedings of a prescribed description, and
- (b) make provision about the making and withdrawal of such determinations by a court."

17. In exercise of the power confirmed by that section the Lord Chancellor has made provision in reg 8 of the 2013 Determinations Regulations for determinations by the Court of Appeal.

Regulation 8 states:

"Determinations by the Court of Appeal

8.—(1) On the application of an individual, or of its own motion, the Court of Appeal may make a determination under section 16 of the Act as to whether an individual qualifies for representation for the purposes of any criminal

proceedings before the Court of Appeal, or criminal proceedings before the Supreme Court on appeal from the Court of Appeal.

(2) A determination made in accordance with paragraph (1)—

- (a) must not be made until service of an appeal notice in respect of the proceedings has taken place; and
- (b) may specify the stage of the proceedings at which the determination is to take effect."

18. In relation to the application of those various legislative provisions, counsel have invited our attention to four cases.

19. In *R v CPW* [2002] EWCA Crim 1603 the CCRC referred a rape conviction to this court.

The appeal was allowed and the conviction quashed. No retrial was ordered as the appellant had served the sentence which had been imposed. The appellant's counsel asked for the representation order "to be made retrospective to when the solicitors first became involved in this appeal" (which was about 4 years before the CCRC's reference). In the ensuing exchange, however, counsel indicated that he lacked full information and that "it is all vague", and he amended his application to seek only an extension of the representation order "from the date of referral". That application was granted.

20. In *R v Blackburn* [2005] EWCA Crim 1349, the CCRC had referred convictions to this court. The appeal was allowed and the convictions quashed. In a very brief exchange counsel for the appellant said:

"It has become customary in successful CCRC references for the pre-grant of legal aid costs, in terms of the solicitor preparing and presenting the petition, to be allowed, subject to taxation on the normal basis, and I ask the court to make an order in this case."

The court granted that application.

21. In *R v Gittins & Khan* [2007] EWCA Crim 806, counsel for each of the appellants had been granted a retrospective representation order but had been privately paid for the application for leave to appeal. The court ruled that they were entitled to payment under the representation order but must return any private payment which had been received because of the principle that public and private funding should not co-exist. Latham LJ, giving the judgment of the court, referred to the statutory provisions then in force, which, as now,

empowered this court to grant a representation order at any stage in the proceedings after the notice of leave to appeal had been given and permitted the court to specify the stage of proceedings at which the representation order would take effect. He observed at [3] that the consequence of those provisions was that "after a successful application for leave to appeal, a representation order is frequently made which covers both retrospectively the work done in relation to and including the application and prospectively the appeal".

22. Those words of Latham LJ were referred to by a costs judge in *R v Alecu*, SCCO reference 196/13. The appellant in that case had received adverse advice on appeal from his trial representatives and had instructed fresh representatives. He subsequently obtained leave to appeal but his appeal against conviction was dismissed. His counsel applied to backdate the representation order so that it covered work which predated the lodging of the application for leave to appeal. The statutory provisions then in force were materially similar to those which we have cited. A Determining Officer held that there was no power to backdate a representation order prior to the commencement of proceedings. An appeal by counsel against that ruling was allowed by a costs judge, who said at [22]:

"In my judgment, the Determining Officer's interpretation of the word 'proceedings' is too narrow and that proceedings must include work carried out that is clearly incidental to the proceedings, which must include investigatory work as well as advice with regard to the appeal and preparation of the notice and grounds of appeal. Indeed, the decision in *R v Gittins & Khan* acknowledges this by stating that representation orders are frequently made which cover, retrospectively, the work done in relation to and including the application and,, prospectively the appeal."

23. We turn to the submissions of counsel.
24. Mr Wells submits that the preparatory work undertaken for the application to the CCRC should be treated as work "for the purposes of any criminal proceedings before the Court of Appeal". He submits that nothing in the statutory provisions specifically restricts the definition of "proceedings" to work done after the reference. In the unusual circumstances of this case, he submits, it would be wrong in principle for the substantial work which was undertaken and which was not previously remunerated by the Legal Services Commission to be excluded from the ambit of state funding. To exclude it, he argues, would be to



penalise the legal representatives unfairly for delay in the CCRC's consideration of the application. He submits that their work was essential to protect Mr Tredget's appeal rights, and it saved public money by reducing the work which had to be done by the CCRC.

Mr Wells points out, for example, that it was their work which first identified the important possibility that at least some of the fires had not been the work of an arsonist at all. In support of his submissions Mr Wells relies on what was said in the cases to which we have referred, in particular in *R v Blackburn*.

25. On behalf of the Lord Chancellor, Mr Howell submits that the application to extend the existing representation order should be refused because this court has no jurisdiction to grant it. He submits that this court clearly is the relevant authority for the purposes of determining eligibility for representation in the appeal proceedings following the CCRC's reference of the case. But, he submits, this court has no power to make an order in respect of costs incurred for the purposes of the application to the CCRC, which is not a "criminal proceeding" as defined in s.14 of LASPO and in any event is not "proceedings before the Court of Appeal". In answer to Mr Wells's argument that nothing in the Act specifically prevents the court from interpreting the provisions in the way for which Mr Wells contends, Mr Howell submits that it is essential to read the relevant provisions as a whole. He points, for example, to the provisions of ss.15(2)(a) and 20(1)(a) of LASPO, which draw a clear distinction between individuals who are involved in an investigation which may lead to criminal proceedings, and individuals who are involved in actual criminal proceedings. He submits that, upon analysis, none of the cases relied on by Mr Wells provides any substantial support for the application. Lest his primary submission based on a lack of jurisdiction should fail, Mr Howell adds in the alternative that if this court has any discretion, the applicants have not shown any sufficient reason why the court should exercise it in their favour.

26. Sympathetic though we are to the legal representatives who undertook many hours of work on Mr Tredget's behalf in making and pursuing the application to the CCRC, we are unable to accept Mr Wells's submissions. We have no doubt that Mr Howell's analysis of the

relevant statutory provisions is correct.

27. The effect of those provisions, in relation to proceedings which come before this court by way of a reference by a CCRC, is in our view clear. Section 16 of LASPO only makes "representation for the purposes of criminal proceedings" available to a person if he is "a specified individual in relation to the proceedings" and the relevant authority has determined that he qualifies for such representation. By s.15 of LASPO and reg 12(2)(e) of the 2013 General Regulations, the Director of Legal Aid Casework may make public funding available for advice and assistance regarding an application or potential application to the CCRC. It was the statutory precursor to that power which enabled the legal representatives in this case to obtain funding for some of their early work. By s.19 of LASPO and reg 8 of the 2013 General Regulations, this court is only the relevant authority for the purposes of criminal proceedings before it or before the Supreme Court on appeal from this court. An application for representation in relation to an application to the CCRC is not an application for the purposes of such criminal proceedings. This is because the relevant proceedings in this regard are the proceedings which are initiated when the CCRC makes a reference to this court, which by s.9 of the 1995 Act is then treated for all purposes as an appeal. In this context, the time at which a reference is made to this court will generally be the date when the appeal notice is served, which by r.39.2(1)(b) of the Criminal Procedure Rules must be not more than 20 business days after the Registrar serves notice that the CCRC has referred a conviction to the court. It may be earlier if the reference itself is to stand as the notice and grounds of appeal.
28. In short, there are no proceedings before any court, and no proceedings before this court, until a reference is made. This court accordingly has no power to determine eligibility for representation before a reference is made, and its power under is reg 8(2)(b) to specify the stage of the proceedings at which the determination is to take effect can only relate to the proceedings which are initiated by the reference. This court's jurisdiction in this regard is derived solely from the Regulations, and the court therefore has no discretion to extend a representation order in circumstances which fall outside the limits of the Regulations.

29. None of the cases to which we have been referred provides any authority against that analysis. In *R v CPW*, as we have noted, counsel amended his initial application and only sought and obtained an order from the date of referral. In *R v Blackburn*, counsel asserted a customary practice, but made no submissions as to the relevant statutory provisions; and the court granted the application without any further analysis.
30. In both *R v Gittins v Khan* and *R v Alecu*, neither this court nor the costs judge was concerned with work undertaken in relation to an application to the CCRC. The decisions in those cases, therefore, cannot provide support for the present application. The important distinction is that an application for leave to appeal is the process which initiates criminal proceedings before this court. The work of preparing the advice and grounds of appeal will generally be covered by a representation order granted in relation to the Crown Court proceedings. But if it is not, for example because the defendant was privately paying in the Crown Court or is making a renewed application for leave to appeal, this court or the Registrar has power to grant a representation order which may cover the preparation of the advice and grounds. We would add, with respect to the costs judge, that we doubt the correctness of the decision in *R v Alecu*; but it is not necessary or appropriate for us to determine that point in this application, and we therefore say no more about it.
31. It follows that the question which we posed at the beginning of this judgment must be answered in the negative. This court does not have jurisdiction to determine an application for representation in relation to work undertaken for the purposes of an application to the CCRC. There is accordingly no purpose in considering the broad merits of the claim for remuneration which Mr Wells puts forward, for in the absence of jurisdiction this court has no discretion to give weight to those merits. We recognise that this decision will be a disappointment to Mr Tredget's legal representatives, but it is a decision which is compelled by the plain words of the legislative provisions.

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Lower Ground, 18-22 Funnival Street, London EC4A 1JS  
Tel No: 020 7404 1400 Email: [Rcj@epiqglobal.co.uk](mailto:Rcj@epiqglobal.co.uk)