[2007–09 Gib LR 180]

R. v. SEDGWICK

SUPREME COURT (Dudley, Ag. C.J.): November 25th, 2007

Legal Aid and Assistance—choice of counsel—overseas counsel—cannot be assigned to legal aid case if merely "admitted" as barrister under Supreme Court Act, s.28(2) for purposes of individual case—Legal Aid (Fees and Expenses) Rules, r.2 requires him to be "enrolled" as barrister of Supreme Court—to be member of panel created under Legal Aid and Assistance Act, s.8(1) before can be directly assigned to legal aid case—if not directly assigned to legal aid case, overseas counsel can represent client if engaged and instructed by legal aid solicitor assigned to case

Legal Aid and Assistance—fees and expenses of counsel—overseas counsel—legal aid solicitor to persuade Registrar that instructing leading overseas counsel reasonable and necessary in legal aid case—fees treated as "disbursements" of legal aid solicitor under Legal Aid (Fees and Expenses) Rules, r.7

Legal Aid and Assistance—fees and expenses of counsel—overseas counsel—Registrar's calculation of fees of leading overseas counsel in legal aid case guided but not restricted by Schedule to Legal Aid (Fees and Expenses) Rules, which only apply to fees of directly-appointed counsel—Registrar to consider mark-up allowed for local QCs, market rates, level of expertise of counsel and whether suitable for complexity of case

The defendant was charged in the Supreme Court with indecent assault.

The defendant pleaded not guilty to five counts of indecent assault. He was granted legal aid at the pre-trial review and the Supreme Court (Schofield, C.J.) expressed the view that he needed representation by leading counsel.

The Crown submitted that the defendant was not entitled to have specialist English leading counsel assigned to represent him on legal aid because (a) although the Chief Justice could "admit a person as a barrister . . . for the purpose of any particular case" under s.28(2) of the Supreme Court Act, such a barrister could not be assigned in the same way as local counsel, since r.2 of the Legal Aid (Fees and Expenses) Rules required that barristers assigned to legal aid cases had to be "enrolled" and not merely "admitted" as barristers of the Supreme Court; (b) in addition to being "enrolled," a barrister appearing in legal aid cases had to be a member of the panel created under s.8(1) of the Legal Aid and Assistance Act 1980, membership of which required him to be both "admitted" and "enrolled" and practising in the jurisdiction; (c) although the original Supreme Court Act did not distinguish between barristers "admitted" and those "enrolled," the subsequent insertion of s.28 created the distinction and the Act, as amended, had to be applied as it now stood, ignoring the original version; and (d) if overseas counsel were permitted to appear in legal aid cases, there should be the same restraints on counsel's fees as for local legal aid counsel, as dissimilar fees would be contrary to the spirit of the Rules.

The defendant submitted in reply that specialist English counsel could be assigned to him on legal aid because (a) the original Supreme Court Act did not distinguish between counsel "enrolled" and those "admitted" as barristers of the Supreme Court and therefore all counsel, irrespective of their status as Gibraltar or overseas counsel fell within the ambit of r.2 of the Rules and could be assigned to his case; (b) if overseas counsel could not be directly assigned to his case on legal aid, he could still be represented by such counsel who could appear as instructed by his legal aid solicitor and whose fees should be treated as a "disbursement" of the solicitor under r.7 of the Rules; and (c) the provision of specialist counsel was a legitimate entitlement under the legal aid legislation to ensure his right to a fair trial was respected.

Held, granting the defendant representation by leading counsel:

(1) The defendant was entitled to be represented by leading counsel. Overseas counsel could not be assigned to represent him on legal aid in the same way as local counsel, however, as, under r.2 of the Legal Aid (Fees and Expenses) Rules, counsel had to be "enrolled" as a barrister of the Supreme Court and a member of the panel created under s.8(1) of the Legal Aid and Assistance Act and not merely "admitted" under s.28(2) of the Supreme Court Act. The distinction between "enrolled" and "admitted" had been made by the addition of s.28(2) and the legislation could not

be interpreted as though provisions subsequently superseded still remained in force (para. 6; para. 9).

(2) The defendant could still be represented by overseas counsel, however, even if he were not directly assigned to the case since he could be engaged to appear and instructed by the local legal aid solicitor assigned to the case (para. 3; para. 12).

(3) The defendant's legal aid solicitor bore the burden of persuading the Registrar that it was reasonable and necessary for the defendant to be represented by overseas counsel since there was no local leading counsel with the necessary expertise or that such counsel was unable to act. If the Registrar agreed, overseas counsel's fees could be treated as a legitimate "disbursement" of the legal aid solicitor under r.7 of the Rules. The Registrar (as taxing officer) would need to consider who it was intended to instruct and whether the barrister's level of expertise was appropriate for the case and the proposed fee. The Registrar's calculation of counsel's fees should properly be guided, but not restricted, by the Schedule to the Rules (which only applied to the fees of local counsel). The Registrar should take account of the mark-up allowed for local Queen's Counsel and for complex cases under rr. 6 and 8 of the Rules as well as the fact that specialist counsel's fees would be sensitive to market rates (paras. 11–12).

Legislation construed:

Legal Aid (Fees and Expenses) Rules 1981, r.2: The relevant terms of this rule are set out at para. 4.

r.7: "(1) . . . [T]here shall be allowed to counsel all disbursements reasonably and necessarily made by him in connection with the defence or the appeal, as the case may be."

Supreme Court Act 1960, s.28: The relevant terms of this section are set out at para. 5.

L. Yeats for the Crown;
A. Christodoulides for the defendant.

1 **DUDLEY, Ag. C.J.:** The defendant has been arraigned and pleaded not guilty to 5 counts of indecent assault on a girl under the age of 16 years. Essentially, it is alleged that he indecently assaulted his daughter on 5 occasions between June 1981 and October 1984.

2 The defendant has been granted legal aid. At a pre-trial review conducted by Schofield, C.J., on June 11th, 2007, the Chief Justice formed the view that this was a case in which there was a need for the defendant to be represented by leading counsel. It is a view which I share.

3 Whilst of course the underlying issue is one of remuneration, as the argument by counsel evolved it became apparent that the discrete point which required determination was whether specialist English counsel

could be appointed under the Legal Aid and Assistance Act 1960 on the same basis as local counsel would be appointed, or whether he could appear having been instructed by the defendant's legal aid solicitor. If the latter, whether English counsel's fees are limited to the fees contained in the schedule to the Legal Aid (Fees And Expenses) Rules 1981, or whether they are to be treated as a disbursement under r.7 of those rules.

4 The relevant statutory provisions are to be found in the Supreme Court Act 1960, and the Legal Aid (Fees and Expenses) Rules. Rule 2 of the Legal Aid (Fees and Expenses) Rules provides: "In these rules, unless the context otherwise requires—'Counsel' means a person *enrolled* as a barrister under section 14 . . . of the Supreme Court Act . . ." [Emphasis supplied.]

5 In the Supreme Court Act 1960, that provision, as amended and re-numbered as s.28, provides:

> "(1) The Chief Justice may approve, admit and enroll as barristers of the Supreme Court any person who satisfies the following requirements, that is to say—
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> (a) he has been called to the Bar in England or Northern Ireland, or has been admitted as an advocate in the Court of Session in Scotland;
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> (b) he is not at the time of his application for admission disbarred, or removed from the roll of advocates in Scotland, or suspended from practice as such barrister or advocate;
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> (c) since his admission in the United Kingdom he has completed a period of at least six months' pupillage with a practising barrister of at least five years professional standing in Scotland, or has completed a practical training course approved by the Council of Legal Education in England or by an equivalent body in Northern Ireland, the Republic of Ireland or Scotland; and
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> (d) he intends on admission to practise in Gibraltar either alone or in partnership with another barrister or solicitor.
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> (2) The Chief Justice may admit a person as a barrister under this section for the purpose of any particular case or cases, notwithstanding that such person does not satisfy the requirements of paragraphs (c) and (d) of sub-section (1), and may impose on a person so admitted such restrictions and conditions as he may think fit."

6 It is apparent that s.28(2) of the Supreme Court Act allows for a barrister to be admitted but not enrolled, that he may appear in a particular case or cases. It follows that giving r.2 its ordinary meaning only barristers (or solicitors) who are enrolled as opposed to merely admitted can be

assigned a case on legal aid. Such an interpretation is further supported by the provisions of s.8 of the Legal Aid and Assistance Act which provides for the setting up of a panel of barristers willing to act for persons receiving legal aid and for their remuneration in accordance with the prescribed rules. It is axiomatic that only a barrister who is both admitted and enrolled and therefore practising in the jurisdiction can properly be included in the panel.

7 Mr. Christodoulides relies upon the original provisions of the Supreme Court Act 1960, in which no equivalent to s.28(2) of the Act is to be found, to urge that there is no real distinction between the words "admitted" and "enrolled" and that therefore all counsel, whether admitted and enrolled or only admitted, fall within the scope of r.2. Whilst ingenious, I think that argument fails to deal with the establishment of the panel under s.8 and indeed the principle of interpretation of statutes that a revised text of an Act is thereafter to be construed as a whole. Bennion, *Statutory Interpretation*, 2nd ed., at 191 (1992) puts it as follows:

> ". . . [I]t is submitted that under modern practice the intention of Parliament when effecting textual amendment of an Act is usually to produce a revised text of the Act *which is thereafter to be construed as a whole*. Any repealed provisions are to be treated as never having been there, so far as concerns the application of the amended Act for the future." [Emphasis supplied.]

8 The corollary that the inserted provision is to be treated as always having been there must, in my view, also be right—particularly in the present case, given that the insertion of s.28(2) is not inconsistent with the provisions of the Legal Aid and Assistance Act or Rules made under it.

9 For these reasons, I conclude that counsel who is admitted but not enrolled cannot be assigned to appear for a legally-aided defendant. The consequential issue which arises is whether the fees of such counsel can be allowed as a disbursement pursuant to r.7 of the Legal Aid (Fees and Expenses) Rules. It is not in issue that there is nothing in the Act or the Rules which suggest that it is not an allowable disbursement.

10 Mr. Yeats, however, submits that it would be inconsistent with the spirit of the legislation that outside counsel should be paid at a rate higher than that allowed for local counsel. Whilst I certainly sympathize with the proposition that outside counsel should not be remunerated more generously than local counsel, the plain meaning of the rules as regards disbursements is such that, in my view, outside counsel's fees are not subject to the limits imposed by the Schedule to the Rules. Moreover, I would be loath to imply any such provision because there is no need to imply it and also because I am mindful that to do so could potentially restrict the defendant's right to a fair trial.

11 That of course does not mean that there is no restriction as to whether outside counsel are to be instructed and if so, the level of remuneration payable. By virtue of r.7, disbursements need to be both reasonable and necessary and, of course, if in excess of £25, need to be approved by the Registrar.

12 In a case such as this, it is incumbent upon the defendant's legal aid barrister or solicitor to persuade the Registrar that it is reasonable and necessary to have leading counsel and that either there is no local leading counsel with the necessary expertise or that such counsel is not able to act. Once the Registrar determines that outside counsel is necessary, she needs to consider who it is that it is intended to instruct and whether the level of expertise is commensurate with the case and the fee. Moreover, in considering the proposed fee, she can properly be guided, but not restricted, by the Schedule to the Rules, taking account of the mark-up allowed for Queen's Counsel and for cases of complexity by virtue of rr. 6 and 8, but also taking account of the fact that market rates will dictate the level of fees of specialist practitioners.

Orders accordingly.