

REPORT FROM THE APPEAL COMMITTEE
THE CLERK OF THE PARLIAMENTS' REFERENCE REGARDING
CRIMINAL LEGAL AID TAXATION

ORDERED TO REPORT:

Background

1. This report concerns the taxation of costs of counsel in appeals to the House of Lords in criminal matters which are legally aided. The Clerk of the Parliaments has referred certain general questions to the Committee for its guidance, but his reference was prompted by the following specific cases as to which it is first necessary to set out the relevant details.

The criminal appeals

2. *Reg v Powell and Daniels* was heard together with *R v English*. Mr Peter Feinberg QC and Mr B Squirrell represented the appellants Powell and Daniels; Mr Christopher Sallon QC and Mr J Knowles represented the appellant English; Mr A Scrivener QC and Mr W Boyce represented the Crown. The Appellate Committee sat on Monday, Tuesday and Wednesday 17, 18 and 19 February 1997. Judgment was delivered on 17 July 1997. The appeals in *Powell and Daniels* were dismissed but the appeal in *English* was allowed. The decisions are reported at [1997] 3 WLR 959.

3. The consolidated appeals in *R v Mills and Poole* were heard together with *R v Brown*. Mr Michael Mansfield QC, Miss Vera Baird and Mr G Ross represented the appellants Mills and Poole; Mr P Chand QC and Mr N Hillier represented the Crown in that case. Mr Richard Henriques QC and Mr I McMeekin represented the appellant Brown and Mr M Shorrocks QC and Mr N Conrad represented the Crown in that case. The appeals were heard on the 8 and 9 April and on 10 April until 12.40 p.m. Judgment was delivered on 24 July 1997 when the appeals were dismissed. The decisions are reported at [1997] 3 WLR 447 and 458.

4. All the appellants in the appeals were in receipt of Criminal Legal Aid Certificates granted by the Court of Appeal (Criminal Division). Each certificate provided for representation by leading and junior counsel.

The Taxations

5. Taxation of the costs of the legally aided defendants in *R v Mills and Poole* took place on 24 February 1998.

Mr Mansfield's fees were charged at £22,300 and allowed at £12,300.

Miss Baird's fees were charged at £22,537.50 and allowed at £7,850.00.

Mr Ross's fees were charged at £17,287.50 and allowed at £11,412.50.

Taxation in *R v English* took place on 25 February 1998.

Mr Sallon's fees were charged at £34,600.00 and were allowed at £21,600.00.

Mr Knowles fees were charged at £17,592.00 and allowed at £13,592.00.

Taxation in *R v Powell and Daniels* took place on 26 February 1998.

Mr Feinberg's fees were charged at £37,000.00 and allowed at £16,000.00
Mr Squirrel's fees were charged at £35,943.81 and allowed at £15,823.42

The Lord Chancellor was not represented at any of these taxations. There has been no appeal against any of them by counsel.

6. Taxation in *R v Brown* has not yet taken place. For various reasons, the bill of costs was not lodged until 1 June 1998. Counsel submitted their fees on 27 January 1998 with a request that they should be taxed independently of the solicitors' bill. Mr Henriques' fees were charged at £28,500.00, and Mr McMeekin's at £18,750.00.

The Annex hereto contains a schedule setting out the fees charged by counsel for the defendants in the Crown Court, before the Court of Appeal and before this House; the costs allowed on taxation at each stage; and the fees charged by prosecuting counsel at each stage.

Clerk of the Parliaments' reference

7. On Tuesday 31 March 1998 the Taxing Officer reported the taxations and the situation with regard to the bill of costs of *R v Brown* to the Clerk of the Parliaments in accordance with Standing Order XII. The Clerk of the Parliaments considered that the size of the fees involved in each of these appeals raised certain matters of principle which ought to be considered by the Lords of Appeal. Accordingly, he referred these matters to the Appeal Committee. His action was recorded in the Minutes of the House of Lords on Monday 6 April 1998. Following the reference, the Clerk of the Parliaments invited the Appeal Committee to consider the following questions:

- (1) What is the measure by reference to which counsel's fees payable out of public funds in criminal matters should be assessed?
- (2) If the measure of such fees is, or involves an assessment of, what is fair and reasonable remuneration for the work done, is such an amount to be fixed by reference to the fee which a comparably qualified advocate would receive in a non-publicly funded case? Or by reference to the rate of remuneration which would be sufficient to produce a reasonable annual income? Or by reference to the rate of remuneration which would be paid out of public funds to those who are not lawyers but have comparable skills?
- (3) Whether, at the taxation of such fees, the Lord Chancellor's Department (as the body liable for the disbursement of such fees) can, and/or should, be represented before the taxing officer?
- (4) In the light of the answers to these questions, whether the fees charged by counsel in these appeals were proper and if not at what figure each should be taxed?

Hearing

8. The Committee invited the Bar Council, the Law Society, the Lord Chancellor's Department and the individual barristers concerned in the criminal appeals to make both oral and written submissions. Those invited were represented as follows:

Mr Sidney Kentridge QC and Mr David Perry appeared for the Bar Council.

Mr Lawrence Collins QC and Miss Anna Coles appeared for the Law Society.
Mr Nigel Pleming QC and Mr Nicolas Hilliard appeared for the Law Chancellor's
Department.

Mr James Munby QC appeared for the individual counsel.

Oral submissions were heard on 17 and 18 June 1998. We are very grateful for the help we received from all counsel.

The statutory structure

9. Taxation is the process whereby a person chargeable with a bill for legal costs is able to have the proper amount of such costs fixed by the court. In the ordinary case before legal aid was introduced, the person claiming the costs lodged an itemised bill with the taxing officer: the person liable to pay the costs brought in objections to the items or amounts claimed. When legal aid was introduced the amount of costs recoverable from the legal aid fund or other public funds was directed to be fixed by taxation. In the present case, we are concerned with the taxation of costs payable to counsel under the Legal Aid Act 1988 in criminal cases.

10. Section 25 of the Act provides for payment out of public funds of the costs of legal representation. Section 34(1)(e) of the Act gives the Lord Chancellor power to make regulations which:

"(e) make provision for the remuneration and payment of the expenses of legal representatives and for the courts, persons or bodies by whom, and the manner in which, any determinations which may be required for those purposes are to be made, reviewed or appealed;"

Section 34(9) and (10) of the Act provide as follows:

"The Lord Chancellor, in making regulations for the purposes mentioned in sub-section (2)(e) above as respects any description of legal aid work, shall have regard, among the matters which are relevant, to -

- (a) the time and skill which it requires;
- (b) the general level of fee income arising from it;
- (c) the general level of expenses of legal representatives which is attributable to it;
- (d) the number and general level of competence of legal representatives undertaking it;
- (e) the effect of the regulations on the handling of the work;
- (f) the cost to public funds of any provisions made by the regulations.

(10) Before making regulations for the purposes mentioned in sub-section (2)(e) above, the Lord Chancellor shall consult the General Council of Bar and the Law Society."

We draw particular attention to sub-section 9(b) which requires the Lord Chancellor to have regard to "the general level of fee income" arising from the remuneration for which he is making provision in respect of legal aid work.

11. The Lord Chancellor has made regulations under the powers conferred by the Act, the most important of these for present purposes being the Legal Aid in Criminal and Care Proceedings (Costs) Regulations 1989. Those regulations do not directly apply to proceedings in the House of Lords, save that the costs of proceedings in the House of Lords payable under section 25 of the Act are to be determined by such officer as may be prescribed by order of the House of Lords: see Regulation 18. The prescribed officer is the Principal Clerk of the Judicial Office. Although the Regulations do not directly apply to costs in the House of Lords, all those represented before the Committee were of the view, and we agree, that the principles applicable in other courts under the regulations are equally applicable to criminal legal aid taxation in the House of Lords.

12. Regulation 3 defines "the appropriate authority" as meaning the Registrar in the case of proceedings in the Court of Appeal; an officer appointed by the Lord Chancellor in the case of proceedings in the Crown Court and the Legal Aid Board in the case of proceedings in the Magistrate Court. Regulation 3(2) authorises the appropriate authority to appoint determining officers to act on its behalf. Regulation 4 then provides:

"4(1) Costs in respect of work done under a Legal Aid Order shall be determined by the appropriate authority in accordance with these Regulations.

(2) In determining costs, the appropriate authority 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."

Under Regulation 9 counsel's fees can fall into one of three categories. About 80 per cent of all cases in the Crown Court have, since 1 January 1997, fallen into the category of graduated fees which were introduced on that date. In this category, the amount of counsel's fees is fixed according to formulae set out in Schedule 3. The second category of fees are those which have a fixed maximum amount. Finally there are fees which are fixed entirely by taxation, being fees in very long trials and appeals to the Court of Appeal. Fees in this last category are to be allowed by the appropriate authority "at such amounts as appear to it to be reasonable remuneration for the relevant work": see Regulation 9(5) proviso (b) and (6).

13. In July 1995 the Chief Master of the Supreme Court Tax Office issued Taxing Officers' Notes for Guidance ("TONG"). They are designed to assist determining officers in the exercise of their discretion. Paragraph 1.11 of TONG provides that the following are relevant factors to be taken into account -

"(a) the importance of the case, including its importance to each defendant in terms of its consequences to his livelihood, standing or reputation even where 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."

14. The Regulations make no provision for the representation of the Lord Chancellor on taxations in lower courts. The view is apparently taken that it is inappropriate for the Lord Chancellor to be represented before an officer of his own Department. If, and only if, counsel choose to appeal the determining officer's decision to the Taxing Master do the rules provide for the Lord Chancellor to have the right to be represented; see Regulation 15(6) and (7). The Lord Chancellor can himself appeal from the Taxing Master to the High Court; Regulation 16(5).

15. That is the legal structure within which taxation of counsel's fees in criminal cases in the lower courts is conducted. In the House of Lords the taxation is conducted by the Principal Clerk with the assistance of a Taxing Clerk. The express directions as to the principles which he is to apply are very limited. In the Green Book Direction 9 provides *inter alia* as follows:

"(b) The length of the hearing, the complexity of the issues as indicated by the speeches delivered in the House, and the general level of fees in analogous appeals will be taken into account.

(d) The hours spent by counsel in preparation are not generally of assistance to the Taxing Officer when assessing the quantum of counsel's fees at any stage of the proceedings."

Direction 10 provides for an appeal against the Taxing Officer's decision, first by way of review to the Clerk of the Parliaments and thereafter by way of petition to the House of Lords. It provides expressly that "an appeal lies on principle but not on quantum".

16. The Principal Clerk has from time to time invited the Lord Chancellor's Department, as the Department which is liable to pay counsel's fees when taxed, to be represented at taxations. However, the Department has always declined to take part in them. Similarly, in the only reported appeals against the Taxing Officer's decision on taxation the Lord Chancellor's Department was not represented: see *A T and T Istel Limited v Tully* (No. 2) [1994] 1 WLR 279.

The subject matter of this report

17. As we have said, the Clerk of the Parliaments has referred to this Committee for guidance certain questions as to the basis on which taxations of criminal fees should be conducted in the House of Lords. It is important to make it clear what this report does not deal with.

18. It became clear during the hearing that there could be no question of this Committee itself fixing the amount of the fees payable to counsel. The fees in *R v Powell and Daniels*, *R v English* and *R v Mills and Poole* have all been taxed by the Principal Clerk and counsel have not appealed those taxations. We are satisfied that in those circumstances, the time for

appeal having expired, the taxed amounts are now final. It was suggested in argument that the taxed amounts could be reopened by the Committee because of the terms of Standing Order XII of the Standing Orders of the House of Lords regulating judicial business which provides:

"XII ORDERED, that the Clerk of Parliaments shall appoint such person as he may think fit as Taxing Officer, and in all cases in which this House shall make any order for payment of costs by any party or parties in any cause, the amount thereof to be certified by the Clerk of the Parliaments. The Taxing Officer shall tax the Bill of Costs so ordered to be paid, and ascertain the amount thereof, and report the same to the Clerk of the Parliaments or Clerk Assistant; . . . and the Clerk of the Parliaments or Clerk Assistant *may* give a certificate of such costs, expressing the amount so reported to him as aforesaid . . . and the amount in money certified by him in such certificate shall be the sum to be demanded and paid under or by virtue of such orders aforesaid for payment of costs." (emphasis added).

19. It was submitted that, because the Standing Order only provides that the Clerk of the Parliaments "may" give a certificate, he had a discretion whether or not to give one and, therefore, the matter was not closed until he had given his certificate. In our view that is not the right construction. It is clear that any certificate the Clerk of the Parliaments can give has to state the amount reported to him by the Taxing Officer. Therefore, the withholding of the certificate cannot authorise any variation of the taxed amount. In our judgment the word "may" was used in order to cover the case where the paying party was prepared to pay the taxed costs without the formality of a certificate, in which case there would be no need for the issue of a certificate.

20. It follows that neither this Committee nor the Clerk of the Parliaments can now alter the amounts due to counsel under the taxations which have taken place. As to *R v Brown* taxation has not yet taken place. It will be a matter for the Taxing Officer to consider in accordance with the principles set out in this report.

21. The purpose then of this report is to give general guidance to the Taxing Officer and the Clerk of the Parliaments. Such guidance relates to the correct approach to taxation of counsel's fees in criminal appeals to the House of Lords. But it may indirectly affect the approach to taxation of such costs in the lower courts, since it is common ground that the principles applicable in this House are the same as in the lower courts.

Should the Committee give guidance?

22. Whilst in no way challenging the right of the Clerk of the Parliaments to seek, or of this Committee to give, guidance in the discharge of his functions, Mr Kentridge for the Bar Council submitted that we should not do so in the circumstances of this case. He pointed out that taxation was a process whereby the Taxing Officer draws on his own knowledge and experience of the "going rate" for comparable work in reaching his view as to a reasonable fee, and that that is a matter on which the members of this committee have little, if any, relevant experience. He said that the system was working well, and that there was no need for our intervention.

23. We cannot accept those submissions. So far as this House is concerned, the relevant officers have rightly sought guidance because of doubts as to the correct approach to the very

large sums being claimed by counsel in legally aided matters. More generally, there is public concern about the cost of legal aid, and in particular about the rate at which counsel are being remunerated out of public funds. We accept that we lack the relevant experience to quantify counsel's fees in any given case. But there are certain matters of basic approach which can usefully be addressed.

Question 1 - The measure by reference to which counsel's fees payable out of public funds should be assessed

24. Because the Costs Regulations do not directly apply to costs incurred in the House of Lords (see Regulation 18) there is no statutory provision laying down the basis on which the costs are to be taxed. However, all parties are agreed that the same principles are applicable as apply to fees in the Court of Appeal, namely to allow "such fee in respect of such work as [the appropriate authority] considers reasonable in such amount as appears to it to be reasonable remuneration for such work". This formula merely poses the real problem, viz. how does one approach the question of what remuneration is "reasonable" for the work of a barrister?

25. It is manifest that widely differing views are entertained as to what is "reasonable". Thus counsel have consistently been claiming fees much in excess of what have been allowed. Presumably, this has been done because they consider they are entitled to the fees they are claiming. However, the evidence put before us by the Lord Chancellor's Department showed that in the year 1994/1995 fees allowed to counsel amounted to only 69 per cent of the fees claimed by them. In the years 1995/1996 and 1996/1997 the proportion of claimed fees allowed was 44 per cent and 55 per cent respectively. The Bar Council entertains doubts about the accuracy of the statistics. However, these figures are borne out by the amounts claimed and those allowed in the present cases. Annex 1 shows that at every stage - Crown Court, Court of Appeal and House of Lords - counsel claimed substantially larger fees than were allowed. In many cases the differences were very great. Thus in *R v Powell and Daniels* leading counsel for Powell had his brief fee at trial taxed down from £10,000 to £7,000, his brief fee in the Court of Appeal from £6,000 to £3,000 and in the House of Lords from £35,000 claimed to the £14,000 allowed. £35,000 and £14,000 cannot possibly both be reasonable remuneration for the work done.

26. There are three possible reasons for such disparity between the amounts claimed and those allowed. The first is that counsel are putting forward claims based on false facts e.g. as to the number of hours worked. This is something against which taxing officers will naturally be on guard but no one suggests that has occurred in any of the cases presently under consideration. But there is no doubt that the system of claiming on the basis of hours worked is capable of being abused. Secondly, the disparity could be due to counsel's clerks deliberately pitching the amount claimed at a very high figure so as to ensure that, when it is taxed down, even the taxed down figure amounts to a good fee. Thirdly, the disparity so far as the costs in this House are concerned, could be due to there being no generally known going rate for counsel's fees because there are comparatively few criminal appeals to this House.

27. As to the second of those reasons, the Bar Council, through counsel, accepted that it would be unprofessional conduct if counsel were knowingly to claim an excessive fee. There is a fine line between claiming a fee at the top end of the reasonable scale and claiming a fee which is obviously excessive. A number of the fees claimed in the present case would appear

to be excessive. It may be that this can be explained by the final factor, namely that the rates payable in the House were not known to counsel's clerks. But in any event, in our view, the culture of making very high claims with a view to them routinely being taxed down by the Taxing Officer is not a good one. Unless the fees claimed appear to have been calculated on the same principles as those appropriate for taxation, they can be of no value to the Taxing Officer and he would be justified in ignoring them altogether.

28. As to the third factor, counsel's clerks put in evidence that they had difficulty in finding out what was the going rate in the House of Lords because there were so few appeals in criminal matters and therefore there was no body of experience on which to draw. For the same reason, the Principal Clerk in taxing bills in criminal appeals has little experience on which to base his determination, beyond the experience of the great increase in the amounts claimed by counsel.

29. There is, therefore, a real need to seek to find some clearer and more objective test of what constitutes "reasonable remuneration". In the words of the written submission by The Law Society, what is needed is to "identify a benchmark, that is an objective and rational criterion, or a set of objective and rational criteria, according to which the actual rate payable can be determined". It is to this point that the second question is directed.

Question 2 - Should the "reasonableness" of fees in the public sector be fixed by reference to (a) fees obtainable by counsel in the private sector (b) a reasonable annual income or (c) remuneration paid out of public funds to e.g. doctors?

30. All those represented before us were agreed that, since virtually all criminal work is publicly funded, fees obtainable by counsel in the private sector are not indicative of any general market rate and that their use would be misleading and unhelpful. As to fixing fees by reference to a reasonable annual income, quite apart from the difficulties of making the necessary adjustments, to ask what is a reasonable annual income merely forces the question one stage back: what is a reasonable income for a barrister? £20,000 per annum, £100,000 per annum, £500,000 per annum? As to using remuneration paid out of public funds to, for example, doctors, Mr Lawrence Collins QC for The Law Society submitted that target incomes for barristers could be set in much the same way as they are for medical and dental practitioners. But in our view it is not the function of a taxing officer to fix target incomes for barristers by reference to the earnings of other professions. He is concerned to allow the barrister a fee which is reasonable in relation to fees which are generally allowed to barristers for comparable work and the earnings of other professions are irrelevant to this calculation. They would be proper to be taken into account (although the practical difficulties of doing so are considerable) by someone charged with fixing levels of fees for the profession as a whole, such as the Lord Chancellor when he determines levels of graduated fees. But a taxing officer, in deciding what is a reasonable fee in a particular case, must take the general levels of fees as given and use them as the basis of his taxation.

Alternative guidance

31. In the course of the hearing, various other ways of assisting in fixing "reasonable" remuneration were considered. In our opinion, some of these are of considerable importance.

Graduated fees

32. The system of graduated fees was introduced by amendments to the 1989 Costs Regulations made in 1996 and 1997. Such regulations were made under section 34 (2) (e) and (9) of the 1988 Act which requires the Lord Chancellor to consult the Bar Council and The Law Society and to have regard, amongst other things, to "the general level of fee income arising from it" i.e. from the remuneration to be paid. We were informed that the Costs Regulations and the amendments were the product of long negotiations between the Bar, The Law Society and the Lord Chancellor. Although it is not said that there was agreement as to the rates to be included in graduated fees, it is obvious that there was a high degree of consensus in the approach. Everybody accepts that in making the Regulations the Lord Chancellor complied with the statutory duty of taking into account the general level of fee income which would be produced by the fees to be allowed.

33. We therefore have, for the first time, a quantification of what constitutes reasonable remuneration for the purposes of legal aid in respect of the work which is covered by the graduated fees scheme.

34. The graduated fees laid down by Regulation 9 and the Third Schedule cover ordinary trials lasting not more than ten days, which constitute some 80 per cent of Crown Court cases. Simply by applying the formula in Schedule 3 to the appropriate class of case, one can find the standard fee payable for any trial lasting up to ten days. Thus, leading counsel acting for two defendants in a murder trial (class A) lasting eight days with two hundred pages of prosecution evidence will receive a total remuneration (including refreshers) of £10,929.40. Leading counsel acting for two defendants in a ten day trial for possession of articles for terrorist purposes with four hundred and fifty pages of prosecution evidence and forty prosecution witnesses will receive a total (including refreshers) of £14,993.80. These figures for eight day and ten day trials give some guidance as to the type of fee to be considered "reasonable" in moderately heavy and responsible cases. If leading counsel had not been briefed to appear in the House of Lords' cases the taxation of the costs of which are being considered, this is the kind of work on which they would have been engaged and those are the fees that they would have recovered for it. Therefore, the graduated fees provide a general indication of the range of appropriate fees. As comparables, graduated fees have an advantage over the only other comparables which will in practice be available to the Taxing Officer, namely the fees which have been allowed on other taxations of comparable cases. This advantage is that they are immune to the ratchet effect whereby a high fee allowed in one case, perhaps on exceptional grounds, is then used as a precedent for another case. In the absence of normal market forces to bring such a process back to reality, the ratchet effect is likely to push fees higher than those which would be negotiated at arms' length. According to the Lord Chancellor's Department's statistics over the years between 1990/1991 and 1996/1997 (during which the Retail Price Index increased by 18.6 per cent) the average payment per bill for counsel's fees under Criminal Legal Aid in the Crown Court and Court of Appeal increased by 56.20 per cent.

35. But we emphasise that in no way do the graduated fees provide the full answer. Graduated fees have deliberately not been adopted as applicable to appeals to either the Court of Appeal or the House of Lords, and for very good reason. The preparatory work involved in an appeal to this House will often be very considerable, and its product will not always be apparent at the hearing of the appeal. For example the House of Lords to a greater extent than lower courts requires counsel to research not only the law of the United Kingdom but very often the law of other Commonwealth countries. Such research may throw up no relevant law on the point. In that case the only sign of what may be considerable research to prove the

negative is nothing more tangible than a statement to the House that there is no relevant authority.

36. However, providing that the Taxing Officer is alert to the demand for legal research on appeals and the time that such research can consume, the graduated fee does provide helpful guidance as to what, in the context of Legal Aid, is reasonable remuneration for counsel. Certainly it shows that a claim for a £35,000 brief fee plus refreshers at £1,000 per day, for a three day appeal to the House of Lords, is wholly out of line. Even the £14,000 allowed for the brief fee is, in our view, generous.

Prosecution fees

37. In the past it has apparently been difficult to introduce as a relevant factor the fees paid to the other side. We do not understand why this is so. At least in fixing the fees payable on appeal to the Court of Appeal or to this House we can see no merit in excluding such information. On the contrary the fees paid to the prosecution ought to provide guidance as to the proper fee for defence counsel. Although there may be exceptions, we can see no reason why in general the fees paid to both sides in the same appeal and both out of public funds should be very different. Both sides have to do the same research and must be prepared to argue all the points which the other side raises. The amount charged by prosecuting counsel will have been the product of some negotiation between him and the Crown Prosecution Service. In our view this provides a limited but helpful cross check against market forces. As the Annex to this report demonstrates, for the most part defence counsel have been paid more in these cases than prosecuting counsel. It is hard to see any justification for this.

Fees in the court below

38. The fees set out in the Annex (both claimed and allowed) show a sharp increase as between the lower courts on the one hand and the House of Lords on the other. This may reflect special additional work required to be done at the final appeal. But in our view the mere fact that the case is being heard in the House of Lords does not justify such an increase. In some cases (for instance where this House is being invited to overrule a line of cases binding on the Court of Appeal) the argument in the House of Lords will be quite different to that in the Court of Appeal, and therefore more research will have been required. On the other hand, the issues in the House of Lords may be narrower than those in the Court of Appeal. If so, the brief fee should reflect such diminution in work. Again counsel may have been instructed for the first time in the House of Lords, in which case he is entitled to be remunerated for "getting up" the brief for the first time unlike counsel who have been with the case throughout.

Consultation with Court of Appeal Taxing Master

39. Because of the relatively small number of criminal appeals to the House of Lords, the Principal Clerk has limited experience in taxing the bills for such appeals. The question was raised during the hearing whether the Principal Clerk could properly consult those who tax bills in the Court of Appeal so as to take advantage of their greater experience and expertise. All those represented before us considered that such consultation would be proper, and we agree.

Hours worked multiplied by hourly rate

40. It is clear from the evidence put in on behalf of the individual counsel that their clerks attributed great weight to the number of hours worked in preparing the brief and then multiplied those hours by an hourly rate to produce the brief fee claimed. The hourly rate did not appear to be a rate always charged by that counsel for all his work but a rate adopted by the clerk for the purposes of fixing the brief fee on that appeal. This despite Direction 9 (d) "the hours spent by counsel in preparation are not generally of assistance to the Taxing Officer . . .".

41. The use of hours worked multiplied by an hourly rate will seldom be helpful in taxing counsel's fees. Regulation 4 (2) (a) requires the appropriate authority to have regard to "the time involved" and TONG 1.11 (e) repeats this requirement. But the time expended by counsel is not necessarily the time to be remunerated. Only the time reasonably expended is to be remunerated: otherwise the inefficient, slow worker, gets better pay for the same work than the efficient worker. Add to this the risk (not a feature of these present cases) of counsel consciously or unconsciously exaggerating the time expended and the limitation on the hours worked approach becomes even more apparent. When the hours worked out of court are then multiplied by an hourly rate substantially higher than that payable as refreshers for hours spent in court, the dangers of the system are very obvious.

42. In our view the policy that hours spent by counsel in preparation are not generally of assistance is a sound one and should be re-affirmed.

Question 3 - Can and should the Lord Chancellor be represented on taxations?

43. There can be no doubt that the Lord Chancellor is entitled to be represented before the Principal Clerk on taxation of criminal legal aid costs and on any appeal from his decision. Such taxed costs are payable out of the Lord Chancellor's vote: it would require some statutory provision to exclude a paying party from being heard on the taxation.

44. It appears that, at least in the past, the remarks of Lord Denning M R in *Storer v Wright* [1981] 1 QB 336 at page 347 have been treated as establishing that on a Legal Aid taxation no one is entitled to be heard in opposition to the claim put in. Lord Denning talked of legal aid taxation being different "in that there is no one to oppose it"; he asked "who is to challenge his bill? There is no one to contest the amount at all". In our judgment those words, insofar as they suggest that no one is entitled to appear to oppose a legal aid taxation, are not the law. In the absence of words excluding him, the Lord Chancellor would be entitled to be heard on a taxation in this House. As to taxations in the courts below, it may be that the structure we have set out, giving the Lord Chancellor express rights to appear on appeals from the determining officer and the Taxing Master, implicitly excludes any right to be heard at the first instance taxation hearing before the determining officer. But of course the Lord Chancellor can change this position by making the necessary regulation, to allow him to be heard.

45. Hitherto the Lord Chancellor has never been represented (despite requests from the Principal Clerk) in any taxation or appeal from legal aid taxation in this House. In the courts below he has on occasion been represented on appeals on points of principle. From the point of view of the Taxing Officer it would obviously be helpful if he were represented so as to point out the possible objections to the claims: it is extremely difficult for someone in a judicial capacity to hold the balance fairly between two parties when he only hears the argument in favour of one of them. We would have expected it to be in the public interest, as

the taxed costs of both counsel and solicitors play such a large part in the overall cost of legal aid, to seek to hold down to reasonable figures the costs allowed on taxation. It is for the Lord Chancellor, not for us, to administer the system and there may be administrative reasons why such representation is not expedient, e.g. the costs of such representation exceeding the amount saved to public funds. But from the point of view of the administration of justice, it would be much better for criticisms of the amount of counsel's fees to be made to the Taxing Officer at taxation and, if they are sound, to be reflected in the reduced sum awarded to counsel rather than to be the subject of adverse comment in Parliament or the media.

46. Finally, under Direction 10 an appeal only lies against the Principal Clerk's determination on taxation in this House on a matter of principle and not on quantum. In the course of argument it appeared that it was a widely held view that a question of quantum could never be a matter of principle, such view being based on *A T and T Istel Limited v Tully (No. 2)* (above). That was an appeal against two decisions of the Principal Clerk. One concerned civil legal aid, where he taxed down leading counsel's brief fee from £25,000 to £9,000; the other concerned criminal legal aid, in which he had taxed down leading counsel's brief fee from £52,000 to £18,000. In argument counsel had submitted that the fees allowed fell so far short of what was appropriate as to be *Wednesbury* unreasonable. The appeals were dismissed on the short ground that there was no point of principle involved. In our judgment it is clear that the only decision in that case was that the sums to which the brief fees had been reduced were not *Wednesbury* unreasonable: it was not a decision that a question of quantum could never be a point of principle. Therefore, if the Principal Clerk were to award an unreasonably high fee, the Lord Chancellor could in an exceptional case challenge that fee as a matter of principle on the ground that it was so high as to be irrational.

Question 4 - Were the fees charged by counsel proper and, if not, at what figure should each be fixed?

47. For the reasons previously given, we decline to answer this question.

48. We have drawn attention to the undesirability of a culture of bargaining between counsels' clerks and the Taxing Officer, although we have acknowledged that this may be an appearance which is explained by lack of experience of the principles upon which costs in the House of Lords are taxed. But the ultimate responsibility for the fees allowed to counsel under legal aid rests, at the general level, with the Lord Chancellor and at the particular level, with the taxing officers. The fees are not fixed by counsel themselves. We have offered some guidance which may go some way to alleviate concern about the payment of fees which appear out of line with the norm, but general levels of barristers' fees are not within our control any more than that of the counsel in an individual case.

Link to report and all papers

<https://publications.parliament.uk/pa/ld199798/ldselect/ldappeal/145/14501.htm>