

DECISION OF AUDITOR – COUNSELS' FEES – CRIMINAL

<b>DATE OF DECISION</b>	14.01.00
<b>NAME OF CASE</b>	HMA –V- [REDACTED] C
<b>CASE TYPE</b>	Appeal against conviction (murder)
<b>AUDITOR</b>	Neil Crichton, Court of Session
<b>COUNSEL/SOLICITOR ADVOCATE</b>	SC and JC
<b>AMOUNT(S) AWARDED</b>	£1250 per day (SC) conduct of appeal £600 per 8 hr day (SC) preparation  £725 per day (JC) conduct of appeal £350 per day (JC) preparation
<b>FEATURES</b>	<p>Fee note related to fees from August 1996 to December 1997. 1<sup>st</sup> day of appeal was 04.11.97. Last day of appeal was 17.12.97.</p> <p>Board accepted that it was reasonable to allow SC 128 hrs preparation.</p> <p>Auditor describes case as “unique” novel and complex.</p> <p>Appeal lasted 8 days during which S17 Crime &amp; Punishment (Scotland) Act 1997 came into effect – first case to be heard under the new Act.</p> <p>Court accepted that preparation of written submissions saved many days of court time (8 days instead of 16 days).</p> <p>Appeal had “unique features”:-</p> <ul style="list-style-type: none"><li>(a) the difficulty of re-opening a case concluded on 10.10.84</li><li>(b) importance to client – life imprisonment – 20 years minimum</li><li>(c) original trial lasted 6 weeks resulting in 30 volumes of evidence to be read and summarised</li><li>(d) the public interest in the appeal</li><li>(e) complex issues of fact</li><li>(f) in addition to the evidence at the original trial the evidence in HMA –v- Granger required to be read</li><li>(g) the issues arising out of Ground of Appeal 10 – the misdirection by the trial judge</li></ul>

## FEATURES

- (h) unique issues of law – Grounds of Appeal based on New Evidence and application of newly introduced legislation
- (i) legal issues regarding how the court was required to address an issue of New Evidence from a witness who now sought to give different evidence
- (j) issues arising under the legislation regarding New Evidence sought to be adduced from a new witness
- (k) issues regarding New Evidence from two witnesses
- (l) the necessity of considering and summarising extensive police interviews
- (m) SC agreed to present the Appeal for co-appellant at the request of the court
- (n) Crown employed a PF and JC exclusively on this Appeal for 6 months and a Senior Depute worked on preparation of the hearing for one month
- (o) extensive Opinions of the presiding Judge – reported in SLT – 34 pages
- (p) written submissions prepared on an Order of the Court

COURT OF SESSION, SCOTLAND

R E P O R T

by the

AUDITOR OF COURT

in causa

[REDACTED]

Appellants

Against

HER MAJESTY'S ADVOCATE

Respondent

EDINBURGH. 14th January 2000

1. This taxation arose out of a dispute between the Scottish Legal Aid Board ("the Board") and two Counsel, Messrs. G.C. Bell, Q.C. and Jamie Gilchrist, Advocate, in relation to fees claimed by Counsel for representing [REDACTED] [REDACTED] in his Appeal against Conviction in the reference by the Secretary of State for Scotland in terms of Section 124(3) of the Criminal Procedure (Scotland) Act 1995. In the course of the Appeal, Section 17 of the Crime & Punishment (Scotland) Act 1997 came into effect and in the absence of any transitional provisions it applied to this Appeal. The Hearing lasted eight days.
2. At the Taxation on 19th October 1999, the Board were represented by [REDACTED] [REDACTED] Senior and Junior Counsel were present with [REDACTED] [REDACTED]

## 3. Faculty Services Ltd., on behalf of Counsel, issued Fee Notes as follows:

Senior Counsel:

10.08.96	Note seeking sanction for employment of Junior Counsel	£ 55.00
18.09.96	Sec of State's Ref – Consultation at Shotts Prison A205/CA967587/01	200.00
13.11.96	Consultation Shotts Prison (with J. Gilchrist)	200.00
09.12.96	Framing Grounds of Appeal to include extensive reading of notes (3 days Preparation)	2000.00
	Framing Petition for Interim Liberation	200.00
12.12.96	Hearing before Appeal Court for Interim Liberation to include consulting with appellant re bail conditions, etc. (half day)	450.00
23.03.97	Note re further preparation for Appeal	90.00
04.06.97	Day perusing papers. Consultation with agents (1.5 hrs)	350.00
05.06.97	Solemn Appeal Hearing: Seeking leave to amend grounds in light of new Legislation	350.00
14.07.97	Consultation with Appellant explaining new Appeal provisions, etc.	250.00
18.08.97	Attendance at meeting with Edinburgh agents discussing further procedure	75.00
26.08.97	Day reading and noting papers; 8.30 – 1.00; 2.00 – 6.00; 7.30 – 11.00	*
27.08.97	Reading papers: 8.30 – 1.00; 2.00 – 3.30; 7.30 – 11.00	*
28.08.97	Consultation to finalise Grounds of Appeal As amended	250.00

28.08.97	19.30 – 23.00 reading further volumes of notes	£	*
07.10.97	Preparation reading productions and Framing submissions: 8.30 – 13.00; 14.00 – 17.00; 20.00 – 23.45		*
08.10.97	Hearing (Procedural) re Appeal against Conviction	350.00	
09.10.97	Preparation for Appeal 8.30 – 13.00		*
10.10.97	Reading and noting evidence 8.30 – 13.00; 14.30 – 15.30		*
12.10.97	Reading and noting evidence 14.30 – 18.00		*
13.10.97	Reading and noting evidence 8.30 – 13.00; 14.00 – 15.30		*
14.10.97	Reading and noting evidence 14.00 – 15.30		*
15.10.97	Consultation to consider Crown Productions and advise on Appendix	350.00	
19.10.97	Preparation for appeal noting Evidence 8.30 – 11.00		*
20.10.97	Preparation for Appeal 8.30 – 12.00		*
21.10.97	Do. 13.30 – 18.00; 19.30 – 22.30		*
23.10.97	Noting further evidence for Appeal 8.30 – 10.30; 11.00 – 13.00; 14.00 – 18.00; 20.00 – 22.00		*
24.10.97	Noting further evidence and submission 8.30 – 13.00		*
26.10.97	15.00 – 18.00: preparation for Appeal		*
27.10.97	8.30 – 13.00: preparation for Appeal		*
30.10.97	Preparation for Appeal: 20.00 – 22.00		*
31.10.97	Preparation for Appeal; 8.30 – 13.00 14.00 – 17.00		*

01.11.97	Preparation for Appeal: 10.00 – 13.00	*	
02.11.97	Preparation for Appeal: 14.00 – 17.30; 21.00 – 23.00	*	
03.11.97	Preparation for Appeal Hearing 20.00 – 24.00	*	
04.11.97	Appeal First Day		1250.00
05.11.97	Appeal Second Day (adjourned after lunch)		1250.00
02.12.97	Preparation for continued Hearing 8.30 – 13.00	*	
08.12.97	Preparation for Appeal: 15.00 – 18.00; 19.30 – 24.00	*	
09.12.97	Solemn Appeal Hearing		1250.00
10.12.97	Continued Solemn Appeal Hearing		1250.00
11.12.97	Continued Solemn Appeal Hearing		1250.00
12.12.97	Continued Solemn Appeal Hearing		1250.00
16.12.97	Continued Solemn Appeal Hearing		1250.00
17.12.97	Final Day of Solemn Appeal		1250.00
			(+297%)
* as detailed above	Preparation Fee:- As noted above preparation involved reading and noting 6 weeks of evidence at original trial together with subsequent police interviews, TV programmes, and affidavits, together with substantial written submission covering authorities and new provisions on Appeal (Total time spent 128 hours; say 16 days @ 8 hours per day @ £600.00 per day		9600.00
<u>Junior Counsel:</u>			24,770
10.10.96	Preparation for Consultation and consideration of Grounds of Appeal; including reading of extensive transcripts etc. from 1984 Trial (3 days preparation) (3 x 350.00)		1050.00

13.11.96	Consultation with client at HMP Shotts (with G.C. Bell Q.C.)	120.00
20.11.96	Consultation with agents (Edinburgh at Anderson Strathern)	100.00
28.11.96	Framing draft Grounds of Appeal for revisal by Senior	150.00
12.12.96	Hearing on Petition for Interim Liberation (including consulting with client re bail conditions, etc.) ½ day (with G.C. Bell, Q.C.)	275.00
21.03.97	Draft Notes for Senior Counsel re further enquiries/preparation for Appeal	100.00
02.06.97	Preparation for Procedural Hearing (1/2 day)	175.00
04.06.97	Consultation with agents (with G.C. Bell, Q.C.)	205.00
05.06.97	Solemn Appeal Hearing (Procedural) (with G.C. Bell, Q.C.)	205.00
14.07.97	Consultation with client: explanation of new Appeal provisions and requirement to revise Grounds of Appeal (with G.C. Bell, Q.C.)	145.00
26.08.97	Framing draft amended Grounds of Appeal including considering and noting new Appeal provisions (Crimc & Punishment (Scotland) Act 1997) (1 day)	350.00
28.08.97	Consultation with agents; finalising revised Grounds and considering joint approach (co-appellant) (with G.C. Bell, Q.C.)	145.00
07.10.97	Indexing and referencing draft Submission by Senior Counsel and preparing for Procedural Hearing (1 day)	350.00
08.10.97	Solemn Appeal Hearing (Procedural) (with G.C., Bell, Q.C.)	205.00

15.10.97	Consultation: re joint List of Productions and Appendix (with G.C. Bell Q.C.)	205.00
21.10.97	Preparation for Appeal (1 day)	350.00
23.10.97	Preparation for Appeal (1 day)	350.00
24.10.97	Preparation for Appeal (1 day)	350.00
27.10.97	Preparation for Appeal (1/2 day)	175.00
28.10.97	Preparation for Appeal (1 day)	350.00
29.10.97	Preparation for Appeal (1 day)	350.00
30.10.97	Preparation for Appeal (1/2 day)	175.00
03.11.97	Preparation for Appeal (1/2 day)	175.00
04.11.97	Solemn Appeal Hearing: Day 1 (with G.C. Bell, Q.C.)	725.00
05.11.97	Solemn Appeal Hearing: Day 2 (with G.C. Bell, Q.C.) (Adjourned)	725.00
11.11.97	Preparation for continued Appeal (1 day)	350.00
08.12.97	Preparation for continued Appeal (1/2 day)	175.00
09.12.97	Solemn Appeal Hearing: Day 3 (with G.C. Bell, Q.C.)	725.00
10.12.97	Solemn Appeal Hearing: Day 4 (with G.C. Bell, Q.C.)	725.00
11.12.97	Solemn Appeal Hearing: Day 5 (with G.C. Bell, Q.C.)	725.00
12.11.97	Solemn Appeal Hearing: Day 6 (with G.C. Bell, Q.C.)	725.00
16.12.97	Solemn Appeal Hearing: Day 7 (with G.C. Bell, Q.C.)	725.00
17.12.97	Solemn Appeal Hearing: Day 8 (with G.C. Bell, Q.C.)	725.00 (= +256%)



09.02.98	Preparation for Advising of Appeal including Consultation with client and explanation of possible outcomes and consequent further procedure (1 day)	350.00
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10.12.98	Solemn Appeal Hearing (Advising)	500.00
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Prior to the Taxation, there had been discussions and a meeting between the Board, Counsel, Counsels' Clerk and the instructing Solicitor. These had proved unsatisfactory and on 14th July 1999 the Board wrote to Counsels' Clerk as follows:-

“Thank you for your letter of 22 June 1999.

Having considered this matter further, and after taking into consideration our meeting of 27<sup>th</sup> May, I am satisfied that an improved offer would prove fruitless in bringing this matter to a conclusion. It is quite clear that we are too far apart to reach some kind of compromise and I fear that this may simply be a matter which you will wish to lodge before the auditor of court for taxation.

With that in mind, I must formally advise that I rescind the offer previously made to counsel with the view that the entire claim be set before the auditor. Accordingly, any offer made previously cannot be founded upon in any future court proceedings.

I trust that this confirms the position and look forward to hearing from you in due course.”

By the time of the Taxation the Board had reconsidered matters and had conceded certain fees in Faculty Services' Fee Notes and the only matters outstanding were the rates charged by Senior Counsel for preparation and conduct of the Appeal. Parties agreed that the Fee Notes for Senior Counsel's fees should be taxed and Junior Counsel's fees would be taxed on a pro rata basis.

4. [REDACTED] had lodged Points of Objection as follows:

“A question or dispute has arisen in terms of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989, Regulation 11(1), requiring the matter to be referred for taxation to the Auditor of the Court of Session. Regulation 10(1) provides “counsel shall be allowed such fee as appears to the Auditor to represent reasonable remuneration, calculated in accordance with Schedule 2, for work actually and reasonably done, due regard being had to economy “. Schedule 2, Chapter II provides a table of fees for remuneration of senior counsel. The prescribed fee for a hearing in appeal against conviction – per day is £315. The preamble to Schedule 2 allows the Auditor to prescribe a fee for any item of work where the table of fees does not otherwise prescribe a fee and, also, to increase or decrease any fee set out in the table of fees, all subject to the proviso's laid out in paragraphs 2, 3 and 4 of the preamble.

During the course of the taxation the Board may seek to refer to the following authorities:

Note of Objections in causa Uisdean McKay v. H.M.A.

H.M.A. v. Birrell SLT 1994 480

(A copy of the Note of Objections has been provided to Mr. Bell)

The question or dispute centres on the following issues:

- The daily rate. Counsel seeks payment of £1250 per day. The Board has offered £650 per day. Counsel seeks to charge separately for preparation. The Board's offer subsumes all preparation.
- The rate at which preparation, if charged separately, be allowed is in dispute. Reference is made to counsel's fee notes as to the level of fees sought in respect of discreet claims for preparation."

██████████ was prepared to concede that it would be reasonable to allow Senior Counsel 128 hours preparation but without prejudice to his submissions to the level of remuneration for that work. He then turned to the Lord Justice Clerk's Opinion in Uisdean McKay v. H.M.A. (25<sup>th</sup> June 1999) at page 10 *et seq.*

"It is important, in our view, to bear in mind that the allowance of fees at a taxation in a legal aid case requires to be carried out within a statutory framework, in the present case that set out in Schedule 2. The rules bind the Auditor, and they bind counsel who are to be taken as having accepted instructions to act in return for fees determined in accordance with them.

Para. 2 makes specific reference to the general level of fees in the Table of Fees as one of the circumstances to which the Auditor is to have regard.

Where a case is of a type for which fees of those general levels would be appropriate, the Auditor would normally be expected to select a fee in line with those levels for any item of work for which no fee was prescribed. However, the case may be one which calls for a higher level of fee than that of the fees prescribed in the Table. This points to the terms of para. 3, namely that “because of the particular complexity or difficulty of the work or any other particular circumstances, such an increase is necessary to provide reasonable remuneration for the work”. Thus in such a situation the Auditor would be entitled under para. 2 to allow a higher fee than would have resulted from his allowing a fee in line with the general levels of fees in the Table. In that sense, therefore, para. 2 includes the possibility of an increase of the type referred to in para. 3.

Para 3 limits the power of the Auditor to increase any fee set out in the Table of Fees to cases where he is satisfied that the test set out in the paragraph is met. By implication he is then expected to select a fee which will “provide reasonable remuneration for the work”. The word “increase” does not in our view entail that he has necessarily to proceed by using some form of incremental calculation. It simply means that he can allow a higher fee. The case may be such that an incremental approach is unrealistic, because it is so different from any type of case for which the Table of Fees is appropriate. However, that does not mean that the Table of Fees can simply be ignored. Thus if the Auditor allowed a fee which was so high as to imply that the “ordinary” fee prescribed in the Table (i.e. the fee allowable where there were no particular circumstances to warrant an increase or a reduction)

was too low, it would be clear that something had gone wrong. In short, on the footing that a fee set out in the Table of Fees is otherwise prescribed, there requires to be a reasonable relationship between that fee and any higher fee which the Auditor is minded to allow, having regard to the features of the case which he considers to justify that higher level. In so far as certain observations by Lord Prosser in Geddes may suggest otherwise, we are unable to endorse his Lordship's views."

Counsel who were to be remunerated under the legal aid scheme must be taken to have accepted the constraints in the Regulation & Schedule set out in his Note of Objection. The level of fees Counsel might charge on a private basis is irrelevant. The Auditor must look at the whole circumstances of the case in applying the General level of fees in the Table. He does not have to apply a tariff nor does he have to use a form of incremental calculation. Any increase in terms of para. 3 must be justified with reference to named factors which involve a level of comparison of novel issues and complexities.

5. Senior Counsel referred to his Note, lodged with the Auditor, as follows:

"Senior Counsel respectfully requests the Auditor to fix an appropriate Fee for the work necessarily done in respect of the above appeal having regard to the following matters.

1. The fees payable fall to be paid in accordance with regulation 10(1) of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 and must therefore "Represent reasonable remuneration, calculated in accordance with Schedule 2, for the work actually and reasonably done, due regard being had to economy." There are two areas of dispute (1) Whether a Preparation Fee is justified under the Regulations and (2) Whether an enhanced fee is Appropriate for the Presentation of the Appeal.
  
2. It is submitted that in fixing a fee in this Appeal regard must be had to the extensive preparation necessary in order to present an Appeal of such importance and complexity. Such preparation was necessary and it was accepted by the Court that the preparation involving inter alia the preparation of written submissions saved many days of Court time. The preparation was not only necessary but was in the interests of economy. An Appeal which was expected to last in the region of four weeks was heard in eight Court days instead of 16 or more. The time recorded in preparation extended to 128 hours. Applying the rate suggested by the Board in *Uisdean McKay v. H.M.A* being £42.00 per hour a fee of £5376.00 would be arrived at. Applying the Rate allowed by the Auditor in that case being £150.00 per hour for Senior a fee of £19,200.00 would be appropriate.
  
3. In addition to allowing a reasonable fee for preparation it is submitted that the daily rate for Senior conducting an Appeal (being £315.00) falls in terms of the Regulations to be increased to take account of the unique

features of this Appeal including (a) the difficulty of reopening a case concluded on 10th October 1984 (b) the importance to the client who was sentenced to life imprisonment with a minimum of 20 years (c) the original trial lasted 6 weeks resulting in 30 volumes of evidence to be read and summarised for presentation of the Appeal (d) the public interest in the Appeal (e) the complex issues of fact which had to be argued in respect of insufficiency of evidence against [REDACTED] (f) the fact that in addition to the evidence at the original trial the evidence in HMA v. Grainger on a charge of alleged perjury arising from the Campbell Trial required to be read in support of Ground of Appeal 14 based on the Advocate Depute's questioning of the witness [REDACTED] (g) the issues arising out of Ground of Appeal 10 the misdirection by the Trial Judge (h) the unique issues of law arising from the fact that the principal grounds of appeal were based on the existence and importance of New Evidence and the Application of the newly introduced legislation on appeals (i) the legal issues arising as to how the Court was required to address an issue of New Evidence from William Love who had given evidence at the original Trial and now sought to give different evidence in the Appeal (j) the issues arising under the legislation in respect of new evidence sought to be adduced from Agnes Carlton who had not given evidence at the original Trial (k) issues also arose as to possible new evidence from [REDACTED] (l) the necessity of considering and summarising extensive taped police interviews with [REDACTED] (m) that it was agreed that I should present the Appeal for the co-appellant [REDACTED] at the request of the Court leaving Mr. McSherry

to cover the minor matters which were not common to both Appellants and were restricted only to issues of fact (n) the fact that the Crown as Respondents employed a Procurator Fiscal and Junior Counsel exclusively on this Appeal for six months and a Senior Depute R. Reed (now Lord Reed) worked exclusively on the Appeal in preparation for the Hearing for a period of one month (Please see Lord Reed's letter referred to supra) and (o) the extensive Opinions of the presiding Judges reported in Campbell v. HMA 1998 SLT 923 and extending to page 957 a total of 34 pages.

4. The Auditor is respectfully referred to the written submission prepared and submitted on behalf of [REDACTED] Said written submission was ordered to be submitted by the Court and accordingly was a necessary step in the Appeal. The refusal of the Board to pay a preparation fee in this instance fails to recognise that the written submission was prepared on an Order of the Court. At a recent meeting of The Lord Justice General with representatives of the Bar, Solicitors and representatives of the Board it is understood the Lord Justice General expressed his surprise at the Board's attitude to preparation particularly where, as here, the Court has ordered written submissions to be lodged. If the Board's attitude is to prevail it would mean only Counsel who appeared to argue the Appeal would be entitled to charge."

He also referred to a letter from the instructing Solicitor, John Carroll dated 14th June 1999 as follows:



“We thank you for your letter of 8<sup>th</sup> June 1999 and note what you say.

You will recall that Mrs. Milne telephoned your office following receipt of your original request for the file. She explained that the case was very much a “live” case and, in any event, the papers did not fall under those that require to be retained following payment of any legal aid account.

The case of [REDACTED] is presently under review of the Scottish Criminal Cases Review Commission and all papers require to remain in situ. We are dealing with a substantial quantity of material and extraction of all or any part of those papers requires a significant degree of effort resulting in major reconstruction work following their return. The Board has consistently held against meeting the cost of constructing or reconstructing papers and unless we receive some resolution to this issue then you would appreciate our concern.

We would obviously wish to assist the Board in whatever proper functions it seeks to carry out but we are also concerned about the reason behind your request. You held on to the [REDACTED] papers for many many months following submission of our account. The papers were passed from one member of staff to another and were examined, in great detail, during the standard audit of our account. Being an unusual case, and a substantial account, there is absolutely no doubt that the Board paid particular attention to what it was doing.

We now understand that the Board is in dispute with senior counsel and is refusing to pay for work that he was required to carry out during the appeal. We might be wrong but our information is that the Board is under the impression that no preparatory work is required to be carried out by counsel in arguing a complex and ground breaking appeal point such as was raised in this case. Obviously, that is a matter between the Board and counsel but you will doubtless appreciate that we have our own view on this and we take this opportunity of stating that it would be preposterous for the Board to hold that counsel should neither prepare or be paid for preparing a case such as this.

Is your request for this file related in any way to the dispute you have with counsel over his fee note? If it is connected in any way with that dispute then you will agree that there is something seriously wrong with the terms of your request for the papers.

In these very difficult times where the Board seems to operate on a policy whereby Solicitors are required to do more and more for less and less, you will appreciate that we are reluctant to become involved in any unnecessary and unchargeable work. If the Board has a statutory right to access to our file, at this stage, then perhaps reference can be made to that authority and we can give consideration to arrangements concerning such access. We do not wish to become involved in protracted correspondence on this matter and a brief reply to the points raised in this letter would be appreciated."

and from The Hon. Lord Reed, Parliament House, Edinburgh, EH1 1RQ, dated 15th June 1999 as follows:

“You asked me recently if I could give you an idea of the amount of work which had been involved for me when I represented the Crown in the above Appeal. I do not have any documentary records available to me, but I can estimate the work involved to the best of my recollection.

The Lord Advocate asked me to act as counsel for the Crown in the Appeal some months prior to the hearing. I was at that time working full-time as an Advocate Depute. I had some initial meetings with Miss Alison Di Rollo, the Procurator Fiscal Depute within Crown Office who had been working on the preparation of the appeal. She had prepared a file of notes for me, identifying the issues raised in the grounds of appeal and summarising the relevant authorities and possible lines of argument. She had also put together for me the essential documents: the transcript of the trial in [REDACTED] (which, from recollection, amounted to something between 10 and 15 volumes); the transcript of the trial of [REDACTED] (another 6 volumes or so); the witness statements taken by the police from the relevant witnesses, notably Love and his sister; and letters, transcripts and other documents emanating from Love subsequent to the original trial.

Miss Di Rollo had done some work on the case, as I have mentioned; and work had also been done on the case by junior counsel, Miss Morag Armstrong, and by my predecessor as senior counsel, the then Solicitor-

General, P.B. Cullen, Q.C. Nevertheless, I evidently had to familiarise myself with the papers to some extent at that stage, for the purpose of instructing further enquiries, and also for the purpose of appearing at a number of preliminary hearings before the Appeal Court. At these hearings, it was necessary to be able to give the court an estimate of the likely length of the hearing of the Appeal, and an idea of the issues which would be raised. I had to do a certain amount of preparation for those hearings, but I did not study the papers in depth at that stage. It was however soon apparent that a substantial amount of time would be required to prepare for the Appeal hearing itself, partly because of the sheer volume of documentation and the necessity to have a detailed knowledge of the facts of the case; partly because of the difficulty and novelty of the legal issues raised, and particularly because of the new legislation on appeal procedure which was to be considered for the first time in that appeal; and partly because of the importance of the case to Crown Office, both because of the intrinsic importance of the legal issues raised, and also because of the importance of the case to the public reputation of the Crown and the police.

At the preliminary hearings, the court set down the Appeal for a period which, from recollection, was one of about four weeks. That was I believe an unprecedented length of time for an Appeal hearing, and it gives an idea of the unprecedented difficulty and complexity of the case. The court also made it clear that it wanted substantial written submissions lodged before oral argument was presented, so as to focus the issues and shorten the length of the hearing.

Against this background, I requested a period of four weeks prior to the hearing during which I would be released from all other duties in order to prepare for the Appeal. Despite the serious resource implications, the importance of the Appeal was such that my request was granted. I accordingly spent a period of four weeks working full-time on the appeal prior to the hearing. Any shorter period would have been inadequate. I spent about the first week reading the documents in detail and taking notes of the facts for the purpose of drafting my written submissions. I spent about another week familiarising myself with the relevant law and researching the background to the new statutory provisions: for example, researching the Parliamentary proceedings and the reports of the various committees (including the Thomson Committee and the Sutherland Committee) which had looked into these matters. The remainder of the time was spent drafting my written submissions, which were the longest I have ever prepared for any court hearing, even in courts which have a predominantly written procedure (such as the House of Lords or the European Court of Human Rights). From recollection, my submissions were approximately 100 pages of typescript.

The hearing itself was interrupted as a consequence of my mother's death, shortly after the hearing had begun. As a result of her death, and my consequent inability to proceed with the hearing as planned, the court adjourned the hearing to a later date, approximately one month after the initial date. That meant that a certain amount of preparation had to be repeated prior to the second hearing, so as to bring oneself back up to speed again on the case. At the end of the day the hearing lasted something of the

order of 10 days, as I recollect. That was an exceptionally long time for an appeal to last, but was nevertheless considerably shorter than had originally been estimated. That saving in time was attributable to the amount of time earlier spent in preparation. In particular, the preparation of written submissions shortened very considerably the length of the oral hearing, both because they could be taken as read, and also because they had the effect of compelling both sides to focus their argument very clearly in advance of the hearing.

I should make it clear, in case there should be any doubt, that Miss Di Rollo and Miss Armstrong also carried out a considerable amount of preparation. Miss Di Rollo had read the entire papers before I became involved in the case, and was intimately familiar with them. Her role was essentially to be on top of the factual aspects of the case, to track down all relevant documents and witnesses, and to carry out such enquiries, by way of precognition or otherwise, as appeared to her to be necessary or were instructed by myself. Miss Armstrong, as junior counsel, provided invaluable assistance to me. She had of course studied the papers, as one would expect junior counsel to do, and assisted me greatly in preparing the legal argument. While the bulk of that work was done by myself, I benefited greatly from discussing the legal problems with her and refined aspects of my argument in the light of her comments. She also had to be in a position to take over the conduct of the appeal, should some emergency have arisen and the court was not prepared to adjourn the hearing. That in fact appeared to be a real possibility at one stage when I sought an adjournment in consequence of my

mother's death and the court appeared to be reluctant to grant the adjournment because of the sensitivity of the case.

Should you wish to have more specific information (e.g. as to the precise length of the Appeal hearing, the number of preliminary hearings, the length of my written submissions or the quantity of documentation which was supplied to me), then I can seek to obtain that information from Crown Office. I hope, however, I have given you in this letter an idea of the amount of preparation which was involved from my perspective.

Please do not hesitate to contact me if you require any further information."

Senior Counsel submitted that the work in this matter was exceptional. Notes of Appeal were lodged in November and December 1996 when the Appeal proceeded under a reference by the Secretary of State for Scotland (1) to Section 124(3) of the Criminal Procedure (Scotland) Act 1995 . During the course of proceedings Section 17 of the Crime and Punishment (Scotland) Act 1997 came into effect. Fresh Notes of Appeal had to be drafted urgently. This was the first case to be heard under the new Act (per Lord McCluskey's Opinion p.1). The case had been referred to the High Court of Justiciary by the Secretary of State for Scotland. The trial in which there had been six weeks' evidence was reopened. A separate trial of the main witness, [REDACTED] on the ground of perjury where there were twelve volumes of evidence had to be considered to identify any different evidence of the Police Officers. The main witness, [REDACTED] had been interviewed by police officers on a number of occasions over the years

and had changed his evidence. Did the change of evidence amount to new evidence? Was there independent support for this? He had to consider the significance of [REDACTED] evidence which was contrary to that given in the Grainger perjury trial and the matter of alleged police intimidation and manipulation of evidence which might have persuaded [REDACTED] to give evidence. For support of his claim for preparation fees, he turned to Lord Reed's letter of 15th June 1999. This set out in detail the time expended by the Crown in the preparation of this Appeal. The High Court had ordered written submissions. They were lengthy and complex. This had greatly reduced the time in Court and days originally set aside for the hearing were not needed. The instructing Solicitor confirmed this was a case where a fee for preparation was appropriate. Senior Counsel also claimed fees for the urgent and successful application for Interim Liberation. [REDACTED] did not oppose this nor did he dispute the sum sought. [REDACTED] had also conceded that 128 hours of preparation were reasonable. Both are items of work which fall under Paragraph 2 of Schedule 2. Had the Auditor been asked for a determination, he would have held that Counsel should be reasonably remunerated for such work in terms of said paragraph. In deciding his level of fee, Counsel had regard to the fees set out in Schedule 2.

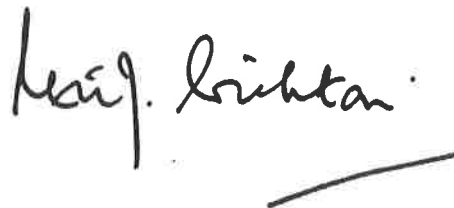
6. In reply, [REDACTED] approved Senior Counsel's approach to charging at a daily rate. He challenged whether Counsel should charge more for preparation than the prescribed daily rate for conducting the Trial. When considering his fee at this level, Counsel might have had consideration of fees he might render on a private basis. He could not simply pay lip service to the Regulations. The uplifts sought here are too much.



7. In view of [REDACTED] concessions, the only matters in dispute at Taxation were Senior Counsel's fees for preparation and conduct of the Appeal. In terms of paragraph 2 of Schedule 2 the Auditor may allow, "such fee as appears to him appropriate to provide reasonable remuneration for work with regard to all circumstances, including the general levels of fees in the said Table of Fees." where the Table of Fees in Chapter II does not provide a fee for any item of work. Paragraph 3 of Schedule 2 gives the Auditor power to increase fees in Chapter II. " where he is satisfied that, because of the particular complexity or difficulty of the work or any other particular circumstances, such an increase is necessary to provide reasonable remuneration for the work" . The work in this case is unique in the Auditor's experience. In coming to this view the Auditor found the letters from the instructing Solicitor, John Carroll dated 14th June 1999 and Lord Reed dated 15th June 1999 persuasive. Paragraph 4 of the letter from John Carroll states in clear terms that preparation is reasonable. Lord Reed's letter sets out in detail the work he undertook as the Advocate Depute who would present the Crown's case. The importance the Crown attached to this case can be gathered from this letter and the importance to the Appellant can be no less. There was a high level of public interest in the outcome of the Appeal. This was the first Appeal under the 1997 Act and that had come into effect during the Appeal. This necessitated the lodging of Amended Notes of Appeal. The novelty made the Appeal complex and difficult and placed great responsibility on Counsel. The Court had taken the step of ordering written submissions. These were of exceptional length. The duration of the Hearing was shortened by the preparation of written submissions but the Hearing still lasted nine days. Both the Lord Justice Clerk (page 3) and Lord McCluskey (page 2) remark on the great

assistance, both written and oral, provided by Counsel. The Auditor is satisfied that the novelty, complexity, difficulty and responsibility of the work justify the fees charged by Senior Counsel. In reaching this view, the Auditor has satisfied himself that there is a reasonable relationship between the fee prescribed in the Table and the fees sought by Senior Counsel. In his experience, the level of fees Senior Counsel might charge on a private basis are so much higher than those sought here that they could not have been in Senior Counsel's contemplation when charging his fee.

Accordingly, the Auditor taxes Mr. G.C. Bell, Q.C.'s fees at the sum of £24,470.00, with VAT in addition, and Mr. Jamie Gilchrist, Advocate's fee at the sum of £13,230.00, with VAT in addition.

A handwritten signature in black ink, appearing to read "M. J. Richter". The signature is written in a cursive style and is positioned above a horizontal line that serves as a separator.

AUDITOR OF THE COURT OF SESSION

12/10/20

F

12/10/20

Note by Senior Counsel  
Re  
Legal Aid Fees  
In Cause  
[REDACTED]  
against  
Her Majesty's Advocate

**Taxation Tuesday 19th October 1999 at 4.30pm**

Senior Counsel respectfully requests the Auditor to fix an appropriate Fee for the work necessarily done in respect of the above appeal having regard to the following matters.

1. The fees payable fall to be paid in accordance with regulation 10(1) of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 and must therefore "Represent reasonable remuneration, calculated in accordance with Schedule 2, for the work actually and reasonably done, due regard being had to economy." There are two areas of dispute (1) Whether a Preparation Fee is justified under the Regulations and (2) Whether an enhanced fee is appropriate for the Presentation of the Appeal.
2. It is submitted that in fixing a fee in this Appeal regard must be had to the extensive preparation necessary in order to present an Appeal of such importance and complexity. Such preparation was necessary and it was accepted by the Court that the preparation involving inter alia the preparation of written submissions saved many days of Court time. The preparation was not only necessary but was in the interests of economy. An Appeal which was expected to last in the region of four weeks was heard in eight Court days instead of 16 or more. The time recorded in preparation extended to 128 hours. Applying the rate suggested by the Board in *Uisdean Mackay v HMA* being £42 per hour a fee of £5,376 would be arrived at. Applying the Rate allowed by the Auditor in that case being £150 per hour for Senior a fee of £19,200 would be appropriate.
3. In addition to allowing a reasonable fee for preparation it is submitted that the daily rate for Senior conducting an Appeal (being £315) falls in terms of the Regulations to be increased to take Account of the unique features of this Appeal including (a) the difficulty of reopening a case concluded on 10th October 1984 (b) The importance to the Client who was sentenced to life imprisonment with a minimum of 20 years (c) the original trial lasted 6 weeks resulting in 30 volumes of evidence to be read and summarised for presentation of the Appeal (d) the public interest in the Appeal (e) the complex issues of fact which had to be argued in respect of insufficiency of evidence against [REDACTED] (f) the fact that in addition to the evidence at the original trial the evidence in *HMA v [REDACTED]* on a charge of alleged perjury arising from the [REDACTED] Trial required to be read in support of Ground of appeal 14 based on the Advocate Depute's questioning of the witness Grainger (g) the issues arising out of ground of Appeal 10 the misdirection by the Trial Judge (h) the unique issues of law arising from the fact that the principal grounds of Appeal were based on the existence and importance of New Evidence and the Application of the newly introduced legislation on appeals (i) the legal issues arising as to how the Court was required to address an issue of New Evidence from [REDACTED] who had given evidence at the original Trial and now sought to give different evidence in the Appeal (j) the issues arising under the legislation in respect of new evidence sought to be adduced from [REDACTED] who had not given evidence at the original Trial (k) Issues also arose as to possible new evidence from [REDACTED] and [REDACTED] (l) the

necessity of considering and summarising extensive taped police interviews with [REDACTED] (m) that it was agreed that I should present the Appeal for the co-appellant [REDACTED] at the request of the Court leaving Mr McSherry to cover the minor matters which were not common to both Appellants and were restricted only to issues of fact (n) the fact that the Crown as Respondents employed a Procurator Fiscal and Junior Counsel exclusively on this Appeal for six months and a Senior Depute R Reed (now Lord Reed) worked exclusively on the Appeal in preparation for the hearing for a period of one month (Please see Lord Reed's letter hereinafter referred to and (o) the extensive Opinions of the presiding Judges reported in Campbell v HMA 1998 SLT 923 and extending to page 957 a total of 34 pages.

4. The Auditor is respectfully referred to the written submission prepared and submitted on behalf of [REDACTED]. Said written submission was ordered to be submitted by the Court and accordingly was a necessary step in the Appeal. The refusal of the Board to pay preparation Fee in the instance fails to recognise that the written submission was prepared on an Order of the Court. At a recent meeting of The Lord Justice General with representatives of the Bar, Solicitors and representatives of the Board it is understood the Lord Justice General expressed his surprise at the Board's attitude to preparation particularly where as here the court has ordered written submissions to be lodged. If the Board's attitude is to prevail it would mean only Counsel who appeared to argue the Appeal would be entitled to charge.
5. The Board as I understand the position wrote to my clerk offering an increase of the daily rate for attendance at the Appeal from £315 to £650 without any fee for preparation. The Mackay case turned on a factual issue and had none of the complicated issues set out in the foregoing heading. If £650 was appropriate for the Court Hearing in that case it is submitted the many additional factors set out above and in Lord Reed's letter clearly justify an increase on £650.
6. I requested a meeting with the Board's Representative to explain the issues in this Appeal and why I considered the increase offered did not meet the test in Regulation 10(1). After many attempts including offers to make the volumes of evidence available the Board finally agreed to a meeting on 27th May 1999.
7. The Meeting was attended by myself, Junior Counsel Mr Gilchrist, Mrs Cameron of instructing Solicitors and my Clerk Miss Ferguson. The Board were represented by four members of staff.
8. The Board much to my astonishment explained their attitude to preparation by expressing the view that as the Solicitor had read the Transcripts it would be a question of paying twice or three times for the same work if the Board allowed a fee for preparation to myself and my Junior. Such an approach reveals a complete failure to understand the elementary distinction between Counsel and Solicitor. I have no view on the necessity of the instructing Solicitor being paid to read through 6 weeks of evidence and for his attendance at the Appeal but it is absurd to suggest as the Board's Representatives did that there was no need for either myself or Junior Counsel to read transcripts which the Solicitor had already been paid for reading. It is outrageous to believe I could have presented an Appeal without reading the Transcripts. It equally outrageous to suggest that Junior Counsel should not have read the evidence. Junior Counsel's assistance was of course invaluable and I reject out of hand the Board's argument that the work done by myself and Junior Counsel was a duplication of work for which the Solicitor had already been paid. It is of course somewhat surprising that the Solicitor has been paid an enhanced fee prior to considering Counsel's fees.
9. It was agreed at that meeting that I would produce a letter from the Advocate Depute setting out the work done by the Respondents in preparation for the Appeal. My Clerk wrote on 22nd June 1999 enclosing a copy of Lord Reed's letter. A copy of his letter is enclosed and the Auditor is respectfully referred to its terms.

10. Notwithstanding the agreement that the Board would consider the representations made at the meeting on 27th May and any letter from the Advocate Depute the Board in fact then rejected the representations made and withdrew all offers without even adhering to their original offer. The remit to the Auditor followed the Board's letter dated 14th July 199 by which they withdrew all previous offers. As I understand the position they now offer the standard fee of £315 for each day of the hearing and refuse to pay anything for preparation. A letter dated 124th July 1999 addressed to my Clerk is referred to for its terms from which the Auditor will note "Any offers made previously cannot be founded upon".
11. The Representatives of the Board sought to rely on fees paid in important appeals such as [REDACTED] v HMA and [REDACTED] v HMA both 5 judge cases. As I was Counsel in these cases and I did not consider the work done in any way compared with the [REDACTED] appeal I would respectfully submit these cases offer no guidance. It is perhaps ironic that I represented Uisdean Mackay in his Appeal against conviction and did not consider the necessary preparation in any way matched this Appeal although I appreciate subsequent Counsel clearly took a different view.
12. I appreciate the Board are not required to pay a fee on the basis of fees payable in non legal aid cases. They have however recently agreed to pay Senior Counsel £900 a day when Agents were otherwise unable to get Senior Counsel to Represent a An appellatant. The Regulations clearly recognise that fees should recognise the particular circumstances of the presentation of an Appeal For all these reasons I would respectfully submit that the Fee of £15 offered is unreasonable and that a Fee be fixed recognising the extensive preparation involved and the important and novel issues canvassed at the Hearing of this Appeal.

In Respect Whereof

*Graham C Bell*

Graham C Bell QC

Parliament House  
16th October 1999.