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[redacted]

[redacted]
Legal Services Dept,
Scottish Legal Aid Board
DX ED555250
EDINBURGH 30

Please reply to: [redacted]
Your reference: [redacted]
Our reference: /
Date: 17 July 2001

Dear ~~Mrs~~ Haggarty,

HMA v [redacted] JS [redacted]

I enclose my written decision about the taxation of Mr Gebbie's fees in this case. No doubt Mr Gebbie will lodge objections.

Yours faithfully

K MacKenzie

Auditor of Court

P.S. I am writing this after today's mail has gone, so Mr Gebbie will not get it until the day after tomorrow, at earliest.

Ken.

Paisley 6 July 2001:

Act: Mr Gebbie, Advocate

Att: [redacted]

Having heard Mr Gebbie, and [redacted], agent for the Scottish Legal Aid Board on the question of Mr Gebbie's fees claimed for waiting days in this case, I continue the taxation for consideration.

Kmackenzie

Auditor of Court

Paisley 17 July 2001: Having resumed consideration of this matter I find that the days in question are not waiting days, as defined in the Criminal Legal Aid Board (Scotland)(Fees) Regulations 1989, and I find the Scottish Legal Aid Board, not liable to pay the fees claimed, nor to pay any part of my own fees in the matter.

Kmackenzie

Auditor of Court

This taxation is about one simple question –
What, in a criminal case, constitutes a waiting day for which counsel should be remunerated by the Scottish Legal Aid Board?

The Board is hereinafter referred to as "SLAB". The taxation arose from the refusal of SLAB to pay Mr G. Gebbie, Advocate, for 28 days on which Mr Gebbie had not been required to attend at Paisley Sheriff Court during the very protracted trial HMA V Singh & Another.

By the time the taxation began the days in dispute were reduced to 27 and during the taxation, they were, on [redacted] motion and of consent of Mr Gebbie, reduced to 25.

During the taxation I was referred to the following authorities.

(1) The Criminal Legal Aid Board (Scotland)(Fees) Regulations 1989 with particular emphasis on Regulation 10(1) quoted below.

(2) HMA v Birrell 1994 SLT 480

(3) A report by Sir Stephen Young, Sheriff at Greenock in a petition to the nobile officium by John Carroll, Solicitor, Glasgow.

(4) Reports by the auditor of the Court of Session in, firstly, HMA v Graham and secondly, HMA v Mahmood.

(5) Muirhead v Douglas 1979 SLT (notes) 17. Copies of all of these are appended to this report. During his submissions Mr Gebbie also made reference to the Human Rights Act and my duties as a public official in terms of it and the European Convention of Human Rights.

In support of his claim for fees Mr Gebbie argued that, having regard to the statutory provisions under which taxation of counsel's fees in this case proceeds, namely, regulations 10 and 11 of the Criminal Legal Aid Board (Scotland)(Fees) Regulations 1989, a day on which he has made himself available to the Court to perform work, even though he knows in advance that the Court will not sit on that day and he therefore does not attend court, is a waiting day. He said that the very fact that he was available, if required to attend, constitues work reasonably done in terms of the statutory provisions of which I now quote Regulation 10(1).

"10. Fees available to counsel: 10(1) 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. Regulation 10(2) deals with Value Added Tax and Regulation 11, in so far as relating to the Sheriff Court, deals with the mechanics of fixing the taxation and hearing objections to an auditor's report."

Mr Gebbie further argued that his presence in court was not necessary for a successful claim. He put it to me that he had made himself available to attend court not only on the days when his presence was required in court, but on days on which, by no fault on his part, he had been excused from attending by adjournments of the trial over one or more days, and that was sufficient. It was not necessary, he said, even for him to come to Paisley.

He referred me to Sir Stephen Young's report and to Muirhead v Douglas to show the consequences of not being available when required. These cases did not involve absences on days when it was known in advance that the cases would not call. In Muirhead the case in question had called in the morning, when the solicitor had pled not guilty, and had been continued to an indeterminate time later the same day, when the solicitor was found to be absent attending to other work. In Sir Stephen's case, Mr Carroll represented clients in Glasgow and Greenock Sheriff Courts, and had not, in Sir Stephen's view, made adequate timeous arrangements to prevent the consequence that the Greenock trial had to be adjourned because of his absence. Mr Gebbie asked me to infer from these cases that because of his duty to the Court to attend when required and the severe consequence of failure to do so he could not in advance have made any arrangements to work on the adjourned days in Paisley because he may have found himself with conflicting obligations had he done so.

Mr Gebbie's final argument was that as I am a public official in terms of the Human Rights Act 1988 and the Convention I have a duty to ensure that in my public capacity I have regard to not only his, but his wife's and his children's human rights and to deprive him of five weeks remuneration by refusing payment constitutes, in all the

circumstances of the case, prejudice to these rights, by depriving him of income and prejudicing his duty to aliment his wife and children.

[redacted] from SLAB based his argument firmly on the language of the regulation 10(1) which mentions only work actually and reasonably done. In his view, the case of HMA v Birrell and both reports by the auditor of the Court of Session in HMA v Graham and HMA v Mahmood support his argument that the prerequisite of payment of fees is work actually and reasonably done. In support of his arguments, he had sent me in advance a note of his submissions and of all the documentation supporting them. These, along with a copy of the case of Muirhead v Douglas, are attached to this report.

In my view the question of deciding whether Mr Gebbie is entitled to the fees claimed comes down to answering the first of two questions which Lord Coulsfield in HMA v Birrell poses at P484, line 7 et sec which I quote "..... as a matter of law there can only be two questions for the auditor to consider, namely whether work has actually and reasonably been done: and if work has been done, what is a reasonable fee for that work." I am not satisfied that by clearing his diary and being ready to attend court on the disputed days Mr Gebbie can reasonably be said to have done work on these days. At each adjournment in question he knew exactly on which day he would next be required to attend the trial, and on which day or days he would be freed from his duty to work at Paisley. Despite the short notice Mr Gebbie was, on those days on which he was freed from his duty to work at Paisley, free also to pursue his own devices. The fact that on three of the 28 original days it was accepted by him that he performed remunerative work demonstrates that freedom amply. The fact that he could not contract for work that would conflict with his continuing duty to represent his Paisley client when required by the court to do so is, in my view, not relevant. Neither can I find that by applying Lord Coulsfield's judgement to Mr Gebbie's circumstance that Mr Gebbie had worked on the days in question. In my view the essence of Lord Coulsfield's judgement lies at P.484 and the third line of the final paragraph on that page whe he says ".....when counsel so attends he makes himself available". That to me means that it is attendance that demonstrates availability to devote the whole day to the conduct of the trial and, in Lord Coulsfield's view, forms the basis for regarding counsel as performing work.

The first and second full paragraphs on page 484, where both the Lord Justice Clerk and Lord Traynor are quoted, in the case of Mackie v Gibb deal with counsel who attended court and are not, in my view, directly in point.

I am not able to extend the definition of a waiting day from a day on which counsel attends and thus demonstrates that he is both available and prepared to devote his whole day to a trial, to a day that counsel has kept himself available, but has not demonstrated that fact by attendance at court, and has therefore been free for the whole day to earn fees for any other work that may come his way, or to pursue his other devices.

So far as human rights are concerned, I cannot hold that the rights of counsel are prejudiced by his acceptance of a case which, in the event, earned him a comfortable living over a period of months, just because he was not remunerated for a number of days during its course. Neither can I believe that the human rights of his wife and children are thus prejudiced.

Because I have found that the Board is not liable to pay Mr Gebbie for the days at issue, neither can I find them liable to pay any of my own fees.

SCOTTISH LEGAL AID BOARD
MEMORANDUM

[redacted]

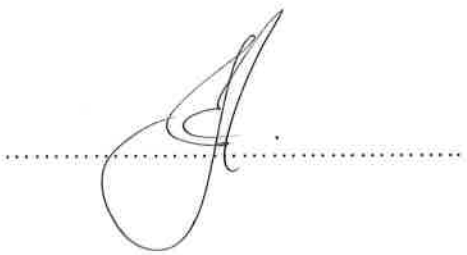
Date: 5 August 2002

Ref: JDH/SMcS

H.M.A. -v- [redacted]
WAITING DAYS

I enclose a copy of Sheriff Pender's Judgement for your information. It is favourable to the Board although, strangely, the Sheriff tries to distinguish the case of *Birrell*. Neither [redacted] nor I really understand this given that he is confirming what *Birrell* says in that counsel can only be paid for work "actually and reasonably done" whatever the circumstances.

However, it is favourable and we now await the Judgement of the Sheriff in Edinburgh.



[redacted]

19/4/01

SCOTTISH COURT SERVICE
Sheriffdom of North Strathclyde
Sheriff Clerk's Office
Sheriff Court House
St James Street
PAISLEY
PA3 2HW

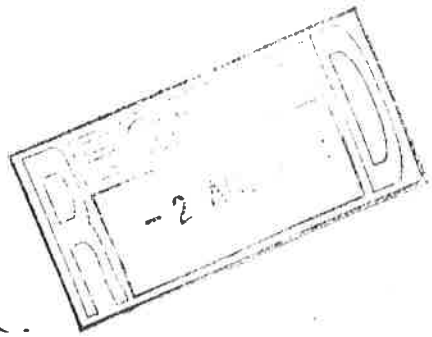
Your Reference: JOH/SMC.S

Our Reference: M3KRD

Date: 31.7.02.

Mr. J.D Haggarty
Scottish Legal Aid Board
DX 555230
Edinburgh 30

Dear Sir/Madam



CASE NO: HMA 119/98

CASE NAME: HMA v Jaswinder Singh.

I enclose for your information a copy of Sheriff Reiser's judgment in the above case.

Yours faithfully

Sheriff Clerk Depute

Ord ltr/mj

INVESTOR IN PEOPLE

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21/02

HMA 119/98 NOTE OF EXCEPTIONS AND OBJECTIONS BY GEORGE GEBBIE, ADVOCATE, TO THE DECISION OF THE AUDITOR OF COURT DATED 17 JULY 2001

PAISLEY, 31 July 2002: The Sheriff, having resumed consideration of the cause, repels the objector's Note of Exceptions and Objections and approves the Auditor's Report; of consent, Certifies the cause as suitable for the employment of Senior Counsel; Reserves meantime the question of expenses and appoints parties to be heard thereon within the Sheriff Court House, St James Street, Paisley on 21 August 2002 at 10 am.

Note:

The Trial of Jaswinder Singh took place in Paisley Sheriff Court from October 1998 to May 1999. Mr Gebbie, Advocate (hereinafter referred to as "the objector") represented Mrs Singh. The Court did not sit on a number of days for a variety of reasons and there were a number of such days where it was known in advance that the Court would not be sitting. The objector included these days in his account to the Scottish Legal Aid Board describing them as "waiting days".

On 6 July 2001 Mr McKenzie, Auditor of Court at Paisley Sheriff Court, conducted a taxation at which the objector and Mr Haggerty, Principal Solicitor for the Scottish Legal Aid Board were present. On 17 July 2001 Mr McKenzie issued his Note holding that the days in question were not waiting days as defined in the Criminal Legal Aid (Scotland) (Fees) Regulations 1989. It is against that decision that the objector lodged his Note of Exceptions and Objections.

I heard parties on 24 June 2002. The objector was represented by Mr Martin, QC while the Scottish Legal Aid Board was represented by Mr Stewart, QC.

At the outset Mr Martin indicated that he was not insisting on paragraph 2 of the Note of Exceptions and Objections but was advancing argument in respect of parts 1 and 3.

Mr Martin referred me to the Statutory background and in particular to:

(a) Criminal Legal Aid (Scotland) (Fees) Regulations 1989 Section 10(1) "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".

(b) Criminal Legal Aid (Scotland) (Fees) Regulations 1989 Schedule 2 Rule 2 "Where the Table of Fees in this Schedule does not prescribe a fee for any item of work the auditor shall allow such fee as appears to him appropriate to provide reasonable remuneration for work with regard to all the circumstances, including the general levels of fees in the said Table of Fees".

(c) Legal Aid (Scotland) Act 1986 Section 21(4) "Criminal Legal Aid shall consist of representation, on terms provided for by this Act – (a) by a solicitor and, where appropriate, by Counsel; .... and shall include all such assistance as is usually given by a solicitor or counsel in the steps preliminary to or incidental to criminal proceedings".

(d) Legal Aid (Scotland) Act 1986 Section 33(1) "Subject to subsections (3A) and (3B) any solicitor or counsel who acts for any person by providing legal aid or advice and assistance under this Act shall be paid out of the Fund in accordance with Section 4(2)(a) of this Act in respect of any fees or outlays properly incurred by him in so acting".

Mr Martin pointed out that "representation" was not defined in the Act but he submitted on the basis of the above Regulations and Act that where Counsel provides criminal legal aid he is entitled to be remunerated for it and that remuneration is reasonable

remuneration for work actually and reasonably done with due regard to economy and that the work referred to in the Regulations is the act of representation.

He submitted that it is clear that the auditor had decided that to qualify for payment for a waiting day Counsel needs to demonstrate his availability to devote his whole day to the conduct of the trial, and that availability is demonstrated by Counsel's attendance at Court on the days in question. He invited me to hold that the auditor had erred in law when he found that no work had been carried out on the days in question and in particular that he had erred in law when following *HMA v Birrell 1994 SLT 480* in requiring that there be some particular type of demonstration that Counsel was available for work.

Mr Martin invited me to deduce from the decision in *Birrell* that it was not the attendance by Counsel which was important; it was the fact that Counsel had made himself available and was able to devote the whole day to the performance of the work and in a trial which is running from day to day the existence of instructions to attend and the commencement of the trial are the indications that Counsel is available and able to devote each day to the conduct of the trial. In short what was necessary was Counsel making himself available to conduct the trial. He contrasted this with the situation where Counsel attends for the first day of a trial which does not start that day. He demonstrates his availability by turning up on each day the trial is likely to start. In an ongoing case, such as the case involving the objector, if Counsel is told at 4 pm that the court will not sit for the next 2 days, he is available for the work. That is the equivalent demonstration; it does not represent a difference in principle. If that is correct, submitted Mr Martin, then the reference to the fact that the objector on three waiting days was able to obtain other work was irrelevant to the question of whether work has been performed. The fact that he got other work was a saving but it does not show that he was not available for the main trial.

Similarly, if Counsel turns up on a particular day and is told at 10.15 that the trial will not be proceeding that day then he knows he is not required for the rest of that day. He is entitled to be paid for that day unless he does other work, for example a consultation or

opinion work. If, as in the present case, the objector is told at 4 pm one day that he will not be required for the next two days through no fault of his own, again he might get other work but it does not represent a difference in principle. The auditor had erred by ruling out the possibility that there may be other demonstrations of availability.

Mr Stewart for the Scottish Legal Aid Board invited me to repel the Note of Exceptions and Objections and to approve the auditor's report.

Mr Stewart confirmed Mr Martin's submission that the issue before me was what constitutes a "waiting day" in the context of "work actually and reasonably done, due regard being had to economy". Mr Stewart submitted that this was a mixed question of fact and law as was clear from the auditor's report.

In so far as the decision in *Birrell* was concerned Mr Stewart pointed out that it is clear from Lord Coulsfield's decision that it proceeded upon a practical concession by the Scottish Legal Aid Board and also that the question at issue was "work actually done" within the meaning of the legislation.

Mr Stewart submitted that Mr Martin's submission overlooked the core provisions of the Statutes. The issue was what work has reasonably been done, "work" as defined in the legislation. The critical question is not, therefore, whether to qualify for payment for a waiting day Counsel needs to attend but whether work has been done within the meaning of the legislation. While accepting that Mr Martin was correct to refer me to the terms of Rule 21(4) of the 1989 Regulations he pointed out that it was also necessary to bear in mind that into the existing tripartite relationship of client, Solicitor and Counsel the 1986 Act introduced a fourth party namely the Scottish Legal Aid Board. It was also necessary to remember the terms of Section 33(1) of the 1986 Act in that Counsel was entitled to be paid from the Fund "in respect of any fees or outlays properly incurred" by him.

Mr Stewart had three basic submissions:

(c) Separatim that the decision of Lord Coulsfield was binding on me and that what the objector was endeavouring to do was to have the decision in *Birrell* re-opened.

Mr Stewart also moved that I should certify the cause as suitable for the employment of Senior Counsel, to which there was no objection from Mr Martin, and it was also agreed that expenses of the hearing before me should be reserved.

Decision

In my view the auditor correctly identified the only issue to be determined, viz "What, in a criminal case, constitutes a waiting day for which counsel should be remunerated by the Scottish Legal Aid Board?" He decided that it was a day when Counsel attends court and thus demonstrates that he is both available and prepared to devote his whole day to a trial.

Mr Martin argued that the issue was a matter of law and not a question of discretion. On the other hand Mr Stewart argued it was a matter of discretion. Although he did not identify its source Mr Stewart quoted the well known dictum of Lord Reid in *Thomson v Corporation of Glasgow 1962 SLT page 107* "... the House of Lords would not overrule the discretion of a lower court merely because they might think that they would have exercised the discretion differently. ... I do not attempt to define the circumstances in which this House might take that course. We might do so if some irrelevant factor had been taken into account or some important relevant factor left out of account or if the decision was unreasonable, and we would no doubt do so if the decision could be said to be unjudicial".

Having listened carefully to both arguments, I have come to the view that it is a two stage process. Firstly, it has to be ascertained if there is a basis in law for the auditor deciding that in any given circumstance Counsel is entitled to be paid a fee by the Scottish Legal Aid Board. If the answer to that question is in the affirmative then it is a question of determining if the auditor has exercised his discretion properly in, for example, allowing a fee for an item of work where the Table of Fees does not prescribe a fee (1989

Regulations Rule 2), or in certain circumstances increasing a fee set out in the Table of Fees (Rule 3) or reducing a fee set out in the Table of Fees (Rule 4).

I agree with Mr Martin that the objector has no onus to discharge. There is either a legal basis for the objector's claim for payment for these "waiting days" or there is not. If there is a legal basis it has to be found in the 1986 Act and/or in the 1989 Regulations. Both Mr Martin and Mr Stewart were agreed that the principal Statutory bases were the four Sections I have quoted at page 2 hereof, and in particular Section 10(1) of the 1989 Regulations, viz "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".

Mr Martin argued that once a trial has started it is, in effect, counsel's availability which is the determining factor. I respectfully disagree. I agree with the auditor, in relation to the objector's claim for payment for "waiting days", that to be entitled to payment the objector required to attend Court (on a day which was put down for hearing the case) and thus demonstrated his availability to represent his client. In my opinion the objector cannot possibly say that on those days there was "work actually and reasonably done, due regard being had to economy".

Although I agree with the auditor's interpretation of that part of Lord Coulsfield's judgement in *Birrell* which he has quoted at page 3 of his Note, I do not consider that *Birrell* is particularly helpful. The facts are different. It is not exactly in point, and even if it were, I do not consider it is binding on me. There is authority that the decision of a single judge is not binding on the Sheriff Court, but is highly persuasive.

In *Birrell* the trial had not started. It was due to start on Thursday 10 October 1991. Senior Counsel attended only to be told that the trial would not be starting that day. He attended Court on 11 and 14 October expecting the trial to start, but it did not. He managed to do other work on the afternoon of 14 October and it was held that he was entitled to be paid a fee for 10 and 11 October.

Mr Stewart maintained that the fact that the objector had managed to obtain work on three of these days was relevant. He submitted that the objector's claim that he was available for work could not be reconciled with the fact that he obtained other work on three such days. This should be contrasted with the situation in *Birrell*. Senior Counsel was held entitled to a fee for the first two days he attended Court and the trial did not proceed. He presumably would also have been entitled to a fee for attendance on the third day (14 October) had he not found other work, but the fact that he found other work did not defeat his entitlement to a fee for the first two days.

In my view, the fact that the objector was able to obtain other work on three of these "waiting days" is neither here nor there. It does not support his argument nor detract from it. It has no bearing on the issue of whether or not there was work "actually and reasonably done".

Accordingly I have repelled the objector's Note, of consent I have certified the cause as suitable for the employment of Senior Counsel and reserved the question of expenses and fixed a hearing.