Auditor of the Court of Session

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LH

[redacted] V HM ADVOCATE
REF - 3979217313

EDINBURGH. 26 June 2015. At a diet of taxation on 18 June 2015 the Auditor heard representations by [redacted] on behalf of the Scottish Legal Aid Board and Mr Lewis Kennedy, Advocate. Having considered the papers submitted to him, the Auditor now taxes Counsel's Fee Note Number R192/HA130264/002, inclusive of VAT, at the sum of **ONE THOUSAND TWO HUNDRED AND SIX POUNDS AND EIGHTY FOUR PENCE (£1,206.84).**

The Auditor's fee, inclusive of VAT, is £59.52.

AUDITOR OF THE COURT OF SESSION

The Auditor
Kenneth M. Cumming, W.S.

Principal Clerk
Mrs Sheila Muir

AUDITOR, COURT OF SESSION

POINTS OF OBJECTION

for

THE SCOTTISH LEGAL AID BOARD

in the case of

[redacted]

3979217313

regarding the fees of

LEWIS KENNEDY, ADVOCATE

Date of Taxation: Auditor of the Court of Session, 2 p.m. on 15th June 2015.

Location: Auditor's chambers, 120 The Cowgate, Edinburgh.

Type of Case : Appeal against Solemn Sentence

1. Nature of the case:

A brief resume of the procedural history of this case is outlined below.

The appellant appeared on indictment at Glasgow Sheriff Court and pled guilty at a first diet on 13 August 2013. On 29 August 2013, the Sheriff (Mitchell) sentenced the appellant to a resultant sentence of 34 ½ months' imprisonment (or 140 weeks). The appellant appealed by note of appeal against sentence on the ground that the length of the sentence of imprisonment was excessive and disproportionate.

The appellant was refused leave to appeal by the (first) sifting judge (Lord Bannatyne) in his decision of 21 October 2013. He was subsequently successful at the second sift stage and the case proceeded to a sentence appeal hearing on 11 December 2013. The appeal appears to have been successful and according to counsel's submissions at paragraph 45 *"That the arguments were fully ventilated in the appeal documentation ultimately shortened the length of this appeal hearing. From memory, the Court did not have to hear from Counsel further - and simply and peremptorily granted the appeal."*

It appears therefore that the written submissions have done what they were intended to do and short circuited the need to have lengthy oral submissions by counsel. However, the dispute with counsel relates not to the documentation produced at appeal, but to the nature of the documentation produced at the second sift stage.

2. Fees allowable to Counsel

Fees of counsel are governed by the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 (the "criminal fees regulations"),

10. (1) Counsel shall be allowed such fee as appears to the Board, or at taxation the auditor to represent reasonable remuneration, calculated in accordance with Schedule 2 or 3, for work actually and reasonably done, due regard being had to economy.

3. Taxation of fees and outlays

The relevant provision states,

11. –(1) If any question or dispute arises between the Board and a solicitor or counsel as to the amount of fees or outlays allowable to the solicitor, or as to the amount of fees allowable to counsel, from the Fund in respect of legal aid in criminal proceedings in-
(a) the High Court, including appeals, the matter shall be referred for taxation to the Auditor of the Court of Session;
(b) the Supreme Court, the matter shall be referred for taxation to the Registrar of the Supreme Court; or
(c) the sheriff or district court, the matter shall be referred for taxation to the auditor of the sheriff court for the district in which those proceedings took place.

4. Nature of dispute:

Despite the extensive and unusual submissions drafted by counsel the dispute is actually very narrow and relates to the single issue of whether counsel is entitled to the fee prescribed under Schedule 2, Part 2, Chapter 1, Paragraph 1(b) *"Written submissions in Appeal against Sentence - £100.00"* or Paragraph 1(e) *"Opinion or note on appeal against sentence (where not otherwise prescribed)"* for documents which are provided in support of an application to the second sift.

There are two fees fee submitted by counsel under FSL Reference: R192/HA130264/001 &2.

Fee note #1 is a single charge for "Drafting Note of Appeal against (solemn) sentence - £82.00" which is the prescribed fee and has been paid in full.

Fee note #2 includes six separate entries and amounts to £1,236.70 inclusive of VAT. With the exception of the disputed entry all fees and outlays (mileage) have been paid as claimed. The only fee in dispute is the entry of 31 October 2013, which reads as follows:-

31-10-2013	Framing Written Submissions in support of appeal against sentence - for purposes of second sift application - potentially final exercise in advocacy in conduct of this appeal (written or oral) - separate and distinct document from Opinion - in so far that additionally engaged with and sought to distinguish the reasoning of the first sifting judge - and required to be more circumspect - given that intended for different audience. In contrast to Counsel's Opinion, these are pleadings. These are written pleadings prepared for the High Court - specifically for consideration by the (second) sifting judges. At this point in time the appeal may be effectively over. This can be potentially the final piece of advocacy in the conduct of an appeal (oral or written). New arguments were prepared - engaging with the reasoning of the first sift judge.	£100.00

We do not dispute that a fee is payable for the document that counsel will ordinarily draft to accompany the second sift court application, under Form 15.3B, which requires to be returned to the Clerk Of Justiciary in terms of Chapter 15.3(2) of the Act of Adjournal (Criminal

Procedure Rules) 1996 SI 1996/513), but the appropriate fee is as prescribed under Schedule 2, Part 2, Chapter 1, Paragraph 1(e) "opinion (or note) on appeal against sentence (where not otherwise prescribed) - £75.00". That is the fee which has been paid in this case.

With the exception of Mr. Kennedy, this is the fee which is universally claimed and paid to all other counsel and solicitor advocates.

In our view a clear and unequivocal distinction must be drawn between the fee for:

- written Submissions in Appeal against Sentence - £100; and
- opinion (or note) on appeal against sentence (where not otherwise prescribed) - £75

Although the sums in dispute are very modest (£25.00), the issue involves a very important point of principle. Mr. Kennedy appears to be trying to create "an important precedent", at least for himself, and we have no alternative but to challenge his approach, an approach that continually disrupts what should be a straightforward payments process in this area.

The prescribed Table of Fees for junior counsel in solemn and summary sentence appeals is set out below (Schedule 2, Part 2, Chapter 1, Paragraph 1):-

		Junior as leader	*Junior alone*	*Junior with leader*
1.	Appeal against Sentence			
	(a) drafting Grounds or Note of Appeal against sentence	£82	£82	£82
	(b) written Submissions in Appeal against Sentence	£125	£100	£75
	(c) any hearing under sections 107 and 187 of the Criminal Procedure (Scotland) Act 1995, including any consultation on the day of the appeal	£201	£150	£112
	(d) any hearing on appeal against sentence, including any consultation on the day of the appeal	£201	£150	£112
	(e) opinion (or note) on appeal against sentence (where not otherwise prescribed)	£75	£75	£75

SLAB`s position

The procedure for solemn sentence appeals is prescribed in Part VIII (Appeals from Solemn Proceedings) of the Criminal Procedure (Scotland) Act 1995.

In terms of section 107(2), the only documents that require to be lodged by statute, when seeking leave to appeal, are as follows:-

(a) the note of appeal lodged under section 110(1)(a) of this Act;

(b) in the case of an appeal against conviction or sentence in a sheriff court, the certified copy or, as the case may be, the record of the proceedings at the trial;

(c) where the judge who presided at the trial furnishes a report under section 113 of this Act, that report; and

(d) where, by virtue of section 94(1) of this Act, a transcript of the charge to the jury of the judge who presided at the trial is delivered to the Clerk of Justiciary, that transcript.

It is, however, recognised and accepted that additional detail will in practice be provided to assist the sifting judges. In this regard, reference is made to Lord McCluskey and the late Paul McBride's book, *"Criminal Appeals" (2nd Edition)* at Chapter 1, paragraph 1.20 dealing with the documents normally lodged which states *"It is not unusual to submit, especially at the stage of the second sift, **a note or opinion** (emphasis added) of counsel supporting the application for leave to appeal by reference to specific matters which are said to be arguable and explaining why and how they fall to be treated as arguable".*

The current Table of Fees was developed with the Faculty of Advocates to reflect that practice.

The Table of Fees at Schedule 2, Part 2, Chapter 1, Paragraph 1(e) *"opinion (or note)"* uses the same terminology, albeit in reverse, by McCluskey and McBride ie. *"note or opinion".*

More fundamental, however, is that the fee for written submissions at the sift stage is premature, unnecessary and does not demonstrate due regard being had to economy where a note or opinion can and does suffice.

"Written submissions" to use the term in the Table of Fees, or, to more accurately reflect the terms of section 115 of the 1995 Act, the "case and argument" are only a requirement of the court **after** leave to appeal has been granted. They are a pre requisite in advance of the appeal hearing and their aim, as apparently achieved in this case, is to short circuit the duration of the hearing and time required by the court in oral submission.

The appellant's written submissions (case and argument) and supporting documents shall constitute the principal submissions of the appellant and, unless otherwise directed by the court, the court will rely on the the case and argument without reading it over to the court (Rule 15.16 (5)(b) of the Act of Adjournal (Criminal Procedure Rules) 1996 SI 1996/513).

The requirement for written submissions or case and argument were introduced for sentence appeals by the Act of Adjournal (Criminal Appeals) 2003 http://www.legislation.gov.uk/ssi/2003/387/made .

The explanatory note which accompanies these Rules makes clear that,

"This Act of Adjournal makes provision for the lodging of **written submissions** (emphasis added) in appeals against sentence in solemn and summary proceedings." **That reflects the terms of the wording used in the Table of Fees "written Submissions in Appeal against Sentence".**

When similar provisions were introduced for conviction appeals under the "Act of Adjournal (Criminal Procedure Rules Amendment No.2) (Presentation of Conviction Appeals in Writing) 2010" http://www.legislation.gov.uk/ssi/2010/309/made, the explanatory note which accompanies the Rules again stated that "Subparagraph 2(3) inserts new rule 15.15A making provision for **written submissions** (emphasis added) , by way of case and argument, in appeals against conviction in solemn proceedings".

The Act of Adjournal (Criminal Procedure Rules) 1996, Chapter 15, at Section 15.15A and B explains the requirement for case and argument only applies to appeals in which leave to appeal was granted on or after 1 November 2010. Although it is accepted that this relates to conviction appeals, it makes clear that there is no requirement for such a document either before the 1 November 2010 or before leave to appeal has been granted.

The distinction between the two fees is, in our submission, with the exception of Mr. Kennedy, fully understood by the relatively small number of counsel and solicitor advocates who practice in the appeal courts. It is important to bear in mind that at the sift stage the appellant is simply seeking leave to appeal which is dealt with by the court by way of application.

There is difference in the language used between the fee for opinion (or note) **on** appeal against sentence and Written Submissions **in** Appeal against Sentence and whilst it may not be intentional the "on appeal" does seem to suggest an element of it being prospective and reflects you are likely at that stage to be seeking leave to appeal whereas "in appeal" suggests you have obtained leave.

Counsel's Position

Counsel has drafted taxation submissions extending to 15 pages and covering 17 grounds.

- Whether Schedule 2 complies with the minimum wage;
- Counsel must draft Case and Argument;
- 'Case and Argument' are 'Written Submissions';
- Payment for additional Written Submissions are not precluded by Schedule 2;
- Irrelevance of apparent duplication (which is denied);
- Work undertaken in this case;
- Appeal hearing fee does not provide for subsumption or cross-subsidy of drafting appeal documentation;
- Appropriateness of counsel drafting Written Submissions after first sift refusal;
- Esto, that provision should at least be made for counsel to be paid the minimum wage;
- Minimum wage should be adjusted to gross figure reflecting counsel's outlays;
- Non-compliance: worker entitled to additional remuneration;
- Potential breach of Article 4, ECHR;
- Late Payments Directive;
- Input from the Low Pay Commission and HMRC;
- Irrelevance of alleged collective bargaining on national minimum wage entitlement;
- Expenses.

A full copy of the the most up to date version of counsel's taxation submissions, as at 4 June 2015, are attached for your information.

Leaving aside the majority of what we consider to be largely irrelevant grounds, it is disappointing given the correspondence that we have exchanged recently that counsel has persisted with lodging quite misleading and in some places wholly inaccurate submissions.

We have already accepted that there will inevitably be overlap and duplication between the note of appeal, documents lodged at the sift stage (aka notes or opinion) and written submissions (aka case and argument). We have also made clear that where counsel drafts the case and argument (written submissions), after the sift stage and in advance of the appeal hearing, then the appropriate fee payable will be that fee for written submissions. We also accept, as Mr. Kennedy does, that the "Case and argument" are "Written Submissions". But that is the only time, in our view, that the fee for written submissions is payable.

This is not an issue about SLAB refusing to pay a fee for written submissions more than once; it is about the single issue of the appropriate fee payable for the document which counsel drafts and lodges at the second sift stage.

Mr. Kennedy has amended his taxation submissions to include a new paragraph 61 following what he "heard from an authoritative source" that apparently a Practice Note was being issued to the effect that "Counsel's Opinions to second sift appeals and these documents 'have no status'. The Practice Note (appendix 7), in our submission, suggests nothing of the sort. The Practice Note simply states that,

"The Act does not expressly permit the lodging of additional material in advance of the second sift. Notwithstanding that, a practice has developed of such material being lodged.....all such material must be intimated to the Crown. Any material not so intimated will not be considered by the court at the second sift stage".

Mr. Kennedy invited his clerk to seek the comments of [redacted] Deputy Principal Clerk of Justiciary who confirmed in his email message 27 May 2015 @ 11:51 as follows.

[redacted]

In reply to this, and your earlier email, I can advise that the Practice Note issued by the Lord Justice General on 26 May 2015 makes it clear that any additional material lodged in support of an appeal against conviction and/or sentence will continue to be accepted by the court, however a copy of said material must be intimated to the Crown.

That is the only change to the current procedure".

The above email message also includes an earlier email sent from [redacted] Criminal Appeals Paralegal, Faculty Appeals Service 26 May 2015 @ 17:01, in the following terms,

"Dear all

I am emailing to advise you of a new practice note issued by Lord Gill today, a copy of which is attached for information. It relates specifically to appeals to the second sift and appears to suggest that anything other than a one line letter to the Clerk of Justiciary stating that we appeal to the second sift requires intimation on the Crown or it will not be considered by the second sift. Whilst this may not be an issue I thought that I should draw it to your attention in case it has an impact on what you would normally state in your ***Opinion or Note*** *(emphasis added) for the second sift.*

As always, if any of you have any queries then please just let me know".

This email by the Faculty of Advocates Appeals Service confirms the nature of the documentation lodged by counsel at the second sift stage.

5. Auditors discretion

Schedule 2, as amended, provides the auditor with limited discretion in the event of question or dispute.

Paragraph 1of the Notes on the operation of Schedule 2

1. Subject to the following provisions of this Schedule, fees including those within a range of fees, shall be determined or calculated by the Board and in the event of a question or dispute by the auditor, in accordance with the Table of Fees in this Schedule.

Paragraph 2of the Notes on the operation of Schedule 2

2. Where the Table of Fees does not prescribe a fee for any item of work or category of proceedings the Board, or as the case may be the auditor, shall allow such fee as appears

appropriate to provide reasonable remuneration for the work with regard to all the circumstances, including the general levels of fees in the Table of Fees.

The auditor has no power to increase any prescribed fee.

It would, therefore, appear to be a very simple question that the auditor is being invited to answer.

6. Appendices

- Appendix 1 - copy of Mr. Kennedys submissions to the auditor as at 4 June 2015.
- Appendix 2 - Fee note #002 which includes the single disputed entry 31/10/13 for "framing written submissions....for purposes of second sift";
- Appendix 3 - copies of Mr. Kennedys second sift application (it should be noted that is the name that Mr. Kennedy has saved this document as) 31/10/13 and for completeness sake his case and argument 12/11/13 (which is not disputed has been paid in full despite what Mr. Kennedy says in his submissions);
- Appendix 4 - Copies of Act of Adjournal (Criminal Appeals) 2003 and Act of Adjournal (Criminal Procedure Rules Amendment No. 2) (Presentation of Conviction Appeals in Writing) 2010;
- Appendix 5 - Copy of relevant excerpt from Lord McCluskey and the late Paul McBride's book, '*Criminal Appeals 2 Edition*" in Chapter 1, paragraph 1.20 The documents.
- Appendix 6 - Copy ACT OF ADJOURNAL (CRIMINAL PROCEDURE RULES) 1996 SI 1996/513, SCHEDULE 2, CRIMINAL PROCEDURE RULES 1996, PART III Solemn proceedings, CHAPTER 15 APPEALS FROM SOLEMN PROCEEDINGS.
- Appendix 7 - Practice Note No 1 of 2015 Appeals.
- Appendix 8 - Copy email correspondence including emails from [redacted] Deputy Principal Clerk Of Justiciary 27 May 2015 and [redacted] Criminal Appeals Paralegal, Faculty Appeals Service 26 May 2015.

IN RESPECT WHEREOF

[redacted]

Scottish Legal Aid Board
91 Haymarket Terrace
Edinburgh
For the Scottish Legal Aid Board

ACT OF ADJOURNAL (CRIMINAL PROCEDURE RULES) 1996 SI 1996/513

SCHEDULE 2

CRIMINAL PROCEDURE RULES 1996

PART III Solemn proceedings

CHAPTER 15 APPEALS FROM SOLEMN PROCEEDINGS

15.15A Requirement for case and argument

15.15B Hearing of appeal

15.16 Presentation of solemn sentence appeal in writing

15.16A Copying of Transcripts to other parties

15.17 Lodging and intimation of transcripts

Register and lists of appeals

15.1 (1) The Clerk of Justiciary shall keep a register, in such form as he thinks fit, of all cases in which he receives intimation of intention to appeal or, in the case of an appeal under section 106 (right of appeal), or section 210F(3) (prosecutor's appeal against refusal to make an order for lifelong restriction) a note of appeal under section 110 of that Act.

(2) The register kept under paragraph (1) shall be open for public inspection at such place and at such hours as the Clerk of Justiciary, subject to the approval of the Lord Justice General, considers convenient.

(3) The Clerk of Justiciary shall—

(a) prepare from time to time, a list of appeals to be dealt with by the High Court; and

(b) cause such list to be published in such manner as, subject to the approval of the Lord Justice General, he considers convenient for giving due notice to persons having an interest in the hearing of such appeals by the High Court.

(4) Subject to paragraph (5), the Clerk of Justiciary shall give the respective solicitors representing parties to an appeal so listed at least 14 days' notice of the date fixed for the hearing of the appeal.

(5) In an appeal under sections 106(1)(b) to (e), 108(1) or 210F(3) of the Act of 1995, the period of notice mentioned in paragraph (4) shall be 28 days.

Forms of appeal

15.2 (1) Any intimation under section 109(1) of the Act of 1995 (written intimation of intention to appeal) shall be in Form 15.2-A.

(2) A note under section 110(1) of the Act of 1995 (written note of appeal) shall be in Form 15.2-B.

(3) An application under section 111(2) of the Act of 1995 (application to extend time) shall be made in Form 15.2-C.

(4) An application under section 112(1) of the Act of 1995 (application of appellant for bail) shall be made in Form 15.2-D.

(5) The following documents shall be signed by the appellant or by his counsel or solicitor:—

(a) an intimation of intention to appeal under section 109(1) of the Act of 1995 except where the appellant is the Lord Advocate; or

(b) an application under section 111(2) of the Act of 1995 (application to extend time).

(5A) The note of appeal shall be signed by –

(a) the counsel or solicitor advocate who has drafted it; or

(b) the appellant where the appellant has drafted it and intends to conduct the appeal himself.

(6) An appeal under section 19 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (appeals in respect of decisions relating to supervised release orders) shall be in Form 15.2-B.

Appeals against refusal of applications heard by single judge

15.3 (1) Where an application has been dealt with by a single judge of the High Court by virtue of section 103(5) of the Act of 1995 (powers exercisable by single judge), the Clerk of Justiciary shall notify the decision to the applicant in Form 15.3-A.

(2) In the event of such judge refusing any such application, the Clerk of Justiciary on notifying such refusal to the applicant shall forward to him a form in Form 15.3-B to complete and return forthwith if he desires to have his application determined by the High Court as constituted for the hearing of appeals under Part VIII of the Act of 1995 (appeals from solemn proceedings).

Extension of time by Clerk of Justiciary

15.4 Where, under section 110(2) of the Act of 1995, the Clerk of Justiciary extends the period for lodging a note of appeal, the period of any such extension shall be recorded on the completed form of intimation of intention to appeal.

Intimation of appeal against sentence of death

15.5 The Clerk of Justiciary shall intimate an appeal against a conviction in respect of which sentence of death has been pronounced, and the determination in any such appeal, immediately on such intimation or determination, as the case may be, to—

(a) the Secretary of State for Scotland; and

(b) the governor of the prison in which the appellant is detained.

Procedural hearing

15.5A (1) In any appeal, the Clerk of Justiciary may fix a procedural hearing for the purposes of determining whether the parties are ready to proceed to a hearing of the appeal.

(2) The procedural hearing shall be heard by a judge of the High Court and, where the appellant is an individual and is represented, may be held in his absence.

(3) The Clerk of Justiciary shall intimate to the parties in Form 15.5A-A the date of the procedural hearing fixed under paragraph (1), not later than twenty-one days before that date.

(4) Not later than seven days before the date of the procedural hearing, the appellant shall complete and lodge a notice in Form 15.5A-B with the Clerk of Justiciary and send a copy to the respondent. The said notice shall be signed by the counsel or solicitor advocate representing the appellant in the appeal, or by the appellant where the appellant intends to conduct the appeal himself.

(5) Where the appellant has lodged a notice in accordance with paragraph (4), the Clerk of Justiciary, having considered the terms of the said notice and any representations made to him by the respondent, may determine that it is unnecessary to proceed with the procedural hearing and, if he so determines, shall intimate this to the parties not less than forty-eight hours before the date of the procedural hearing.

(6) Not later than seven days after the last day of the appeal court sitting during which

(a) the procedural hearing at which it has been determined that the appeal is ready to proceed has been heard; or

(b) the procedural hearing was due to be heard but in respect of which the Clerk of Justiciary has made a determination in terms of paragraph (5),

the Clerk of Justiciary shall fix and intimate to the parties the date when the appeal is to be heard.

(7) Not later than seven days before the date of the appeal hearing, the appellant shall submit a list of the authorities upon which he intends to rely with references to the relevant passages and shall send a copy to the respondent. (This paragraph only applies to appeals in which leave to appeal, whether in terms of section 107 or, as the case may be, section 180 of the Criminal Procedure (Scotland) Act 1995, was granted before 1 November 2010)

Abandonment of appeals

15.6 A notice of abandonment under section 116(1) of the Act of 1995 (abandonment of appeal) shall be in Form 15.6.

Note of proceedings at trial

15.7 In an appeal under section 106(1) of the Act of 1995 (right of appeal), the High Court may require the judge who presided at the trial to produce any notes taken by him of the proceedings at the trial.

Clerk to give notice of date of hearing

15.8 (1) Where the High Court fixes the date for the hearing of an appeal or of an application under section 111(2) of the Act of 1995 (application to extend time), the Clerk of Justiciary shall give notice to the Crown Agent and to the solicitor of the convicted person, or to the convicted person himself if he has no known solicitor; and the appellant or applicant shall, within seven days before the hearing, lodge three copies (typed or printed) of the appeal or application for the use of the court.

(2) Where the powers of the court are to be exercised by a single judge under section 103(5) of the Act of 1995 (powers exerciseable by single judge), a copy of the application to be determined shall be lodged for the use of the judge.

(3) A notice by the Clerk of Justiciary to the Secretary of State for the purposes of section 117(4) of the Act of 1995 (notice that appellant or applicant be present at a diet) shall be in Form 15.8.

Continuation of hearings

15.9 (1) The High Court, or any single judge exercising the powers of the High Court under section 103(5) of the Act of 1995 (powers exerciseable by single judge), may continue the hearing of any appeal or application to a date, fixed or not fixed.

(2) Any judge of the High Court, or the person appointed by the court to take additional evidence, may fix any diet or proof necessary for that purpose.

Note to be kept of appeal

15.10 (1) The Clerk of Justiciary shall, in all cases of appeal from a conviction obtained or sentence pronounced in the High Court, note on the margin of the record of the trial the fact of an appeal having been taken and the result of the appeal.

(2) In the case of an appeal taken against any conviction obtained or sentence pronounced in the sheriff court on indictment, the Clerk of Justiciary shall notify the clerk of that court of the result of the appeal; and it shall be the duty of the clerk of that court to enter on the margin of the record of the trial a note of such result.

Suspension of disqualification from driving pending appeal

15.11 (1) Where a person who has been disqualified from holding or obtaining a driving licence following a conviction on indictment appeals against that

disqualification to the High Court, any application to suspend that disqualification pending the hearing of the appeal shall be made—

(a) if the sentencing court was the sheriff, by application to the sheriff; or

(b) if the sentencing court was the High Court, or if an application to the sheriff under sub-paragraph (a) has been refused, by petition to the High Court.

(2) An application to the sheriff under paragraph (1)(a) shall be—

(a) in Form 15.11-A, and

(b) lodged with the sheriff clerk with a copy of the note of appeal endorsed with the receipt of the Clerk of Justiciary;

and the sheriff clerk shall record the order made by the sheriff on the application in the minute of proceedings.

(3) A petition to the High Court under paragraph (1)(b) shall be—

(a) in Form 15.11-B; and

(b) lodged with the Clerk of Justiciary.

Provisions supplemental to rule 15.11(3)

15.12 (1) The petitioner or his solicitor shall, on lodging a petition under rule 15.11(3), send a copy of it to—

(a) the Crown Agent; and

(b) if the sentencing court was the sheriff, the clerk of that court.

(2) The High Court may order such further intimation (including intimation to the Lord Advocate) as it thinks fit, and may dispose of the application in open court or in chambers.

(3) An order made by a single judge under paragraph (2) shall not be subject to review.

(4) On an order being made on a petition under rule 15.11(3), the Clerk of Justiciary shall, if the sentencing court was the sheriff, send a certified copy of the order to the clerk of that court.

(5) Where the order referred to in paragraph (4) suspends a disqualification from driving, the Clerk of Justiciary shall also send a certified copy of the order to the Secretary of State with such further information as the Secretary of State may require.

(6) The Clerk of Justiciary shall, on determination of the appeal against a disqualification from driving—

(a) if the sentencing court was the sheriff, send the clerk of that court a certified copy of the order determining the appeal and the clerk of that court shall, if appropriate, make the appropriate endorsement on the appellant's driving licence and intimate the disqualification to the persons concerned; or

(b) if the appeal against the disqualification is refused, make the appropriate endorsement on the appellant's driving licence and intimate the disqualification to the persons concerned.

(7) Where leave to appeal has been refused under section 107 of the Act of 1995, "determination" in paragraph (6) of this rule means—

(a) the fifteenth day after the date of intimation to the appellant or his solicitor of refusal of leave under subsection (1)(b) of that section, unless the appellant applies to the High Court for leave to appeal; or

(b) the day two days after the date of intimation to the appellant or his solicitor of the refusal of leave by the High Court under subsection (5)(b) of that section.

Suspension of sentence under s.121A of the Act of 1995

15.12A (1) Where under section 109(1) of the Act of 1995 a person lodges intimation of intention to appeal, any application for suspension of a relevant sentence under section 121A of that Act shall be made by petition to the High Court in Form 15.12A-A.

(2) Where a convicted person or the prosecutor lodges a note of appeal in respect of an appeal under section 106(1)(b) to (e) or 108 of the Act of 1995, as the case may be, any application for suspension of a relevant sentence under section 121A of that Act shall be made by petition to the High Court in Form 15.12A-B.

(3) A petition to the High Court under paragraph (1) or (2) shall be lodged with the Clerk of Justiciary.

(4) The court shall grant or refuse any application under paragraph (1) or (2) within 7 days of the petition having been lodged as mentioned in paragraph (3).

(5) Where the court grants an application under paragraph (1) or (2) the Clerk of Justiciary shall, if the sentencing court was the sheriff, send a certified copy of the order to the clerk of that court.

(6) In any case where -

(a) intimation of intention to appeal is lodged under section 109(1) of the Act of 1995; and

(b) a relevant sentence is suspended under section 121A of that Act,

but no note of appeal is lodged under section 110 of that Act, the order suspending *ad interim* the relevant sentence shall be recalled with effect from the seventh day after the date on which the Clerk of Justiciary intimates that the appeal is deemed to have been abandoned.

(7) In the application of section 121A of the Act of 1995 (suspension of certain sentences pending appeal) to a case in which leave to appeal has been refused under section 107 of that Act, the word "determined" in subsection (1) of the said section 121A shall be construed as meaning -

(a) the fifteenth day after the date of intimation to the appellant or his solicitor and to the Crown Agent of refusal of leave under subsection (1)(b) of section 107 of that Act, unless the appellant applies to the High Court for leave to appeal; or

(b) the seventh day after the date of intimation to the appellant or his solicitor and to the Crown Agent of the refusal of leave by the High Court under subsection (5)(b) of section 107 of that Act.

Suspension of disqualification etc. under section 121 of the Act of 1995

15.13 In the application of section 121 of the Act of 1995 (suspension of disqualification, forfeiture, etc.) to a case in which leave to appeal has been refused under section 107 of the Act of 1995, the word "determined" in subsections (1) and (2) of section 121 of that Act shall be construed as meaning—

(a) the fifteenth day after the date of intimation to the appellant or his solicitor of refusal of leave under subsection (1)(b) of section 107 of that Act, unless the appellant applies to the High Court for leave to appeal; or

(b) the day seven days after the date of intimation to the appellant or his solicitor of the refusal of leave by the High Court under subsection (5)(b) of section 107 of that Act.

Remits in applications for leave to appeal

15.14 The judge of the High Court considering an application for leave to appeal under section 107 of the Act of 1995 may, before deciding to grant or refuse leave, remit the case to the judge who presided at the trial for a supplementary report to be produced to him as soon as is reasonably practicable on any matter with respect to the grounds of appeal.

Amended grounds of appeal

15.15 (1) On cause shown, the High Court may grant leave to an appellant to amend the grounds of appeal contained in the note of appeal.

(2) Where the High Court has granted leave to amend the grounds of appeal under paragraph (1), it may order –

(a) that the Clerk of Justiciary shall send a copy of the amended note of appeal to the judge who presided at the trial; and

(b) that as soon as is reasonably practicable after receiving a copy of the amended note of appeal, the judge who presided at the trial shall provide the Clerk of Justiciary with a written report on the amended grounds of appeal.

(3) Section 113(2) to (4) of the Act of 1995 (judge's report) shall apply to a report on the amended grounds of appeal ordered under paragraph (2) as it applies to a report under subsection (1) of that section.

(4) Where the High Court grants leave to amend under paragraph (1), section 107 of the Act of 1995 shall apply, unless the Court otherwise directs, for the purposes of obtaining leave to appeal for the amended grounds of appeal as it applied for the purposes of the original grounds of appeal and, for the references in subsection (2)(a) and (c) of that section to the note of appeal and the trial judge's report, there shall be substituted references to the amended grounds of appeal contained in the amended note of appeal and the trial judge's report, if any, on the amended grounds of appeal, respectively.

(5) This rule does not apply to appeals on reference to the High Court under section 194B of the Act of 1995 **(unless leave to amend the grounds of appeal was granted under paragraph (1) of that rule before the 5 November 2010)**

Requirement for case and argument

(Section 15.15A only applies to appeals in which leave to appeal, whether in terms of section 107 or, as the case may be, section 180 of the Criminal Procedure (Scotland) Act 1995, was granted on or after 1 November 2010)

15.15A. (1) Subject to paragraphs (2) and (3), this rule applies to an appeal under section 106(1)(a) or (f) of the Act of 1995.

(2) The court may, of its own motion or on the application of the appellant, order that this rule is not to apply in a particular appeal or to a particular aspect of an appeal.

(3) Where in relation to any ground of appeal an appellant seeks to lead evidence this rule shall apply to that ground of appeal only in relation to the question of whether that evidence should be led; but the court may nevertheless make an order containing provision similar to this rule in relation to the presentation of submissions following the hearing of that evidence.

(4) The appellant must, within 42 days of the granting of leave to appeal in accordance with section 107 of the Act of 1995, lodge a case and argument.

(5) A case and argument must—

(a) set out, for each ground of appeal, a succinct and articulate statement of the facts founded upon and the propositions of law being advanced;

(b) contain an estimate of how long will be required for the hearing of the appeal; and

(c) be signed by counsel or the solicitor advocate instructed to represent the party concerned in the conduct of the appeal, or by the appellant where the appellant intends to conduct the appeal himself.

(6) A case and argument must, when lodged, be accompanied by—

(a) all documents, or a copy thereof, referred to or founded upon in the case and argument and not already lodged in the appeal process; and

(b) all authorities, or a copy thereof, listed in the case and argument and not contained within a publication specified by the Lord Justice General by direction.

(7) The Crown—

(a) must, if the court, considering that the circumstances of the case require it, orders it to do so; and

(b) may, if it considers it appropriate to do so,

lodge a case and argument in response to the appellant's case and argument.

(8) Where the court makes an order under paragraph (7)(a), the Crown must lodge the case and argument within 21 days of the making of that order.

(9) At the same time as a case and argument is lodged, a copy of it and of all the documents accompanying it must be sent to the other party to the appeal.

(10) Where the Deputy Principal Clerk of Justiciary considers a case and argument to be unduly lengthy he shall refer the matter to a judge of the High Court who shall give such directions as he considers appropriate.

(11) Where a case and argument is not lodged timeously, the Deputy Principal Clerk of Justiciary shall refer the matter to the Lord Justice General, whom failing the Lord Justice Clerk, for such action as he considers appropriate.

(12) The court may, on the application of the relevant party and on cause shown, extend the period for lodging a case and argument.

Hearing of appeal

(Section 15.15B only applies to appeals in which leave to appeal, whether in terms of section 107 or, as the case may be, section 180 of the Criminal Procedure (Scotland) Act 1995, was granted on or after 1 November 2010)

15.15B. (1) This Rule applies to the hearing of an appeal in so far as a case and argument has been lodged by the appellant in terms of rule 15.15A(4).

(2) At the hearing of the appeal—

(a) the appellant's case and argument and supporting documents shall constitute the principal submissions of the appellant;

(b) unless it otherwise directs, the court will expect the appellant to rely on the case and argument without reading it over to the court;

(c) the appellant may, subject to the control of the court, make supplementary comment to the case and argument;

(d) the appellant may respond to any case and argument lodged by the Crown; and

(e) the appellant shall answer any points raised by the court.

(3) Where the Crown lodges a case and argument paragraph (2) applies, with the necessary modifications, to the Crown as it applies to the appellant.

(4) The appellant and Crown have a duty to co-operate with each other and the court to ensure the completion of the hearing of the appeal within the time allocated by the court;

(5) The court may, at any point during the hearing, set a timetable for the completion by a party of any submissions permitted in terms of paragraph (2)(b), (c), (d) or (e).

(6) On cause shown, the court may permit the appellant to introduce new information that has come to light in the period since the case and argument was lodged.

(7) Where the court permits the introduction of new information, it may at its discretion permit the lodging of additional documents in support of the new information.

(8) An appellant who wishes to introduce new information and lodge additional documents shall send a copy of the information and documents to the Clerk of Justiciary and to the Crown as soon as the information and documents come into the appellant's possession.

(9) An appellant who has sent new information and documents to the Clerk of Justiciary shall apply at the bar to allow it to be introduced or lodged, as the case may be.

Presentation of solemn sentence appeal in writing

15.16 (1) This rule applies to an appeal under sections 106(1)(b) to (e), 108(1) or 210F(3) of the Act of 1995 listed in terms of rule 15.1(3) (register and lists of appeals).

(2) In an appeal to which paragraph (1) applies, the appellant shall present his case in writing.

(3) The solicitor for the appellant or, if unrepresented, the appellant shall –

(a) not later than 14 days before the date assigned for the appeal court hearing, lodge a case and argument in Form 15.16;

(b) lodge with the case and argument all documents, or a copy thereof, referred to or founded upon in the case and argument and not already lodged; and

(c) at the same time as he lodges the case and argument referred to in sub-paragraph (a) and the supporting documents referred to in sub-paragraph (b), send a copy to the Crown or, where the Crown is the appellant, to the respondent.

(4) The case and argument referred to in paragraph (3) shall be signed by counsel or the solicitor advocate representing the appellant in the appeal, or by the appellant where the appellant intends to conduct the appeal himself.

(5) At the hearing of the appeal –

(a) the case and argument and supporting documents referred to in paragraph (3) shall constitute the submissions of the appellant;

(b) unless it otherwise directs, the Court will expect the appellant to rely upon the case and argument without reading it over to the Court; and

(c) the appellant may make supplementary comments to the case and argument; and shall answer any points raised by the Court.

(6) On cause shown, the Court may permit the appellant to introduce new information that has come to light in the period since the case and argument was lodged.

(7) Where the Court permits the introduction of new information, it may at its discretion permit the lodging of additional documents in support of the new information.

(8) A party who wishes to introduce new information and lodge additional documents shall send a copy of the information and documents to the Clerk of Justiciary as soon as the information and documents come into the appellant's possession.

(9) A party who has sent new information and documents to the Clerk of Justiciary shall make application at the bar to allow it to be introduced or lodged, as the case may be.

(10) Where the documents referred to in paragraph (3) are not lodged timeously, the Deputy Principal Clerk of Justiciary shall refer the matter to the Lord Justice-General, whom failing the Lord Justice-Clerk, for such action as the Lord Justice-General or Lord Justice-Clerk, as the case may be, considers appropriate.

Copying of Transcripts to other parties

15.16A (1) Where the prosecutor receives a transcript under section 94 (2) of the Act of 1995, the prosecutor shall forthwith send a copy to the other parties and to the clerk of court.

(2) Where a person receives a transcript under section 94 (2A) of the Act of 1995, that person shall forthwith send a copy to the other parties and to the clerk of court.

Lodging and intimation of transcripts

15.17 (1) This rule applies where a party intends to rely upon a transcript of a record made under section 93(1) of the Act of 1995 (record of trial) in any appeal under section 106 or 108 of that Act.

(2) The party shall lodge 4 copies of the transcript or any relevant part thereof with the Clerk of Justiciary in accordance with paragraphs (3) and (4) and shall at the same time intimate to the other parties that the transcript or the relevant part thereof has been so lodged.

(3) Where a procedural hearing has been fixed the party shall lodge the copies not later than 7 days before the date of that hearing.

(4) Where no procedural hearing has been fixed the party shall lodge the copies not later than 28 days before the date of the hearing at which he intends to rely upon the transcript.

(5) Where a party has not complied with the requirements of paragraphs (3) and (4) he shall not, except by leave of the court on cause shown, be permitted to refer to such transcript in the course of any hearing.

HIGH COURT OF JUSTICIARY

PRACTICE NOTE

No. 1 of 2015

Appeals

The form, content and intimation requirements for all documents associated with appeals against conviction and/or sentence are set down in the Criminal Procedure (Scotland) Act 1995 ("the Act") and the Act of Adjournal (Criminal Procedure Rules) 1996 SI 1996/513 ("the Rules"). Notwithstanding this, there is inconsistent compliance with these requirements. This Practice Note is to remind practitioners that all forms lodged must comply with the Act and with Chapters 15 and 19 of the Rules.

The Act does not expressly permit the lodging of additional material in advance of the second sift. Notwithstanding that, a practice has developed of such material being lodged. While the Court will continue to accept this material, agents should note that all such material must be intimated to the Crown. Any material not so intimated will not be considered by the court at the second sift stage.

Brian Gill

Lord Justice General

26 May 2015

Edinburgh

[redacted]

[redacted]

Please see below for your information.

Thanks

[redacted]

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From: Moyes, Joe [mailto:JMoyes@scotcourts.gov.uk]
Sent: 27 May 2015 11:51
To: Angela Bath
Subject: RE: Leo Hamilton - Taxation - R192/HA130264

[redacted]

In reply to this, and your earlier email, I can advise that the Practice Note issued by the Lord Justice General on 26 May 2015 makes it clear that any additional material lodged in support of an appeal against conviction and/or sentence will continue to be accepted by the court, however a copy of said material must be intimated to the Crown.

That is the only change to the current procedure.

Regards

[redacted]

Deputy Principal Clerk of Justiciary,
Parliament House,
11 Parliament Square,
Edinburgh, EH1 1RQ.
Email: jmoyes@scotcourts.gov.uk
Telephone number: 0131 240 6869

[redacted]

Sent: 27 May 2015 11:09
To: Moyes, Joe

[redacted]

[redacted]

Further to my email to you yesterday, I have now received this additional email from Counsel.

Are you able to provide any comments?

I look forward to hearing from you.

Thanks

[redacted]

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[redacted]

[redacted]

Under reference to my earlier email, can you submit this with the Auditor - and intimate on the Board?

Thanks,

Lewis

Lewis Kennedy, Advocate

Advocates Library,
Parliament House,
Edinburgh EH1 1RF

[redacted]

Subject: Appeals Update - Second Sifts
Date: Tue, 26 May 2015 17:01:31 +0000

Dear all

I am emailing to advise you of a new practice note issued by Lord Gill today, a copy of which is attached for information. It relates specifically to appeals to the second sift and appears to suggest that anything other than a one line letter to the Clerk of Justiciary stating that we appeal to the second sift requires intimation on the Crown or it will not be considered by the second sift. Whilst this may not be an issue I thought that I should draw it to your attention in case it has an impact on what you would normally state in your Opinion or Note for the second sift.

As always, if any of you have any queries then please just let me know.

Kind regards

[redacted]

Criminal Appeals Paralegal
Faculty Appeals Service

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Faculty Services Limited
Registered Number : SC48261
Registered In : Scotland
Registered Office : Advocates Library, Parliament House, Edinburgh, EH1 1RF.

SLAB OFFER R192/HA130264 [redacted] OO/08/3979217313 - LEWIS KENNEDY

SUBMISSION TO THE AUDITOR

Remuneration for written submissions in sentence appeals:

1. The Board refuses to pay Counsel the recognised rate in terms of Schedule 2 (£100) for drafting Case and Argument – or a Written Submission in support of an appeal against sentence.

2. There would be some purpose in the Auditor specifically confirming that the drafting by Counsel of a second sift application is a valid, chargeable item – as a Written Submission in a sentence appeal – which should be paid at the rate, which is consistent with drafting Written Submissions in sentence appeal proceedings, as provided for in Schedule 2 (£100) – and a such, should be typically countenanced within the ambit of 'special urgency' Regulation 15 cover – now that full legal aid cannot be competently granted until such time as leave to appeal is granted. It is not tenable to expect Counsel to do this work for nothing.

Whether Schedule 2 complies with the minimum wage:

3. A further issue engaged by this taxation is not just whether Counsel is entitled to be paid £100 for drafting court-mandated Case and Argument - but whether Counsel ('the worker') is at least entitled to be paid minimum wage – and whether the Board can arbitrarily abate (as they have done) (court-mandated) work to zero. The Auditor is also specifically invited to consider Counsel should be entitled to claim the protection of the national minimum wage (NMW) – particularly in circumstances where work has been Court-mandated – and where Counsel will be subject to disciplinary or other coercive sanctions in the event of non-compliance – in a specific category of court proceedings (criminal appellate) where the applicable fee structure does not realistically allow for the principle of subsumption (that the work might be absorbed by the court appearance fee) – and otherwise precludes the operation of a 'brief fee'.

4. Also relevant is whether Counsel (the worker) is entitled to be paid for the labour involved in attempting to recover a minimum wage payment.

Counsel must draft Case and Argument:

5. The abated fee in respect of Case and Argument relates to the drafting of essential appeal documentation.

6. This documentation had to be drafted – because the Court insisted upon it. This is an imperative and is non-negotiable.

7. In the conduct of sentence appeals, it is a requirement of the Court that Counsel (and not the solicitor) prepares – and personally signs – Case and Argument (or Written Submissions). This cannot be delegated to the instructing solicitor. This documentation has to be signed off by Counsel – who bears the professional responsibility for its content and its timeous lodging.

8. Counsel has to ensure that four signed, principals are lodged with the Clerk of Justiciary.

9. [Even if Case and Argument were drafted by the instructing solicitor, it would still have to be revised by and approved by Counsel – because Counsel assumes the responsibility for and

ownership of its content. But Case and Argument (or a second sift application) prepared by Counsel, with rights of audience – and who is putting their credibility on the line – is more authoritative than an argument prepared by a solicitor without rights of audience.]

10. The Case and Argument is a form, which is emphatically not in identical terms to any earlier written submission (such as the note of appeal against sentence or a second sift application). It has a specific statutory format, which has to be obtempered.

11. This also has the advantage of allowing for a late replacement Counsel to pick up the case and identify the argument – in a way in which the second sift application does not – because the second sift application may only be about engaging arguments not ventilated in the original grounds of appeal – picking up the possibly flawed reasoning of the sentencer.

12. Significantly, the non-compliance by Counsel with this requirement may be regarded by the Court as a professional disciplinary matter – and possibly even as a Contempt of Court.

13. Case and Argument must still be prepared even if a second sift application has previously been lodged.

14. The Depute Principal Clerk of Justiciary has confirmed that Rule of Court 15.16 (solemn sentence appeals) and Rule 19.19 (summary sentence appeals) govern this procedure. Both rules are virtually identical in their terms and state that the Case and Argument "shall be signed by counsel or the solicitor advocate representing the appellant or by the appellant where he intends to conduct his own appeal". Failure to lodge this document timeously would result in the DPCJ "referring the matter to the Lord Justice General to take whatever action he considers appropriate". This may or may not result in disciplinary action – or a finding of Contempt of Court. The expectation of the Court is that Case and Argument shall be lodged – notwithstanding what documentation may have been previously lodged in support of an appeal to the second sift.

15. [Matters might be different if there were no prescribed fee for drafting Written Submissions – and Counsel had superfluously prepared and lodged them in advance of the appeal hearing (to assist the Court). But that is not the position.]

16. Whether it takes 15 minutes – or 5 hours – or 15 hours – this document has to be drafted – by Counsel. As such, it should be regarded as a chargeable item – regardless of whether it contains much in the way of additional averments or arguments or information.

17. If the Court insists that two separate documents be lodged (and intimated), Counsel should surely be paid for drafting both documents.

'Case and Argument' are 'Written Submissions':

18. The Board argues that there is no prescribed fee for drafting Case and Argument.

19. But these are, self-evidently, Written Submissions in the conduct of an appeal against sentence – and, as such, are a specifically chargeable item in terms of Schedule 2.

20. The Case and Argument is in writing – and it is a submission, which is made to the Appeal Court – in the course of an appeal against sentence. Therefore, it is a Written Submission in the conduct of an appeal against sentence.

21. That the Court categorises these 'Written Submissions' as 'Case and Argument' – and happens to label this appeal documentation as such – does not detract from their substance – as Written Submissions in the conduct of an appeal against sentence. The approach of the Court is certainly not inconsistent with their description as Written Submissions in the conduct of an appeal against sentence.

22. This is appeal documentation, which is distinct from the Opinion of Counsel – which serves an entirely different purpose. In contrast, this can be characterised as a form of (written) advocacy or pleadings.

Payment for additional Written Submissions are not precluded by Schedule 2:

23. The Board states that in all of the discussions, which they have had with the Faculty of Advocates and the Solicitor Advocate branch of the profession, when developing the Appeal Table of Fees, that the fee for Written Submissions was ever envisaged to be chargeable at the sift stage.

24. But nowhere in the Regulations is it provided that the fee for drafting Written Submissions (in the conduct of an appeal against sentence) is payable only once – and that repeat written submissions are somehow precluded. The matter should not have been left to implication. If the Board was insistent that Counsel should have been paid only once for drafting Written Submissions, then the Regulations should have expressly provided so.

25. [Then again, that approach would not be consistent with minimum wage legislation – see below.]

26. The Board has no authority for that proposition – though it has been invited to produce such. None is apprehended.

27. [Enquiry has been made of the Auditor's Office by Counsel's Clerk as to the existence of any such authority – but none is understood to exist.]

28. This approach is illogical given that litigation – and especially appellate litigation – is a dynamic process. Legal arguments evolve over time. New facts emerge. Written Submissions can change. Properly, the feeing structure should reflect such eventualities.

29. So even if there were such a provision in the Regulations, it could hardly be regarded as objectively reasonable – and as reflecting litigation reality.

30. Since the fee for drafting Written Submissions (in the conduct of an appeal against sentence) is capped at only £100, it might be thought that the claiming of only two fees for framing appeal documentation (totalling £200) is hardly unreasonable or perverse.

31. This is particularly so since Counsel's fees have remained at their present level since Schedule 2 was promulgated in December 2006 – and have not been increased to reflect the intervening (25%) movement in the RPI. [1]

[1] http://www.ons.gov.uk/ons/datasets-and-tables/data-selector.html?cdid=CHAW&dataset=mm23&table-id=2.1

32. There might well be circumstances in which provision might be reasonably expected to be made for the remuneration of Counsel in respect of additional or amended Case and Argument – which amounts to the amendment or adjustment of essential (Court-mandated) pleadings. Provision is made for remuneration in civil procedure.

Irrelevance of apparent duplication (which is denied):

33. It is not accepted that the original second sift application and the Case and Argument are duplicates. A cursory glance would confirm that these are hardly carbon copies.

34. Of course, there will be some element of duplication. Invariably, the subsequent document will build upon the earlier, predecessor document – but it might be expected to contain additional information too.

35. To reiterate – this form has a specific statutory format, which has to be obtempered.

36. It still takes some time to create a new appellate document – even if its content (so far as the legal argument is concerned) were broadly similar.

37. It should be remembered that after the passage of time, case papers will have to be revisited and re-read – even if the legal argument were not ultimately further developed. Counsel (or the worker) cannot reasonably be expected to have an eidetic memory. But the likelihood is that after a further passage of time – and the opportunity for greater thinking time – the legal argument might be expected to evolve in some way – and the legal propositions submit to further refinement.

38. Legal arguments are not one-off set-pieces. They develop organically and incrementally. This is not a mechanical process. This cannot be compared to the kind of legal writing, which involves, for example, the submission of paperwork to Companies House or the Land Register. Legal argument (particularly appellate argument) involves the use of professional discretion and judgment. Counsel is the kind of lawyer who is paid to think – and remuneration for their written work product in appellate proceedings ('Case and Argument') should typically recognise the additional thinking time, which has been brought to bear.

39. It should be remembered that the predecessor Written Submissions in support of a second sift application will represent a response to the first sifting judge's reasoning – and will have necessarily been made within only a limited time-frame of 14 days or less (contingent on when exactly Counsel has received instructions from the instructing solicitor). By the time the appeal has successfully negotiated the second sift, there will have been scope for greater thinking time.

40. It should also be remembered that the fee for drafting Written Submissions is capped at £100 (gross). This is frequently inadequate and does not adequately reflect the time and professional responsibility involved. Accordingly, even if paid in full, the overall fee for drafting two items of appeal documentation (Written Submissions in support of a second sift application – and Case and Argument – is only £200 (gross). Even if leave to appeal were granted by the second sifting judges, this scarcely reflects adequate remuneration for the work undertaken in necessarily drafting one or two items of appeal documentation.

Work undertaken in this case:

41. These are not identical documents as the Board has inexplicably maintained.

42. Again, the format of each document differs.

43. The Auditor is invited to compare the respective length of each document. It is not intended to elaborate on how different the documents are – because that should be obvious from reading the respective documents. The complexity of this written work product should essentially 'speak' for itself.

44. In particular, the Case and Argument incorporates an appendix providing an exposition of the approach taken in relation to the legal issue engaged in other common law jurisdictions – a consequence of having additional preparatory time.

45. That the arguments were fully ventilated in the appeal documentation ultimately shortened the length of this appeal hearing. From memory, the Court did not have to hear from Counsel further – and simply and peremptorily granted the appeal.

    [Somewhat disappointingly, no written judgment was issued.]

46. Agents can confirm the position.

Appeal hearing fee does not provide for subsumption or cross-subsidy of drafting appeal documentation:

47. The fee rate for the conduct of a sentence appeal does not realistically allow for the subsumption of the drafting fee for Case and Argument – or for any element of cross-subsidy.

48. There would be no logical basis for saying that the fee for Written Submissions (in the conduct of an appeal against sentence) should be subsumed within the appearance fee (of £150) – particularly given that there is separate and specific provision elsewhere in the Regulations for the payment of Written Submissions.

49. That argument might well have application in other forms of (criminal) procedure where Counsel might be expected to receive something approximating to a 'brief fee', which can provide the bulk of their fee in relation to the case.

    [In contrast, in first instance High Court proceedings, the drafting of preliminary notices is arguably subsumed within the fee for the conduct of the first preliminary hearing – which equates to the 'brief fee' operable in England and other common law jurisdictions.]

50. Matters are further compounded by the introduction of an effective travel 'ban' – because the Board is no longer prepared to pay for travel time and expenses necessarily incurred by Counsel in travelling to and from Edinburgh for the conduct of an appeal hearing. This has the effect of substantially squeezing the appeal hearing fee from £150 – such that there can be no scope for the subsumption of other work within it.

51. There is no guarantee that a case will be taken in the morning session. Counsel has no control over its time-tabling. So the resultant fee earned by Counsel for the conduct of an appeal hearing – especially if extending into the afternoon session – allowing for travel time and

travel expenses – prior preparation – and after deductions – can already approximate to the national minimum wage (NMW).

52. It should also be remembered that the Counsel who has drafted the Case and Argument may not be subsequently available to conduct the actual appeal hearing – because in this jurisdiction, appeal hearing dates are fixed peremptorily – without any consideration to Counsel's diary – and will not be shifted in the event that Counsel has competing court or other commitments. Accordingly, this has to be treated as 'piece work' – or 'zero-hour' contract work – and the minimum wage should apply on each occasion.

53. 'Piece workers' (which includes Counsel) must be paid either at least the minimum wage for every hour worked – or on the basis of a 'fair rate' for each task or piece of work done. What may have been paid by the contractor for work, which was done on other days, is irrelevant. There is no basis for allowing the contractor to avoid complying with minimum wage compliance for (court-mandated or compulsory) work done by Counsel (the worker) on the very particular day (or days) on which it was done – on the pretext that it considers payment 'generous' for the level of work required (which is denied) – and because it maintains that there is a fair measure of equalisation over the total spread of cases, which Counsel (the worker) undertakes in any given year (which is denied). It is what is paid for the (court-mandated) work was done – and on the day(s) when it was done – and the subsequent efforts by the worker to recover that fee from an obstructive contractor – which ultimately matters.

54. The time typically involved for the drafting of this appeal documentation might be expected to be between 4 and 6 hours' labour – though that might depend on the complexity of the subject-matter. Since this was a sentence appeal on an issue of competency – and which involved extensive comparative analysis – more labour still was expended. Accordingly, the impugned fee of £100 is hardly 'generous' – given the labour, legal analysis, creative thinking and professional responsibility involved. This work is capped at £100 – and has been frozen at this rate since 2006. It is not accepted that there is somehow a fair measure of equalisation over the total spread of cases undertaken in a given year – at this frozen, capped rate – if Counsel is doing this work properly and conscientiously – whether in the individual case or over a spread of cases.

55. The more comprehensive and tightly argued the appeal documentation, then, self-evidently, the shorter should be the appeal hearing.

    [Lengthier arguments do not always mean that more time has been spent.]

56. Counsel should surely be motivated to produce a meticulously reasoned written submission, which focuses the issues for the Court – and reduces the length of the appeal hearing.

Appropriateness of Counsel drafting Written Submissions after first sift refusal:

57. The Board maintains that I am the only Counsel who drafts specifically tailored 'Written Submissions' in support of second sift application – and that all other Counsel (and Solicitor Advocates) charge the fee for an opinion (or note) on appeal against sentence. I do not accept that this claim is accurate – because I have recently inherited case papers in a solemn sentence appeal, where my predecessor Counsel had drafted written submissions in support of a second sift application. Nor do I accept that I am the only Counsel who charges for preparing second sift applications.

58. Certainly, I am surprised at the suggestion that I am the only Counsel or Solicitor Advocate who has ever drafted specifically tailored Written Submissions in support of a second sift application. That strikes me as remarkable – because the implication must be that other Counsel are producing skewed and deliberately incomplete Opinions in support of second sift applications. That is a matter entirely for other Counsel. I am not my brother's keeper.

59. Professionally I would have a difficulty with the Court thinking that I had not addressed all relevant issues in my Opinion – if I were presenting it to the Court as my definitive Opinion on the matter. It would be implicit in a custom-made Opinion for the second sift that adverse subject-matter had been removed from consideration altogether – lest this compromise the conduct of the appeal. It would be a concern that the perception of the Court might be that I was attempting to misrepresent the appellant's case and mislead it (by omission) by such an approach. In contrast, a Written Submission is a form of advocacy – and can accentuate the positive and eliminate the negative – in way which avoids this professional or ethical dilemma.

60. Even assuming that were so, I am not bound by the practices of other Counsel. Each individual Counsel is entitled to exercise their own professional judgment in deciding how to best advance their client's case or interests. To suggest otherwise means that Counsel's professional discretion should somehow be fettered by the instinct of the herd. It should be remembered that Counsel operates in an atomistic context – in contrast to the corporate ethos prevailing in a large firm of solicitors – or a government department – where the individual is subordinate to the interests of the organisation with little scope for the expression of individual flair or identity. Allowance has to be made for the idiosyncrasies of individual Counsel if the practice of being an Advocate is to mean anything. Advocates are not corporate clones.

    [Though I do not regard it as an eccentricity to produce Written Submissions for the Court – and to be expected to be paid – modestly – for doing so.]

    Counsel is entitled to be in a minority of only one (and be paid the minimum wage for being so – see below). As Gandhi said:

    > "If you are a minority of one, the truth is the truth."

61. The Lord Justice General has recently issued a Practice Note (Practice Note No. 1 of 2015, dated 26 May 2015). Though not expressly stated, this could be construed as disapproving of agents' practice of attaching Counsel's Opinions to second sift appeals – on the basis that these documents 'have no status'. Accordingly, the contemplated change in procedure commends this Counsel's practice of preparing Written Submissions in support of a second sift application. This is what will have to happen in future – since Counsel's Opinion might presumably be treated by the Court as *pro non scripto* – and as not equating to a written submission. If Counsel cannot make a submission at this stage, what exactly is the point in agents instructing Counsel?

62. What was significant about this case was that leave to appeal was refused at the first sift – was granted at the second sift – and that the appeal (originally considered unstateable by the first sifting judge) went on to succeed. And since this appeal ultimately succeeded who is to say that this Counsel's conduct of the appeal was misconceived or unreasonable?

[And since this appeal succeeded, public money was ultimately saved elsewhere – in reducing the period of imprisonment to be served by the appellant.]

63. The Board maintains that at that stage the Court is being invited for leave to appeal – and to establish whether there are arguable grounds – and that "Written submissions" (as described in the Table of Fees) – or the "Case and Argument" (to more accurately reflect the terms of section 115 of the Criminal Procedure (Scotland) Act 1995) – only becomes a requirement after the sift stage and leave to appeal has been granted.

64. The Board also maintains that submissions of this nature, which are prepared in advance of leave to appeal being granted, are 'premature, potentially unnecessary and do not therefore, in their view, satisfy the statutory tests of taxation of "work actually and reasonably done, due regard being had to economy"'.

65. I do not accept the proposition that Written Submissions only become a requirement after the sift stage has been successfully negotiated – and are somehow premature. That is to completely misunderstand the nature and significance of the sift procedure. There is no point in lodging Written Submissions after leave to appeal has been refused at the second sift – when the appeal is finally over. I do not see how the Written Submissions could have been lodged later. That would not have been consistent with acting in the best interests of the appellant.

66. It is not immediately apparent what 'potentially unnecessary' means. Something is either (potentially) necessary – or it is unnecessary. If it were to subsequently transpire that it was unnecessary, then until such time as it was ultimately known to have been unnecessary, it is still 'potentially necessary'.

67. Self-evidently, the Written Submissions after leave to appeal was refused by the first sifting judge were necessary – because leave to appeal had been refused – and at that point in time the appeal was effectively dead – unless it could be resuscitated by persuasive Written Submissions in support of the second sift application.

68. The point is that this is potentially the final point of advocacy in an appeal – oral or written. If leave to appeal were not granted at the second sift stage, then the appeal is over – and there is no further scope for Written Submissions. This may well be the most determinative advocacy in the conduct of an appeal – particularly since it is implicit that what has been argued to date – in terms of the grounds of appeal (which are prepared before the Sheriff's full reasoning has become apparent) – has not been sufficiently persuasive. At this point the appeal is effectively over – unless something new can be said. A formal second sift submission – unsupported by further, suitably focused written argument – challenging the reasoning of the Sheriff and the first sifting judge – is doomed to fail.

69. Since the Written Submission in support of the second sift application succeeded, this work was timeous – potentially and actually necessary – and satisfies the statutory test of "work actually and reasonably done, due regard being had to economy".

70. The relevant statutory test, which has been invoked, also has to be interpreted in way, which is compatible with minimum wage legislation (see below).

71. Meanwhile, the Opinion of Counsel is an entirely different form of legal writing from a (Written) Submission to the Court – which is a form of advocacy. There is a completely

different emphasis. Most obviously, Counsel's Opinion should be expected to tell it as it is – and realistically address adverse considerations – which may not be highlighted in (written) advocacy. There is no purpose in putting forward a (partially) negative Opinion in support of a second sift application.

72. Further, Counsel might be expected to produce an Opinion as and when the report of the Sheriff (or judge) materialises. There is no obvious reason to wait until such time as and when the appeal has negotiated the first sift. The appellant is entitled to an early indication and assessment of his prospects. To suggest otherwise might be regarded as a lack of empathy for the position of an incarcerated appellant.

Confirmation that Counsel should be remunerated for drafting second sift applications before full legal aid is granted:

73. Since it is no longer possible for full (appeal) legal aid to be granted until such time as the appeal has been successfully sifted, there would be some purpose in the Auditor specifically confirming that the drafting by Counsel of a second sift application is a valid, chargeable item – that the Board might also be compelled to grant emergency or special urgency cover (in terms of Regulation 15) for their drafting – because specific provision is made for a Regulation 15 grant to also include 'the usual work undertaken in connection with the sift process' (under Regulation 15.8) – and should be paid at the rate, which is consistent with drafting Written Submissions in sentence appeal proceedings, as provided for in Schedule 2 (£100). After all, it might be thought that this is precisely the stage at which critical work has to be undertaken in the conduct of a sentence appeal – to render what has hitherto been deemed unstateable, stateable. This is the point at which Counsel can make an effective and meaningful contribution in advancing the appeal. [2]

Esto,

That provision should at least be made for Counsel to be paid the minimum wage:

74. Since the drafting of this appeal documentation is mandated by the Court – and there is no provision for this work to be subsumed or cross-subsidised elsewhere within the appeal hearing fee (of only £150) – Counsel should at the very least be remunerated for its drafting at an amount corresponding to the national minimum wage (NMW).

75. Counsel is a 'worker' – under section 1(2)(a) of the National Minimum Wage Act 1998 – and is entitled to be paid the national minimum wage (NMW) for hours worked. [3]

76. Counsel is not an excluded category of worker, who is denied this protection. [4]

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[2] http://www.slab.org.uk/handbooks/Criminal%20handbook%20master%20copy/wwhelp/wwhimpl/js/html/wwhelp.htm#href=Part%20III%20Carrying%20out%20criminal%20legal%20assistance/III%2015%20Applications%20to%20the%20Board%20appeals.html

[3] http://www.legislation.gov.uk/ukpga/1998/39/section/1

[4] *Edmonds v Lawson* [2000] EWCA Civ 69 only precluded the operation of minimum wage legislation to pupil barristers. Though there was a contract, it was not held to be a contract of employment or service – but a contract of apprenticeship. What is significant about this case is that the English Court of Appeal did not hold that barristers were an excluded category of worker.

http://www.bailii.org/ew/cases/EWCA/Civ/2000/69.html

77. A 'worker' is someone who has entered into or worked under a 'contract of employment' (section 54(3)(a)). [5]

78. Agency workers are not excluded (section 34). [6]

79. A 'contract of employment' includes a contract of service – whether express or implied – and (if it is express) whether oral or in writing (section 54(2)).

80. By undertaking this case, Counsel is a 'worker' who had entered into or worked under a contract of service.

81. Since this is a contract of services, minimum wage legislation applies. This effectively equates to a 'zero-hour' contract. Counsel typically operates under 'zero-hour' contracts – on stand-by time, on-call time, and down-time.

82. The national minimum wage (NMW) is £6.50 per hour.

Commitment of the Scottish Government to pay the living wage:

83. Meanwhile, the Scottish Government has guaranteed the living wage – of £7.65 per hour – to its own staff and says it would like to extend its application. [7] There should be an expectation that the Scottish Government pay contract workers (including Counsel) a sustainable income.

84. In contrast, the Board's position is that Counsel (the worker) should do this Court-mandated work for nothing. That approach is not fair, equitable or reasonable – and is very possibly illegal – again under reference to the National Minimum Wage Act 1998.

85. Even if the Board maintain that it is 'likely' that Counsel will be paid – they cannot give a '100% commitment – and that is not consistent with minimum wage legislation. They must pay Counsel at least the minimum wage – and, standing the commitment of the Scottish Government – the living wage. There cannot 'inevitably be situations where a fee may not be appropriate'. There can be no exceptions.

Refusal to pay defence advocates the living wage is in breach of the Equality Act 2010:

86. It is also illegal to deny payment by discriminating against an advocate, who has been instructed in what is perceptibly anti-Government work – under reference to section 48 of the Equality Act 2010 – which provides that person must not, in relation to instructing an advocate discriminate against the advocate by subjecting the advocate to a detriment – or harass or victimise the advocate. It would be inconceivable that the Scottish Government would deny Advocate Deputes (and other Government-employed or funded lawyers) the living wage (or minimum wage).

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[5] http://www.legislation.gov.uk/ukpga/1998/39/section/54

[6] http://www.legislation.gov.uk/ukpga/1998/39/section/34

[7] http://www.bbc.co.uk/news/uk-scotland-scotland-politics-27386503

http://www.bbc.co.uk/news/uk-scotland-scotland-politics-32878559

Minimum wage should be adjusted to gross figure reflecting Counsel's outlays:

87. The determination of the hourly rate of remuneration should reflect deductions form earnings and any charges or expenses, which the worker is required to bear – under reference to section 2(5)(c) and (d) of the National Minimum Wage Act 1998. [8]

88. Accordingly, in calculating the appropriate gross fee for the payment of the national minimum wage (NMW) to Counsel, due allowance should be made for deductions, charges and expenses necessarily incurred by Counsel – including unavoidable deductions such as Faculty dues and commission. Proportionate recognition ought to be made for professional indemnity insurance cover – and other incidental outgoings.

89. Properly, a resultant net minimum wage (NMW) has to be reflected in a substantially higher gross fee than £6.50 per hour.

90. The gross fee should also reflect something of the indemnity risk – which does not typically attach to minimum wage employees. This might be expected to be more significant still in a solemn appellate case – and in circumstances in which custody or reputational damage to an accused is involved.

91. The figure for a minimum wage should also reflect the considerable time and labour now expended on recovering that minimum wage – which, in the circumstances of this case, has increased exponentially – above and beyond the original time-frame of 4 – 6 hours' for drafting the essential appeal documentation – as posited above.

92. Further, the gross minimum wage paid should reflect the factoring in the possibility of future, unremunerated work, which Counsel may be obligated to potentially undertake – specifically in the event of a disgruntled client complaining to the regulatory body (the Scottish Legal Complaints Commission) – such that Counsel is required to prepare a response – or of the client continuing to exhausting his remedies and resorting to the Scottish Criminal Cases Review Commission and/or the Dean of the Faculty of Advocates.

    [As it transpires this client was not so disgruntled to resort to these remedies – but it is submitted that the potentiality of such – the implicit potential risk element – ought to be reflected in calculating a reasonable rate of remuneration.]

93. These are professional obligations, which do not typically concern the minimum wage, 'zero-hour' employee. The point is that – consistent with Counsel's professional duties – Counsel's responsibility (and work) does not necessarily cease when a case is apparently or notionally concluded.

94. But it might be thought that specialist appellate lawyers should be regarded as being worth marginally more than the minimum wage – if, that is, the Government has any kind of respect for this branch of the legal profession who focus on criminal appellate litigation. If they do not have any such respect, the state can at least pay Counsel the national minimum wage.

Non-compliance: worker entitled to additional remuneration:

[8] http://www.legislation.gov.uk/ukpga/1998/39/section/2

95. In the event of non-compliance the worker (Counsel) is entitled to additional remuneration – under reference to section 17 of the National Minimum Wage Act 1998. [9]

96. The worker (Counsel) is also entitled to be paid for the time expended administratively in recouping payment of the minimum wage.

97. The Board can no longer justifiably argue that Counsel should not be paid for work, which they consider to be 'unrelated' to the actual work done on the case. Counsel is entitled to be remunerated for all incidental, administrative work undertaken as a result of having been instructed to conduct a case – including time and labour expended on fee recovery – that they might at least recoup the national minimum wage (NMW) – if, that is, the Board is to comply with the National Minimum Wage Act 1998. Any asserted distinction by the Board – to differentiate between work 'related' to the case and work 'unrelated' to the actual conduct of the case – is wholly artificial. It is immaterial whether work deemed to be only administrative is 'related' or 'unrelated' to the case (as the Board sees it).

    [It is submitted that all work arising from a case is, by implication, related to the conduct of the case. It does not exist in a vacuum.]

    So any time spent by the worker (Counsel) in attempting to recover the national minimum wage (NMW) must also be reimbursed – at least at National Minimum Wage (NMW) levels. It is hardly the fault of the worker (Counsel) that he has been subjected to such an additional administrative burden. To suggest that this administrative workload – needlessly extended by the intransigence of the Board – should not qualify for remuneration would be to facilitate the frustration of the *bona fide* efforts of the worker (Counsel) to assert his statutory rights and be paid (the minimum wage).

98. The worker (Counsel) should be paid for the time engaged in asserting his statutory rights. The Low Pay Commission would surely concur. If Schedule 2 is to be interpreted in terms compatible with the National Minimum Wage Act 1998, then the worker (Counsel) must be paid for all of his labour – and regardless of whether the Board consider it 'related' to the case or not.

99. This should specifically reflect the time expended in producing this written submission for the Auditor (20 hours – on a 6,741 word document) – and on lengthy and abortive negotiations with the Board – also additional time expended for attendance at a hearing before the Auditor – and expenses necessarily incurred in travel to and from Edinburgh for the conduct of this hearing.

100. To compound matters, the Board advises that it will be seeking expenses against the worker (Counsel) in the event that the worker is unsuccessful at taxation. Again, this amounts to an amount to frustrate the efforts of the worker to assert his statutory rights – and representations should be invited from the Low Pay Commission about the appropriateness of their doing so (see below).

Potential breach of Article 4, ECHR:

[9] http://www.legislation.gov.uk/ukpga/1998/39/section/17

101. Because the impugned work in this case is Court-mandated – with the prospect of punitive sanctions in the event of non-compliance – this arguably gives rise to a potential breach of Article 4, ECHR – which provides for freedom from forced labour.

102. Properly, the Scottish Government – and its agent, the Scottish Legal Aid Board – must act in a manner, which is Convention-compatible – and they have a positive obligation to ensure that the relevant fee framework addresses such anomalies.

103. This is forced labour because it is undertaken in circumstances in which there is a risk of a punitive sanction – and given the implications of a finding of Contempt of Court.

Late Payments Directive:

104. Counsel would also be entitled to payment of interest – in terms of the Late Payments Directive, 2011/7/EU. [10]

Input from the Low Pay Commission and HMRC:

105. The matter should be referred to the Low Pay Commission (LPC) [11] – the Scottish Low Pay Unit – and the Compliance Team of HMRC.

106. It might well be that the Auditor can be assisted in obtaining submissions from such interested organisations.

107. The Low Pay Commission has the power to issue an enforcement notice – in terms of section 18 of the National Minimum Wage Act 1998. [12] They also have the power to sue on behalf of the worker (Counsel) – in terms of section 20 of the National Minimum Wage Act 1998. [13]

108. Non-compliance is a criminal offence under section 31(1) and (6) of the National Minimum Wage Act 1998. [14] This offence can be committed by a body corporate (section 32). [15]

Irrelevance of alleged collective bargaining on national minimum wage entitlement:

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[10] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:048:0001:0010:EN:PDF

The Late Payment of Commercial Debts (Interest) Act 1998, section 2A – as amended by the Late Payment of Commercial Debts (Scotland) Regulations 2002

See *Andrew Smith QC v. SLAB* (2012)

[11] https://www.gov.uk/government/organisations/low-pay-commission

[12] http://www.legislation.gov.uk/ukpga/1998/39/section/18

[13] http://www.legislation.gov.uk/ukpga/1998/39/section/20

[14] http://www.legislation.gov.uk/ukpga/1998/39/section/31

[15] http://www.legislation.gov.uk/ukpga/1998/39/section/32

109. The Board state that in all of the discussions, which they have had with the Faculty of Advocates and the Solicitor Advocate branch of the profession, when developing the Appeal Table of Fees, it was not their belief that the fee for Written Submissions was ever envisaged to be chargeable at the sift stage. They also argue that other Counsel have not expressed any problem with the fee – or, rather the fee being abated to zero.

110. But the state – or a corporate body that is its agent – or a professional body – or a trade union – cannot negotiate away the statutory rights of the individual worker (Counsel) to be paid the national minimum wage – and to assert his statutory rights. That would amount to an *ultra vires* (and potentially criminal) act – for the minimum wage legislation is couched in imperative terms.

111. Further, a worker who has previously waived his right not to be paid – or not to be paid an amount equating to at least the national minimum wage – is not bound by that earlier undertaking. Any previous concession or waiver can be re-visited – and re-opened. Minimum wage legislation has retrospective effect – and is not covered by prescription or time-bar.

112. It is irrelevant that only one disgruntled worker has ever complained – that does not invalidate their complaint. A disgruntled worker is not bound by the state – or his professional body – or a professional association in his specialised field (of which he may not be a member) – or his peers – in asserting his statutory rights.

113. In any event, Schedule 2 was unilaterally imposed by the Scottish Government. It was hardly a negotiation as conventionally understood.

114. Further, Schedule 2 has not been subject to any recent revision in terms favourable to the worker (Counsel) – most obviously, to reflect movements in the RPI – or changes in court procedures, which complicate Counsel's workload. The Board cannot rely on any distant, purported agreement until the end of time. The failure by the Scottish Government to amend Schedule 2 – and update fee rates – is not demonstrative of fair dealing – has the effect of vitiating any previous alleged agreement – and negates any suggestion that what transpired was in the nature of binding collective bargaining.

115. But what is sought by this taxation is that Schedule 2 is interpreted literally – and in terms, which are consistent with the National Minimum Wage Act 1998 – such that the Board cannot peremptorily and arbitrarily abate court-mandated work to zero.

Expenses:

116. The implication might be that the worker (Counsel) asserting his rights should not be required to risk exposure to payment of expenses if unsuccessful at taxation. That would certainly not be consistent with the spirit of the minimum wage legislation.

117. Again, it might well be that the Auditor can invite representations from the Low Pay Commission.

Lewis Kennedy, Advocate

Advocates Library,

Parliament House,

Edinburgh

4 June 2015

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Date of Issue 11-12-2013

FSL Reference R192/HA130264/002

Contact Name R V ROBERTS

Contact Ref RR/LMCG/H715A

[redacted]

Case Type CRIMINAL LEGAL AID- SCHEDULE 2
Legal Aid Certificate No. **Issued**
3979217313

Advocate K18 Lewis K. Kennedy **VAT Reg No.** 751 2393 42

Date	Details	Amount
23-10-2013	Opinion on prospects of sentence appeal	75.00
24-10-2013	Consultation, HM Prison Saughton - advising re appeal procedure, prospects in light of the Sheriff's report	184.00
	Travel from Arrochar to HM Prison Saughton - 85 miles x 2 - Train fares from Arrochar to Glasgow Queen St (return); and Glasgow Queen St to Edinburgh - £19.85 - cab fare from Haymarket Station to HM Prison Saughton £6.60	26.45
	Travel Allowance	100.00

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Advocate K18 Lewis K. Kennedy

VAT Reg No. 751 2393 42

Date	Details	Amount
31-10-2013	Framing Written Submissions in support of appeal against sentence - for purposes of second sift application - potentially final exercise in advocacy in conduct of this appeal (written or oral) - separate and distinct document from Opinion - in so far that additionally engaged with and sought to distinguish the reasoning of the first sifting judge - and required to be more circumspect - given that intended for different audience. In contrast to Counsel's Opinion, these	

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Date	Details	Amount
	are pleadings. These are written pleadings prepared for the High Court - specifically for consideration by the (second) sifting judges. At this point in time the appeal may be effectively over. This can be potentially the final piece of advocacy in the conduct of an appeal (oral or written). New arguments were prepared - engaging with the reasoning of the first sift judge.	100.00
12-11-2013	Framing Case and Argument - in support of solemn sentence appeal - on receipt of second sifting	

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Advocate K18 Lewis K. Kennedy

Date	Details	Amount
	judges' decision - previously premature - specifically required (ordered) by the Court - notwithstanding that earlier Written Submissions had been filed. Again, in contrast to Counsel's Opinion, these are pleadings. And in contrast to the second sift application, this is an additional and separate category of pleadings. This is hardly superfluous documentation. These are essential pleadings in the conduct of appeal proceedings. Justiciary were contacted (by Counsel on	

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Advocate K18 Lewis K. Kennedy **VAT Reg No.** 751 2393 42

Date	Details	Amount
	12/11/2013) - and insisted that Counsel must lodge Case and Argument. This requires to be done on pain of disciplinary sanction. Additional submissions incorporated - reflecting comparative analysis of position in Commonwealth and equivalent jurisdictions - Engaged 7 hours (12/11/2013); Engaged 1 hour (13/11/2013)	100.00
22-11-2013	Consultation, HM Prison Saughton - advising client re latest procedural developments (at second sift) - revised prospects of success - taking	

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Advocate K18 Lewis K. Kennedy

VAT Reg No. 751 2393 42

Date	Details	Amount
	instructions re video-conferencing procedure	184.00
	From Arrochar to HM Prison Saughton - return - 85 miles x 2 - car-shared with agent for part-journey - otherwise claim restricted to train fares incurred	11.25
	Travel Allowance	100.00
11-12-2013	High Court, Edinburgh - conduct of solemn sentence appeal	150.00

- Schedule 2 Details -

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G73 2JQ

Date of Issue 11-12-2013

FSL Reference R192/HA130264/002

Contact Name R V ROBERTS

Contact Ref RR/LMCG/H715A

[redacted]

Case Type CRIMINAL LEGAL AID- SCHEDULE 2
Legal Aid Certificate No. **Issued**
3979217313
VAT Reg No. 751 2393 42

Advocate K18 Lewis K. Kennedy

Date	Details	Amount
	Acting as Junior counsel Alone Court Type: Appeal Court Nature of Case: charge (5) - possession of an offensive weapon (in contravention of Criminal Law (Consolidation)(Scotland) Act 1982, section 47(1)); charges (6) and (7) - threatening or abusive behaviour (in contravention of the Criminal Justice and Licensing (Scotland) Act 2010, section 38(1)); charge (8) - impeding the police (in contravention of Police and Fire Reform	

*** LEGAL AID ***

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Advocate K18 Lewis K. Kennedy

VAT Reg No. 751 2393 42

Date	Details	Amount
	(Scotland) Act 2012, section 90(1)(a) and section 90(2)(a); and charge (9) - assaulting the police (in contravention of Police and Fire Reform (Scotland) Act 2012, section 90(1)(a))	
	Charges Against Client: 5	
	Category of Case: b	
	Number of Accused: 4	
	Case is now Complete	
	Date of Completion: 11 December 2013	
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9 of 9

[redacted]

Case Type CRIMINAL LEGAL AID- SCHEDULE 2
Legal Aid Certificate No. **Issued**
3979217313

Advocate K18 Lewis K. Kennedy

VAT Reg No. 751 2393 42

Date	Details	Amount
	Notes:- *See Attachment*	

*** LEGAL AID ***

Net Total	1030.70
VAT @ 20%	206.14
FEE TOTAL	1236.84

BACS Payments to:
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HIGH COURT OF JUSTICIARY, EDINBURGH

Appeal against (Solemn) Sentence (only)

[redacted]

V

HER MAJESTY'S ADVOCATE

Appeal Reference: XC539/13

PF reference: GG13009715

1. The appellant appeals against the refusal of leave to appeal by the (first) sifting judge (Lord Bannatyne) in his decision of 21 October 2013.

The grounds of appeal that have not passed the sift:

That the length of the sentence of imprisonment was excessive and disproportionate

[Given the appellant's record – and the nature of the charges – it was immediately acknowledged that the custodial threshold had been reached.]

No issue is taken with the level of *Du Plooy* discount of 25% – but with the core sentence of 46 months' imprisonment.

Reasons in support of these grounds of appeal:

Focus of the appeal – combined sentences – that the overall sentence was excessive:

By this appeal, it is argued that a total sentencing starting point of 46 months' imprisonment was excessive – and the Court should now adjust the sentence so that the total sentence is just and proportionate.

The focus of this appeal is on the overall length of the aggregate consecutive sentences of imprisonment. While it is acknowledged that consecutive sentencing can reflect subsequent aggravating conduct in police custody – the 'overall effect' of the consecutive sentences of imprisonment, imposed on the same day, on separate charges on this same indictment – was excessive.

It is difficult to find fault with each individual aspect of sentence in isolation – and argument instead is directed toward the 'overall effect' of the aggregate sentence – that the decision to sentence consecutively raised the aggregate sentence to an excessive level in light of the criminal conduct at issue.

This 'overall effect' of aggregate sentencing can be a relevant consideration in scrutinising sentence. [1]

Even if each offence was distinct and separate – and the Sheriff was entitled to impose a consecutive sentence in relation to each of them – this approach toward sentencing should be moderated by consideration of the 'overall effect' – or the so-called 'totality' principle.

The Scottish courts should adopt the 'totality' principle – prevalent in other common law jurisdictions – and whose purpose is to ensure just and proportionate sentencing for multiple offending.

As it was, the sentence on each individual charge – other than perhaps charge (5) – is excessive.

By resorting to serial consecutive sentencing, the Sheriff did not adequately address the 'overall effect' of such a lengthy aggregate sentence of imprisonment. The Sheriff went beyond the proper range of his discretion in ultimately deciding that a period of imprisonment of such duration, on each individual charge, was appropriate when holding that all sentences had to be served on a consecutive basis.

Understandably, consecutive sentencing on the police custody charges would be entirely appropriate – for deterrence purposes – but consecutive sentencing on each of charges (6), (7), (8) and (9) (to each other) was excessive – given that these offences were all committed on the same day – and, latterly, on the same occasion in police custody – when there was a sufficiently close nexus in time, character and circumstances between the custody offences – to suggest that they were all conceivably part of the same course of conduct.

Issues with individual sentences:

It is conceded that all of the offences were imprisonable – and all of the individual offences merited a custodial sentence – given the appellant's antecedents.

Charge (5):

No issue is taken with the core sentence.

[1] It is stated in *Renton and Brown* at paragraph 22 – 42:

> "In deciding whether or not consecutive sentences should be imposed in any such case the court should consider the overall effect of the sentence."

Charge (6):

Again, no issue is taken with the core sentence – at least in isolation.

Charge (7) – Inappropriate lexicon of abuse:

The homophobic aggravation is a factor indicating higher culpability – and of itself would be expected to result in a consecutive sentence – for public policy reasons.

But it does appear to have been in the nature of merely gratuitous abuse – and not a genuine attack on the sexuality of the officers – which was not known or otherwise in issue. The appellant seems to have been expressing his contempt for the police rather than any particular intolerance for gay men as such. At face value, this can be characterised as homophobic abuse – though the Sheriff seems to have given insufficient weight to the appellant's intention in sentencing for what was a technical aggravation. [2]

Charge (8):

Again, no issue is taken with the headline sentence – at least in isolation.

Charge (9):

Again, no issue is taken with the core sentence – in seclusion.

The 'totality' principle – just and proportionate sentencing for multiple offending:

As a matter of general principle, where consecutive sentences are imposed, the combined sentence should not be unduly long or excessive. The principle of totality comes into play where multiple offences are involved – requiring the sentencer to craft a global sentence of all offences that is not excessive.

The totality principle is an example of proportionality and the principle of restraint combining to temper the pursuit of deterrence through heavier sentences.

The passage in *Renton and Brown* at paragraph 22 – 42 (cited above in footnote (1)) impliedly recognises the application of a totality principle in Scottish criminal sentencing.

[2] Again, see the English Sentencing Guidelines:

http://www.cps.gov.uk/legal/s_to_u/sentencing_manual/police_assault/

If the total sentence is excessive, the Court should adjust the sentence so that the total sentence is proper – and avoid sentences that are cumulatively out of proportion to the gravity of the offences. [3]

A cumulative sentence may offend this 'totality principle' if the aggregate sentence is substantially above the normal level of a sentence for the most serious of the individual offences involved – or if its effect is to impose a particularly crushing sentence on the offender.

How sentencers should be expected to proceed in accordance with the totality principle:

Properly, the sentencer should take one last look at the combined sentence to determine whether it is excessive – in the sense of it being disproportionate to the gravity of the offences and the degree of the offender's responsibility.

In determining whether the combined sentence is just and proportionate (to the gravity of the offence and the degree of responsibility of the appellant), the sentencer should take into account and balance the following factors: [4]

- The length of the combined sentence in relation to the normal level of sentence for the most serious of the individual offences involved;
- The number and the gravity of the offences involved;
- The offender's record;

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[3] The Sentencing Council has published definitive Guidelines on three overarching aspects of sentencing: allocation – offences taken into consideration (TICs) – and totality. These came into force on 11 June 2012.The totality guideline reflects existing sentencing principles and can be accessed at:

http://sentencingcouncil.judiciary.gov.uk/docs/Definitive_guideline_TICs__totality_Final_web.pdf

"The principle of totality comprises two elements:

1. All courts, when sentencing for more than a single offence, should pass a total sentence which reflects all the offending behaviour before it and is just and proportionate. This is so whether the sentences are structured as concurrent or consecutive. Therefore, concurrent sentences will ordinarily be longer than a single sentence for a single offence.

2. It is usually impossible to arrive at a just and proportionate sentence for multiple offending simply by adding together notional single sentences. It is necessary to address the offending behaviour, together with the factors personal to the offender as a whole.

Concurrent/consecutive sentences
There is no inflexible rule governing whether sentences should be structured as concurrent or consecutive components. The overriding principle is that the overall sentence must be just and proportionate."

[4] The Newfoundland and Labrador Court of Appeal decision in *R v Hutchings*, 2012 NLCA 2, sets out "guidelines for the analytical approach to be taken" when considering applying the principle of totality – at paragraph [83].

- The impact of the combined sentence on the offender's prospects for rehabilitation, in the sense that it may be harsh or crushing;
- Such other factors as may be appropriate to consider to ensure that the combined sentence was proportionate to the gravity of the offences and the appellant's degree of responsibility.

The sentencer should then proceed to determine the extent to which the aggregate sentence should be reduced to achieve a proper totality. If, on the other hand, the sentencer concludes that the combined sentence is not excessive, the sentence can stand.

The sentencer should achieve a fitting result by first attempting to adjust one or more of the sentences by making it or them concurrent with other sentences – and/or progressively reduce the length of an individual sentence below what it would otherwise have been. [5]

It might be appropriate to first consider the worst of the offences and then assess what affect the collateral offences have on the overall culpability, thus treating the lesser offences as modifiers of the initial sentence on the substantive charge.

The length of the combined sentence in relation to the normal level of sentence for the most serious individual offence:

The Sheriff failed to have due regard as to how the combined sentence – the 'overall sentence' – radically departed from the most serious of the individual offences involved (charge (5)) – and failed to consider the overall effect of the combined sentences in arriving at a headline sentence of 46 months' imprisonment.

The number and the gravity of the offences involved:

Though the (first) sifting judge calls the incident involving the broken bottle as 'very nasty and serious' – the sentence on charge (5) was not insignificant.

In any event, the appellant was not responsible for committing the most serious offence on this indictment (charge (3)) – on which the co-accused had been sentenced to 3 years' imprisonment (reduced from a sentencing starting point of 4 years' imprisonment). [6]

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[5] See the Totality guideline:

"when sentencing for similar offence types or offences of a similar level of severity the court can consider:

- whether all of the offences can be proportionately reduced (with particular reference to the category ranges within sentencing guidelines) and passed consecutively;
- whether, despite their similarity, a most serious principal offence can be identified and the other sentences can all be proportionately reduced (with particular reference to the category ranges within sentencing guidelines) and passed consecutively in order that the sentence for the lead offence can be clearly identified."

The (first) sifting judge may be overstating matters when he describes each offence as being in itself a serious and nasty one. Significant deletions had been made to the libel on charge (9) (of 'attempt to bite him on the head'). There is no suggestion of the police being hospitalised or failing to complete their tour of duty. Police Constable [redacted] (the complainer on charges (8) and (9)) sustained grazes to the little and wedding fingers of his left hand when during his dealings with the appellant they both lost their balance and fell. There is no mention of injury to any other officer.

It might well be that each of the offence was distinct and separate – but there was still a sufficiently close nexus in time, character and circumstances between them – to suggest that the Sheriff's approach – of unrelenting consecutive sentencing – veered towards the excessive. These were 'spree crimes' – involving a string of similar offences committed over a short period of time. Though strictly separate offences, the Sheriff should have treated them as two discrete groups of offences – two 'transactions' – the offence before arrest (charge (5)) – and the subsequent chapter involving those offences after arrest (charges (6), (7), (8) and (9)) – due to the linkage between them. [7]

It is not being argued that the Sheriff should have sentenced only on a concurrent basis – and while the Sheriff was entitled to consider that each of these offences was deserving of separate punishment – he ought not to have done so on this kind of scale. Given that the sentence on the lead offence (charge (5) – of 18 months' imprisonment) was already significant – a further, single or *cumulo* consecutive sentence on charges (6), (7), (8) and (9) could have adequately marked the appellant's escalating loss of self-control in police custody – in so far that these latter charges might be rightly characterised as one rolling incident or self-contained transaction.

Esto,

Even if there should be consecutive sentencing between the offences committed in police custody – including before and after arrest – charges (8) and (9) were still sufficiently closely connected – and arguably part of the same criminal adventure or 'transaction' – such as to have justified sentences concurrent with each other – involving as they did, the same complainer.

The appellant's record:

It is acknowledged that the appellant's record is a formidable and recent one.

But the appellant did not have a significant indictment record – unlike his co-accused.

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[6] The co-accused had an extensive record – including numerous convictions on indictment for aggravated assault and robbery.

[7] The English courts have held that the single transaction rule does not apply when offending is accompanied by assault against law enforcement officers. The rationale is that cumulative sentences are necessary to mark the gravity of this offending – and for deterrent purposes.

Conclusion:

There was ample scope for the Sheriff to adjust one or more of the sentences by making it (or them) concurrent with the other sentences. [8]

By adopting a 'mixed' approach, the Sheriff could still have avoided any reduction for bulk or continued offending – and sufficiently punished the appellant for his behaviour towards the police.

The Sheriff erred when he held that 28 months' imprisonment was not outwith the appropriate range of sentence for the appellant's conduct towards the police. [9]

Objections to the 'totality' principle:

The objection often raised to the totality principle is that it amounts to discounting for bulk offending – weakening the deterrent effect of sentencing. As the effective sentence for each additional crime progressively decreases, there would appear to be no inducement for an offender to refrain from committing further crimes against law enforcement officers. But this assumes that offenders are rational and well-informed calculators of the cost/benefit analysis of committing such further offences and that the likely sentence is a major determinant of offending behaviour.

Then again, there is a need to balance totality with deterrence and adequate denunciation of the conduct involved.

Importation of the English Guideline totality principle involves a particularly analytical approach – though the present Scottish approach lacks any kind of structure or framework. [10]

Significantly, the Appeal Court has approved of the application of the English Sentencing Guidelines in other areas of criminal law. Though they are not in any respect binding, the English Sentencing Guidelines are, at the very least, instructive. [11]

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[8] Of course, if the offences had been indistinguishable, there would otherwise have been scope for a 'double counting', or a 'double punishment' argument.

[9] See paragraph [18] of his report

[10] Other common law jurisdictions also recognise the totality principle – Canada, Australia, New Zealand and Hong Kong. In contrast, Irish judges tend to favour concurrent sentencing.

[11] See *Gill, Craig and Montgomery v HM Advocate* [2010] HCJAC 99 at paragraph [4]:

> "Care must be taken when considering formal Guidelines from England, even in relation to United Kingdom statutory offences, because of divergent sentencing powers and practices in the two jurisdictions."

English Sentencing Guidelines 'provide a structure for, but do not remove, judicial discretion' (*HM Advocate* v *Graham* [2010] HCJAC 50, *per* Lord Justice-Clerk (Gill) at paragraph [21]).

***Du Plooy* discount:**

The sentence discount should still be 'ring-fenced'. This is a separate issue entirely.

List of authorities:

- *Renton and Brown* at paragraph 22 – 42;
- Sentencing Council Guideline on totality, which came into force on 11 June 2012 [12]; and
- *R v Hutchings*, 2012 NLCA 2

IN RESPECT WHEREOF:

Lewis Kennedy, Advocate

Counsel for the Appellant

Advocates Library,

Parliament House,

Edinburgh

Solicitor for the Appellant

Principal agents:

Roberts & Co.,

See *HM Advocate v Discovery Homes (Scotland) Ltd and Pratt* [2010] HCJAC 47, *per* the Lord Justice General at paragraph [17]:

> "That Guideline has statutory effect only for England and Wales but it will, no doubt, in the future be noticed for the purposes of sentencing on like offences in Scotland."

The Guidelines cannot be disregarded because they reflect that someone has applied their mind to the issues – and highlighted in a matrix the relevant aggravating and mitigatory factors (*A Serious Matter*, Frank Crowe, JLSS, 19 August 2013).

These Guidelines have not been tested in the Supreme Court – though the Supreme Court would hardly be expected to be involved in sentencing minutiae.

[12] http://sentencingcouncil.judiciary.gov.uk/docs/Definitive_guideline_TICs__totality_Final_web.pdf

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31 October 2013,

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