3.18a *Fresh counsel New lawyer and original lawyer's responsibilities*

Getting an accurate picture by the Registrar Archbold Review Issue 8 page 7 In practice [a failure of new lawyers] to contact trial lawyers may cause three problems:

i) There is a danger that the person advising and drafting grounds will not be aware of all that occurred, whilst the case was in the hands of the previous lawyers.

ii) There is no notice given to the trial lawyers that a case they were involved in is being critically examined and on what basis.

iii) Waiver of privilege may not be addressed at the time of lodging the grounds by the person best able to see the need for it. If it is deemed necessary further on in the proceedings, it will result in former representatives being asked for detail after they could first have been informed.[1]

The discretion as to whether fresh representatives contact previous lawyers has now been removed as a result of a series of cases that examined another issue entirely, see *R v Davis and Another* 2013 EWCA Crim 2424, *R v Achogbuo* 2014 EWCA Crim 567, and *R v McCook* EWCA Crim 734. The following principles arise from the combination of those decisions:

1 The Court of Appeal expects strict compliance with the duties of advocates and solicitors. There is a fundamental duty on them to make applications to the Court only after the exercise of due diligence, *R v Achogbuo* 2014 EWCA Crim 567 at para 20. For fresh lawyers this necessarily entails taking steps to ensure that they are fully apprised of all that occurred whilst the case was in the hands of the previous lawyers insofar as that is relevant to the new proceedings.

2 In cases where an application is based upon allegations of actual or implicit incompetence by previous legal advisers then it is essential that enquiries should be made of those prior lawyers said to have acted improperly and equally important that other objective and independent evidence be sought to substantiate the allegations made, *R v Achogbuo* 2014 EWCA Crim 567 at para 20.

3 These principles apply not only where there is an allegation that previous lawyers have erred or failed in some way but also in any case where it is essential to ensure that the facts are correct, *R v McCook* 2014 EWCA Crim 734 at para 11.

The rulings highlight the necessity of finding out what has actually happened in the Court below. Lawyers should not rely solely on assertions made by a convicted applicant. They should check with the prosecution before asking the officer to confirm the defendant was of good character. If they did not and got an unfortunate reply they would be likely to be subject to wasted costs if the proceedings were aborted. [When counsel and contacting counsel I] used a standard phrase when writing to former counsel, 'I would greatly appreciate any other comments you have. I am acutely aware that I was not at the trial with all the attendant disadvantages that that brings'.

[I] would recommend the following as the appropriate procedure for fresh lawyers and trial lawyers when applications are submitted to the Court of Appeal:

1 See for example *R v Gohil* 2014 EWCA Crim 1393 at para 38

Fresh lawyers

i) When drafting grounds make a sensible decision on whether waiver is required. Any ground that goes to the conduct of the trial is likely to require waiver. If so, advise the applicant about the waiver of privilege procedure. Either obtain a signed waiver of privilege from the applicant or note that the applicant declines, having advised them of the consequences of doing so.

ii) Send draft grounds to former representatives inviting their comments, particularly on the facts.

iii) On receiving comments reconsider the draft grounds and include confirmation that trial counsel has seen the grounds or, in cases where there has been no response, that that is the position. Should the grounds still be arguable, finalise the same.

iv) Lodge the grounds. In cases where waiver is judged to be necessary, lodge the formal waiver document with the grounds or (having confirmed that the applicant does not wish to waive privilege) inform the Court that the applicant is unwilling do so and has been advised as to the consequences of that decision.

Trial lawyers

i) Respond on the facts, it need not be lengthy. If put on notice of criticism, confine yourself to the facts and explain that you cannot expand without waiver.

ii) If there is no criticism but you do not feel able to respond fully without waiver of privilege, say so.

iii) Whilst responding is a matter of courtesy, bear in mind that a failure to respond will be notified to the Court on consideration of the application.

Note: This is an edited extract. As the Registrar has sent it out it can be assumed that it was with the encouragement of the Lord Chief Justice and practitioners would be wise to treat the article as if it were a Practice Direction. Ed.

3.20a *Incompetent advocates – Ground relying on*

R v A 2014 EWCA Crim 567 LCJ D appealed. It was later admitted the he had appealed before and the first appeal was misconceived. The second made no mention of the first and suggested his solicitor was incompetent regarding a no comment interview. It was discovered the solicitor had in fact properly advised D. Held. The Court expects not only the highest levels of disclosure but also the highest standards from advocates and solicitors. In cases where incompetence of trial advocates is alleged there is a duty to exercise due diligence and make enquiries of trial lawyers and take other steps to obtain evidence before submitting grounds of appeal. Because the second appeal made no mention of the first we refer this case to the Solicitors Regulation Authority.

Note: It is assumed that the single judge refused the first application for leave and so it was not formally dismissed. Ed.

3.34 *Abandonment*

R v Taylor 2014 EWCA Crim 1208 D was convicted of burglary and counsel wrote grounds of appeal. They were submitted but before they were seen by the single judge D signed a Form A abandoning his appeal. He sought to withdraw it. D said the reason why he abandoned the appeal was because he was

advised by fellow inmates he might end up with additional time in custody and he had not received any legal advice about the abandonment. D added he had acted hastily and should have asked for legal advice. Held. But for the bad advice D would not have abandoned his appeal. That was the sole reason. We allow him to withdraw the abandonment.

R v Livesey 2013 EWCA Crim 1913 D, N and E pleaded to numerous robberies. They applied for leave to appeal. The single judge refused the applications and stated that the full court should consider making a direction for loss of time prior to the hearing of any renewed application. On a non-counsel application, the full court granted all three leave to appeal and ordered up-to-date prison reports. Eight days before the hearing, D abandoned his appeal based on advice from his solicitor. His solicitor advised him, in strong terms, that he should abandon his appeal because of the risk of losing time. The solicitor wrote to the court in full and frank terms and accepted that he had incorrectly advised D to abandon his appeal. The solicitor accepted that he was unaware that once the full court had granted leave, a direction for loss of time could not be made (Criminal Appeal Act 1968 s 29). D sought to have his abandonment treated as a nullity. Held. The advice was fundamentally flawed and although in the strict sense D knew he was abandoning his appeal, it would be wrong to describe this as a deliberate and informed decision on his part. He had been advised that he was at considerable risk of his sentence being increased in real terms if he persisted with his appeal, a risk that simply did not exist following the grant of leave by the full court. D's decision was based on a wrong view of the law and D's mind did not truly go with the abandonment. Applying the authorities, the act of abandonment was a nullity. Sentence reduced from 32 months to 24.

3.39a *Removing unarguable cases from the list*

R v Muller 2014 EWCA Crim 490 D appealed his conviction and sentence. The single judge refused leave and said there were no arguable grounds. The case was listed before three judges. No counsel attended. Held. This is not an appeal but a stage in the filter of arguable from unarguable cases. There is absolutely no merit in any of allegations made by D. Application refused.

3.46 *Direction for loss of time*

See also: *R v Horne* 2014 EWCA Crim 1253 (This is an utterly hopeless application. The fact that the defendant was represented on a *pro bono* basis did not give him immunity from having time spent in custody disallowed. In deference to counsel's submissions to the court we don't do so.)

R v Fogo and Another 2014 EWCA Crim 1462 (D and F renewed their appeal. The single judge warned them loss of time would be considered. One had an advocate. Held. The applications were without merit. The advice of a lawyer is a factor but it is not determinate. 42 days not to count.)

3.53 *Right of appellants to attend*

R v Martindale 2014 EWCA Crim 1232 D pleaded to landlord Health and Safety offences. A tenant died and another collapsed due to a faulty gas boiler. She was given a Suspended Sentence Order, a £4,000 fine and a £17,500 costs order. She was granted leave to appeal but declined legal aid. The Court of Appeal explained that they were unable to guarantee her travel expenses as they could only be considered at the end of the hearing. She said as she was unable to afford to attend the prosecution should not be in a position to attend in order to add anything to the written submissions. Held. We have some sympathy for D but she has chosen not to attend. There is a public interest in the prosecution attending, but we did not invited the prosecution to assist the court further and the merits of the appeal were considered on the strength of the written submissions.

3.73a *Bail and Delay*

R v Golding 2014 EWCA Crim 889 D was sentenced to 14 months for section 20 in August 2011. He appealed his conviction and his sentence. In September 2011, he was granted conditional bail. In May 2014, the full court considered the plea was properly entered and no proper criticism could be made about the 14 months. However he had lost his job because of the sentence and that over the 3 years on bail he had not found another one and family difficulties caused by that and his period in limbo meant it would be wrong to return him to custody, so 3 months making immediate release was appropriate.

3.74 *Power to rehear apparently concluded appeals*

See also: *R v Procter* 2014 EWCA Crim 162 (Defendant's conviction quashed. Basis for that discovered to be flawed. Eight days later conviction restored.)