

**WRITTEN QUESTION TO H.M. ATTORNEY GENERAL
BY DEPUTY M.R. HIGGINS OF ST. HELIER
ANSWER TO BE TABLED ON TUESDAY 21st MAY 2019**

Question

Further to the response to Written Question 244/2018, will H.M. Attorney General advise members how a decision not to pay defence costs in full in criminal cases where the client has either been acquitted of the offence(s) charged, or the prosecution does not offer any evidence, is compatible with the European Convention of Human Rights, in particular Article 6?

Answer

There is no right under the European Convention on Human Rights (“ECHR”) to recover costs. This has been clearly established by the European Court of Human Rights (“ECtHR”) in the cases of *Masson v The Netherlands* (1996) 22 EHRR 491 and *Ashenden v United Kingdom* (2012) 54 EHRR 13. In *Masson* the point was made at [49]:

“... the Court observes firstly that the Convention does not grant to a person ‘charged with a criminal offence’ but subsequently acquitted a right either to reimbursement of costs incurred in the course of criminal proceedings against him, however necessary these costs might have been ... Such a right can be derived neither from Article 6(2) nor from any other provision of the Convention or its Protocols. It follows that the question whether such a right can be said in any particular case to exist must be answered solely with reference to domestic law.”

The matter was considered recently in the English High Court in *R (Henderson) v Secretary of State for Justice* [2015] EWHC 130 (admin) which considered the position of a defendant who paid for his own lawyers when successfully defending criminal proceedings having wrongly come to the conclusion that he was not entitled to legal aid. Article 6(3)(c) of the Convention creates a duty on states to provide legal assistance in criminal cases to those who could not afford it:

“24 The argument relating to restriction of choice proceeds upon the premise that defendants should not be ‘forced’ to engage lawyers who accept instructions on criminal legal aid by the prospect of lack of recovery of privately incurred costs paid to their lawyers of choice. It is suggested that for many reasons a defendant might wish to engage the services of lawyers who do not accept instructions on legal aid. For example, in cases where the client judges his solicitors and advocates of choice to have expertise in a specialist field not shared by legal aid lawyers or because he has a long-standing relationship with a particular firm in whom he reposes confidence. We do not know whether the claimant would have gone to legal aid solicitors had he been correctly advised that he was eligible. But I am unable to see how this point can assist the claimant’s argument. Article 6(3)(c) protects the right of a defendant to defend himself in person or through legal assistance of his own choosing; or if he has insufficient means to do so to be given free legal assistance when the interests of justice so require. In the claimant’s case he defended himself with his own lawyers. He exercised the right protected by the Convention. The Strasbourg case law makes plain that the Convention does not in those circumstances guarantee to an acquitted defendant a right to recover the costs of defence.”

Similarly, it may be reasonable for a company or person under financial or fiscal regulatory enquiry to engage elite lawyers to provide the best possible representation, but there is no human right to pass the bill onto the prosecutorial or regulatory authority concerned should those lawyers succeed in securing an acquittal.

In England and Wales an acquitted defendant can only recover their legal costs if:

1. They are a natural person (i.e. companies etc can not recover their legal costs) ;and,
Either
 2. The proceedings were dealt with in the Magistrates' Court
- Or
3. If the proceedings were dealt with in the Crown Court, the Defendant applied for, but was refused legal aid on the grounds of financial ineligibility.

If an Order for Defence Costs is made by an English Court, the rates which are recoverable for Crown Court proceedings are as follows:

Litigators:

<i>Class of work</i>	<i>Grade of fee earner</i>	<i>Rate</i>	<i>Variations</i>
Preparation	Senior solicitor	£43.73 per hour	£45.99 per hour for a litigator whose office is situated in London
	Solicitor, legal executive or fee earner of equivalent experience	£37.13 per hour	£38.98 per hour for a litigator whose office is situated in London
	Trainee or fee earner of equivalent experience	£24.54 per hour	£28.05 per hour for a litigator whose office is situated in London
Advocacy	Senior solicitor	£52.80 per hour	
	Solicitor	£46.20 per hour	
	Attendance at court where more than one representative assigned	Senior solicitor	£34.86 per hour
	Solicitor, legal executive or fee earner of equivalent experience	£28.05 per hour	
	Trainee or fee earner of equivalent experience	£16.91 per hour	
Travelling and waiting	Senior solicitor	£20.42 per hour	
	Solicitor, legal executive or fee earner of equivalent experience	£20.42 per hour	
	Trainee or fee earner of equivalent experience	£10.31 per hour	
Routine letters written and routine telephone calls		£2.85 per item	£2.97 per item for a fee earner whose office is situated in London

Junior advocates

<i>Type of proceedings</i>	<i>Basic fee</i>	<i>Full day refresher</i>	<i>Subsidiary fees</i>		
			<i>Attendance at consultation, conferences and views</i>	<i>Written work</i>	<i>Attendance at pre-trial reviews, applications and other appearances</i>
All cases	Maximum amount: £545.00 per case	Maximum amount: £178.75 per day	£33.50 per hour, minimum amount: £16.75	Maximum amount: £58.25 per item	Maximum amount: £110 per appearance

Queens Counsel

<i>Type of proceedings</i>	<i>Basic fee</i>	<i>Full day refresher</i>	<i>Subsidiary fees</i>		
			<i>Attendance at consultation, conferences and views</i>	<i>Written work</i>	<i>Attendance at pre-trial reviews, applications and other appearances</i>
All cases	Maximum amount: £5,400.00 per case	Maximum amount: £330.50 per day	£62.50 per hour, Minimum amount: £32.00	Maximum amount: £119.50 per item	Maximum amount: £257.50 per appearance

An English Lawyer's fees charged to the client will often be four and five times these rates (if not higher). These additional costs are not recoverable.

The following table shows the position in some other jurisdictions with similar criminal justice systems:

Jurisdiction	Defence costs upon acquittal
Canada	Exceptionally rare – only awarded where the court has found a breach of the Canadian Charter of Rights and Freedoms.
Scotland	In exceptional circumstances, the acquitted person must prove that the prosecution was vexatious.
Northern Ireland	This is provided for in S.3 of the Criminal Costs (Northern Ireland) Act 1968. We have been advised by the Public Prosecution Service of Northern Ireland that applications are rarely made.
Isle of Man	Yes
Guernsey	No

In summary, the ECHR and its case-law does not recognise any general right for an acquitted defendant to recover costs, whether that be after a trial or when no evidence is offered.