



JUDICIARY OF
ENGLAND AND WALES

24 August 2018

SUMMARY

Forz Khan v Bar Standards Board [2018] EWHC 2184 (Admin)
Mr Justice Warby

References in square brackets are to paragraphs in the judgment

The judgment

The Court gives judgment on a barrister’s statutory appeal against findings of guilt and the sanction imposed by a 3-person disciplinary Tribunal of the Bar Tribunals and Adjudication Service (“BTAS”), on 22 March 2018. The appeal against findings of guilt is dismissed, but the appeal against sanction is allowed.

The appeal

The appellant is a barrister of 20 years’ call. He was charged with three counts of professional misconduct, to all of which he pleaded guilty. He was suspended from practice for 7 months. He appeals against the finding of guilt and against sanction. The penalty is stayed pending the outcome of the appeal. [1]

The grounds of appeal

The appeal against “conviction” is brought on the basis that although the relevant facts were not in dispute, and he pleaded guilty, his admitted behaviour did not amount to professional misconduct in law; his admissions were based on wrong or incomplete legal advice; and there has thus been a miscarriage of justice. In the alternative, he contends that the sanctions imposed were excessive and hence unlawful [2].

The appellant’s case is that he has been subjected to a severe professional disciplinary sanction for behaviour, the majority of which amounted in substance to nothing more than an exercise in “robing room gossip” or “barrister tittle-tattle”. The other conduct in question was private correspondence which was at worst ill-judged, he says. The first ground of appeal is that none of this conduct reaches the high threshold of being “seriously reprehensible”. Alternatively, if it does, it cannot merit such a severe sanction [3].

The second ground of appeal is that the spoken and written words for which he was sanctioned were protected by the Convention rights to freedom of expression and respect for correspondence and, on the facts of this case, the pursuit of disciplinary

proceedings and/or the imposition of sanctions was an unjustified interference with those rights [4].

The facts

On two occasions, in the robing rooms of two Courts in the Midlands, Mr Khan spoke words that suggested to those who were present and heard him that a fellow barrister, Adrian Jones, had (a) stalked and then (b) raped another, female, lawyer who had been Mr Khan's client and, (c) when she complained of this, caused serious threats to her life to be made, in an attempt to cover up what had taken place. All the information that Mr Khan had about these matters came from his former client, Anne McBride, who was the complainant. Mr Khan did not name her in what he said, but he did name Adrian Jones. In between these episodes, Mr Khan sent two messages via LinkedIn to Emma Davies, Adrian Jones' wife, alluding to the allegations against her husband. [5]

The names of the others involved have been changed to protect the identity of the complainant of rape: [6]. The facts are set out in greater detail in the judgment at [7]. Most of them were agreed before the Tribunal.

The disciplinary proceedings

The regulatory framework, the charges, the progress of the case to a final hearing, and the decisions made by the Tribunal, are all summarised at [8-15].

The challenge to “conviction”

The court accepts that it can in principle allow an appeal despite a “guilty plea”, and accepts for present purposes that it could allow an appeal and remit a case to the Tribunal if satisfied that legal advisors failed to identify an available defence which would “quite probably have succeeded”: [17-25]. The Court admits fresh evidence to allow consideration of that question [26-31].

The Court accepts that there is a firmly established principle that misbehaviour must attain a certain level of seriousness before it can qualify as professional misconduct [32-37]. But the first ground of appeal is rejected. The Court finds that the Tribunal applied the test of seriousness in reaching its conclusions, and that the appellant's behaviour comfortably met the necessary standard [37-38]. It is not seriously arguable that the Tribunal was wrong [40]. The detailed reasoning behind that conclusion is set out [41-55].

The Court accepts that the disciplinary process represented an interference with the appellant's article 8 and 10 rights [57-60]. The real issue on the second ground of appeal is whether such interference is justified under Articles 8(2) or 10(2); the Court concludes that it clearly is [61]. The detailed reasoning behind that conclusion is set out [62-69].

The overall conclusion on the ‘conviction’ appeal is given at [69]:

The “conviction” appeal is dismissed, because there is no good reason to set aside or disregard Mr Khan's pleas of guilty. Mr Khan was right to plead guilty. There is no probability that a re-hearing following a not guilty plea would lead to a different conclusion. The Tribunal was entitled, indeed right, to conclude that the admitted misconduct in this case was serious. It comfortably crossed

the threshold of gravity which the authorities show must be exceeded before behaviour can be characterised as professional misconduct. Although the pursuit of disciplinary proceedings was an interference with Mr Khan's Convention rights under Articles 8 and 10, it was a justified interference. It pursued legitimate aims prescribed by law, and was a proportionate measure, corresponding to a pressing social need to uphold and maintain standards in a profession of critical importance to the public welfare.

The challenge to sanction

The court acknowledges [70] the high threshold for interference with a sanction imposed by a specialist disciplinary tribunal but, noting the BSB's concession that the sanction "could be viewed as being at the higher end of the scale", it concludes that the sanction in this case was manifestly excessive and should be set aside [71]. The reasons behind that conclusion are explained [72-76]. In summary, though suspension was merited, the Tribunal's approach was flawed in four or more ways, leading to a suspension which was too long.

The court accepts the appellant's invitation to reassess the position and substitute a lesser sanction, and proceeds to do so [77-78]. It concludes that the appropriate starting point could not have been more than 5 months. After due allowance for mitigation, and an appropriate discount for Mr Khan's early admissions, a sanction of 3 months' suspension is substituted for the 7 months imposed by the Tribunal.

NOTE: This summary is provided to help in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: www.bailii.org.uk