IN THE BAR TRIBUNAL AND ADJUDICATION SERVICE Case no.: 2021/4441

B E T W E E N

**JON HOLBROOK**

Appellant

and

**BAR STANDARDS BOARD**

Respondent

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**AMENDED APPEAL NOTICE, UPDATED IN RESPONSE TO THE BSB's REPLY**

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> *The ethos of service and duty that used to underpin so many professions often seems to have been replaced with a claim to moral leadership by the better-educated.*
>
> *Head, hand & heart: The struggle for dignity and status in the 21st Century*
> David Goodhart, 2020, Allen Lane, p17

> *There is no doubt that the term "Islamophobia" is used as a heckler's veto to shut down alternative opinions. We need to come up with a way forward that does not compromise free speech*
>
> Lord Greenhalgh, Minister of State (Dept of Levelling Up, Housing and Communities)
> House of Lords, 15 November 2021[1]

Sidelined text has been added on 17 November, in response to the BSB's Reply of 11 November.

1. By its decision of 9 August the Independent Decision-Making Panel (IDP) considered 18 of my tweets and concluded that 17 of them (including the Afro-hair tweet) did not breach any professional rules [1.1]. However, the IDP imposed an 'administrative sanction' - which 'does not constitute a disciplinary finding' - in the form of a warning and a £500 fine in respect of one tweet (the 'free speech tweet') namely:

[1] Hansard, Volume 816, column 14.


2. This tweet was a response to Roshan M Salih's tweet ('the Salih tweet'). He describes himself on Twitter as a 'Muslim Journalist' who edits the 'British Muslim news site 5Pillars', as shown here:


3. My grounds for appealing the administrative sanction are set out below under the following headings, namely the sanction was unlawful:

    1. under the Equality Act 2010 which protects 'philosophical belief'

    2. under the common law and human rights law that protects speech

    3. because the charge of *causing offence and possible hostility towards Muslims*:

        a) sets the bar far too low for bringing either me or the profession into disrepute

        b) is not set out in the BSB Handbook, is ultra vires and is not prescribed by law

c) breached natural justice as I was given no chance to respond to this new charge

4. because the procedure breached my right to a fair trial under article 6 of the ECHR and common law

4. However, before I address each of these headings they are all underpinned by the fact that the free speech tweet was a statement of genuinely held political belief and hence not only was it beyond sanction, but that those who have sanctioned me have themselves acted in an unlawful discriminatory way. Under the Equality Act discrimination on the basis of political belief is no different from discrimination on the basis of race, sex or sexuality etc. They are all unlawful. So far as the Equality Act is concerned the BSB's sanction imposed on me for expressing my conservative beliefs is as unlawful as a sanction imposed on a black man because of his race.

**My tweet was a political statement on the tension between Islam and free speech**

5. The free speech tweet was a response to a tweet ('the Salih tweet') that had threatened a Muslim led civil war if free speech was not curtailed. The Salih tweet drew on recent French history that highlighted the tension between Islam and free speech. In January 2015 twelve people who worked for the French satirical weekly newspaper Charlie Hebdo were murdered by Islamists acting to frighten people into not speaking freely. On 16 October 2020 school teacher Samuel Paty was beheaded by an Islamist in Paris for teaching his students about blasphemy and free speech. In this tension between Islam and free speech in France Mr Salih took the side of those Muslims who seek to curtail free speech.

6. In the tension between Islam and free speech I, unlike Mr Salih, am on the side of free speech. Moreover, I am aware that the challenge to free speech from Islam exists not just in France, but in the UK as well. My belief is informed by many examples dating back to the Satanic Verses controversy of 1989 when Muslims burned books and intimidated the author, Salman Rushdie, so as to cause him to go into hiding with police protection as he feared for his life. In 2011 the Daily Mail reported on the case of an east London school teacher, Gary Smith, with the headline: *Battered and slashed by a Muslim gang just because he taught RE: Four jailed over their 'dangerous extreme religious beliefs'*. The problem has continued this year with another school teacher, this time in Batley, Yorkshire, being forced into hiding after being threatened by Muslims (see *here*).

7. The tension between Islam and free speech was addressed by Dame Louise Casey in her 2016 report on integration where she noted how 'some [Muslims] are expressing more regressive attitudes towards . . . freedom of speech and are, in a small minority, expressing greater sympathy for violent extremist action'.[2]

8. I am not aware of any sanction being imposed on Mr Salih for his tweet, even though he implied there would be a Muslim led civil war if Islam did not prevail over free speech. It would be highly undesirable if the antagonist of free speech was given a free hand, whilst the protagonist was sanctioned. Fortunately, the law does not create such a democratic distortion. In fact, by protecting political speech the law bolsters the democratic process and outlaws the cancel culture that has been directed at me and which was practised by my former Chambers (which expelled me for a tweet in respect of which I have now been exonerated) and which is being practised by the BSB.

[2] *The Casey Review: A review into opportunity and integration*, December 2016, p71, §5.22.

9. In response to the BSB finding that my free speech tweet brought either me or the profession into disrepute the legal commentator and journalist Joshua Rozenberg stated:

> Really? Holbrook was responding to a tweet from a UK-based Muslim journalist. The journalist's tweet, which has been widely shared, calls for a lawful publication to be closed down - a clear restriction on free speech. That view is shared by most Islamist extremists, I suspect. It may be shared by other Muslims - though certainly not by all. Was Holbrook saying that the Muslim community as a whole was responsible for curtailing free speech? Or should "other Muslims" be understood to mean "some other Muslims"?[3]

10. It is clear from the context that my tweet meant that some Muslims, like Mr Salih, are curtailing free speech, but this is to miss the point. Even if I had expressly and erroneously stated that 'all Muslims are killing free speech' that would not have entitled anyone to sanction me. Speech is protected under the Equality Act providing it is a statement of political belief and is not an espousal of Nazism or totalitarianism or an incitement to violence or an expression of hatred in the gravest form.

11. The simple answer to this appeal is that my tweet was a statement of protected political belief as it fell well short of the thresholds (espousing Nazism etc) that would have entitled the BSB to impose a sanction. My tweet was on an issue of public interest and drew attention to the tension between Islam and free speech and it did so in the context of what had happened in Paris and elsewhere in the recent past and in response to a Muslim journalist who was threatening civil war if there were not further restrictions on free speech. It is frankly shameful of the BSB to have fined me for this exercise of political speech. This shameful conduct can be addressed under the following ~~three~~ four headings.

**1. Unlawful under the Equality Act 2010 which protects 'philosophical belief' (s10)**

12. Under the Equality Act 2010 'belief' is a protected characteristic (s4). Section 10 amplifies the meaning of 'belief':

> Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.

13. Case law has amplified the test to be applied and there are five criteria that must be satisfied, as set out in *Grainger*, for a belief to be protected under the Act:

    i) The belief must be genuinely held.

    ii) It must be a belief and not an opinion or viewpoint based on the present state of information available.

    iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour.

    iv) It must attain a certain level of cogency, seriousness, cohesion and importance.

    v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others

[3] *Must lawyers meet higher standards?* Joshua Rozenberg, 27 August 2021.

14. As I explained in my BSB submissions of 4 May [3.150] my beliefs are those of the centre-right and often draw on the conservative writings of Sir Roger Scruton (see BSB submissions, section 1 and particularly §§16-24). In particular, I, like Scruton, am a critic of identity politics which encourages people to see themselves as different and special, at the expense of being a member of one cohesive society. This belief can either be described as being *against* identity politics (specifically against multiculturalism and the celebration of cultural difference) or it can be described as being *for* assimilation. Essentially, I am *for* the 'melting pot' approach developed in 19th century America, rather than the 'salad bowl' of multiculturalism. I am also a firm believer in free speech which I see as the freedom on which all other freedoms are built (see BSB submissions §§29-32). These two beliefs came together to inform my free speech tweet.

15. On 10 June when the EAT handed down judgment in *Forstater*[4] the fifth *Grainger* criterion became easier to satisfy. It is now established that political beliefs are worthy of respect in a democracy subject only to a limited exception:

> it is only those beliefs that would be an affront to Convention principles in a manner akin to that of pursuing totalitarianism, or advocating Nazism, or espousing violence and hatred in the gravest of forms, that should be capable of being not worthy of respect in a democratic society. Beliefs that are offensive, shocking or even disturbing to others, and which fall into the less grave forms of hate speech would not be excluded from the protection. (§79)

16. It looks like the BSB accepted, as it had to, that my beliefs were protected under the Equality Act, which is why it cleared me on 17 tweets on the basis that I was 'expressing [my] personal political opinions' rather than 'intending to demean or insult another'.

17. So the issue that arises is: on what basis was the 18th tweet (unlike the other 17) deemed to fall outside the *Grainger* criteria, as interpreted by *Forstater*? As a matter of law it could only have been on the basis that the 18th tweet was an expression of belief that was 'akin to totalitarianism or Nazism' or an expression that 'espoused violence and hatred in the gravest of forms'. And when considering this high threshold *Forstater* warns that 'less grave forms of hate speech' namely 'beliefs that are offensive, shocking or even disturbing to others' are protected under the Equality Act (§79).

18. Any contention that my 18th tweet was akin to totalitarianism or Nazism or espoused violence or hatred in the gravest of forms, is hopeless because:

i) My tweet did not espouse violence and hatred

- There are no words (or even inuendo) that are capable of supporting such a conclusion. My tweet patently did not 'espouse violence and hatred in the gravest of forms'. In fact, it did not espouse violence or hatred of any degree.

- The IDP made no such finding. In fact, it should have concluded that my speech *was protected* because it did no more (in its opinion) than cause offence which *could* promote hostility towards Muslims. As *Forstater* makes clear 'Beliefs that are offensive, shocking or even disturbing to others, and which fall into the less grave forms of hate speech would not be excluded from the protection.'

[4] *Forstater v CGC Europe* UKEAT/0105/20/JJ

- Had my tweet had the required characteristic of advocating something akin to totalitarianism or Nazism it would have stuck out like a swastika.

ii) My tweet was a defence of free speech

- My tweet was a call 'to reinstate free speech as the foundation of all other freedoms' in the context of (a) the Islamist murder of a teacher (Samuel Paty) who had exercised his right of free speech and (b) a call by a prominent Muslim (Mr Salih) to 'shut down immediately' a lawful publication, namely Charlie Hebdo.

- The IDP has made the mistake, that Lady Hale warned against, of failing to see that my statement 'had something to do with' Muslims but only in order to make a broader political point.[5] It can never be the law in a democracy that a group or religion, such as Islam, is protected from criticism.

iii) The BSB has distorted the meaning of my tweet

- The IDP claimed the 'ordinary reasonable reader' would 'understand the tweet to mean that the Muslim community was to blame for curtailing free speech'. This is not an accurate reading of the tweet because my tweet (a) whilst referring to a causal factor, did not attribute 'blame', and (b) referred to 'Islamists and other Muslims' playing 'a central role', rather than the only role.

- The IDP has taken the tweet out of context by failing in substance to appreciate that it was in response to (a) an Islamist murder in Paris and (b) a prominent Muslim, not an Islamist, who was calling for a lawful publication, Charlie Hebdo, to be 'shut down immediately'.

- The tweet meant what it said, it did not require the IDP to *mis*interpret it for the ostensible benefit of the 'ordinary reasonable reader'.

19. Once it is established that my tweet was a statement of political belief that was protected then the only other issue that arises is whether my treatment 'was because of or related to that belief'[6]. In this case it clearly was. Accordingly, the IDP's sanction was an unlawful act of discrimination under the Equality Act s13 because it amounted to less favourable treatment as a result of expressing my protected beliefs. Section 13 is clear and unqualified:

> A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

20. So far as the Equality Act is concerned sanctioning me for my political beliefs is the same as a sanction imposed on a black man because of his race or a woman because of her sex. Political belief, race and sex are all both protected characteristics and the scheme of protection under the Equality Act is the same. Once this is appreciated the unlawfulness of the BSB's actions becomes clear. Moreover, it shows that the Equality Act protects political beliefs from sanctions just as it protects race etc. It protects the conservative from cancellation just as it protects the black man from racism.

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[5] *Lee v Ashers Baking Co* [2018] UKSC 49, Lady Hale §§33-35.

[6] *Forstater*, §117.

21. The BSB responds to this central ground of appeal with four arguments, which are addressed below. Essentially, despite accepting that my tweet was a statement of protected political belief the BSB contends that this can be disregarded.

*i) Breach of the Equality Act is not an appeal ground (§50)*

22. The BSB does not explain its submission that 'It is doubtful whether this [the Equality Act] constitutes an appeal grounds as such, or rather would form the basis for a separate action against the BSB.' (§50).

23. It undoubtedly is an appeal ground because under the Equality Act 2010 the BSB is discharging a public function.[7] As such it 'must not, in the exercise of a public function … do anything that constitutes discrimination'.[8] The words 'must not' are emphatic.

24. This appeal is 'a review of the original decision'.[9] This must entitle the appeal tribunal to correct errors committed at first instance. Further authority for this comes from Arden LJ when considering the Court of Appeal's appellate powers in respect of a possession order obtained by a landlord in circumstances that breached disability discrimination laws (that were then in the Disability Discrimination Act 1995). She applied the principles that 'a person alleging his own wrongdoing is not to be heard' and that 'no one should be allowed to profit from his own wrong'. From this she concludes 'that the court would not lend its assistance to it' (an unlawful act) and hence that the court on appeal should overturn a possession order made in breach of discrimination law.[10]

25. Accordingly an unlawful act by the BSB must be corrected on appeal. (Indeed, if BTAS were to fail to correct it then, like the BSB, it would leave itself open to being sued for unlawful discrimination.)

26. It is surprising that the BSB has claimed that unlawful discrimination by itself does not constitute an error of law. I doubt it would have made such a suggestion had the BSB unlawfully discriminated on the grounds of race or sex. The BSB's submission shows that it does not appreciate the true ambit of protected characteristics: 'philosophical belief' does not rank below the protections given to race, sex or sexuality etc.

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[7] Equality Act 2010, s31(4):

> A public function is a function that is a function of a public nature for the purposes of the Human Rights Act 1998.

Human Rights Act 1998, s6(3):

> In this section 'public authority' includes –
>
> a) a court or tribunal,
>
> b) any person certain of whose functions are functions of a public nature …

[8] Equality Act 2010, s29(6).

[9] BSB Handbook, rE55.

[10] *Lewisham LBC v Malcolm* [2007] EWCA Civ 763, §§63-65. This point was upheld in the House of Lords on the grounds that the court would not uphold, permit or facilitate an unlawful act. [2008] UKHL 43, §§19, 104, 160.

*ii) The lack of clarity over a comparator (§51)*

27. As Underhill LJ recently noted:

> It is trite law that it is not necessary in every case to construct a hypothetical comparator, and that doing so is often a less straightforward route to the right result than making a finding as to the reason why the respondent did the act complained of: see the very well-known passage at paras. 8-13 of the speech of Lord Nicholls in *Shamoon v Chief Constable of the RUC* [2003] UKHL 11.[11]

28. The reason for this is that until 'the reason why' issue has been resolved it is not possible to identify the comparator. Thus, in this case, I say that it is the barrister whose tweets are of a different political hue whereas the BSB contends that it is the barrister whose tweets have the same alleged effect on Muslims as mine (§52). This issue can only be resolved by establishing the true reason for the sanction (see next point).

*iii) I was sanctioned for causing offence, not my beliefs – claims the BSB (§52)*

29. The BSB claims I was *not* sanctioned for my political beliefs but 'due to the offence his tweet is likely to cause Muslims' (§52). The case law shows that whilst it is possible to draw a distinction between the holding of beliefs and their manifestation, cogent reasons for making the distinction are required. Thus:

    a. In three cases of Christian proselytization it was not the person's Christianity that resulted in sackings. But in each of these cases there were behaviours that, independently of the views that motivated them, caused the disciplinary action. Typically the person was dismissed for improperly foisting Christian beliefs on service users so as to blur the boundary between work and non-work in ways that caused distress.[12] The Christians were disciplined for their *acts*, not their *beliefs*.

    b. In another case (Page) a Christian was sacked from an NHS board for media appearances in which he expressed his views about homosexuality after the NHS Trust had expressly told him to inform them and in circumstances where his views were 'liable to cause the real damage to the Trust's work with gay people'. Underhill LJ noted that this was a difficult case but because it was fact sensitive he concluded that the Employment Tribunal had been entitled to conclude that the sacking was not unlawful.[13] (He also stated that because the case was fact specific 'wider conclusions should not be drawn from it.')

    c. In a related case Mr Page was also lawfully dismissed as a magistrate but this was not because of his beliefs, it was because 'he had shown himself incapable of honouring his undertaking … to act as a magistrate in a way that was free from bias.'[14]

30. The BSB gives as an example the barrister who states that he would 'not act for a black person because they are untrustworthy' (§45). In such a case a sanction could be imposed because the *manifestation* of the belief would be unlawful and this, rather than the statement per se, could

[11] *Page v NHS* [2021] EWCA Civ 255, §79.

[12] *Wasteney v East London NHS Foundation Trust* [2016] UKEAT 0157/15.

[13] *Page v NHS* [2021] EWCA Civ 255, §§59, 68-72, 101.

[14] *Page v Lord Chancellor* [2021] EWCA Civ 254, §§83, 84.

the basis of a sanction. The BSB's example is interesting because it relies on a quality to speech that does not exist with my impugned tweet.

31. In my impugned tweet the words themselves manifested no intention to act unlawfully, or indeed, in contrast to the Christian cases above, to do something forbidden. In so far as the BSB took exception to my tweet, it did it so on the basis of the tweet's political content.

32. Alternatively, a political statement that is said to give rise to 'offence' and which may cause 'hostility' affords no basis for obviating Equality Act protection because:

    a. If political speech falls outside of the Equality Act on this basis then political speech ceases to be protected. Any political belief can 'offend' a different political belief: one holds a political belief on the basis that it is understood to be right and that its opposition is wrong. Any view expressed about the interface of free speech and Islam has the scope to 'offend', just as views expressed on abortion, homosexuality, race or even food banks (if allied to a notion of their users being feckless) could offend some. Those who suffered from communism during the Cold War could claim offence caused by today's revolutionary left. I could take offence at the BSB's pathetic submission that due to my political beliefs I could not do my job properly as a public law barrister (BSB §62(d)). There is no warrant in the Equality Act for denying the protection given to 'philosophical belief' to those who are said to have caused offence or who could cause hostility.

    b. Speech that is said to cause *offence* should not be curtailed:

        i. It encourages thin skins by incentivising those of a certain political or religious view to affect or feign hurt as a basis for censure ie winning an argument without an argument.

        ii. It is subjective and is informed by the assessor's values, which may include, in this context, a willingness to view Muslims as victims.

        iii. It has been declared by the courts on several occasions to be no basis for curtailing political speech (see Collins J and Sedley LJ below).

    c. Speech that *could* promote *hostility* towards Muslims should not be curtailed:

        i. Hostility to any religion (or belief system) is permissible in a democracy.

        ii. Hostility is not hatred (the word used in the Public Order Act when allied to threatening words or behaviour and an intention to stir up religious hatred). 'Hatred in the gravest of forms' is also the expression used in *Forstater* to deny speech its protected status. Hostility clearly falls a long way short of hatred.

        iii. Speech that could promote hostility is unknowable since it leaves unaddressed the factor that will turn possibility into actuality.

    d. The notions of offence and hatred are far too subjective and far too low to be a basis for curtailing political speech.

33. With my tweet there are no cogent reasons for distinguishing between the belief expressed and the manner of its manifestation because:

a. The tweet did not have the quality that could enable it to have consequences that could be separated from the belief that it conveyed. It was not, for example, a statement where any political message was overborne with gratuitously offensive or intemperate language (such as was the case in *Diggins* [3.185]).

b. There is nothing to justify the curtailment of my right to speak freely under article 10.

c. There was nothing to give the BSB power to treat the tweet as bringing the profession into disrepute.

*iv) The BSB may 'sanction discriminatory speech' (§53)*

34. The BSB accepts, as it must, that my tweet satisfied the five *Grainger* criteria including the fifth, namely that my tweet expressed a political belief that was worthy of respect in a democracy. However, the BSB contends that this 'does not mean that the BSB is unable to sanction discriminatory speech'. (§53) Indeed, the BSB contends that Core Duty 5 trumps the Equality Act: 'Statements considered to infringe Core Duty 5 can be sanctioned, notwithstanding that they are a "statement of genuinely held political belief".' (§44)

35. This submission is tantamount to saying that the BSB is above the law in that the BSB is seeking to give itself the right to unlawfully discriminate against the expression of a political belief if the speech is, in its opinion, undesirable or 'discriminatory' (ie critical of an aspect of Islam). There is simply no warrant for this in the Equality Act and it again shows how the BSB does not appreciate that belief is on the same footing as race and sex etc in terms of its protected status in the Equality Act.

**2. Unlawful under the common law and human rights law that protects speech**

36. The protection afforded to political speech under the Equality Act is broader than exists under the common law and human rights law because under the former there is no defence of justification, such as arises under article 10(2) of the European Convention on Human Rights:[15]

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are *prescribed by law and are necessary in a democratic society*, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, *for the protection of the reputation or rights of others*, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

37. However, if the 1st ground of appeal were to fail then the IDP had no lawful basis to conclude that its interference with my article 10 rights was justified 'for the purpose of protecting the reputation and rights of others' namely Muslims. This is because the sanction (i) did not pursue a legitimate aim and (ii) was not necessary in a democracy. (The restriction is also not prescribed by law but this is addressed below under the 3rd heading.)

a) The sanction did not pursue a legitimate aim

38. A legitimate aim, such as the protection of another's human rights, is to be construed strictly. This is particularly so in the context of seeking to interfere with political speech, as judges have noted:

> I remind myself that there is little scope under Article 10(2) of the Convention for restrictions on political speech or on the debate of questions of public interest[16]
>
> Freedom of political speech is a freedom of the very highest importance in any country which lays claim to being a democracy. Restrictions on this freedom need to be examined rigorously by all concerned[17]

39. Case law indicates the gravity of interest in play in order for free speech to be interfered with. For example, in *Khan v BSB* the legitimate aim was the protection of a former client's confidentiality and right to a private life that had been breached when a barrister implied that another barrister had stalked and raped another lawyer, the accused barrister's former client. Moreover:

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[15] *Forstater*, §79.

[16] *Miller v College of Policing*, [2020] EWHC 225 (Admin), Knowles J, §276.

[17] *R(Prolife Alliance) v BBC*, [2004] 1 AC 185, HL, Lord Nicholls, §6, cited in *Miller*, *ibid.*, §276.

> his case is that it [his speech] was mere gossip, nothing more. That is speech which ranks low in the hierarchy of free speech values. The need for a compelling justification for interference is correspondingly less[18]

40. Because it was concerned with 'mere gossip' *Khan* was not a political speech case. In other cases a political message can be overborne with personal abuse that is so offensive and gratuitous that the personal abuse is real and obvious. In these circumstances the court may find that a sanction is justified in order to protect the profession's reputation. However, for that threshold to be crossed something grossly or seriously offensive that is wantonly or gratuitously directed at a person is required.[19] For example, this tweet crossed the threshold:

> Read it. Now; refuse to perform cunnilingus on shrill negroids who will destroy an academic reputation it has taken aeons to build.

41. But it only crossed the threshold because, as Warby J explained, it was hostile and expressed gratuitous and derogatory racist and sexist language:

> it plainly expresses hostility to people whom the appellant describes as "shrill", and who he claims "will destroy an academic reputation". Those who are criticised in these ways are identified only as "negroids", a term which defines more than one person exclusively by reference to their appearance and racial or ethnic origin. The Tweet provides no indication why those characteristics might justify, support or be relevant to the criticism. It was legitimate for the BSB to describe this as "offensive race-based language", and equally proper for the Panel, applying ordinary community standards, to find that it was "racially charged". The reasonable reader will also have gleaned from the Tweet itself that the appellant was strongly urging someone to refuse the "negroids" something they were seeking, in connection with academic matters; and that he was doing so by deploying sexual language depicting the "negroids" as women seeking, metaphorically, oral sex. No indication was given of the relevance of the gender of the "negroids", or why such a sexual metaphor might be considered fitting. It was legitimate for the BSB to describe this as "offensive … gender-based language" and for the Panel to conclude that it was "derogatory to women".[20]

42. Similar thresholds were applied in an earlier Tribunal decision where Facebook posts were:

> grossly offensive and disparaging and included matters of a sexual and / or violent nature. For example, there were references to her being a prostitute and a witch, references to sexual and physical violence and, on one post, there was effectively a threat to kill her. The tribunal found the posts to be targeted and misogynistic;[21]

43. None of the above thresholds (such as gross offensiveness) were satisfied by my free speech tweet. The IDP imposed the restriction 'for the purpose of protecting the reputation and rights of others' i.e. Muslims (p3). But restrictions under article 10(2) cannot be imposed in order to protect Muslims from political criticism. In other words the sanction did not pursue a legitimate aim.

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[18] *Khan v BSB* [2018] EWHC 2184 (Admin), Warby J, §65.

[19] *Diggins v BSB* [2020] EWHC 467 (Admin), Warby J §§86, 89.

[20] *Diggins v BSB* [2020] EWHC 467 (Admin), Warby J §94.

[21] *Richard Miles*, PC 2018/0372/DS.

*Having an aim is not tantamount to having a legitimate aim*

44. The BSB claims that its aim in sanctioning me was to 'protect the rights of others' namely 'in particular British Muslims, to not be subject to speech which causes offence and may promote hostility towards them' (§56). But the threshold that the BSB needed to cross is not having an 'aim', something entirely subjective. The task, which the BSB does not address, is to explain why this aim was legitimate in circumstances where:

    i) political speech 'is a freedom of the very highest importance in any country which lays claim to being a democracy' (Ld Nicholls)

    ii) as explained above, the thresholds of offence and possible hostility do not establish a basis for silencing speech (Sedley LJ and Collins J), and

    iii) in disciplinary proceedings it is necessary to show that the impugned conduct brought 'disgrace' upon the professional and thereby prejudices the reputation of the profession.

45. The BSB does not address points (i) and (ii). It addresses point (ii) but only by denying case law on the point. Thus it accepts that it 'is a proper reading or use of the cases the Appellant cites' that sanctions in speech cases have been limited to those where the speech is 'grossly offensive'. But it proceeds to argue that these cases:

> 'do not state that anything less that "grossly offensive" speech is incapable of giving rise to a legitimate aim for the purposes of Article 10(2). Nor do they express any similar concept in more general terms, e.g. by stating that, because the speech in issue was not "grossly offensive", it must be tolerated as an expression of free speech rights.' (§57)

46. Once again, the BSB is setting itself up as above the law: it has not addressed the cases above and below concerning the importance of political speech and hence the need for a compelling justification before sanctioning it.

b) The charge was not necessary in a democracy

47. There is much case law on the test of necessity that must be satisfied by those who rely on it to infringe another's free speech. It establishes that 'necessary' is not synonymous with 'indispensable' but neither does it have the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'. It is a stringent test as the curtailment has to be 'convincingly established by a compelling countervailing consideration'[22]. In particular Lord Bingham noted how:

> One must consider whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authority to justify it are relevant and sufficient under article 10(2).[23]

48. This issue overlaps with the one above (legitimate aim) and for the following reasons the restriction was an unlawful infringement of my free speech rights because the infringement was not necessary in a democracy:

[22] *Turkington Breen v Times Newspapers* [2001] 2 AC 277, p297; .

[23] *R v Shayler* [2003] 1 AC 247, §23, cited in *Miller v College of Policing*, *ibid.*, §213, 214.

1. Legitimate aim: As noted above there was no legitimate aim because Muslims do not have a right to be protected from political criticism.

2. Other civil & criminal protections: Given the existence of other legal protections the IDP had no basis to create its own fetter on speech. Indeed it was wrong for the IDP to impose this fetter with much lower thresholds than exist in the numerous laws against 'hate speech'[24] and harassment. As Collins J noted (emphasis added):

> However offensive and undeserving of protection the appellant's outburst may have appeared to some, it is important that any individual knows that he can say what he likes, *provided it is not unlawful*, unless there are clear and satisfactory reasons within the terms of Art. 10(2) to render him liable to sanctions[25]

3. Offence and possible hostility: Case law has established that this threshold is far too low as. As Sedley LJ observed:

> Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative … Freedom only to speak inoffensively is not worth having[26]

4. Protection for Muslims: No reason has been given as to why a charge is framed that singles out Muslims for special protection (with thresholds much lower than exist in law to protect religions[27]).

5. Aimed at a particular group: The restriction fails to distinguish between a statement that 'has something to do with' Muslims and treating such persons improperly (such as by directing hatred at them). A political statement is not a personal treatment.[28]

6. '*could* promote *hostility*': As with point 3 above, this threshold is far too low. Indeed the word 'could' has been used in preference to the word 'would' because the IDP accepted that the tweet did *not* actually promote hostility towards Muslims as a group. Furthermore 'hostility' is not 'hatred' and the former is a legitimate political response to any religion or set of political ideas.

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[24] The Public Order Act 1986, s29B(1):

> A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred

The Communications Act 2003, s127(1):

> A person is guilty of an offence if he—
>
> (a) sends by means of a public electronic communications network a message or other matter that is *grossly offensive* or of an indecent, obscene or menacing character;

[25] *Livingstone v The Adjudication Panel for England* [2006] HRLR 45, §38.

[26] *Redmond-Bate v DPP* (1999) 7 BHRC 375, §20, cited in *Miller*, *ibid.*, §3.

[27] Public Order Act 1986, s26B, as set out in footnote above.

[28] *Lee v Ashers Baking Co* [2018] UKSC 49, Lady Hale §§33-35.

7. The trigger of causing offence and possible hostility towards a group is so subjective and broad that almost anyone who engages in political argument could fall foul of it. This test offends the very basis for protecting freedom of speech, as the ECHR observed (added emphasis):

> Freedom of expression constitutes one of the essential foundations of such a society [democracy], one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those *that offend, shock or disturb the State or any sector of the population*. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued.[29]

*The BSB has not satisfied the threshold of 'necessity'*

49. The BSB purports to address the necessity point in paragraphs 59 & 60 but its arguments fall short:

a. Offensive speech: As noted above, case law has made it clear that 'offensive' language falls short of the threshold for curtailing speech.

b. Low level sanction: The fact that the sanction was 'of the lowest level' (§59(b)) is no answer to a threshold test. The test is whether it is necessary in a democracy to curtail speech, the test is not whether the sanction was justified. Unless the threshold was crossed any sanction breached my human rights.

c. Secret sanction: 'The sanction would not have been publicised, had the Appellant not chosen to publicise it himself' (§59(c)). That may have been the BSB's intention but it was not the reality: the BSB unlawfully disclosed my sanction to a member of the public, who then broadcast it to the world. (The BSB admitted this and apologised for it on 8 November.) In any event a sanction that breached my human rights breached them whether or not it was imposed in secret.

d. General principles: The fact that I am said to have cited 'general statements about free speech made in vastly different contexts; mostly criminal cases' (§60) is to misunderstand the fact that human rights (as with many laws) are based on general principles. The BSB is not authorised to disregard them or to proceed as if they do not apply to me (an individual) or it (an emanation of the state).

e. Regulation is not crime: Furthermore, the general principles derived from article 10(2) apply whether the context is criminal or civil (regulatory). Article 10 establishes a right that applies in civil and criminal proceedings. Whilst it is true that 'a breach of professional standards may occur in situations falling short of that which may amount to a crime' (§60(3)) this does not mean that threshold requirements for curtailing speech apply in one jurisdiction (crime) but not another (professional regulation).

[29] *Handyside v UK*, (1979-80) 1 EHRR 737, §49, cited in *Miller*, *ibid*., §6.

50. The BSB has not established that the curtailment of my right to speak freely satisfied the 'stringent test' of necessity that 'corresponded to a pressing social need' (Ld Bingham). Patently it did not.

**3. Unlawful because the charge of *causing offence and possible hostility* towards Muslims:**

a) sets the bar far too low for bringing either me or the profession into disrepute

b) is not set out in the BSB Handbook, is ultra vires and is not prescribed by law

c) breached natural justice as I was given no chance to respond to this new charge

a) My conduct did not impugn me or my profession

51. At no stage did the IDP identify how my tweet impacted on core duty 5 namely that I 'must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession'. For three reasons my free speech tweet did not do this.

52. First, it follows from the *Forstater* test that my statement was worthy of respect in a democracy and hence it could not possibly have brought the profession into disrepute.

53. Secondly, in the context of statements made outwith the course of professional practice the conduct can only trouble the profession if it brings 'disgrace' upon the professional and thereby prejudices the reputation of the profession. The conduct must be 'dishonourable or disgraceful' or attract 'some kind of opprobrium' that brings the profession into disrepute.[30] My tweet did not have this quality.

54. Thirdly, in a recent case (*Beckwith*) concerning the sexual activity of a solicitor the High Court overturned a disciplinary finding against the professional after noting that (emphasis added):

> 45. … What the Appellant did affected his own reputation; but there is a *qualitative distinction* between conduct of that order and conduct that affects either his own reputation as a provider of legal services or the reputation of his profession. The Tribunal asserted that the Appellant's behaviour crossed this line but provided no explanation.
>
> 54. There can be no hard and fast rule either that regulation under the Handbook may never be directed to the regulated person's private life, or that any/every aspect of her private life is liable to scrutiny. But Principle 2 or Principle 6 may reach into private life only when conduct that is part of a *person's private life realistically touches on her practise of the profession (Principle 2) or the standing of the profession (Principle 6).* Any such conduct must be qualitatively relevant. It must, in a way that is demonstrably relevant, engage one or other of the standards of behaviour which are set out in or necessarily implicit from the Handbook. In this way, the required fair balance is properly struck between the right to respect to private life and the public interest in the regulation of the solicitor's profession. Regulators will do well to recognise that it is all too easy to be dogmatic without knowing it; popular outcry is not proof that a particular set of events gives rise to any matter falling within a regulator's remit.[31]

55. My tweet was not private, but it was posted in a personal rather than professional capacity. And it was incumbent on the IDP to explain how my tweet had a quality that realistically touched on my practice or that of the profession or the standing of the profession. Patently it did not.

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[30] *R(Remedy UK Ltd ) v General Medical Council* [2010] EWHC 1245 (Admin), Elias LJ, §37.

[31] *Beckwith v Solicitors Regulation Authority* [2020] EWHC 3231 (Admin).

56. As Joshua Rozenberg has argued: 'It is absurd to suggest that the tweet for which Holbrook was fined £500 could damage public confidence in the barristers' profession.' He, who I cite as a seasoned observer and commentator of lawyers over many decades, then notes that:

> We can disagree with the views of individual barristers without attributing their views to the entire profession. All barristers in the House of Commons have political affiliations and most will express strong views from time to time. Some return to full-time legal practice after leaving parliament. Other practising barristers take a party whip in the Lords. Their opinions are bound to challenge the views of their political opponents but nobody would say they damage public confidence in the legal profession as a whole.[32]

57. The above point is implicitly accepted by the IDP which did not make a disciplinary finding in respect of my tweet.

*The BSB has not addressed the threshold of 'disgrace' etc*

58. The BSB has not addressed the threshold points raised above. My response to each point raised in §62 is as follows:

a. This point is a self-serving assertion.

b. *Forstater* establishes that my tweet was worthy of respect in a democracy and it is absurd of the BSB to claim that '*Forstater* does not assist the Appellant'.

c. The BSB has failed to address the important distinction made in *Remedy* between conduct during the course of professional practice and conduct outwith the course of professional practice. Accordingly, the BSB has not addressed the threshold of needing to establish that my tweet brought disgrace on me (by being dishonourable or disgraceful or as attracting opprobrium) and thereby prejudiced the reputation of the profession. It is not for the BSB to impose politically correct values on the bar.

d. The IDP did not claim that my tweet impacted on the profession either at all or, as the BSB now claims, on my practice 'in the field of public law'. This is absurd: politics is concerned with how the world should be, law is concerned with how it is. It is jejune to be unable to see that a barrister can engage in the former without it impacting on his practice in the latter. It may be that woke 'social justice warriors' take their politics into the courtroom and see their professional lives as a continuation of their political interests. But I have never had any difficulty distinguishing between political and professional roles, which is why nobody has or will find any evidence to support the BSB's pathetic claim.

e. Joshua Rozenberg amplifies the point above by noting how barristers have often had political careers without the latter impacting on the former. The BSB seems unable to grasp this fact.

b) The charge is not set out in the BSB Handbook, is ultra vires and is not prescribed by law

59. As a matter of law the charge that the IDP used to sanction me had to be set out in the BSB Handbook. Under the Legal Services Act 2007 (s1) the only relevant law is the regulatory objective of 'protecting and promoting the public interest'. Under this power the BSB Handbook states that:

[32] *Must lawyers meet higher standards?* Joshua Rozenberg, 27 August 2021.

> The BSB Handbook sets out the standards that the Bar Standards Board requires the persons it regulates to comply with in order for it to be able to meet its regulatory objectives.[33]

60. The BSB Handbook sets out the core duties ('CD'), of which only CD5 was relevant:

> You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession. (p6)

61. The BSB Handbook then lists rules relating to 'honesty, integrity and independence' (p10) but there is nothing relevant to my circumstances. Moreover, the section marked 'Media comment' (p11) also says nothing relevant to my circumstances. The only possibly relevant provision is on page 12 where under the heading 'Other possible breaches of CD3 and/or CD5' there is a list of 'other conduct which is likely to be treated as a breach of CD3 and/or CD5' and the list includes:

> 'seriously offensive or discreditable conduct towards third parties'

62. All of this shows that the IDP sanctioned me for a charge that is not set out in the BSB handbook. Indeed, I was sanctioned for a charge with considerably lower thresholds than are provided for by the handbook because the IDP did not find that my free speech tweet constituted 'seriously offensive or discreditable conduct towards third parties'.

63. The Legal Services Act 2007 does not empower the BSB to set itself up as political policemen that sanctions barristers for expressing their political beliefs (and the Equality Act and human rights laws certainly forbid it). But if this is what it desires then as a minimum it must state the standards that barristers must not offend. Under human rights law this is described as the need for prescription. As noted in *Beckwith*, citing the case of *James v United Kingdom* (1986) 8 EHRR 123, the ECHR stated that:

> …a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which any given action may entail.[34]

64. Lord Sumption has developed this point and summarised the relevant Strasbourg case law on prescription by noting the need for the 'law' to establish a three-fold test concerning accessibility, foreseeability and safeguards. He notes that these requirements must satisfy the principle summed up in the adage of the American founding father John Adams, 'a government of laws and not of men'. In particular, the law must not:

> confer a discretion so broad that its scope is in practice dependent on the will of those who apply it, rather than on the law itself. Nor should it be couched in terms so vague or so general as to produce substantially the same effect in practice. The breadth of a measure and the absence of safeguards for the rights of individuals are relevant to its quality as law where the measure confers discretions, in terms or in practice, which make its effects insufficiently foreseeable. Thus a power whose exercise is dependent on the judgment of an official as to when, in what circumstances or against whom to apply it, must be

[33] *BSB Handbook*, version 4.6, p1.

[34] *Beckwith*, *op cit*, §48.

sufficiently constrained by some legal rule governing the principles on which that decision is to be made.[35]

65. Neither the Handbook nor the BSB's *Social Media Guidance*[36] of October 2019 [3-183] establish that it is professional misconduct to publish a comment on social media that *would cause offence and could promote hostility* towards Muslims. In fact this is expressly *not* the charge allegedly created in the Social Media Guidance:

> *Comments designed to demean or insult are likely to diminish public trust and confidence in the profession (CD5).* It is also advisable to avoid getting drawn into heated debates or arguments. Such behaviour could compromise the requirements for barristers to act with honesty and integrity (CD3) and not to unlawfully discriminate against any person (CD8). You should always take care to consider the content and tone of what you are posting or sharing. Comments that you reasonably consider to be in good taste may be considered distasteful or offensive by others.

*i) Guidance and the Handbook have a different status*

66. The High Court recently applied the above point (about the Guidance not being the Handbook) when overturning a BSB finding of professional misconduct (underlining added):

> The basis upon which the Tribunal found that these allegations could amount to a lack of integrity was the Guidance at gC25 which lists "*other conduct which is likely to be treated as a breach of CD3 and/or CD5*" including "*seriously offensive or discreditable conduct towards third parties*". It is clear from the manner in which the Tribunal's judgment is expressed that they proceeded on the footing that, if they found the conduct to be seriously offensive or discreditable towards the complainants, then the conduct necessarily amounted to conduct which breached CD3. In my view, the Tribunal erred in applying the Guidance as if it was a mandatory rule of conduct, and they lost sight of the need to be satisfied that the "*seriously offensive or discreditable conduct*" in this particular case amounted to a failure to "*act with honesty and integrity*" within the meaning of CD3.[37]

*ii) Disregarding the Guidance test re seriously offensive or discreditable conduct*

67. As noted above the only relevant part of the Guidance is that CD5 may be breached if a barrister engages in 'seriously offensive or discreditable conduct towards third parties'. The IDP did not apply this test and neither does the BSB in its Reply.

*iii) The BSB has ignored the need for prescription*

68. The BSB has not addressed Lord Sumption's point about the need for prescription. Only by re-writing the nature of the professional misconduct could the IDP find me guilty. As a result, John Adams' phrase about the need for 'a government of laws and not of men' needs to be updated to deal with the present problem: 'a regulation of laws and not of wokesters'.

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[35] *In re Gallagher*, [2019] UKSC 3, §14, as set out in *Miller v College of Policing* [2020] EWHC 225 (Admin), §186-190.

[36] Which in any event has not been incorporated into the Handbook and I deny that it is part of the regulatory framework.

[37] *BSB v Howd* [2017] EWHC 210 (Admin), §46.

*iv) The BSB is seeking to exceed its statutory powers*

69. The BSB's powers are limited by statute to those which are 'compatible with the regulatory objectives'.[38] These are set out in s1 of the Legal Services Act and the only relevant objective is that which requires the BSB to support the encouragement of 'an independent, strong, diverse and effective legal profession'.[39] Core Duty 5 which protects the public's trust and confidence in the profession must fall within these legal restraints. This regulatory framework provides no warrant for enforcing political values but it does require the BSB to encourage a profession where its practitioners have independence of mind and may hold a diversity of political beliefs.

c) I was given no chance to respond to the new charge

70. The IDP disregarded the rules of natural justice. I was originally charged for tweets that were 'designed to demean or insult' individuals. The IDP exonerated me of this charge. But it sanctioned me for a different charge of causing offence and possible hostility towards Muslims. The first time I saw that charge was when I received the BSB letter of 9 August. By failing to put this reframed charge to me, so that I had an opportunity to respond to it, the IDP breached a fundamental principle of natural justice.

71. The BSB's reply claims 'This appeal ground is incorrect' (§65). Two issues arise:

*i) I was disciplined for a new and different charge*

72. But, it is clear from the BSB's decision letter of 9 August that the IDP found that I had breached the Handbook with speech that 'caused offence etc'. This was a materially different formulation to that contained in the BSB's letter of 12 April which required me to address the BSB investigation concerning tweets 'designed to demean or insult others including Muslims … and which tweets may be considered distasteful or offensive by others'. The element of :

- speech designed to demean or insult – was dropped,
- speech which could promote hostility – was added.

73. Moreover, I was not given an opportunity to address the IDP's conclusion that my tweet meant that 'the Muslim community was to blame for curtailing free speech'. Had I been given such an opportunity I would have made clear that a plain reading of the tweet did not:

- Attribute 'blame', a notion qualitatively different from 'playing a central role'.
- Refer to 'the Muslim community', it referred to 'Islamists and other Muslims'. The IDP has read 'other Muslims' as 'all Muslims', hence its use of the definite article ('*the* Muslim community) and the BSB's description of my tweet as referring to 'Muslims as a class' (§33).

74. In its Reply the BSB has sought to distort the meaning of my tweet even more on grounds that (a) are absurd and (b) were not put to me, namely that:

- There was an unspecified problem with the 'tone of this tweet' (§31).

[38] Legal Services Act 2007, s28(2).

[39] Legal Services Act 2007, s1

- There was 'no indication that people of any other religion (or none) have taken action against particular forms of speech' (§33). Maybe the BSB does not know that tweets are limited to 280 characters and intended to be short, pithy and immediate statements. A tweet is not a treatise on religion and free speech.

- The tweet *did* (not *may*) promote hostility towards Muslims (§58).

*ii) I was given no right to be heard*

75. It is a fundamental requirement of fairness that a person ought to have a chance to satisfy the decision-maker that a decision should be taken in his favour or to address any particular concern that the decision-maker has about the applicant. I rely on each of the six reasons outlined by Bingham LJ in *Ramjohn* as to why this is so.[40]

[40] *Permanent Secretary v Ramjohn* [2011] UKPC 20, §39, as set out in Treverton-Jones §1.68

**4. The procedure breached my right to a fair trial under article 6 of the ECHR and common law**

76. Article 6 of the ECHR establishes a right to a fair trial:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

77. Moreover, 'the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting article 6(1) of the Convention restrictively'.[41]

78. The IDP made a finding that I had breached the BSB Handbook because without such a finding the Administrative Sanction could not have been imposed. Part 5 – A3 of the BSB Handbook sets out the possible outcomes of the investigation of an allegation. Rule rE22 sets out the IDP's powers:

> Where an allegation has been referred to an Independent Decision-Making Panel under rE19.5 the Independent Decision-Making Panel has the power to decide:
>
> .1 that, on the evidence before it, the conduct alleged did not constitute a breach of the Handbook, or that there was insufficient evidence of a breach of the Handbook (on the civil standard of proof); or
>
> .2 that, on the evidence before it, the conduct alleged did constitute a breach of the Handbook (on the civil standard of proof) but that, in all the circumstances, no enforcement action should be taken in respect of the breach; or
>
> .3 *that, on the evidence before it, the conduct alleged did constitute a breach of the Handbook (on the civil standard of proof) and that the breach should be dealt with by an administrative sanction*; or
>
> .4 that
>
> .a there is a realistic prospect of a finding of professional misconduct being made or there is a realistic prospect of the disqualification condition being satisfied, and
>
> .b having regard to the regulatory objectives, it is in the public interest to pursue Disciplinary Action in which case the allegation must form the subject matter of Disciplinary Action.

79. In other words the IDP usurped the Tribunal's right to make a finding of professional misconduct. It was wrong to proceed on the basis that it could do this without breaching article 6 and common law rules on fairness. Had the matter progressed to the Tribunal I would have had all the rights that the IDP deprived me of (as listed below in (b)).

[41] *Perez v France* 2004-I, (GC), 40 EHRR 909, §64.

a) The BSB determined my civil rights

80. Disciplinary proceedings of the BSB engage article 6:

> There is no difficulty in accepting the proposition that the civil limb of article 6 applies to professional disciplinary proceedings including those prosecuted by the BSB: see *Le Compte, Van Leuven and de Meyere v Belgium* (1982) 4 EHRR 1; *P (A Barrister) v General Council of the Bar* [2005] 1 WLR 3019.[42]

81. Furthermore, the nature of the BSB imposed sanction was such as to embrace article 6 in that it:

a. Curtailed my right to speak freely on political issues and freedom of speech is a fundamental right under article 10.

b. Was an act of discrimination on the basis of political opinion and hence embraced article 14 of the ECHR:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, *political or other opinion*, national or social origin, association with a national minority, property, birth or other status.

Issues of discrimination have been recognised as civil rights.[43]

c. Impacted on my professional reputation.[44]

*i) In regulatory proceedings article 6 is not limited to cessation cases*

82. The BSB relies on *Thompson v the Law Society* which establishes that in disciplinary proceedings a sanction that is not determinative of a person's right to practise his profession does not engage a civil right (Reply §70(a)). That may be so in many ordinary professional misconduct cases. But in my case the central issues was not my right to practise, it was my right to speak freely. The BSB has not addressed this point (§§71-73), which is clearly stated above, and which is now amplified below.

83. The position is summarised in the *Law of the European Convention on Human Rights*[45], from which the following principles are derived:

- It is 'the character of the right or obligation that is the subject of the case when deciding whether Article 6 applies. If that right or obligation falls within private law then any state action that is directly decisive for it must be either taken by a tribunal that complies with Article 6 or, if it is administrative action, challengeable before such a tribunal.' (p380).

[42] *R (McCarthy) v Bar Standards Board* [2015] EWCA Civ 12, §23.

[43] *Orsus v Croatia* (2010) 15766/03, 16 March 2010, §§106, 107.

[44] *Tolstoy Miloslavsky v UK* A 316-B (1995)

[45] *Law of the European Convention on Human Rights*, Harris, O'Boyle & Warbrick, 3rd Edn, 2014.

- Non-pecuniary rights of private persons may engage article 6 'by reference to the general perception of them in national law as private law rights or obligations with which the state may not interfere without due process.' (p383/4)

- Examples are 'freedom of expression and assembly (unless used for political purposes) … freedom from discrimination' (p384. However, the expression 'used for political purposes' embraces political rights such as the right to stand for election, or the right to vote, or the dissolution of a political party (p385).

- Freedom of speech and freedom from discrimination each engage Article 6 because they are rights that are guaranteed by the Convention.[46]

84. Accordingly, article 6 was engaged because the proceedings had the character of curtailing my civil rights under article 10 (freedom of expression) and article 14 (freedom from discrimination).

b) The BSB breached article 6 and the common law

85. The right protected by article 6 and the common law was breached by the BSB in that:

a. The IDP was not independent of the BSB (which brought the charge). This want of independence arises from the manner of the IDP member's appointment, training, pay and tenure. Furthermore, the meeting was attended by BSB two staff members: (i) Secretary / Regulatory Panel Manager (Jenny Hazell); Duty Manager (Paul Pretty) and (ii) two observers whose purpose or status is not known (Lanre Olusoga & Dawn Ebanks).

b. The IDP did not have an appearance of independence given the points above and the fact that the decision was made behind closed doors and was attended by four non-panel members whose role and participation cannot be known or verified.[47]

c. There was no disclosure of relevant documents such as the complaint that gave rise to the charge and sanction.[48]

d. There was no public hearing, which was required to protect me against 'the administration of justice in secret with no public scrutiny'.[49] No exceptional circumstances (such as those set out in CPR 39.3) that would justify the departure from this obligation. The fact that the BSB then informed a political campaigner of the sanction, which resulted in it being published on Twitter, highlights the insidious nature of the IDP's secret sanction.

e. There was no oral argument, which is fundamental to article 6 and general fairness. Essentially the BSB, which was present at the hearing, was allowed to prosecute but I was no allowed to defend.[50]

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[46] *Orsus v Croatia* 15766/03, 16 March 2010, §§106-107. As noted in *Harris, O'Boyle & Warbrick*, p384, fn160.

[47] *Sramek v Austria* [1985] 7 EHRR 351 at §42.

[48] *McGinley & Egan v United Kingdom* [1999] 27 EHRR 1.

[49] *Malhous v Czech Republic* (GC) (2001) 33071/96, §55.

[50] *Werner v Austria* [1998] 26 EHRR 310 §66; *Regner v Czech Republic* (GC) 2018 66, EHRR 9 §146; *Ruiz-Mateos v Spain* [1993] 16 EHRR 505 §63.

c) The process as a whole

86. The IDP made the essential fact finding decision that my 'behaviour was likely to diminish the trust and confidence that the public place in [me] or the profession'. The process is not rescued from its want of article 6 compliance by the fact that I am able to appeal or to judicially review that appeal decision, because the IDP is the tribunal of fact, against which there is no right of challenge.

*ii) The IDP and BSB are effectively indistinguishable*

87. The IDP's want of independence has been established by the BSB's Reply in this appeal. If the BSB had been neutral it would have merely presented the IDP's reasons and, if there were grounds, defended them. But the BSB has raised several new points, which the IDP did not raise such as the claim that:

- The Equality Act can be obviated on grounds that were not addressed (and probably not considered) by the IDP (§§50 – 53).

- The nature of my practice was relevant to the issue of bringing the profession into disrepute (§62(d)).

88. Furthermore throughout the Reply the BSB's invariably refers to the sanction as the BSB's, not the IDP's, which again suggest the sanction was not imposed by a body independent of the BSB (§§17, 19, 39, 53, 56).

*iii) Article 6 requires 'full jurisdiction' to rule on questions of fact and law*

89. It cannot seriously be argued that the IDP procedure, allied to this right of appeal (a review, not a rehearing before another tribunal, not a court) can satisfy article 6. That deficiency cannot be cured by the right of judicial review, which (a) affords the decision taking tribunal a wide latitude, (b) would have no fact-finding jurisdiction, and (c) could only intervene if there were an error of law, in public law terms.

90. The situation is amply set out in the *Law of the European Convention on Human Rights*[51], which makes the following points:

- There needs to be 'control by a judicial body that has full jurisdiction or provides sufficiency of review' (p393).

- The scope of supervisory powers is less when the tribunal is making a decision which requires 'a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims.' (p393)

- This is not such a case: the issue of limits imposed on political speech does not turn on professional knowledge etc.

- Accordingly, more is demanded. The supervisory judicial body must have 'full jurisdiction' or sufficiency of review' in the *Albert* and *Le Compte* sense, ie full jurisdiction to rule on questions of fact as well as law.' (p395)

[51] *Law of the European Convention on Human Rights*, Harris, O'Boyle & Warbrick, 3rd Edn, 2014.

**Conclusion**

91. In light of the BSB's Reply it is the BSB's case that it has the following powers, which should alarm anyone who is concerned to defend liberty, the rule of law and democracy. The BSB claims the right to:

    i) Disregard the Equality Act by sanctioning a barrister even though this may amount to unlawful discrimination (§35 above).

    ii) Disregard case law that establishes that speech cannot be curtailed merely because some consider it offensive (§32 above).

    iii) Disregard case law that establishes limits on the powers of regulators to sanction conduct that is not directly related to professional practice (§58 above).

    iv) Sanction a barrister for professional misconduct with a charge that does not appear in the Handbook or Guidance (§67 above).

    v) Draft a charge that goes beyond the BSB's powers (§69 above).

    vi) Deny that barrister the right to address the panel (§75 above).

    vii) Do the above in the privacy of a room attended by the regulatory authority (the BSB) and the supposedly 'independent' members (§85(a) above).

    viii) Inform a third-party of the supposedly secret sanction with the inevitable result that it is put in the public domain by that third-party (§49(c)).

    ix) Disregard articles 6, 10 and 14 of the European Convention on Human Rights.

    x) Resist attempts to have the appeal hearing in public .

92. Islamists and some Muslims are enemies of free speech but they are not the only ones. Twitter is full of those, including many lawyers, who would rather denounce than disagree and who would rather cancel than criticise. There is a legal remedy to this problem in the form of the Equality Act, which in light of the *Forstater* judgment of June this year clearly protects political speech. Those who discriminate against others who express sincerely held political beliefs act unlawfully. In my case this applies to all those who acted to expel me from my former Chambers and all those, such as the BSB, that has imposed a sanction on the expression of my beliefs.

93. In the *Miller* case of 2020 the court was concerned with how the police investigated Harry Miller for a 'non-crime hate incident'. Knowles J observed:

> [Counsel] sought to play down the police's actions. They said that there had been no interference with the Claimant's free expression rights or, if there had, it was at a trivial level. In my judgment these submissions impermissibly minimise what occurred and do not properly reflect the value of free speech in a democracy. There was not a shred of evidence that the Claimant was at risk of committing a criminal offence. The effect of the police turning up at his place of work because of his political opinions must not be underestimated. To do so would be to undervalue a cardinal democratic freedom. In this

country we have never had a Cheka, a Gestapo or a Stasi. We have never lived in an Orwellian society.[52]

94. Oppression can arise in different ways. Under the jackboot of the Cheka, Gestapo or Stasi it is easy to see and it provokes outrage from those with a sense of history. But under the beguiling notion of regulation imposed by respectable people in suits it is harder to see and instead of provoking outrage it tends to set norms and limits. If I am sanctioned for criticising Islam, free speech will be dead and it will have died under the oppressive weight of regulation. Twentieth century oppression under the jackboot is yielding to 21st century oppression by regulation. This ought to trouble everyone who believes in freedom and democracy.

JON HOLBROOK
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Section 4 added on 26 October 2021
Response to BSB's Reply added on 17 November 2021

[52] *Miller*, op cit, §259.