Neutral Citation Number: [2022] EWHC 1258 (Admin)

Case Nos: CO/4803/2020 & CO/218/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
27th May 2022

Before:
MR JUSTICE FORDHAM

- -

Between:

CO/4803/2020	**THE QUEEN (on the application of CRAIG GARRETT)**	**Claimant**
	- and -	
	LEGAL AID AGENCY	**Defendant**
CO/218/2021	**THE QUEEN (on the application of CRAIG GARRETT)**	**Claimant**
	- and -	
	SOLICITORS REGULATION AUTHORITY	**Defendant**
	-and-	
	SOLICITORS DISCIPLINARY TRIBUNAL	**Interested Party**

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The **Claimant** in person
Malcolm Birdling (instructed by Legal Aid Agency) for the **LAA**
Rory Mulchrone (instructed by Capsticks LLP) for the **SRA**
The **SDT** did not appear and was not represented

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Hearing date: 24.5.22

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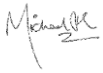
Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



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THE HON. MR JUSTICE FORDHAM

Note: a non-confidential version of this judgment was released on 24th May 2022, with typos to be incorporated in the handed-down version.

MR JUSTICE FORDHAM:

Introduction

1. This is a case which arises out of an order made by the SRA pursuant to section 43 of the Solicitors Act 1974, which I will call a "Control Order". For the purposes of section 43, the SRA acts for the Law Society ("the Society") and "the Tribunal" is the SDT. Section 43 includes the following:

> ***43.— Control of solicitors' employees and consultants.***
>
> ***(1) Where a person who is or was involved in a legal practice but is not a solicitor – (a) has been convicted of a criminal offence which is such that in the opinion of the Society it would be undesirable for the person to be involved in a legal practice in one or more of the ways mentioned in subsection (1A), or (b) has, in the opinion of the Society, occasioned or been a party to, with or without the connivance of a solicitor, an act or default in relation to a legal practice which involved conduct on his part of such a nature that in the opinion of the Society it would be undesirable for him to be involved in a legal practice in one or more of the ways mentioned in subsection (1A), the Society may either make, or make an application to the Tribunal for it to make, an order under subsection (2) with respect to that person.***
>
> ***…***
>
> ***(2) An order made by the Society or the Tribunal under this subsection is an order which states one or more of the following – (a) that as from the specified date – (i) no solicitor shall employ or remunerate, in connection with his practice as a solicitor, the person with respect to whom the order is made, (ii) no employee of a solicitor shall employ or remunerate, in connection with the solicitor's practice, the person with respect to whom the order is made, (iii) no recognised body shall employ or remunerate that person, and (iv) no manager or employee of a recognised body shall employ or remunerate that person in connection with the business of that body, except in accordance with a Society permission; (b) that as from the specified date no recognised body or manager or employee of such a body shall, except in accordance with a Society permission, permit the person with respect to whom the order is made to be a manager of the body; (c) that as from the specified date no recognised body or manager or employee of such a body shall, except in accordance with a Society permission, permit the person with respect to whom the order is made to have an interest in the body.***
>
> ***(2A) The Society may make regulations prescribing charges to be paid to the Society by persons who are the subject of an investigation by the Society as to whether there are grounds for the Society– (a) to make an order under subsection (2), or (b) to make an application to the Tribunal for it to make such an order. (2B) Regulations under subsection (2A) may– (a) make different provision for different cases or purposes; (b) provide for the whole or part of a charge payable under the regulations to be repaid in such circumstances as may be prescribed by the regulations. (2C) Any charge which a person is required to pay under regulations under subsection (2A) is recoverable by the Society as a debt due to the Society from the person.***
>
> ***(3) Where an order has been made under subsection (2) with respect to a person by the Society or the Tribunal— (a) that person or the Society may make an application to the Tribunal for it to be reviewed, and (b) whichever of the Society and the Tribunal made it may at any time revoke it.***
>
> ***(3A) On the review of an order under subsection (3) the Tribunal may order— (a) the quashing of the order; (b) the variation of the order; or (c) the confirmation of the order; and where in the opinion of the Tribunal no prima facie case for quashing or varying the order is shown, the Tribunal may order its confirmation without hearing the applicant.***
>
> ***(4) …***

> ***(5) Orders made under subsection (2) by the Society, or made, varied or confirmed under this section by the Tribunal and filed with the Society may be inspected during office hours without payment.***
>
> …

2. There are before me two renewed applications for permission for judicial review, permission having been refused by Steyn J on 14 and 15 September 2021. The renewed applications (dated 15 September 2021) were listed on the same day before the same Judge and it has made sense to deal with them at the same hearing[1] and in a single judgment. The Claimant applied, unopposed, for the renewal hearings to be "hybrid" hearings involving the use of "CVP" so that he could attend remotely from his address in Newport. I granted those applications. I explained that I was doing so based on the particular circumstances, not intending to set a precedent, because – in light of the Claimant's medical conditions, given the urgency (since the applications had not been dealt with more promptly), and in circumstances where the Defendants were not opposing the applications – I was satisfied that it was reasonable and appropriate on this occasion for the Claimant to participate in the hearing remotely. That is what he did. The Court was informed on 23 May 2022 that he had been taken into hospital. In the event, he was able to appear at the hearing (24 May 2022) by CVP. He told me that he was not requesting an adjournment and was content to go ahead, which we did.

3. The background is this. On 28 March 2014 the Claimant was dismissed from his employment with a firm of solicitors called Louise Stephens and Co ("the Firm"). The Firm's owner and proprietor (Louise Stephens) reported the Claimant to the SRA on 1 April 2014 and later provided a witness statement (5 June 2014). There was a police investigation, in which the Claimant was represented by criminal solicitors. Subsequent SRA steps included a report (22 September 2015), communications from the criminal solicitors (20 November 2015 and 11 March 2016) and a supervision report (14 March 2016). An SRA Adjudicator decided (12 April 2016) to impose a Control Order (s.43(2)) on the Claimant, pursuant to the test in section 43(1)(b). The Adjudicator went on to make an order against the claimant for costs in the sum of £600. The Adjudicator's decision was published by the SRA on 23 May 2016. More than four years later, on 2 September 2020, the Claimant made an application pursuant to section 43(3) to the SDT for the Control Order to be "reviewed" (s.43(3)(a) and (3A)). The decisions which are impugned in these two claims for judicial review arose out of those background circumstances.

4. The Claimant makes a number of points in his claims for judicial review. But there are two key themes in his position so far as the Control Order is concerned.

    i) Never justified. First, he says that the Control Order should never have been made. In particular, that is because the SRA Adjudicator – wrongly – thought that the police investigation was limited to the Firm's "client account" and did not concern the Firm's "office account". The investigation was never restricted in that way. The Claimant was being investigated in relation to both accounts and did not respond substantively to the SRA, including in relation to the "office account", because there was an extant criminal investigation. This is a "never justified" point. It has been present throughout.

[1] The SDT did not participate but later contributed a clarification (see §8A) for the handed-down judgment.

ii) No longer justified. Secondly, he says that the Control Order cannot stand in light of his subsequent vindication in the criminal proceedings. He points to his formal certificate of acquittal on 5 May 2021, the Crown having offered no evidence. This is a "no longer justified" point. It is a point which arose from May 2021 onwards.

5. So far as the claim against the LAA is concerned, further key circumstances include these. The Claimant made an application for exceptional case funding ("ECF") pursuant to the Legal Aid Sentencing and Punishment of Offenders Act 2012 section 10, read with the ECF Guidance and the legal aid Means Regulations and Merits Regulations. On 4 December 2020 a reasoned decision was made by the LAA decision-maker, confirming that ECF was refused. The ECF sought by the Claimant was so as to be represented at the SDT hearing of the application pursuant to section 43(3)(a), to quash the Control Order made by the SRA Adjudicator in April 2016. The refusal of that funding is impugned in the judicial review proceedings against the LAA (CO/4803/2020), filed on 23 December 2020. Steyn J refused permission for judicial review on 15 September 2021 on the basis that, beyond argument, the LAA's decision of 4 December 2020 was lawful and reasonable in assessing the prospects of success as poor (less than 45%). That meant the judicial review claim could not succeed, even if the LAA had misappreciated whether Article 6 ECHR was engaged. Steyn J made a costs order: that the Claimant pay the LAA's costs of its acknowledgement of service assessed in the modest sum of £300 in circumstances where no evidence of the quantum of costs had been provided with the AOS by the LAA. Mr Birdling for the LAA submits that Steyn J was right for the reasons she gave and, moreover, that the claim impugning the December 2020 decision is academic, having been overtaken by events.

6. So far as the claim against the SRA is concerned, further key circumstances include these. The Claimant issued judicial review proceedings on 19 January 2021 seeking to impugn the Adjudicator's decision of 12 April 2016 imposing the Control Order, the £600 costs order, and the act of publication of 23 May 2016. Steyn J refused permission for judicial review on 14 September 2021. She concluded that: (i) the judicial review was very substantially out of time with no good reason to extend time; (ii) section 43(3)(a) statutory review by the SDT stood as an alternative remedy so far as concerns the Control Order (which alternative remedy was in fact being pursued by the Claimant); (iii) that the act of publication was unimpeachable (and any alleged prejudice to criminal proceedings was a matter for the crown court and in any event was academic in the light of the prosecution against the claimant having formally been dropped on 6 May 2021); (iv) the £600 costs order was, beyond argument, lawful in the circumstances in which the Control Order had been made (but would in any event be reconsidered in conjunction with any decision by the SDT on the statutory review were that to succeed). These were the judicial review proceedings CO/218/2021. Steyn J ordered the claimant to pay the SRA's AOS costs assessed in the full amount (£2,650).

Statutory remedies to challenge the Control Order

7. Section 43(3), which I set out at the start of this judgment, contains two routes of challenge to a Control Order.

i) Revocation (whether presently necessary). The body which imposed the Control Order – whether it is the SRA (as in this case) or the SDT – may be asked to "revoke" it (s.43(3)(b)). In SRA v Ali [2013] EWHC 2584 (Admin) (26.6.13)

Wilkie J at §41 identified as "the correct question" whether "it was, in all the circumstances, any longer necessary for the level of regulatory control to be imposed upon the applicant". On that basis – broadly speaking – revocation asks whether the Control Order is presently necessary.

ii) Review (whether necessary when imposed). The SDT may "review" (s.43(3)(a)) the Control Order – whether imposed by it or the SRA – considering whether to quash, vary or confirm it (s.43(3A)). In SRA v Arslan [2016] EWHC 2862 (Admin) (10.11.16) Leggatt J (for the DC) identified (at §§38-42) the nature of a "review", including that the SDT on a review "should not generally receive new evidence that was not before the original decision-maker, although it may do so if justice requires it", and should ask whether the decision was "wrong" or "unjust" (§38); and where the "proper starting point" is "the findings made by the adjudicator and the evidence before the adjudicator" (§39). On that basis – broadly speaking – review asks whether the Control Order was necessary when imposed.

These two routes reflect the Claimant's two key themes: review (whether necessary when imposed) would address his "never justified" point; revocation (whether presently necessary) would include addressing his "no longer justified" point.

8. The Claimant told me that he had been confused as to these two remedies. He is not alone. The SDT's Deputy Clerk wrote to him on 1 December 2020 to say that his application to the SDT was for a "review" but that one of the powers available to the SDT was "revocation" and that "the Tribunal is in no doubt that you are seeking the revocation of the s.43 order in this case". That was corrected as an "error" by a letter from the SDT's solicitors, much later and very recently, on 6 April 2022. The SDT's solicitors had written on 17 March 2022 to say it had "jurisdiction to consider the Claimant's application as one for review and not revocation". Mr Mulchrone candidly told me that the SRA's understanding was that the SDT's jurisdiction extended to questions of revocation (whether the Control Order is presently necessary), a position reflected in his skeleton argument (3.11.21) and linked to an observation in Arslan at §72 (referring to "another application to the Tribunal for the order to be revoked"). Mr Mulchrone also told me[2] that an SDT decision in the Arslan sequel case (decided by the SDT on 21 March 2022) led to a new Guidance Note (March 2022) on "Other Powers of the Tribunal" ("the New Guidance"), where the position is spelled out at §§12-16 (sadly with an erroneous reference to Ali §8 rather than Ali §41). The SRA wrote, promptly, on 16 March 2022 drawing attention to the New Guidance and SDT's statement in issuing the New Guidance that: "The Tribunal does not have jurisdiction to hear an application for the revocation of a Section 43 Order made by the SRA (this must be made directly to the SRA as the body which imposed the Order)".

8A. The SDT provided this clarification for inclusion in the handed-down version of this judgment. The Arslan sequel case was decided on 21 February 2022 (judgment dated 21 March 2022). It was a case called Mordi, heard in December 2021 (judgment dated 13 January 2022), which had raised issues regarding jurisdiction leading to the guidance being revisited and clarified. The New Guidance was approved on 9 March 2022 and issued with a website article.

[2] Paragraph 8A is a clarification provided for the handed-down judgment by the SDT.

9. To this picture of SRA revocation (whether presently necessary) and SDT review (whether necessary when imposed), there must be added a "hybrid" scenario. The New Guidance at §16 says that where the SRA is asked to revoke and refuses to do so, on the basis that the Control Order remains presently necessary, the SDT can in those circumstances then "review" the Control Order but "in light of the facts and circumstances which were before the SRA on the application to revoke" asking whether the SRA was "wrong to keep the Order in place".

10. The upshot of all of this, as clarified in a flurry of recent materials belatedly put before this Court, is that the Claimant has a flowchart of remedies – so far as the Control Order is concerned – other than by judicial review.

    i) His next step could be to communicate with the SRA, making clear that he is applying for revocation (the "not presently necessary" question), relying in particular on his May 2021 acquittal: his "no longer justified" point. Mr Mulchrone accepted that such an application would need to be considered by the SRA. It would either be granted or refused.

    ii) Having received the SRA's decision as to revocation he could decide whether to maintain his application to the SDT for review. That includes questions whether the Control Order was "necessary when imposed": the Claimant's "unjustified when imposed" point. However, if the SRA has refused revocation, it would also constitute the "hybrid" scenario (New Guidance §16), and would mean examination of the SRA's decision on non-revocation: including "not presently necessary" (and "no longer justified").

11. For reasons which it is not necessary to discuss further, this is a picture which only emerged fully at the oral hearing before me. It is because I wanted to try and set it out with clarity that I decided to put this judgment into writing, rather than embarking on an ex tempore judgment at the hearing. Having done so, I can turn to the question of permission for judicial review.

The claim against the LAA

12. The Claimant seeks permission for judicial review, to challenge the decision of the LAA refusing ECF on 4 December 2020. That decision refused ECF for the Claimant's section 43(3) application to the SDT for statutory review of the Control Order made by the Adjudicator in April 2016. This claim could attract permission for judicial review only if the Court were satisfied that it is arguable with a realistic prospect of success that the assessment of the prospects of success in a manner which was not reasonably open to the LAA decision-maker. There was a further issue, as to whether Article 6 ECHR was engaged, which was a distinct consideration: see section 10(2) of the Act and R (Gudaviciene) v Director of Legal Aid Casework [2015] 1 WLR 2247 at §56. The LAA decision was that, whether or not Article 6 was engaged, the prospects on the review application were "poor". The applicable public law standard in impugning that assessment is unreasonableness: see R (Connell) v Director of Legal Aid Casework [2019] EWHC 3050 (Admin) at §§24 and 45. The reasonableness of the decision has to be considered on the material which was available to the decision-maker at the time of the decision. Leaving aside the distinction between revocation and review, there was no acquittal yet. The focus was on the decision of the Adjudicator in the circumstances in which it had been made in April 2016.

13. The LAA decision-maker's assessment of the prospects of success on the review application, as being "poor", was based on two particular features: the first was that the primary purpose of the Control Order was not punitive but to protect the public (see Ali §41; Gregory v Law Society [2007] EWHC 1724 (Admin) at §18); the second was that the Control Order was made in circumstances where the Claimant had failed to respond to evidenced allegations which had been raised with the SRA, specifically as to the Firm's office account.

The decision was plainly reasonable

14. In my judgment, beyond argument, it was reasonable for the decision-maker in December 2020 to assess the prospects of success on the application – in light of the two particular features which were emphasised and on the evidence then available – as being poor (less than 45%). As Mr Birdling rightly points out, accepting the patent reasonableness of the LAA decision-maker's (predictive) assessment does not involve this Court expressing any view as to how any question would ultimately be resolved by the SDT. The Claimant has emphasised that he was subsequently vindicated in that on 6 May 2021 the criminal proceedings against him were discontinued when the Crown offered no evidence and he was formally certified as being acquitted of the 29 counts of theft and fraud of which he had been charged on 7 December 2018. But the answer to that is that that was a development which had not taken place as at December 2020. Judicial review on reasonableness grounds is not approached with hindsight, based on later developments. The decision-maker was considering the material available as at that stage. The May 2021 discontinuance and acquittal were relevant considerations to the question of ECF. But they were properly the subject of a reapplication for ECF.

The challenge has become academic

15. Such an application was in due course made. The case returned to the LAA. There was a reconsideration by the LAA and a fresh decision on 3 September 2021. That was a positive decision which permitted advice and assistance from solicitors which was assessed as most appropriate at this time and on current information on which would enable the solicitors to liaise and engage with the SRA in ascertaining the reasons for continuing to subject the Claimant to the Control Order and to enter into negotiations with the SRA to lift the order. As Mr Birdling accepts, that positive decision meant that the LAA was accepting that Article 6 ECHR was engaged. There is no challenge, in these judicial review proceedings, to that decision. The Claimant's renewal submissions dated 15 September 2021 referred to a recent "grant of funding" to secure representation in order to, in turn, make an application for full representation. These circumstances, and the current position, mean that there is a second reason why permission for judicial review of the December 2020 refusal of ECF is inappropriate. The Claimant has avenues of redress whereby he can raise the May 2021 acquittal with the SRA and – if revocation is refused – the SDT. On any view, the picture has materially changed. The December 2020 decision cannot be impugned, as I have explained, by reference to a subsequent development. The challenge to it has, moreover, been rendered academic by the fact that the subsequent development can and has triggered a further application so that relevant matters could lawfully be considered by the LAA.

16. The Claimant tells me that the legal help which he secured did not provide the assistance which was intended by the LAA's decision of 3 September 2021. He accepts that he

has not made a further application for ECF. Mr Birdling accepts that if a further application is made, it will need to be considered by the LAA.

LAA's AOS costs

17. The claim for judicial review against the December 2020 decision has no realistic prospect of success for these reasons. So far as concerns costs of the AOS, the Claimant was afforded the usual opportunity within the paper decision refusing permission for judicial review to impugn the costs order, as he did by means of submissions which emphasise in particular his current circumstances and lack of means. It is right that his lack of means this reflected in the fact that he was recognised as meeting the means threshold for a grant of legal aid. In my judgment, there is no basis for the Court interfering with the modest £300 costs order that Steyn J made in favour of the LAA. I have agreed with Steyn J as to the unimpeachability of the December 2020 decision. I have also concluded that there is an independent reason why permission for judicial review is inappropriate: that challenge has become academic. The enforcement of that order will be a matter for the LAA no doubt carefully to consider. That disposes of the renewed application in CO/4803/2020, the claim against the LAA. I turn to claim CO/218/2021, the claim against the SRA.

The claim against the SRA

18. In challenging the Adjudicator's April 2016 decision to impose the Control Order, the Claimant makes his "never justified" point. He says the Adjudicator relied on the scope of the police investigation, but misappreciated that scope. He says the Adjudicator relied on the fact that the Claimant had not responded substantively to the evidenced allegations against him, but that this was because of the ongoing criminal investigation, as his solicitors' communications explained. He also says it was only when his criminal Leading Counsel told him in September 2020 that it was now appropriate to raise the matter with the SRA that he made his application for statutory review of the Control Order. He says there was good reason for the passage of time, and that there are arguable grounds for judicial review.

Alternative remedy

19. In my judgment, this is a case in which permission for judicial review is clearly inappropriate, on the straightforward basis that the Claimant has adequate alternative remedies. He can pursue his SDT review, on the not "necessary when imposed" and "never justified" points. In relation to the acquittal and the current circumstances, he can first seek revocation by the SRA, on the " not necessary when imposed" and "no longer justified" points which – if unsuccessful – he can then also raise before the SDT under the "hybrid" scenario described in the New Guidance §16. This is a classic case where there is a discretionary bar to judicial review. The issues can all be addressed under mechanisms for which Parliament made provision.

Delay

20. This is also a clear case of a lack of promptness. The delay is several years. I cannot accept that the ongoing existence of the criminal investigation was a good reason why the Claimant could not have brought a challenge based on a misappreciation of its scope. But I confess that I find the delay point a little artificial, since I find it difficult

to 'strip out' of the justice of the refusal of judicial review in the context of an ongoing and intrusive Control Order the suite of alternative remedies provided by Parliament which remain available.

Challenging publication and costs

21. There is no arguable ground for judicial review in relation to publication or costs. The publication by the SRA of the Adjudicator's decision in May 2016 was not, even arguably, unlawful unreasonable or unfair nor in breach of Convention rights. The judicial review Court would not grant a remedy relating to that act of publication. The same is true of the costs order which the Adjudicator made. This was on the face of it lawful reasonable and fair, in light of the applicable 2011 Costs of Investigations Regulations, given the reasoned decision which the Adjudicator had made. Any challenge to publication or costs is far, far too late and there is no good reason to extend time. And as Steyn J pointed out – adopting a point in the SRA's summary grounds – the costs could be revisited if the Control Order were discharged under the statutory review remedy.

SRA's AOS costs

22. So far as the costs order made by Steyn J in relation to the SRA's AOS are concerned, I can find no good or legitimate reason to overturn that costs order. As with the LAA, whether to take steps to enforce that order is a distinct matter which the SRA will need to consider. The confusion regarding the alternative remedies does not assist the Claimant on the question of costs of the AOS. At the time of the AOS there was no May 2021 acquittal and no "not presently necessary" ("no longer justified") point which could have attracted greater clarity as to the route for revocation. Had there been any question regarding the SRA's costs after May 2021, the position could have been different. No application is made for costs after the AOS (11 February 2021). I will apply a modest 'broadbrush' adjustment (to £2,200) to reflect the fact that I am considering AOS costs afresh and do not myself think "indemnity" (100%) costs of the AOS are appropriate in all the circumstances of this case.

Conclusion

23. For these reasons I refuse both applications for permission for judicial review. I leave undisturbed the costs orders made on the papers by Steyn J of £300 in favour of the LAA and adjust down to £2,200 the costs in favour of the SRA.