Agenda Item No. 5

Standards Committee – 21 July 2014

Standards Cases of Interest

Summary of report:

The purpose report is to provide Elected Members with a summary of cases that will be informative to them in relation to standards issues, and provide a greater understanding of the consideration that is given to issues that form part of a review of complaints against members.

Background papers:

Reported Cases:

R (on the application of Dennehy) v Ealing London Borough Council [2013] EWHC 4102 (Admin)

R (on the application of Mulaney) v Adjudication Panel for England [2010] LGR 354

Recommendation:

1. To note the content of the report and Appendices
2. To disseminate this as part of a further briefing note to Elected Members.

1.0 Background

R (on the application of Dennehy) v Ealing London Borough Council

1.1 This case concerned an elected councillor who posted comments on a blog about Indian community in Southall. The Standards Committee found there had been a breach of the code of conduct and ordered the councillor to apologise. Two issues were raised before the court, whether the committee had given sufficient reason for its decision, and whether or not the finding and sanction applied were an infringement of the councillor's right to free speech under the Article 10, Human Rights Act 1998. The committee had found that the "tone and much of the content of the blog had been inappropriate and unnecessarily provocative", and that contrary to the code, the claimant had not treated others with respect and had brought the local authority and officer councillor into disrepute. The claimant sought to judicially review this decision.

1.2 The court went on to find that the reasons for the committee's decision were given in the meeting minutes and the letter to the claimant. Having regard to

the context and from the standpoint of an informed audience, it could not arguably be said that there was a failure to give adequate reasons to the claimant. The claimant was well aware of the contents of the report and had provided considerable input into its production. It was also obvious in light of the evidence why the committee would consider the comments in the blog to be inappropriate and unnecessarily.

1.3 The court also held that the committee was plainly entitled to find that the code had been breached. On the face it, the finding & imposed by the committee constitute a breach of article 10 of the convention. However, they were justified. The decision in question was plainly a proportionate interference with the claimant's right to free speech in the light of other interests identified in the convention. It was also, in any event, a very limited interference. The application would be refused.

1.4 This is a relatively short judgment therefore I have included it in its entirety. There are a number of interesting points that arise out of this case for members to take note of.

- The intention of the legislation under the Localism Act 2011 in respect of standards matters is to ensure that the conduct of public life at local government level does not fall below a minimum level which endangers public confidence in democracy.

- Article 10 of the European Convention on Human Rights provides that,

  "(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 and 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 which as are prescribed by law and are necessary in a democratic society, in the interests of our 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."

- A court needs to address three questions to determine whether a finding that a member has breached a code of conduct and/or any sanction imposed has contravened article 10, these are:

a) Was the case tribunal entitled as a matter of fact to conclude that a councillor's conduct was a breach of a code conduct?
b) If so, was the finding in itself or the imposition of a sanction prima facie a breach of article 10?

c) If so, was the restriction involved one which was justified by reason of the requirements of article 10(2)?

In considering whether or not comment is justified under article 10 (2) the court has taken into account that "political expression" or "the expression of a political view" attracts a higher degree of protection whilst expressions in personal or abusive terms do not attract the same higher level of protection. It is well established that the limits of what is acceptable is wider were the subjects of the speech are politicians acting in the public capacity since politicians "lay themselves open to close scrutiny of their words and deeds and are expected to possess a thicker skin and greater tolerance than ordinary members of the public."

R (on the application of Mullaney) v Adjudication Panel for England.

1.5 This is a case that was reported in 2010 and is interesting because it considered the point about when an elected member may be considered as acting in their official capacity at the material time it was alleged a breach of code conduct occurred. This is a matter that needs to be considered every time a complaint is submitted regarding elected member conduct and is sometimes not as clear as one would suppose it should be.

1.6 The court discussed the issue of official capacity in the above case looking at it in simple and objective terms. “The words official capacity and its definition, namely, "conducts business of the office to which he has been elected or appointed" were ordinary descriptive English words. Their application was inevitably fact sensitive and so whether or not a person was so acting inevitably called for an informed judgement by reference to the facts of a given case. It also meant that there was the potential for two decision makers, both taking the correct approach, to reach different decisions.” Official capacity would include anything done in dealing with staff, when representing the Council or in dealing with constituent’s problems and so on. In essence this will mainly be determined on the actual facts of the case itself. In the case of Mullaney the councillor described himself as a councillor by making, “councillor enquiries”, due to his membership of the planning committee, his legitimate and keen interest in the building as a councillor (who is interested in planning matters) and the identification of himself as a councillor on the video and in its publication.

2.0 Resource and legal considerations:

2.1 None directly related to this report. The complaints procedure is being managed within Legal and Democratic Services from existing resources. If there is a considerable increase in complaints or the council receives a very serious and complex complaint, consideration may need to be given to outsourcing some work if the demand cannot be met from existing resources. The specific facts of each complaint, legislation, standards guidance and case law are all considered prior to a review of case being finalised.

3.0 Performance and Risk Management issues:

3.1 Performance and risk management are a feature of all council functions. The better that determinations are made in respect of complaints will reduce the risk of the decisions being challenged.

3.2 In terms of performance it is important that both Elected Members have a clear framework of standards to follow in delivering services to the community. These frameworks provide accountability and transparency in respect of the way in which the council delivers services.

4.0 Equality Implications:

4.1 In maintaining up to date policies and procedures the council will ensure that services are delivered fairly in an open and transparent manner. There are specific requirements in both codes that elected members and officers observe equalities. It is important that complaints are dealt with in a fair and transparent manner.

5.0 Consultation:

5.1 There is no requirement to consult on this report.

Author:

Tony Cox
Head of Legal and Democratic Services
☎ 01922 654822
✉ coxt@walsall.gov.uk

[2014] LGR 269

R (on the application of Dennehy) v Ealing London Borough Council

[2013] EWHC 4102 (Admin)

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

JUDGE MCKENNA SITTING AS A JUDGE OF THE HIGH COURT

12, 20 DECEMBER 2013

Human rights - Freedom of expression - Councillor posting comments on blog about Indian community in particular town - Standards committee deciding that councillor having breached code of conduct - Whether committee failing to give adequate reasons for its decision - Whether infringement of right to free speech - Human Rights Act 1998, Sch 1, Pt I, art 10.

The claimant, an elected councillor of the defendant local authority, posted comments on a blog about the Indian community in Southall, in particular, how they were exploiting immigrants, and about criminality being endemic in the town. After the comments were reported in the local press, complaints were received by members of the public. It was alleged that the comments breached the code of conduct for councillors. A formal investigation was carried out, which led to a report of findings. The local authority's standards committee subsequently met to consider the matter. It formed the view that the 'tone and much of the content of the blog had been inappropriate and unnecessarily provocative', and that, contrary to the code, the claimant had not treated others with respect and had brought the local authority and the office of councillor into disrepute. It was then resolved that the claimant should issue an apology. The committee's decision was recorded in the minutes of a meeting and also contained in a letter which was given to the claimant. The claimant sought permission to apply for judicial review of the committee's decision, contending that the committee (i) had failed to give adequate reasons for the conclusion that the 'tone and much of the content of the blog had been inappropriate and unnecessarily provocative'; and (ii) had infringed the claimant's fundamental right to free speech at common law and under art 10[a] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

Held - (1) The reasons for the committee's decision were given in the meeting minutes and the letter to the claimant. Having regard to the context and from the standpoint of an informed audience, it could not arguably be said that there was a failure to give adequate reasons to the

[a] Article 10, so far as material, is set out at [18], below

claimant. The claimant was well aware of the contents of the report and had provided considerable input into its production. It was also obvious in the light of the evidence why the committee would consider the comments in the blog to be inappropriate and unnecessarily provocative (see [43], [44], below).

(2) The committee was plainly entitled to find that the code had been breached. On the face of it, the finding and the sanction imposed by the committee constituted a breach of art 10 of the convention. However, they were justified. The decision in question was plainly a proportionate interference with the claimant's right to free speech in the light of the other interests identified in the convention. It was also, in any event, a very limited interference. The application would be refused (see [47], [48], below); *Sanders v Kingston* [2005] LGR 719 applied.

Cases referred to in judgment

Axel Springer AG v Germany (2012) 32 BHRC 493, ECt HR.

Livingstone v Adjudication Panel for England [2006] EWHC 2533 (Admin), [2006] LGR 799.

Miss Behavin' Ltd v Belfast City Council [2007] UKHL 19, [2008] LGR 127, [2007] 1 WLR 1420.

R (on the application of Calver) v Adjudication Panel for Wales [2012] EWHC 1172 (Admin), [2013] PTSR 378.

R (on the application of Lord Carlile of Berriew) v Secretary of State for the Home Dept [2013] EWCA Civ 199, [2013] All ER (D) 224 (Mar), [2013] NLJR 26.

Sanders v Kingston [2005] EWHC 1145 (Admin), [2005] LGR 719.

Judicial review

The claimant, Benjamin Dennehy, an elected councillor, sought permission to apply for judicial review of the decision of the standards committee of the defendant local authority, Ealing London Borough Council, that comments made by him in a blog had breached the council's 2007 code of conduct for councillors. The facts are set out in the judgment.

Simon D Butler (instructed by Gunner Cooke Partnership) for the claimant.

Tom Cross (instructed by Director of Legal and Democratic Services, Ealing London Borough Council) for the defendant.

Judgment was reserved.

20 December 2013. The following judgment was delivered.

JUDGE McKENNA.

Introduction

[1] This is the hearing of an application made on behalf of Mr Benjamin Dennehy (the claimant) for permission to apply for judicial review of a decision (the decision) of the standards committee (the committee) of the council of the London Borough of Ealing (the

council) to find that comments made by the claimant, an elected councillor, had breached the council's 2007 code of conduct for councillors (the code).

[2] The committee found that in posting comments on a blog on 12 March 2012 the claimant had not treated others with respect and had brought the council and the office of councillor into disrepute contrary to the code.

[3] In the light of its findings the committee resolved that the claimant should be requested to issue an appropriate apology, and that a notice summarising the committee's decision should be published in the Ealing Gazette and on the council's website.

[4] In his original grounds, the claimant, who at that stage was unrepresented, maintained a large number of grounds albeit that some were interrelated. The matter was considered in some detail by Kenneth Parker J, on paper on 21 August 2013, and he ordered that the application be adjourned to be listed in court on notice to the defendant. In doing so he made the following observations:

> '1. The Council found that the Claimant, in breach of the Code of Conduct for Councillors had not treated others with respect and so brought the Council and the Claimant himself, as a councillor, into disrepute. The Council reached that finding because "the tone and much of the content [of the internet blog] had been inappropriate and unnecessarily provocative" (minutes of meeting of 22 May 2013, Bundle p143).
>
> 2. The reason for the decision did not specify precisely in what way the tone had been inappropriate and unnecessarily provocative, or identify exactly what part of the content of the blog was referred to. (Given that the right to free speech of a democratically elected member of a public authority was *prima facie* engaged, it might be better practice if more specific reasons are given). Nonetheless the comprehensive, careful and balanced Final Report of the Investigating Officer of February 2013 was before the Council and no doubt informed its decision.
>
> 3. That Report at paragraph 4.7 identified a particular passage from the blog. In my view, it is a reasonable interpretation of that passage that the Clamant was telling his readers (including residents of Southall) that (a) nearly the whole or at least a substantial part of the Indian community in Southall is "harbouring" and "exploiting" other members of that community (in particular illegal immigrants) in "squalid third world living conditions"; and (b) such whole or substantial part of the Indian community did not pay income tax on income derived from letting deplorable property to illegal immigrants and might also justifiably be suspected of engaging in other illegal "scams". There appears to me to be no justification for such a sweeping statement, which would be likely to cause legitimate indignation and serious offence to those members of the group referred to who have no involvement with illegal immigration or any other form of
>
>
>
> criminality. Furthermore, I find it hard to accept that any reasonable Councillor could have believed that such a sweeping statement was justified, and I therefore have difficulty in accepting that the Claimant thought that such a statement was justified. It may be that the Claimant did not intend to make such a sweeping and offensive statement. However, in my view, the words used were reasonably capable of bearing the above meaning, and the correct course would then have been frankly to recognise that fact, and to apologise unqualifiedly for the offence that the words, on their reasonable interpretation, would have caused.
>
> 4. On that basis I was minded to conclude that the Council's decision, although engaging Article 10 of the [European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998)), was without question a proportionate interference, in the light of the other interests identified in that Article. However, I am conscious that this is a sensitive area, raising an issue about the right of a democratically elected member of a public authority freely and frankly to express views about matters which he believes are of topical social and political concern in his local area. I do not believe, therefore, that I should shut out the Claimant by a paper refusal of permission, and so give him the opportunity, if he decides that it is appropriate, to advance orally his application for permission.
>
> 5. For the avoidance of doubt I see no merit in the other grounds of challenge, for the reasons set out in the Summary Grounds of Defence.'

[5] Since the order of Kenneth Parker J dated 21 August 2013, the claimant has sought legal representation and at the oral permission hearing before me only two grounds of challenge were advanced as follows namely that the committee had failed to give adequate reasons for the decision and that the decision of the

committee was unreasonable and irrational on the grounds that the comments posted by the claimant on his blog did not justify a finding that the claimant's conduct was in breach of paras 3 and 5 of the code. The committee's decision infringed the claimant's fundamental right to free speech at common law and under art 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) and the reasons given by the committee in relation to the comments posted on the blog were an unjustified restriction on the claimant's right to free speech.

Legal framework

The Localism Act 2011

[6] By s 27(1) of the 2011 Act a 'relevant authority' (which includes a London borough council) is placed under a statutory duty to 'promote and maintain high standards of conduct by members and co-opted members of the authority'.

[7] By s 27(2) of the 2011 Act a relevant authority--

> 'must, in particular, adopt a code dealing with the conduct that is expected of members and co-opted members of the authority when they are acting in that capacity.'

[8] Under s 28(1) of the 2011 Act a relevant authority must secure that a code adopted by it is, when viewed as a whole, consistent with prescribed principles of standards in public life--the so-called 'Nolan principles'.

[9] The intention of the legislation is to ensure that the conduct of public life at the local government level does not fall below a minimum level which engenders public confidence in democracy as was recognised by Beatson J, as he then was, in *R (on the application of Calver) v Adjudication Panel for Wales* [2012] EWHC 1172 (Admin), [2013] PTSR 378 when he held that there was a clear public interest in maintaining confidence in local government whilst at the same time bearing in mind the importance of freedom of political expression or speech in the political sphere.

[10] Under s 28(6) of the 2011 Act a London borough council must have in place (a) arrangements under which allegations can be investigated and (b) arrangements under which decisions on allegations can be made. By s 27(7), arrangements put in place under sub-s (6)(b) must include provision by the appointment of the authority of at least one 'independent person' whose views are to be sought, and taken into account, by the authority before it makes its decision on an allegation that it has decided to investigate.

[11] Section 28(11) of the 2011 Act provides that if a relevant authority finds that a member or a co-opted member of the authority has failed to comply with its code of conduct it may have regard to the failure in deciding (a) whether to take action in relation to the member or co-opted member and (b) what action to take.

[12] Pursuant to the provisions of the 2011 Act the council drafted the code together with a standards procedure which deals with the investigation and hearing of complaints (the standards procedure).

[13] The following paragraphs of the code are material:

> '2(1) Subject to subparagraphs (2) to (5) you must comply with this Code whenever you--
>
> (a) conduct the business of the council (which, in this Code, includes the business of the office to which you are elected or appointed); or

(b) act, claim to act or give the impression you are acting as a representative of the council,

and references to your official capacity are construed accordingly.

(2) Subject to subparagraphs (3) and (4), this Code does not have effect in relation to your conduct other than where it is in your official capacity.

3(1) You must treat others with respect

[2014] LGR 269 at 274

5 You must not conduct yourself in a manner which could reasonably be regarded as bringing your office or your council into disrepute ...'

[14] The standards procedure provides for written complaints against members to be investigated where required and for a report to be compiled. Paragraph 4.2 states that at the end of the investigation the investigator will send a draft of the report to the parties for comment before a final version is produced. Where the investigator concludes that a breach of the code has taken place, the complaint is referred to the standards committee for determination at a formal hearing. The final version of the report is sent to the complainant and the complainee in advance of the hearing and the complainant and the complainee are both entitled to attend the hearing and may give evidence. The committee must consult an independent person before making a finding as to whether a complainee has failed to comply with the code or when deciding on action to be taken in respect of that complainee.

Human Rights Act 1998

[15] Section 3 provides:

'(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights ...'

[16] Section 6 provides:

'(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right ...'

[17] Section 7 provides:

'(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may--

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act ...'

European Convention on Human Rights

[18] Article 10 provides:

'*Freedom of expression*

> (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,
>
> *[2014] LGR 269 at 275*
>
> 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.'

[19] I was referred to a number of authorities by counsel for the claimant as to the principles to be applied in this area and in particular as to the importance of freedom of speech.

[20] In *Livingstone v Adjudication Panel for England* [2006] EWHC 2533 (Admin), [2006] LGR 799, Collins J put the position this way:

> '[34] There can be no doubt that restraints imposed by a code of conduct designed to uphold proper standards in public life are in principle likely to be within art 10(2). But it is important that the restraints should not extend beyond what is necessary to maintain those standards. There has always been a debate over the extent to which conduct in private as opposed to public life should be regulated and that debate continues. The government has, it seems, recognised that para 4 of the code may go too far but that does not of itself mean that it is not necessary in the circumstances. It must, however, raise some doubts. Added to that is the recognition that it is not considered necessary to go that far in Scotland.
>
> [35] [Counsel for the appellant] has suggested that the appellant was making a political comment so that there is a higher threshold to be surmounted in establishing that the restraint was proportionate. Interference with the right of free speech which impedes political debate must be subjected to particularly close scrutiny: see *Sanders v Kingston* [2005] EWHC 1145 (Admin) at [81], [2005] LGR 719 at [81] in which Wilkie J refers to the high level of protection given to expressions of political views ...
>
> [39] The burden is on the defendant to justify the interference with freedom of speech. 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 ...'

[21] In *Calver*'s case, to which I have already referred, Beatson J, as he then was, provided a detailed analysis on the principles adopted by the courts on the issue of proportionality and justification. Whilst in the more recent case of *R (on the application of Lord Carlile of Berriew) v Secretary of State for the Home Dept* [2013] EWCA Civ 199, [2013] All ER (D) 224 (Mar), Arden LJ said the following (at [56]):

> 'Moreover, the court has to consider the value of the right not in the abstract but in the context in which the appellants seek to exercise it. While it must be borne in mind that the right to freedom
>
> *[2014] LGR 269 at 276*
>
> of expression extends not only to ideas that are favourably received, or are inoffensive, but also to ideas that shock or disturb, when it comes to balancing rights or interests, the fact that the communication relates to a matter of public interest is a factor to be put in the side of the scales in favour of allowing the exercise of the right (see *Axel Springer AG v Germany* (2012) 32 BHRC 493). When conflicting rights are balanced, contribution to debate on matters of public interest is "an essential initial criterion": see the *Axel Springer* case (para 78). Here the communication relates to a matter of public interest. Indeed I accept Miss Montgomery's submission that the exercise of the right in this case had an exceptionally high value. The link with the public interest is far from tenuous. The appellants seek to exercise their art 10 rights in Parliament. As is common knowledge and can be seen to some degree from Parliament's website, there are frequently meetings in Parliament and the subject matter obviously does not have to be approved by the government or

be compatible with national policy. The value of free debate in a democratic society cannot be underestimated. It increases knowledge and understanding on national and international affairs.'

[22] Where it is alleged that a decision-making body has erred in relation to a convention right, the role of the court is to address the substantive question of compatibility with the convention right rather than whether the public authority properly took the right into account. As Lady Hale put it in *Miss Behavin' Ltd v Belfast City Council* [2007] UKHL 19, [2008] LGR 127:

'[31] The first, and most straightforward, question is who decides whether or not a claimant's convention rights have been infringed. The answer is that it is the court before which the issue is raised. The role of the court in human rights adjudication is quite different from the role of the court in an ordinary judicial review of administrative action. In human rights adjudication, the court is concerned with whether the human rights of the claimant have in fact been infringed, not with whether the administrative decision-maker properly took them into account. If it were otherwise, every policy decision taken before the 1998 Act came into force but which engaged a convention right would be open to challenge, no matter how obviously compliant with the right in question it was ...'

[23] In *Sanders v Kingston* [2005] EWHC 1145 (Admin), [2005] LGR 719 Wilkie J set out the three questions to be answered by a court in determining whether a finding that a member has breached a code of conduct and or any sanction imposed had contravened art 10 as follows:

'[72] In my judgment the questions that I must answer are as follows:

(1) Was the case tribunal entitled as a matter of fact to conclude that Cllr Sanders' conduct was in breach of para 2(b) and/or para 4 of the code of conduct?

(2) If so, was the finding in itself or the imposition of a sanction prima facie a breach of art 10?

(3) If so, was the restriction involved one which was justified by reason of the requirements of art 10(2)?'

[24] Moreover when considering justification under art 10(2) it is plain from *Sanders*' case that 'political expression' or 'the expression of a political view' attract a higher degree of protection whilst expressions in personal or abusive terms do not attract the same higher level of protection. It is well established that the limits of what is acceptable is wider where the subjects of the speech are politicians acting in their public capacity since politicians 'lay themselves open to close scrutiny of their words and deeds and are expected to possess a thicker skin and greater tolerance than ordinary members of the public'.

Factual background

[25] In March 2012 the claimant posted comments on a blog he maintained under the heading 'CLLR Benjamin Dennehy (Conservatives) putting Hanger Hill residents first'. The relevant 'news' item was entitled 'the Southall Card'.

[26] The blog included the following passages material to this application:

'Back to Southall and how this all came about. Southall is a constant on the public purse in Ealing. It is home to the worst concentration of illegal immigrants in the UK. It has gambling, drinking, drug, prostitution and crime issues unlike many other parts of London. It is a largely Indian community who say they deplore this behaviour but yet it is that very same community that harbours and exploits their own people in squalid third world living conditions.

A simple rule: supply and demand.

> If there was no demand for gambling in Southall, why then does it have such concentration of gambling shops? I can say the same for prostitutes, drugs and drinking.
>
> Betting shops want to make money and usually exclusivity is the best way, but not in Southall though, one shop, 2 shops, 3 shops more can't stem the demand. I heard that it is the most lucrative area for betting shops in the UK. I suspect that illegal rent money is letting people live it up.
>
> The exploding population of illegal immigrants is a constant on the public purse. Illegal immigrants don't pay tax. The legitimate immigrants exploiting them in the squalid bed sheds don't pay tax on their rental income.
>
> If these sorts of people exploit the desperate what other scams are they perpetrating I ask?
>
> Criminality is endemic in Southall ...'

[27] The posting of the blog was widely reported in the local press. A petition was signed by some 280 people condemning the claimant's statements about the Indian community in Southall and highlighting in particular the claimant's description of criminality as being endemic in Southall and his accusation that the Indian community were exploiting immigrants. There is a copy of the petition at pp 104-126 in the bundle.

[28] An Ealing councillor, Cllr Malcolm, received correspondence from the public about the blog and on 16 March 2012 he made a formal written complaint to the council about it alleging a breach of the code. This led to the opening of a formal investigation in accordance with the standards procedure.

[29] On 26 March 2012 the council summoned a meeting of members of the council to be held at the town hall on 3 April 2012 to consider a motion by Cllr Dheer to call on the claimant to withdraw the following specific comments from the blog and issue an apology to the Southall community:

> 'It is a largely Indian community who say they deplore this behaviour but yet it is that very same community that harbours and exploits their own people in squalid third world living conditions ...
>
> The exploding population of illegal immigrants is a constant on the public purse. Illegal immigrants don't pay tax. The legitimate immigrants exploiting them in the squalid bed sheds don't pay tax on their rental income. If these are the sorts of people who exploit the desperate what other scams are they perpetrating I ask? Criminality is endemic in Southall.'

[30] The motion was accepted unanimously at the meeting on 3 April 2012.

[31] The claimant was expelled from the Conservative Party but remains a councillor and in due course joined the United Kingdom Independence Party.

[32] In August 2012 a draft report was prepared concerning the complaint by Ms Jackie Adams, investigating officer.

[33] Ms Adams stated at para 4.4 as follows:

> 'The key issue which I am asked to investigate is whether the blog entry was not only "blunt" but went beyond what could reasonably be regarded as fair and legitimate comment so as to amount to a breach of the Code as summarised in 4.1 above irrespective of whether it might or might not be considered to be racist.'

[34] Ms Adams accepted that the topics raised in the blog would not themselves amount to a breach of the code and were issues which could reasonably be raised as part of a legitimate public debate (para 4.7) and she went on as follows at para 4.8:

> 'The aspects of the blog giving rise to the complaint and to the reaction of fellow councillors and the wider public relate not so
>
> *[2014] LGR 269 at 279*
>
> much to the subject of the blog but principally to its style and tone. For example it is clear from the terms of the councillors' motion and the petition referred to above that the blog was considered by both councillors and some members of the public to be derogatory and offensive particularly in relation to the Southall community as a whole ...'

[35] Ms Adams continued at para 4.18 as follows:

> '... I am satisfied that the tone, style and choice of wording in the post was written in such a way that it did cause offence to some residents and councillor Dennehy could reasonably have expected that to be the case had he reflected on the particular way in which he chose to raise the issues.'

[36] Ms Adams concluded that the claimant had demonstrated a failure to treat others with respect and brought the council and his office as a councillor into disrepute.

[37] The claimant responded to the draft report in detail and in fact a further second draft was prepared before a final draft was prepared in February 2013 a copy of which is at pp 60 and following in the bundle. That final report (the report) includes the following material paragraph:

> '4.7 In addition at a meeting of the full Council on 3rd April 2012 Councillor Dheer moved a motion noting the following specific comments from the blog.
>
> "it is a largely Indian community who say they deplore this behaviour but yet it is that very same community that harbours and exploits their own people in squalid third world living conditions ...
>
> The exploding population of illegal immigrants is a constant on the public purse. Illegal immigrants don't pay tax. The legitimate immigrants exploiting them in the squalid bedsheds don't pay tax on their rental income. If these sorts of people exploit the desperate what other scams are they perpetrating I ask? Criminality is endemic in Southall." '

'Legal Framework'

[38] The report at para 5, under the heading 'Legal Framework' set out and discussed art 10 including the questions which Wilkie J posed in *Sanders*' case and in section 6 under the heading 'Analysis' the report analysed the blog post making it clear that the remarks had to be assessed against the requirements of paras 3 and 5 of the code (referred to above) and identified that the issue was not whether the remarks were actually racist. It noted that the blog contained a number of subject matter topics which could reasonably and properly be raised as legitimate public debate which did not in the officers' view amount to a breach of the code (paras 6.5 and 6.6), it suggested that the blog could properly be divided into separate parts and materially, so far as this claim is concerned, an aspect of the second part (corresponding to the passage referred to at para 4.7) was identified as being considered by

[2014] LGR 269 at 280

both councillors and some members of the public to be derogatory and offensive particularly in relation to the Southall community as a whole.

[39] The report went on as follows:

'6.10 The second part of the post addresses, raises issues in Southall specifically for the first time. Opening with the words "Back to Southall" Councillor Dennehy refers to Southall being the "home to the worst concentration of illegal immigrants in the UK". Councillor Dennehy then refers to gambling, drinking, drug, prostitution and crime issues "unlike many other parts of London" and asserts that it is "a largely Indian community who say they deplore this behaviour but yet it is that very community that harbours and exploits their own people in squalid third world living conditions."

6.11 Councillor Dennehy concludes this second part with the words "criminality is endemic in Southall."

6.12 The third part of the post criticises the approach of Southall councillors in their approach to issues within Southall.

6.13 Although the document does have to be read as a whole it is principally the content of the second part which has given rise to most criticism. The accusation of those who have criticised the blog is that the overall impression gained from reading this part in particular (as evidenced by the terms of the petition, the Council motion, the letter to Ealing Gazette and Extract from Rupa Huq's blog) is that illegal immigrants are the cause of high levels of gambling, drinking, drug, prostitution and crime issues in Southall and that the legitimate immigrants in Southall are exploiting them. There is no attempt to qualify this last statement, for example, in terms of proportion of legitimate immigrants who Councillor Dennehy accuses of exploiting illegal immigrants.

6.14 It is in my view significant that Councillor Dennehy makes no positive comments about Southall, the community of Southall at any point or immigration generally. Given the particularly blunt way in which he has chosen to highlight the "endemic" crime he has identified in Southall it is possible to see how any resident of Southall might reasonably feel offended to have their local area and community criticised in this way without any acknowledgement of any positive aspects of the area or those that live there.

6.17 For the reasons outlined above lack of proper care and sensitivity does not automatically equate to a failure to treat others with respect or necessarily bring the Council and Councillor Dennehy's office into disrepute given the importance of the right to freedom of expression. However I am satisfied that the tone, style and choice of wording in the post did cause offence to some residents and Councillor Dennehy could reasonably have expected that to be the case had he reflected on the particular way in which he chose to raise the issue.

6.18 In summary I am of the view that despite the issues that Councillor Dennehy highlighted being legitimate matters for debate, the way in which these issues were raised were

intemperate and, in my view, the blog can be seen as inappropriately derogatory about a whole section of the community in Ealing, thereby showing a lack of respect. I am also of the view that the result of this was that, in addition, they brought the Council and Councillor Dennehy's role as a councillor into disrepute, as evidenced by the subsequent reaction of a cross section of the community (including Councillor Dennehy's fellow Councillors and his own party).'

[40] The matter was set down for a hearing of the committee on 22 May 2013 in advance of which the claimant was provided with a copy of the report. In the event, the claimant chose not to attend the meeting on 22 May. A copy of the minutes of the standards committee are to be found in the bundle at pp 142 and following and which includes the following material section:

'The Committee considered the agenda papers in full and heard from both of the Independent Persons that each of them considered that a breach of the Code of Conduct had occurred. The Committee concluded that the subject Councillor, in his/her blog had raised a number of important issues for debate, but that the tone and much of the content of the blog had been inappropriate and unnecessarily provocative. Accordingly the committee felt that the subject Councillor had breach the Code of Conduct of Councillors by reason that he/she had failed to treat others with respect and brought the Council and the office of councillor into disrepute. The Committee noted that the councillor had been given the opportunity, to issue a public apology for his/her actions but that he had not done so. The Committee nevertheless felt it was appropriate for the Standards Committee, as the Council's official body tasked with addressing Councillor behaviour, to ask the Councillor again to make an apology.

Resolved:

The Standards Committee:

i. agreed that the public interest required that consideration of this complaint be held in private

ii. noted that the subject councillor was aware of the Committee's meeting, that the meeting had been rearranged specifically to a date he/she would have been able to attend and that he/she had nevertheless declined to attend.

iii. Agreed to proceed to consider the complaint without the subject councillor present.

iv. Refused the written request of the subject councillor to defer consideration of this complaint pending determination of any legal challenge that he/she may bring against the decision of the Council Director of Legal and Democratic Services to proceed to bring this report for consideration in advance of such determination or at all.

v. Having considered the report of the investigating officer, the verbal contributions from the complainant, and having sought

the views of both the Independent Persons, agreed that the subject councillor had failed to comply with Ealing Council's 2007 Code of Conduct for Councillors by reason that, by his/her blog entry he/she had failed to treat others with respect and brought the Council and the office of Councillor into disrepute.

vi. Determined that the subject councillor's breaches of the 2007 Code represented unacceptable behaviour for a councillor and therefore should not be repeated and requested that he/she be asked to issue an appropriate apology, whilst noting that the committee had no power to compel him/her to do so.

vii. Agreed that a letter be sent to the subject Councillor as soon as possible, to be signed by the chair, summarising the committee's decision, and

viii. Agreed that a notice summarising the committee's decision should be published in the Ealing Gazette and on the Council's website as soon as possible.

Reason for decision

The Standards Committee considered that, while the blog post raised a number of important and legitimate issues for debate, the tone of much of the content had been inappropriate and unnecessarily provocative. The committee had particular regard to evidence that a number of residents had been offended by the blog post and that the subject councillor had declined to issue an appropriate apology for his/her actions.'

[41] On 23 May 2013 the claimant was informed of the outcome of the hearing by letter which contained the following material paragraphs:

'The committee determined that you breached Ealing Council's 2007 Code of Conduct for Councillors in relation to the internet blog you posted in early March 2012 concerning the residents of Southall. The committee found that your actions breached the following sections of the 2007 code.

Paragraph 3

You must treat others with respect, and

Paragraph 5

You must not conduct yourself in a manner which could reasonably be regarded as bringing your office or the Council into disrepute

> The Standards Committee considered that, whilst the blog post raised a number of important and legitimate issues for debate, the tone and much of the content have been inappropriate and unnecessarily provocative. The committee had particular regard to evidence that a number of residents had been offended by the blog post and that you had declined to issue an appropriate apology for your actions, as requested by full council at its meeting on 3rd April 2012.
>
> *[2014] LGR 269 at 283*
>
> Accordingly the Standards Committee determined that your breached [sic] of the Council's 2007 Code represented unacceptable behaviour for a Councillor and therefore should not be repeated, and we request that you now issue an appropriate apology.
>
> I attach a copy of the notice of the committee's decision that will be published in the Ealing Gazette.'

Grounds of challenge

Ground 1

[42] What is said on behalf of the claimant is that the committee failed to give adequate reasons for concluding that the 'tone and much of the content of the blog had been inappropriate and unnecessarily provocative'. Moreover, the committee did not identify which part or parts of the blog were inappropriate or unnecessarily provocative nor it is said did they give reasons in relation to the freedom of expression issues. Whilst the matters raised by the claimant, it was submitted and indeed conceded, were legitimate issues for debate and, as such, it could not properly be said that their tone was inappropriate or provocative.

[43] To my mind it cannot arguably be said that there was a failure to give adequate reasons to the claimant on the facts of this case. The committee plainly found that the claimant had breached paras 3 and 5 of the code and there can be no doubt but that reasons were given both in the minutes of the standards committee meeting of 22 May 2013 (p 142 and following in the bundle) and through the letter to the claimant of 23 May 2013 a copy of which is at p 145 in the bundle and to which I have referred earlier in this judgment. The only issue can be whether the reasons given were adequate and in this regard it is trite law that whether reasons which are given are adequate depends on the context and the nature of the decision. It is also clear that the adequacy of the reasons must be assessed from the standpoint of an informed audience. Seen in context, and from the standpoint of an informed audience, the reasons given here were plainly adequate. The claimant was well aware of the report's content and indeed had provided considerable input into its production. It is plain that the committee accepted the distinction drawn in the report between the fact that on the one hand the blog raised a number of important and legitimate issues for debate, and on the other that the tone of much of the content had been inappropriate and unnecessarily provocative.

[44] In my judgment, when the reasons are read together with the report, it is plain that the parts of the blog of concern to the committee were the parts in which the investigation report had focused that is to say those set out in para 4.7 and again summarised at paras 6.10 and 6.11 of the report. It is also obvious in the light of the evidence of the offence taken by residents of Southall why the committee would consider such comments inappropriate and unnecessarily provocative. The investigating officer had specifically referred to the tone and

[2014] LGR 269 at 284

content of this part of the blog and the plain inference is that the committee considered that description applied to the passages highlighted in the report.

Ground 2

[45] What is said on behalf of the claimant is that the committee fell into error in failing to have regard to the claimant's protected rights under art 10 of the convention. The council was under a duty to examine whether

the restriction imposed by the committee was necessary or rather was not proportionate and justified by relevant and sufficient reasons yet the decision of the committee, it is said, failed to make any mention of art 10, whether or not it was engaged and more fundamentally whether it was proportionate and justified so as to restrict the claimant's right. Moreover the committee was under an obligation carefully to balance the claimant's right to freedom of expression against the right of others. To my mind, however, the report made specific reference to art 10 and the relevant case law as I have recorded and again the plain inference is that the committee duly considered art 10 and the guidance to its interpretation when considering whether art 10 was engaged and, if so, whether the interference in terms of the sanctions proposed was justified.

[46] Great emphasis was placed by counsel for the claimant on the importance of freedom of expression and the significance of ensuring that local politicians such as the claimant could speak freely. Any interference which might impede political debate must, it was said, be subject to particularly strict judicial scrutiny. Even strident hurtful and highly offensive communications should not be considered to be breaches of the code when used in raising issues which could reasonably and properly be regarded as part of legitimate public debate which is what the claimant says he was engaged in through the medium of his blog and indeed the council accepted that the blog did raise a number of important issues for debate. However inappropriate and provocative members of the council might have found aspects of the contents of the blog in terms of tone and or content, that did not justify an infringement of the claimant's common law and art 10 rights to freedom of speech.

[47] To my mind the question whether the decision was in accordance with art 10 falls to be answered by reference to the questions posed by Wilkie J in *Sanders*' case. Applying those questions to the facts of this case I have no hesitation in concluding that:

(1) The committee was plainly entitled to find, as it did, that as a matter of fact, what the claimant had said about Southall residents had failed to treat others with respect and had brought the council and the office of councillor into disrepute.

(2) On the face of it the finding and the sanctions do indeed constitute a breach of art 10.

(3) The finding and the sanctions are justified under art 10(2) since, as the report explained, the comments about Southall residents were contained in a separate section of the blog from those which raised

legitimate topics of political debate. They were not the expression of a political view, but an unjustified personal and generic attack on a section of the public. The subjects of the speech were not politicians but ordinary members of the public and, as such, the comments did not attract the higher level of protection applicable to political expressions and the comments would plainly have undermined confidence in local government, the preservation of which is a recognised aim of the code.

(4) Furthermore the extent of the interference was on any view very limited indeed. In terms of sanctions following the finding, the claimant was merely requested, not required, to apologise and as I understand it, he has not done so and in addition the committee's findings were neutrally reported in the local press and on the council's website.

Conclusions

[48] For all these reasons I conclude that the council's decision, although engaging art 10 of the convention, was plainly a proportionate interference in the light of the other interests identified in the convention. It follows in my judgment that this application for judicial review is unarguable and I refuse permission.

Application refused.

Robert Chan Barrister.