Neutral Citation Number: [2013] EWHC 3097 (Admin)

Case Nos: CO/2985/2012, CO/9851/2011,CO/12383/2011

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/10/2013

Before :

LORD JUSTICE MOSES
MR JUSTICE KENNETH PARKER

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Between :

The Queen on the Application of	
David Leathley	**1st Claimant**
Yash Mehey	**2nd Claimant**
Josephine Hayes	**3rd Claimant**
- and -	
Visitors to the Inns of Court	**Defendant**
Bar Standards Board	**Interested Party**

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Mr Marc Beaumont (instructed under **the Bar Public Access Scheme**) for the **1st Claimant**
Mr John Hendy QC and Mr Marc Beaumont (instructed by **CKFT Solicitors and BMIF**) for the **2nd Claimant**
Ms Josephine Hayes, the 3rd Claimant was not instructed and appeared in person
Mr Paul Nicholls QC and Mr Tom Cross (instructed by **Berrymans Lace Mawer**) for the **Interested Party**

Hearing dates: 16th-18th July, 2013

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Approved Judgment

Lord Justice Moses:

1. These claimants are barristers who seek permission to challenge, by way of judicial review, findings in relation to professional misconduct. They raise a number of points, some of which are common to each of their applications. The President ordered that the issues in common should be heard together. Subsequently this court ordered that, in order to avoid further delay, their cases should, if permission is granted, be heard in full.

2. The most significant issues relate to the constitutions of the Disciplinary Tribunals convened to hear the charges against them, and of the Visitors of the Inns of Court who heard their appeals. The claimants submit that some of the members of the Disciplinary Tribunals, and of the Visitors, were not qualified to sit because the limited duration of their eligibility to sit had expired. Accordingly they were not tried by a tribunal established by law; within the meaning of Art. 6 of the European Convention on Human Rights the Tribunal had no power to try them and the Visitors no power to uphold the findings.

3. No detailed account of the facts is necessary. Mr Mehey was disbarred for a variety of incidents of professional misconduct, which included drafting an application for judicial review, misleading a court, and mishandling clients' money. Two members of the Disciplinary Tribunal, Mr Fadipe and Mr Simon, had been members of the Council of the Inns of Court's 'pool' from which, so the claimants say, all members of a Disciplinary Tribunal must be chosen to hear a particular case. But at the time of their nomination to sit on the hearings in question, their membership of the pool had expired. Similarly, a member of the Visitors, who heard Mr Mehey's appeal, was no longer, it is said, qualified to sit as a Visitor because his time as member of the COIC pool had also expired.

4. Ms Hayes was said to have failed to undertake the necessary 12 hours for continuing professional development. She said she had satisfied that requirement because of the many hours she had spent drafting, amongst other things, Atkin's Court Forms, for which she was allotted a measly four hours. She was fined and her appeal dismissed. A member of the Visitors was, it was said, no longer eligible to sit because his time as a member of the pool had expired. A similar defect has been identified in the case of Mr Leathley who was fined for discreditable conduct, in that he claimed to a member of the Criminal Appeals office to be a Queen's Counsel acting for the Bar Standards Board. It is said that a member of the Visitors, Mr John Elliott, was similarly disqualified.

5. There was, save possibly in the case of Mr Elliott, no dispute but that membership of the COIC pool had expired through lapse of time. The real issue was whether it was necessary to be a member of the COIC pool in order to be appointed to sit on a Tribunal or as a Visitor. Resolution of this issue depends, at least in part, on the regulatory scheme, and the relationship between the Disciplinary Tribunals Regulations 2009 and the Hearings before the Visitors Rules 2010 and the Constitution of COIC (May 2011).

6. COIC is an unincorporated body which is separate from the Bar Council (see *In re P* [2005] 1 WLR 3019). It was established in 1987 following the dissolution of the Senate of the Four Inns of Court and its replacement by the General Council of the

Bar and COIC. Its constitution was set out in Part III of the agreement signed on 11 November 1986. Its functions included the obligation "to appoint Disciplinary Tribunals in accordance with the provisions of Schedule A" (1(f)). Amongst the members of what is also described as the Inns' Council is the President, elected by members of the Inns' Council 2)(a) and 3). Clause 15 (1)(a) records that the Judges had agreed that their disciplinary powers over barristers should be exercised according to the Constitution. By clause 15(b):

> "Disciplinary Tribunals shall be appointed by the Inns' Council, and shall conduct their proceedings in accordance with, and shall have the powers and functions specified in Schedule A…"

7. Under Paragraph 2 of Schedule A, disciplinary charges were to be heard by a Disciplinary Tribunal:

> "Such a Tribunal shall act in the name and on behalf of the Inns' Council and shall have such powers as may from time to time be conferred by the Inns' Council."

8. The Composition of such a Tribunal was identified in paragraph 4 (a):

> "A Disciplinary Tribunal shall consist of the following persons *nominated* by the President".

The paragraph then specified, a Judge as Chairman, a Lay Representative "from a panel appointed by the Lord Chancellor", and three practising barristers (unless the barrister charged was employed or non-practising). By paragraph 4(c), the President had power to cancel nominations and make alternatives.

9. In 2000, COIC resolved that Schedule A be replaced by the Disciplinary Tribunals Regulations 2000 (the Court was shown a later resolution approving amendments in 2009, but there is no reason to think that the 2000 Regulations came into effect through any route other than the resolution of COIC). Regulation 2(1) required the Disciplinary Tribunal to consist of the five people it specified could be "nominated" by the President. The specifications were changed in some respects but the power conferred on the President to cancel and replace was retained (Regulation 2(3)). It is material to note that the requirement to appoint lay representatives from a panel appointed by the Lord Chancellor was removed, and that retired judges, to be eligible for nomination had, amongst other requirements, to be appointed to a panel of retired judges by the President (2)(1)(a)(iii)).

10. The Regulations were amended in 2005. The 2005 amendments removed the requirement that a retired judge eligible for nomination should have been appointed to a panel ((2)(5)(e) of the 2005 Regulations).

11. The 2005 and now the 2009 Regulations retained the power conferred on the President to nominate the members of a particular Tribunal in accordance with the specifications in the Regulations. The 2009 Regulations, the Regulations relevant to these applications, provide that Disciplinary Tribunals shall consist of three or five

persons with the qualifications specified but, whether three or five person, Tribunals are to be nominated by the President (Regulation 2).

12. Like the 2005 Regulations, the 2009 Regulations conferred a power on the President to publish qualifications or other requirements for those appointed to be barrister or lay members (2)(5)(e)). Regulation 4(7) retains the power conferred on the President to cancel nominations and make alternative nominations "as in the exercise of his discretion he deems to be necessary or expedient".

13. The provisions relating to Visitors are contained in the Hearings Before the Visitors Rules 2005. The pre-amble is of significance in these applications:

> "We, the Judges of Her Majesty's High Court of Justice, in the exercise of our powers as Visitors to the Inns of Court, hereby make the following rules for the purposes of appeals to the Visitors from Disciplinary Tribunals of the Council of the Inns of Court and certain other appeals to the Visitors:…"

14. Documents in relation to the petition to appeal are to be served on the Lord Chief Justice (Rule 9(1)). The Lord Chief Justice is required to nominate the persons to hear the appeal (Rule 10(1)).

15. The Regulations, had they stood on their own, provide that the power to nominate those to sit on a Disciplinary Tribunal rests solely with the President of COIC, provided that those nominated meet the specifications in the Regulations. Similarly, the sole power, under the 2005 Rules, to nominate persons to sit as Visitors rests with the Lord Chief Justice. Neither regulation nor rule make any reference to a panel appointed by COIC or confine the power of either President or Lord Chief Justice to selection from a panel. Indeed, the history demonstrates that previous references to panels were deleted.

16. This is striking in the light of COIC's introduction, in 2006, of a procedure for appointing and selecting members of a panel suitable for selection to sit in Disciplinary Tribunals and to sit as Visitors. The year before, in 2005, the Visitors *in re P* [2005] 1 WLR 3019 had decided that a member of the Professional Conduct and Complaints Committee, the body then responsible for deciding whether to prosecute, could not sit as a Visitor: to do so would be to act as a judge in her own cause. In January 2006, the Bar Council established the Bar Standards Board to take over the regulatory functions of the PCCC which were abolished. It describes its responsibilities as including "taking disciplinary or other action against barristers" (see Section 3 of the Disciplinary panel members' Information and Guidance Pack April 2009). Its Strategic Plan in 2007 sought to ensure that its complaints and disciplinary procedures were "efficient, provide transparent and fair outcomes, protect the public and carry public confidence" (the fourth of its 'key' challenges). The BSB acknowledged its responsibility for the Code of Conduct to which the Disciplinary Tribunal Regulations were attached at Annex K. It recognised that:

> "the final determination of a case is the responsibility of independent disciplinary panels appointed and convened by COIC. This ensures that the final determination process is

> independent of the BSB and compliant with the Human Rights Act."(Regulatory Framework 4.7 p.4b).

17. By this means the BSB drew a clear line between its responsibilities for imposing and enforcing standards in the public interest and the process of adjudicating on those prosecuted for breach of those standards, which was the responsibility of disciplinary tribunals appointed by COIC. By this separation of powers the BSB and COIC sought to avoid the conflict impugned in *re P*.

18. Pursuant to *its* responsibilities under Art. 1(f) of COIC's constitution for appointing and convening independent disciplinary panels, COIC created a Tribunals Appointments Body to establish a pool of lay representatives, barristers, silks and clerks, in accordance with Terms of Reference drawn up by COIC (noted in the COIC Minutes of 25 January 2006).

19. The rules contained within those Terms of Reference are the rules which it is alleged were breached in the instant applications. The Tribunals Appointments Body was appointed by COIC to vet the applications of those who wished to sit and decide on issues of misconduct, inadequate professional service, and fitness to practise (clause 1). It was required to meet when necessary and review the lists of those who had been successfully vetted at least once a year (7 and 8). Applicants were to be assessed against specified criteria, and interviewed (14 and 15). By clause 19, lay representatives were to be appointed to the panel for five years, renewable once, and barristers, if they were already existing panel members, for three years, but otherwise for five years, renewable once. The complainants allege that members of their particular tribunals had, by reason of lapse of time, ceased to be members of the panel and accordingly were no longer eligible for appointment to a disciplinary tribunal or to sit as Visitors.

20. COIC's Guidance pack for Disciplinary Tribunal Members of April 2009 (*q.v.supra*) refers to its responsibility for recruiting and appointing all disciplinary panels, explaining that its "involvement ensures the independence of the panels and the final decision making within the process" (2.3). The guidance continues:

> "2.4 COIC convenes and organises….Disciplinary Tribunals…the President of COIC signs all convening orders for Disciplinary Tribunals
>
> 2.5 COIC is the body responsible for recruiting the pool of QCs, barristers, lay members and clerks (known as 'panel members') from which panels are selected to sit. Recruitment is carried out via the Complaint Tribunal Appointments Board…
>
> 2.6 Given COIC's responsibilities for disciplinary matters,…It is one of the bodies required to approve changes to the Disciplinary Tribunals Regulations as well as the Hearings Before Visitors Rules….."

The BSB itself reiterates that the responsibility for appointing members of the Disciplinary Tribunals rests on COIC (*Complaints against barristers; Information about the Disciplinary Tribunal Process* 2011, pp 5 and 15).

21. On 29 September 2010, the then President of COIC and the Chairman of the BSB signed a Memorandum of Understanding. Its purpose was to set out the arrangements between COIC and the BSB for arranging and administering disciplinary and other proceedings between the BSB and members of the Bar. Para 6.1 records that COIC is responsible for the appointment of Panel Members for *all* relevant hearings. Panel Members are defined under paragraph 1:

> "Judges, barristers and lay people appointed by COIC to determine a proceeding under the relevant provisions of the Annexes to the Code of Conduct namely:….the Disciplinary Tribunal Regulations…..and the Hearings before the Visitors Rules."

22. Paragraph 7 of the Memorandum deals with the recruitment of panel members and clerks.

> "7.1 COIC will retain a pool of suitably qualified clerks and Panel members to meet the needs of all relevant hearings for any one year."

That paragraph also confirms that COIC will conduct an assessment of the current pool every three years, conduct an open recruitment process, in accordance with Nolan principles and that recruitment is a matter for COIC (7.3 and 7.5). It records:

> "11.1 COIC will be responsible for appointing all Panel members for all relevant hearings. Such appointments will be made by the President of COIC in accordance with the relevant provisions of the Code of Conduct. Where appropriate, COIC will delegate authority to the Tribunals Administrator to undertake this task".
>
> "14.1 COIC will be responsible for the appointment of the barrister member and the lay member of Visitors' Panel, appointed under Rule 10 of the Hearings before the Visitors Rules 2005, to hear appeals against decisions of Disciplinary Tribunals."

23. All of these declarations reinforce the distinction between the responsibilities of the BSB and COIC and that, as part of its responsibility for appointment of members of Disciplinary Tribunals and Visitors' Hearings, COIC has established a pool of those it has vetted as suitable for membership of such panels. But paragraphs 1, 11 and 14 of the Memorandum of Understanding refer to the Regulations and the Rules under which it is the President and the Lord Chief Justice who make appointments to any particular tribunal or Visitors' hearing. In order to succeed, the applicants must establish that either the President or the Lord Chief Justice is required to make the appointment from the pool vetted by COIC.

24. Mr Hendy QC, on behalf of the applicant Mr Mehey, emphasises that the President of COIC must be acting on behalf of COIC and bound by its rules, which retains responsibility for appointing Disciplinary Tribunals when appointing any particular barrister or lay member. He was right to do so. But I do not think that helps the applicant, unless the COIC rules themselves require the President to choose from the vetted pool. But they do not. The rules set out an elaborate procedure for vetting those suitable to sit on a disciplinary panel but nowhere do they require the President to appoint from the COIC pool. The absence of any such provision is even more blatant when it comes to a Visitors' Hearing. The Lord Chief Justice is not acting on behalf of COIC when making an appointment nor is he bound by its rules.

25. Mr Hendy pursued his quest to make good the proposition that the legality of membership of a disciplinary or Visitors' panel depended on membership of the pool by reference to the legislative intervention in 2007 into what had hitherto been free from such interference. By the Legal Services Act 2007 the General Council of the Bar was amongst the approved regulators designated (in Part 1 of Schedule 4) in relation to reserved activities, such as the exercise of rights of audience and the conduct of litigation (defined in section 12) (section 20).

26. It is on section 21 that Mr Hendy QC places the greatest emphasis. This section defines "regulatory arrangements of a body". They include:

> "(e) its disciplinary arrangements in relation to regulated persons (including its discipline rules)", and under (i) "any of its other rules or regulations (however they may be described), and any other arrangements which apply to or in relation to regulated persons, other than those made for the purposes of any function the body has to represent or promote the interests of persons regulated by it……(whether or not those arrangements, rules or regulations are contained in, or made under, an enactment)".

27. There was controversy as to whether this definition embraced COIC's constitution, its creation of the Tribunals Appointments Body in 2006 and the Memorandum of Understanding with the Bar Standards Board. Mr Nicholls QC, on behalf of the intervening party, the Bar Standards Board, rightly pointed out that section 21 referred to the regulatory arrangements of the Bar Council and not those of COIC or any body of its creation. But, in my view, that is no answer. The width of the definition provides ample justification for including within the regulatory arrangements all those provisions designed to separate the prosecution process from the rules for independent adjudication. The General Council of the Bar has necessarily sought to keep those processes separate and through the medium of COIC provide an independent system of adjudication. The arrangements for adjudication, and the methods whereby the disciplinary tribunals and Visitors' hearings are constituted, seem to me to be part of the regulatory arrangements of the approved body, the Bar Council. That the Bar Council has ensured that COIC and not the BSB is responsible for the appointment of independent clerks and members of the panel does not mean that all the arrangements relevant to appointment are not part of *its* regulatory arrangements.

28. But Mr Hendy's success in bringing within the scope of section 21 regulatory arrangements the COIC arrangements for appointment gains him nothing unless they

make provision for the appointment to disciplinary tribunals and Visitors' hearings from the pool created by the Tribunals Appointments Body. In that crucial respect the legislative intervention has nothing to say.

29. Section 28 identifies general principles in relation to regulatory functions. The regulator must 'have regard' to principles under which regulatory activities must be transparent and accountable, and represent the best regulatory practice. Section 30 requires the Board to make rules designed to ensure that the regulatory and representative functions of the Bar are kept separate. But it is important to appreciate that the Act makes no provision whatever in relation to the content of the General Council of the Bar's regulatory arrangements. The Act does no more, in this respect, than to approve the regulatory arrangements immediately before 1 January 2010, when the relevant paragraph of Schedule 4 came into force.

30. Accordingly, I take the view that there is no legislative provision which requires appointment to Disciplinary Tribunals or Visitors' Hearings to be confined to those from the vetted pool of those eligible for appointment. Unless the applicants can identify a requirement that the President of COIC or the Lord Chief Justice is confined to appointing only those who have been approved by COIC and remain eligible for appointment, they cannot make good their claim that members of the relevant tribunals lacked the power to adjudicate.

31. As I have already indicated, none of the provisions of COIC require the President or the Lord Chief Justice to make appointments from the pool. It would have been easy, once COIC had established the pool in 2006, to amend the Disciplinary Tribunal Regulations so as to ensure that the Regulation 2 requirements of those who could be nominated by the President included a requirement that he be a member of the pool. No such requirement has ever been imposed. This is all the more striking when it is recalled that references to a panel of retired judges, originally contained in the 2000 Regulations, was deleted in 2005.

32. It would also have been easy to impose a requirement that those nominated should be members of the pool by arranging for the President to exercise his powers under Regulation 2(4)(e) to publish the Appointments Body's Terms of Reference as "qualifications or other requirements required" (*sic*) in those eligible for appointment. But there is no reference whatever to that exercise of the President's power in any of the arrangements for establishing the pool.

33. In the result, the sole requirements for appointment to any particular Disciplinary Tribunal are those contained in the Disciplinary Tribunals Regulations 2009 themselves and in the Hearings before Visitors Rules 2005. The legal authority to sit is derived from those regulations and rules and not from COIC's arrangements constituting the pool of those who have been approved by COIC.

34. This conclusion has the single and substantial merit of being consistent with the ruling of Sir Rabinder Singh in *Russell v Bar Standards Board* 12 July 2012. But I regret it. As Mr Hendy QC argued so compellingly, the Bar must surely be at the forefront of setting standards as to how institutions should regulate themselves. Anyone reading COIC's constitution, the relevant guidance and the Memorandum of Understanding or even, other than in a process bordering upon Talmudic analysis, reading the regulations and rules themselves, would gain the clearest impression that the

qualifications devised by COIC for eligibility to the pool were themselves the qualifications for appointments to disciplinary tribunals or Visitors' hearings. That they were not provides a poor example to others.

35. Moreover, to allow the regulations and rules to become so opaque must expose the Bar Council to an allegation that it has failed to have regard to its legal obligation to abide by the principles of transparency imposed under Section 28(3) of the Legal Services Act 2007. After all, COIC could have made it clear that the Appointments Body was only advisory. But that section 28(3) only imposes a target duty was not argued, and would not avail these applicants' challenge to the *vires* of those sitting in judgment on them.

36. The result is all the more disappointing when it is appreciated that all the elaborate arrangements which have been changed and fortified following the Browne Report of July 2012 still contain no requirement that those nominated may only be nominated from the pool of those approved as eligible. The argument that the pool is a useful source of those available to be chosen but that it is important that either the President or the Lord Chief Justice may feel the need to appoint someone, for example a specialist, from outside the pool, borders on sophistry. It seems plain to me, and there is no evidence to the contrary, that those whose membership of the pool had expired, were not appointed because of some special qualification, but because it was believed they were still members of the pool. This mistake was not noticed at the time. The fact that those who have the sole power to nominate might in some other case deliberately choose to go elsewhere does not explain what was a mistake, and an avoidable mistake. It appears that the records of the proceedings of COIC's Appointments Body and of those listed were so inadequate that they undermined the essential purpose of its creation. There are no minutes or records available to discover how the Body undertook its duties.

37. Since it is plain that the expiry of the period of eligibility was unobserved and accidental, it might be said that the Bar Standard Board's success in establishing that eligibility to be appointed from the pool did not matter reflects the merits of the individual cases. I disagree. COIC's functions in vetting those eligible were of great importance. They established and maintained standards for appointment designed to fulfil the requirements of Art. 6 of the European Convention on Human Rights. There was no dispute that Art. 6 applied to disciplinary hearings in relation to barristers. Art. 6.1 of the Convention requires the disciplinary tribunals and the Visitors' panels to be established by law and to be independent. Their composition must comply with the rules by which they are composed (*Gurov v Moldavia* 2006 36455/02 11 July 2006, *DMD Group v Slovakia* (2010) App 19334/03, *Volkov v Ukraine* (2013) App 21722/11). Independence requires guarantees against outside pressure, in relation to appointment and term of office, and requires the appearance of independence (*Bryan v United Kingdom* (1996) 21 EHRR 342 [37]).

38. If the rules for appointment were defied, ignored or forgotten then plainly the tribunals in question were not established in accordance with law. If the rules required members of tribunals to be drawn from the pool and membership of the pool was time-expired, then the tribunals did not comply with Art. 6, subject to whether the doctrine of *de facto* judges applied. Mr Hendy rightly pointed to the dangers of permitting time-expired judges to continue beyond the period of eligibility, when they would be at risk of being refused to be allowed to continue should those permitting

them to extend their office beyond the appointed time object to the nature or quality of their decisions. That risk would, at least in theory and appearance, exist *if* appointments had to be made from the pool, membership of which was restricted by time. But no such restriction applies, absent any requirement to appoint from the pool. As I have concluded, there was no breach of the domestic rules.

39. There remains, however, the question whether the Regulations or the Visitors' Hearings Rules themselves failed to comply with the requirements of Art. 6. This was not the subject of any separate submission: the submission was that for the President or Lord Chief Justice to ignore COIC's Rules would breach Art. 6 (see the written argument at [55]). For the reasons I have given, those rules were not ignored because the actions of the President and the Lord Chief Justice were consistent with the Regulations, the Visitors' Rules and COIC's and the Bar's arrangements. Those provisions do not envisage any period of office or tenure *as a judge* on a Disciplinary Tribunal or Visitors' panel after the conclusion of a hearing. The nomination is for one case and one case only and provides no warrant or guarantee for nomination for any other case. In such circumstances, the provisions contained within the Disciplinary Regulations and Visitors' Rules comply with Art 6.

40. I would grant permission to argue this point, but refuse judicial review.

De facto Judges

41. In light of my conclusion, it is unnecessary to consider the alternative argument advanced by the intervening party, that the consequences of a defective judicial appointment can be avoided by the doctrine of *de facto* authority. But I deal with it, if only shortly, because, if the doctrine applies, it reinforces the Bar Standard Board's contention that the applicants have not in any way suffered as a result of the dispiriting state of affairs surrounding COIC's Appointment Body.

42. The principles of the doctrine would make valid the acts of those nominated to sit on Disciplinary Tribunals or Visitors' Panels, even if their eligibility had expired because of the length of time they had been in COIC's pool. The principles apply provided there is a basis for the judge's assumption of office, or he was generally supposed to be lawfully exercising his judicial office. This is not the occasion to set out again the learning of Hale LJ in *Fawdry v Murfitt* [2003] QB 104 or Sir Rabinder Singh in *Russell* [37]-[63].

43. Mr Hendy QC advanced two arguments as to why the decisions of the Court of Appeal in *Coppard v Customs & Excise* [2003] QB 1428 and *Baldock v Webster* [2006] QB 315 did not apply to the decisions in question. First, he contended that the doctrine only concerned the public administration of justice of which Disciplinary Tribunals and the Visitors' Hearings formed no part. They are domestic non-statutory tribunals, and a judge sitting on such a tribunal or panel is not sitting as a judge, as Sir Donald Nicholls VC made clear in *Calder v General Council of the Bar* [1994] QB 1 [33], [34]-[36] and [46]-[47]. But, as Sir Rabinder Singh observed, the regulation of those who appear in the courts and conduct litigation there is not merely a matter of the public interest in ensuring the quality of advocates, it lies at the very heart of the public administration of justice. The legal system and the courts cannot fulfil their function without advocates on whom they can rely and place their trust. The Legal Services Act 2007 is a more recent expression of this indisputable feature of any legal

system which seeks to maintain the rule of law. Had it been necessary, I would have rejected this argument, as it was rejected by this court in *R (Argles) v Visitors and the BSB* [2008] EWHC (Admin).

44. The second, more substantial argument the applicants advanced was that the doctrine cannot survive Art. 47 of the Charter of Fundamental Rights of the European Union:

> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal *previously* established by law." (my emphasis)

45. It is a point of substance since its deployment was foretold with some obiter enthusiasm by Sedley LJ, in *Coppard* [38] and again, when he cited that earlier judgment of his, in *Sumakan Ltd v Commonwealth Secretariat (No 2)* [2007] EWCA Civ 1148 [51]. At the time of *Coppard* and *Sumakan*, Art. 47 was not thought to be binding. Sedley LJ, giving the judgment of the court in *Coppard* said:

> ""Established" in (the complainant's) contention requires a tribunal to have been established by the time the individual's civil rights and obligations come before it. We are not disposed to accept Mr.Sales' argument that the common law gives de facto tribunals this legal status proleptically. To accept this would be to establish, in effect a prior dispensation for avoidable error, with undesirable consequences for legal certainty and good administration. If the de facto doctrine establishes a tribunal by law, it seems to us that it does so by recognising the authority, in an appropriate and legally controlled situation, of what would otherwise not be a lawful tribunal. "

46. Of Art. 47, he said:

> "[38]…..This reproduces the language of article 6(1) of the Convention with the striking addition of the word "previously.". If it was part of the Convention we might well have been driven to hold that the de facto doctrine did not comply with it".

47. Had it been necessary, I would have ruled that Art. 47 was binding, contrary to the submissions of Mr Nicholls QC, on behalf of the BSB. The Charter has the same legal value as the EU Treaties themselves. Although Art. 51(1) confines the application of the Charter to Member states only when they are applying EU law, it is now plain that it applies to member states when they are taking action within the scope of EU law (Kenneth Parker J has identified *R v Sandiford v the Secretary of State for Foreign and Commonwealth Affairs* [2013] EWCA Civ 581,[17] and [20] which was not cited to us). It follows the principle of ECJ jurisprudence that when a

member state derogates from a provision of EU law it is implementing EU law for the purposes of Art 51(1) and must, accordingly, apply the fundamental principles of EU law. The proposition finds further support in Professor Craig's *Rights Legality and Legitimacy, The Lisbon Treaty,*Oxford,2013., p.211-213.

48. Further, it is plain that there must be effective domestic disciplinary provisions in relation to EU lawyers practising in the United Kingdom which comply with Art. 47 (see Directive 98/5/EC 16 January 1998 and *Wilson* (2006) C-506/04). If the *de facto* doctrine cannot, by virtue of Art. 47, apply to such lawyers, then it makes no sense if it persists in relation to United Kingdom lawyers.

49. The essential question, if it had to be answered, is whether the wording of the Charter makes the difference forecast by Sedley LJ. The authors of the Explanatory Note to Art. 47, to which Sedley LJ had not been referred, did not think so.

50. The Explanation on Art. 47, contained in *Explanations Relating to the Charter of Fundamental Rights* (2007/C 303/02), (O.J.14.12.2007), states, without qualification, that the second paragraph of Art. 47 "corresponds" to Art. 6(1) of the Convention. It does not suggest that the inclusion of the adverb 'previously' adds anything to the requirement that the tribunal be established by law. The Court of Appeal has already concluded that the doctrine, unknown to lawyers familiar with the jurisprudence of civil law, is compatible with Art. 6 of the Convention (*Fawdry* [34]-[36]).

51. Moreover, it seems to me that, *pace* Sedley LJ's prediction, the addition of the adverb does not add to the meaning of 'established by law', it merely emphasises the need to prevent *ex post facto* ratification by the Executive of decisions made by those without legal authority. The legal objective of the requirement is to prevent judicial organisation depending on the discretion of the executive (see *Zand v Austria* (1978) 15 DR 70,[69], cited in *Fawdry* [34]). It is important not to miss the very impact of the word 'established'. It carries within it the notion of formation; it looks to the appointment of the tribunal in question, not the subsequent ratification of its decision. 'Established' and 'previously established' mean the same thing: a tribunal must be appointed according to the law and, if they are not, then its decision has no authority and cannot be ratified by Executive discretion.

52. The 'judge made rule', designed to protect the interests of the public and litigants (Hale LJ in *Fawdry* [34]), is not an arbitrary process of retrospective validation at all. It depends on the existence of some basis for the assumption of office, 'colourable authority' (*Fawdry*[21]). It depends on a general belief, held in good faith, of competence; if the judge is known to be unqualified or is a usurper, the doctrine cannot apply (*ibid* [22]). These fundamental requirements suggest to me that the doctrine is not designed to *ratify*, a retrospective action, but rather to *recognise* authority, where, by virtue of the doctrine, such authority exists at the time the impugned tribunal is appointed, or, in the words of Art. 47 or Art. 6(1), 'established'. It is a recognition of an authority which exists at the time the tribunal whose authority is impugned is formed or established.

53. I do not regard this proposition as offending Sedley LJ's strictures against affording a tribunal 'a proleptic' status, a 'prior dispensation for avoidable error' [[38] *q.v.supra*). After all, the doctrine does exist at common law, but the essential condition for its

application is that no-one, neither judge nor the parties, have it in mind at the time of the adjudication, since all act on the assumption that the tribunal is validly constituted.

54. There are, however, echoes of the fear of prior dispensation leading to a careless attitude to qualification in authorities in the ECrtHR to which Mr Hendy QC drew attention. In *Tocono v Moldova Judgment* (32263/03 26/9/2007), the Court re-iterated that Art 6.1 required a court to check whether it is an impartial tribunal [31]. There is no principle as yet recognised by our Court of Appeal which prevents the application of the *de facto* doctrine to those courts which ought to have appreciated that they were not qualified to act. Had there been, then some of our domestic cases may well have been decided differently (it is, perhaps, not difficult to find out whether one is 'ticketed' to try a case or not). I prefer to say no more on the principle that carelessness precludes the recognition of a generally assumed authority, in this *obiter* part of my judgment. If it did, and if membership of the pool was a requirement for nomination to a panel then BSB would fail. COIC could hardly claim that its record-keeping satisfied even a moderate standard of care.

55. Accordingly, there is no reason to conclude that the doctrine offends Art. 47. The doctrine recognises an authority which existed at the time the tribunal in question was appointed. In the instant case, the nomination of the members whose authority is impugned derives from the fact that all believed them to be qualified and that it was on that basis they were nominated. Had it been necessary I would have upheld their authority to make the decisions in the instant cases.

Delay

56. Two of the applicants, Ms Hayes and Mr Leathley, complain about delay. There was delay. On 5 June 2009, Ms Hayes produced a petition of appeal from the decision of the Disciplinary Tribunal communicated on 5 May 2009. The first Visitors' Hearing took place on 9 February 2011 and was determined on 13 June 2011. The delay between May 2009 and February 2011, a passage of nearly two years, has been explained by Mr Carter, a BSB case-officer. A hearing that appears to have been provided in December 2009 was postponed because the prosecutor was unavailable. This was unfortunate since the issues in the appeal were hardly so complicated that someone else could not have taken the case over.

57. On 20 March 2011 the BSB advised the Clerk to the Visitors that the prosecutor would not be available until September. No explanation has been offered as to why the prosecution could not be conducted by someone else. The Clerk to the Visitors ought to have told the BSB so. Far from it: the BSB sought an appeal date on eight occasions from March 2010 to January 2011. On 24 January a February date was fixed although that was adjourned.

58. This delay comes close to being unreasonable; that it seems to have been attributable to difficulties the Clerk found in arranging a date, rather than BSB's wish to retain the services of a particular prosecutor, does not make the delay reasonable. But I am, just, persuaded that in all the circumstances the delay was not unreasonable. Ms Hayes had the annoyance of waiting for the appeal to be heard but her career and livelihood hardly turned on the points she wished to raise in resisting the comparatively low fine. Her main concern, understandably, was the unfairness she perceived in failing to give adequate weight to her valuable work in drafting

precedents, for the good of the legal system as a whole. For those reasons, I would give leave to apply but refuse the application.

59. Again, in Mr Leathley's case the delay occurred not in relation to the original hearing but in the appeal. A notice of appeal was received on 8 December 2008 but the mandatory fee was not paid. A Petition and partial transcript was not received until 18 May 2009. The most substantial delay not attributable to the claimant occurred between February 2010 and 2011, during which it was sought to list a date for the appeal. After directions had been given on 18 February 2011, Mr Leathley sought and was given an adjournment but no further date was set between February and September 2011. A November 2011 date was given on 18 October 2011.

60. The delay is not as bad as that in the case of Ms Hayes but, again, too much time passed seeking to fix a date for the appeal. But it was an appeal and not the original hearing and the delay was, in part, caused by Mr Leathley himself. I would grant leave but refuse the application.

Other Grounds

61. None of the other grounds, whether raised jointly or by individual claimants, provide a basis for granting permission to move by way of judicial review. I shall deal with them with the brevity they merit.

62. The claimants argue that there were members of the Tribunal appointments Body who vetted those who wished to be included in the pool who were or had been members of the BSB. Ms Artesi was a member of the Complaints and Professional Conduct Committee of the BSB, and Ms Lambert had been. No fair-minded and informed observer would conclude that there was any real possibility or real danger that anyone appointed to the pool of those eligible to sit by a group which included either of those two persons would themselves, if nominated, be biased, lack independence or be partial. The point is not arguable and is totally without merit.

63. It is argued that non-judicial members of the pool lacked security of tenure since they could be dismissed from the pool at will. Membership could not be terminated at will, but only if a person ceased to be suitable on identified grounds or the period for membership expired. Membership of the pool, even if I had concluded that it was a pre-condition for appointment to a Disciplinary Tribunal or Visitors' Panel, provided no guarantee of nomination even once. One nomination was no guarantee of a second. The argument is totally without merit and I would refuse permission.

64. It was argued that lay members lacked independence because they were paid fees and expenses. The point was rejected by Burnett J presiding over a Visitors' Panel in Mr Leathley's case (20/1/12). For the reasons he gives [38]-[42] I would refuse permission and say that the point is totally without merit.

65. Mr Mehey submits that Mr Simon, a member of his disciplinary Tribunal had the appearance of bias because he was an examiner on the Bar Vocational Course, now the Bar Professional Training Course. After Mr Mehey's hearing he successfully applied to be chief examiner for professional ethics. He was and is remunerated, to a small extent, by the BSB. I would regard his teaching career more as a ground for qualification, not disqualification. I find the point as unarguable as Richards LJ did in

the renewed application in *Conlon v the Visitors* (C1/2012/0150) [10] only more so. It is totally without merit.

66. Mr Mehey argued that a letter dated 14 August 2010 from the BSB created a legitimate expectation that his application for judicial review would be conceded. In fact, the letter merely accepted that a person could not be a member of the BSB and sit on a Tribunal. It went no further than that. In the instant case that did not occur. The point is totally without merit.

67. He also contended that Mr Jacobson did not regard himself as an independent decision-maker but, in an e-mail explaining how he was appointed to a tribunal stated that, before the BSB was instituted he regarded himself as acting for the Bar Council. There is no warrant for reading that as an admission that, when sitting on a Tribunal he thought he was acting for the prosecutor. The point is totally without merit. So too is a point which had been raised in relation to his nomination to a different disciplinary body.

68. Mr Mehey also sought to argue points which were not argued on his behalf by Mr Hendy QC. He tried to do this by the device of dismissing Mr Hendy and Mr Beaumont as his counsel. We agreed to hear Mr Mehey although we probably should have refused to do so. The points he tried to raise concerned matters that were not open to him in a hearing for judicial review from the Visitors (*R v Visitors to the Inns of Court, ex parte Calder* [1994] QB 1); they concerned the merits of the case against him. I would refuse him permission to argue them: they are totally without merit.

69. Miss Hayes cloaked her arguments as to the connections between COIC and the BSB in terms of EU law. She contended that appeals to Visitors did not satisfy Art. 9 of Directive 98/5 which requires a remedy against disciplinary measures before a court or tribunal. A combination of Visitors Hearings and limited judicial review after a disciplinary tribunal hearing satisfies Art. 9. The point is not arguable and is totally without merit.

70. She also complains that Mr Katz QC should not have made the decision to send her case to the tribunal because he had prosecuted for the BSB in the past. The point is not arguable and is totally without merit.

71. Mr Leathley contended that the Disciplinary Tribunal and the Visitors misdirected themselves in construing the word 'discreditable', and in particular failed to define it. The point is not open to him in judicial review (see *Calder*). In any event it is hopeless; the tribunals should not seek to define such a word, rather they should devote their attention to the question whether it applies to the facts they find proved (see *Brutus v Cozens* [1973] AC 854). I would refuse permission and say that this ground is totally without merit.

72. The upshot is that on every ground I would refuse permission and categorise each and every ground as totally without merit, save in relation to the grounds as to expiry of time for eligibility and delay, in respect of which I would grant permission but refuse the applications.

Mr Justice Kenneth Parker:

73. I agree.