Neutral Citation Number: [2018] EWHC 2184 (Admin)

Case No: CO/1385/2018

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

(On appeal from the Bar Tribunal and Adjudication Service PC 2016/0175/D3)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 August 2018

Before :

THE HONOURABLE MR JUSTICE WARBY

- -

Between :

Forz Khan	**Appellant**
- and -	
Bar Standards Board	**Respondent**

- -
- -

Marc Beaumont (instructed under the **Bar Public Access** scheme) for the **Appellant**
Martin Goudie QC (instructed by the **Bar Standards Board**) for the **Respondent**

Hearing date: 14th August 2018

- -

Approved Judgment

MR JUSTICE WARBY :

1. Forz Khan is a practising barrister, of 20 years' call. On Thursday 22 March 2018, he appeared before a 3-person Disciplinary Tribunal of the Bar Tribunals and Adjudication Service ("BTAS"), charged with three counts of professional misconduct. Mr Khan pleaded guilty to all 3 charges. The Tribunal imposed a sanction of 7 months' suspension from practice on each charge, to run concurrently. Mr Khan now appeals to this Court in accordance with s 24 of the Crime and Courts Act 2013, and the provisions of CPR Part 52 and 52PD1 and PD52D. The penalty is stayed pending the outcome of the appeal.

2. Mr Khan challenges the findings of guilt, on the basis that although the relevant facts were not in dispute, and he pleaded guilty, his admitted behaviour did not amount to professional misconduct in law; he was not guilty, or at the very least he had a good argument that this was the position; he only admitted guilt on the basis of legal advice that was wrong, or at best incomplete; and there has thus been a miscarriage of justice. For these reasons, he submits that the decision should be quashed and the matter should be re-heard, if the BSB wishes it to be re-heard. In the alternative, Mr Khan contends that the sanctions imposed were excessive and hence disproportionate and unlawful.

3. At the heart of the appellant's case is the proposition that he has been subjected to a severe professional disciplinary sanction for behaviour, the majority of which amounted in substance to nothing more than an exercise in "robing room gossip" or "barrister tittle-tattle". It is submitted that, to quote the Appellant's Skeleton Argument, "Mere gossip is not and cannot be professional misconduct". The other conduct in question was private correspondence which may have been ill-judged, but neither this nor the "gossip" reaches the high threshold of being conduct that is "seriously reprehensible". Alternatively, if it does, it cannot merit a sanction as severe as that imposed.

4. A separate strand in the appellant's arguments is that the spoken and written words for which he was sanctioned were protected by the Convention rights to freedom of expression and respect for correspondence. It is said that, on the facts of this case, the pursuit of disciplinary proceedings and/or the imposition of such sanctions represented an unjustified interference with the appellant's human rights under Articles 8 and 10 of the Convention.

The facts

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

6. This is a brief encapsulation of the facts on the basis of which the Tribunal proceeded, which were put before it in the form of a written statement of Agreed Facts. I have

however changed the name of the complainant because, as someone who has alleged rape, she is entitled to lifetime anonymity (Sexual Offences (Amendment) Act 1992, s 1). To make anonymity effective in her case, I have also changed the name of the barrister she accused. Adrian Jones is not his real name. I have used this method of anonymisation, in preference to the use of initials, as it is at least as effective, less artificial, and reduces the potential for confusion. For the same reasons, I have used a false name for Mr Jones' wife, and shall need to do so for one other individual – a colleague of Adrian Jones, from the same barristers' Chambers, who features in the narrative.

7. That narrative can largely be taken from the Agreed Facts, which I shall now set out, in slightly edited form. I shall have to add in a few further factual matters that are matters of common knowledge among advocates, or which emerged in the course of the hearing before me, and have some bearing on the issues. My additions are in bold italics, in brackets.

"**Key Individuals**

1. Mr Khan was called to the Bar by the Honourable Society of Middle Temple on 28th July 1998.

   [He is a sole practitioner, specialising in crime, family, and immigration law.]

2. The Complainant in this case is ... [Adrian Jones]… who is a practising barrister called to the Bar in November 2007; he practises from Chambers in Birmingham. [Mr Jones] has never met Mr Khan and had no knowledge of him prior to the matters that gave rise to this complaint.

3. [Mr Jones] is married to [Emma Davies] who is a practising Solicitor; they were married in December 2013.

4. [Ms McBride] was called to the Bar in November 2012, but, has not completed pupillage. [Ms McBride] is a member of the Institute of Legal Executives and works as a litigator.

5. [Mr Jones] and [Ms McBride] met through their professional work and were in an intimate relationship for about a year prior to the relationship ending in October 2014. [Mr Jones] did not disclose to [Ms McBride] that he was engaged and then married.

Background

6. The breakdown in the relationship between [Mr Jones] and [Ms McBride] was acrimonious and led to both [Mr Jones] and [Ms McBride] (i) making criminal allegations against each other; (ii) instituting civil proceedings

against each other; and (iii) making complaints to the Bar Standards Board.

7. On 23rd December 2014 [Mr Jones] reported [Ms McBride] to the police for harassment. About a month later [Ms McBride] reported [Mr Jones] to the police for harassment.

   [At or around this point in time Mr Khan was instructed by Ms McBride in respect of the allegations of criminal harassment.

   On or about 23 February 2015, Ms McBride began civil proceedings against Mr Jones in the Birmingham County Court. She sought an injunction to restrain alleged harassment. The application was made ex parte. District Judge Parfitt adjourned it to a hearing on notice on 2 March 2015, when he granted an injunction against Mr Jones. Mr Khan was not instructed in those matters.]

8. On 3rd March 2015 [Ms McBride] was interviewed under caution by the police and admitted fabricating emails she had provided to them as part of the allegation of harassment she had made against [Mr Jones]. Three days later [Ms McBride] reported to a number of police forces that [Mr Jones] had raped her.

   [Subsequently, Ms McBride placed a post on Mr Jones' LinkedIn page, referring to the injunction granted by District Judge Parfitt. The posting did not set out the text of the order but said "avoid this man" who was described as a "cheating, deceiving psychopath who will threaten you when you speak out against him."

   On 20 March 2015, prompted by this LinkedIn post and other matters, Mr Jones applied for an injunction against harassment, which was granted by HHJ Purle QC.

   On 21 May 2015, the two cases came before Knowles J, when the injunctions against each party were continued, subject to some modifications, and directions were given.

   On 7 July 2015, Mr Jones filed a witness statement in support of his claim, complaining of a "plethora" of allegations against him by Ms McBride.]

9. On 12th July 2015 [Ms McBride] attended at hospital with a stab wound to her right thigh. She was discharged

on 16th July 2015. [Ms McBride] alleged that the stabbing was carried out on the instruction of [Mr Jones].

10. [Mr Jones] has been interviewed under caution by the police in respect of the allegations by [Ms McBride]. No further action has been taken against [Mr Jones] in respect of those allegations.

    [At or around this point in time Mr Khan ceased to be instructed by Ms McBride. He was thus instructed for a period of some months between about late 2014 and mid-2015].

11. [Ms McBride] remains under investigation for perverting the course of public justice in respect of allegations made against [Mr Jones].

12. The civil proceedings concerned counter claims of harassment between [Mr Jones] and [Ms McBride] and included applications for injunctions; initially by [Ms McBride] against [Mr Jones] and then by [Mr Jones] against [Ms McBride].

13. The claims were considered by HHJ Hampton QC sitting at the Northampton District Registry on 17th November 2016. The Judge dismissed [Ms McBride]'s claim and discharged the interim injunction granted in her favour. [She] ordered that the injunction obtained by [Mr Jones] should continue for a period of a further two years and awarded damages of £7,000 in his favour.

    [The Judge found Ms McBride to be an untruthful witness. She found, among other things, that Ms McBride had deliberately fabricated emails and other communications which she alleged had been made by Mr Jones as part of a course of harassment. She rejected the contention that Mr Jones had caused Ms McBride to be stabbed.]

14. The complaint to the BSB in respect of [Mr Jones] by [Ms McBride] was dismissed following investigation.

15. The investigation into the complaint by [Mr Jones] in respect of [Ms McBride] has been stayed pending the completion of separate BSB referrals in respect of [Ms McBride] by the Tribunal.

The Charges

Charge 1

16. On 5th February 2016 Mr Khan attended at Stafford Crown Court.

17. A colleague of [Mr Jones], [Martin Lewis], was in the canteen when a Solicitor advocate informed him that a conversation was taking place in the robing room about the fact that a member of his Chambers called [Adrian] had been arrested for rape. [Mr Jones] is the only member of his Chambers called [Adrian].

    [A robing room is a cloakroom and dressing room exclusively for advocates, where they meet, change into and out of court dress, and may discuss their cases and other matters.]

18. [Mr Lewis] went to the robing room where he saw Mr Khan, who he did not know, by the signing in computer. Mr Khan was talking about [Mr Jones].

19. [Mr Lewis] cannot remember the precise nature of the conversation Mr Khan was having with others in the robing room and was not involved in it. However, he understood the following (i) Mr Khan was or had been representing a female, possibly a Solicitor, who had been raped by [Mr Jones]; (ii) [Mr Jones] was in Chambers in Birmingham/on the Midland Circuit; (iii) [Mr Jones] had been stalking the female and then raped her; (iv) The female had made a formal complaint and as a result serious threats had been made to her life in attempt to cover up what had taken place.

20. [Mr Lewis] noted that Mr Khan had a great deal of knowledge and understanding of the allegations including in respect of text messages and photos that had been exchanged.

21. [Mr Lewis] did not recall Mr Khan prefacing any comment with allegedly, but was not present for all of the conversation that was taking place. It is accepted that Mr Khan was only repeating the allegations made to him by [Ms McBride].

22. Mr Khan honestly believed that what he was told by [Ms McBride] about the events surrounding [Mr Jones] was credible. The matters relayed by Mr Khan were matters that had been relayed to him by [Ms McBride].

Charge 3

23. [Emma Davies] has a profile on LinkedIn. Mr Khan also has a profile on LinkedIn. In early 2016, the exact date is unknown, Mr Khan invited [Emma Davies] to connect with him on LinkedIn. [Emma Davies] accepted the request. [Emma Davies] had never heard of Mr Khan prior to the request to connect on LinkedIn.

24. On 7th March 2016 [Emma Davies] started at a new firm and updated her employer details on LinkedIn. One of the features of LinkedIn is that your connections will be notified of updates you make to your profile. Later, on the 7th March, [Emma Davies] received a message from Mr Khan via LinkedIn – *'Congratulations, glad to see you are doing well considering everything'*.

25. [Emma Davies] replied asking Mr Khan to explain what he meant.

26. Mr Khan's response was words to the effect of – Oops. I heard that your husband had a personal difficulty. I hope I am in error.

27. [Emma Davies] replied saying she did not know what Mr Khan meant.

28. No further response was received from Mr Khan.

Charge 2

29. On 23rd May 2016, Mr Khan attended at Birmingham Crown Court. Mr Khan made similar enquires and comments in respect of [Mr Jones]. [Mr Jones] was informed of these by a member of the Bar who was present at Birmingham Crown Court.

The Complaint and correspondence thereafter

30. A complaint was submitted to the Bar Standards Board by [Mr Jones] on 25th May 2016.

31. On 16th August 2016, Mr Khan was written to by the Bar Standards Board in respect of the complaint by [Mr Jones].

32. Mr Khan responded to the letter of 16th August on 21st September 2016. His response included the following –

    (i) He had been asked by [Ms McBride] to defend her in respect of the initial allegation of harassment by [Mr Jones]. All the information he had in respect of the

allegations concerning [Mr Jones] came via [Ms McBride]. When the harassment allegation was dropped he had no further involvement in the legal proceedings involving [Ms McBride] and [Mr Jones];

(ii) He was at Stafford Crown Court on 5th February 2016 and at Birmingham Crown Court on 23rd May 2016;

(iii) He enquired in the robing room as to what had become of [Mr Jones];

(iv) The Counsel he spoke to said they knew nothing about the case and he told them that he had been involved in the defence of [Ms McBride] but had fallen out of the picture;

(v) He accepted setting out the allegations of harassment, sexual assault, rape, conspiracy to murder and [Mr Jones] being involved in the knife attack on [Ms McBride];

(vi) Nobody at Stafford knew about the case which is why he made similar enquiries at Birmingham;

(vii) At no time did he say that [Mr Jones] was guilty. He did say that they were allegations. He enquired as to whether and where any trial was to take place;

(viii) He accepted contacting [Emma Davies] via LinkedIn;

(ix) He denied any breach of the Code through his actions.

33. On 5th October 2016, solicitors representing [Mr Jones] wrote to Mr Khan asking him to sign an undertaking not to repeat any of the allegations in respect of [Mr Jones] or to contact him, his family or Chambers. Mr Khan signed this on 6th October 2016.

34. On 11th January 2017, Mr Khan's case was considered by the Professional Conduct Committee. The case papers and charges were sent to him on 17th March 2017.

35. On 16th October 2017, following discussions between the parties and the supply of further material Mr Khan communicated to the BSB that he should not have made the comments in the robing rooms or sent the Linked-In messages and apologised for doing so.

[He then indicated an intention to plead guilty to the three charges that had been formulated.]"

The regulatory framework

8. The BSB is the statutory regulator of the Bar, established for that purpose by the Legal Services Act 2007. At the material times it administered the Code of Conduct which set out core duties imposed upon all barristers. The relevant duties, as set out in the 9th edition of the Code, are:

> "CD3 You must act with honesty and integrity.
>
> CD5 You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession."

9. The Code also contained a core duty numbered 6: "You must keep the affairs of each client confidential". The BSB did not base its case against Mr Khan on any allegation of breach of that duty, nor has it relied on any such case in the course of this appeal. This is because, although the matters of which Mr Khan spoke and wrote were "the affairs of" his former client, Ms McBride, she is not a complainant in respect of any of the disciplinary charges; nor is she a witness whom the BSB would want to call in support of its case.

The disciplinary proceedings

The charges

10. The charges were framed as follows:

> "**Charge 1**
>
> Statement of Offence
>
> Professional misconduct contrary to Core Duty 3 and Core Duty 5 of the Code of Conduct (9th edition).
>
> Particulars of Offence
>
> On 05 February 2016, in the robing room at Stafford Crown Court, Forz Khan broadcasted serious allegations made by a third party, [Ms McBride], against a barrister, [Mr Jones], including allegations of rape, assault and conspiracy to murder; by so acting:
>
> (1) Forz Khan failed to act with integrity (CD3);
>
> (2) Forz Khan behaved in a way which is likely to diminish the trust and confidence which the public places in Forz Khan or in the profession (CD5).

> **Charge 2**
>
> Statement of Offence
>
> Professional misconduct contrary to Core Duty 3 and Core Duty 5 of the Code of Conduct (9th edition).
>
> Particulars of Offence
>
> On 23 May 2016, in the robing room at Birmingham Crown Court, Forz Khan broadcasted serious allegations made by a third party, [Ms McBride], against a barrister, [Mr Jones], including allegations of rape, assault and conspiracy to murder; by so acting:
>
> (1) Forz Khan failed to act with integrity (CD3);
>
> (2) Forz Khan behaved in a way which is likely to diminish the trust and confidence which the public places in Forz Khan or in the profession (CD5).
>
> **Charge 3**
>
> Statement of Offence
>
> Professional misconduct contrary to Core Duty 3 and Core Duty 5 of the Code of Conduct (9th edition).
>
> Particulars of Offence
>
> On 07 March 2016, approximately one month after broadcasting allegations which had been made against a barrister, [Mr Jones], Forz Khan contacted [Mr Jones]'s wife [Emma Davies] via a professional networking site and made reference to issues concerning [Mr Jones]. Forz Khan did not know [Mr Jones] or [Mr Jones]'s wife. By so acting:
>
> (1) Forz Khan failed to act with integrity (CD3);
>
> (2) Forz Khan behaved in a way which is likely to diminish the trust and confidence which the public places in Forz Khan or in the profession (CD5)."

Charges 1 and 2 have been referred to, for convenience, as the "robing room charges". Charge 3 has been referred to as "the LinkedIn charge".

Advice and representation

11. Mr Khan was advised and represented before the Tribunal by Leading Counsel, Mark Simpson QC, under a scheme provided by BTAS. The appellant has waived privilege in the content of the advice, and submitted evidence about the advice and his reasons for pleading guilty. I shall come to the detail of some of that evidence. The gist of it is,

however, that he had a face-to-face consultation with Leading Counsel on or about 30 March 2017, and a telephone consultation in October 2017. He was advised to plead guilty, and accepted that advice. Hence the indication, on 16 October 2017, of an intention to plead guilty.

The hearing

12. On 22 March 2018, the three-person BTAS Disciplinary Tribunal consisted of Mohammed Khamisa QC (Chairman), a lay member, and a barrister. The BSB was represented by Leading Counsel, Mr Goudie QC, who also appears on this appeal. Mr Simpson QC appeared for Mr Khan. Mr Khan admitted the charges. The Tribunal then heard submissions on penalty from the BSB and in mitigation from Mr Simpson.

13. In the course of these submissions, both Leading Counsel made clear to the Tribunal, and it accepted, that although, on 21 September 2016, Mr Khan had denied breach of the Code (Agreed Facts 32(ix)), the BSB's factual case was then evolving, and did not crystallise until around 16 October 2017; it was therefore not to be held against him that he did not admit wrongdoing a year before that.

The decision

14. After hearing from Counsel, the Chairman delivered an extempore reasoned judgment and finding on sanction ("the Judgment"), a transcript of which is before me. The Tribunal's decisions and reasons were also reduced to writing in four documents, each countersigned by each Tribunal member: a "Finding Sheet", and a "Sanction Sheet" in respect of each charge. The Tribunal also completed a document entitled "Mitigating and Aggravating circumstances", which is a "tick-box" style of document. Finally, a Report of Finding and Sanction was prepared, dated 10 April 2018. This did not add in any relevant way to what had gone before. It merely drew together materials that already existed, including the Judgment.

The challenge to "conviction"

The grounds

15. The Appellant's Notice, filed on 5 April 2018, sets out the following grounds of "Appeal against Conviction"

> "The guilty pleas and consequential convictions fall to be set aside, as the investigation and/or prosecution and/or conviction were unlawful because:
>
> a) the Appellant committed no "professional misconduct" as defined in *Howd v Bar Standards Board* [2017] EWHC 210 (Admin) [[2017] 4 WLR 54] at [51]; and/or,
>
> b) the Appellant had a complete defence to the charges under Section 6 of the Human Rights Act 1998 and ECHR Articles 10(1) and 8(1);
>
> c) the Appellant received no advice about 1(a) or 1(b)."

The approach to withdrawal of a guilty plea

16. These are not criminal proceedings, and it is necessary to be cautious about drawing analogies from criminal procedure when dealing with disciplinary matters, which are either civil or hybrid in nature. But both sides are agreed that this appeal can fairly be dealt with by reference to the principles which would apply in crime.

17. It can seem odd for someone who has pleaded guilty to challenge his conviction on appeal. There is something counter-intuitive about the process. But on closer analysis there is nothing wrong in principle with such an appeal, in appropriate circumstances. The issue has been considered by the Court of Appeal Criminal Division in *R v Mohamed (Abdalla)* [2010] EWCA Crim 2400, *R v Asiedu* [2015] EWCA Crim 714 and, most recently, in *M Najib & Sons Ltd v Crown Prosecution Service* [2018] EWCA Crim 909.

18. In *Asiedu*, Lord Hughes explained that, as a general rule, a defendant who has admitted the facts which constitute the offence charged by an unambiguous and deliberately intended plea of guilty cannot then appeal against conviction:

> "for the simple reason that there is nothing unsafe about a conviction based on the defendant's own voluntary confession in open court. A defendant will not normally be permitted in this court to say that he has changed his mind and now wishes to deny what he has previously thus admitted in the Crown Court."

19. But it does not follow that a plea of guilty is always a bar to the quashing of a conviction. Lord Hughes identified two principal cases where this is not so:

(1) The first is:-

> "…where the plea of guilty was compelled as a matter of law by an adverse ruling by the trial judge which left no arguable defence to be put before the jury. So, if the judge rules as a matter of law that on the defendant's own case, that is on agreed or assumed facts, the offence has been committed, there is no arguable defence which the defendant can put before the jury. In that situation he can plead guilty and challenge the adverse ruling by appeal to this court. If the ruling is adjudged to have been wrong, the conviction is likely to be quashed. Contrast the situation where an adverse ruling at the trial (for example as to the admissibility of evidence) renders the defence being advanced more difficult, perhaps dramatically so. There, the ruling does not leave the defendant no case to advance to the jury. He remains able, despite the evidence against him, to advance his defence and, if convicted, to challenge the judicial ruling as to admissibility by way of appeal. If he chooses to plead guilty, he will be admitting the facts which constitute the offence and it will be too late to mount an appeal to this court."

(2) The second situation was summarised by the Court of Appeal in *Najib* at [15]:-

> "where, even if on the admitted or assumed facts the defendant was guilty, there was a legal obstacle to his being tried for the offence. Lord Hughes said that this will be true in those rare cases where the prosecution would be stayed on the grounds that it is offensive to justice to bring the defendant to trial."

20. There can be cases which are analogous to the first situation, and covered by its rationale, albeit not precisely within its ambit. *Najib* was such a case. As Leggatt LJ explained at [19]:

> "This is not a case in which an appellant is now, by challenging the conviction, by implication seeking to deny facts which have previously been admitted. The appellant is seeking only to argue that, on facts which it has admitted (once and for all), it is not as a matter of law guilty of the offence. If that argument is correct, the conviction is unsafe. The short point is that a conviction is unsafe if the facts admitted by the defendant do not in law amount to a criminal offence."

21. I had thought at one stage that this might be the case for Mr Khan on this appeal. But Mr Beaumont prefers to rely on a somewhat different and perhaps less exacting principle, which he derives from *Mohamed,* and the earlier case of *R v Boal* (1992) 95 Cr. App. R. 272. These authorities establish that, exceptionally, the Court will be prepared to intervene even when the appellant was fit to plead; intended to make the pleas he made; and did so without equivocation, after receiving expert advice. The cases show that there may yet be a basis for appellate intervention if the guilty plea was entered on the basis of bad advice which had the effect of depriving the appellant of "what was ***in all likelihood*** a good defence in law" (my emphasis).

22. The limits on this jurisdiction were spelled out by Simon Brown LJ in *Boal* at 278:

> "This decision must not be taken as a licence to appeal by anyone who discovers that following conviction (still less where there has been a plea of guilty) some possible line of defence has been overlooked. Only most exceptionally will this Court be prepared to intervene in such a situation. Only, in short, where it believes the defence would ***quite probably*** have succeeded and concludes, therefore, that a clear injustice has been done. That is this case. It will not happen often."

23. *Mohamed* involved just such circumstances. The four appellants had been charged with the possession of false identity cards, contrary to s 25(1) of the Identity Cards Act 2005. The legislation expressly provides – in summary - that it is a defence for a refugee charged with such an offence to show that having come here from a country where his life or freedom was threatened he presented himself to the authorities without delay; showed good cause for his illegal entry or presence; and made a claim for asylum as soon as reasonably practicable. The appellants had not been advised about this defence,

and pleaded guilty in ignorance of its existence. The Court of Appeal allowed some of the appeals, on the basis that the failure to advise was inexcusable; the appellants in question would have had good prospects of success had they been properly advised; and the convictions were thus unsafe.

24. The BSB's position is that there is a parallel with criminal proceedings, and that, if this Court is satisfied that the threshold identified by Simon Brown LJ in the passage I have cited is met, then it can exercise a discretion to remit the matter to the Tribunal. Without deciding the issue, I am prepared to accept for present purposes the submission of Mr Beaumont that this test is an appropriate one to adopt in the present context. If made out, it would seem to fall within the second of the two bases on which this Court may allow an appeal, pursuant to CPR 52.21(3). An appeal will be allowed where the decision of the lower court was "wrong" or where it was "unjust because of a serious procedural or other irregularity in the proceedings in the lower court".

Fresh evidence

25. To support this ground of appeal, the appellant seeks to adduce fresh evidence, in the form of one witness statement of his own, and one from Mr Simpson QC. I accept that it is both legitimate and appropriate to admit such evidence, in order to evaluate the grounds of appeal.

26. Mr Khan's own evidence is that the explanation for his guilty pleas, "given the availability of the defences that have now been set out in a written skeleton argument drafted by leading and junior counsel", is that Leading Counsel

> "did not advise me about these matters. He did not explain to me that the test of "professional misconduct" had been subject to judicial consideration, first of all by the Visitors to the Inns of Court in 2013, by disciplinary tribunals in two other cases in 2014 and 2016 and, more recently, in 2017 by the High Court."

27. The "more recent" case alluded to here is *Bar Standards Board v Howd* (above). The appellant goes on to say this:

> "Furthermore, leading counsel did not advise me about the impact of the Human Rights Act 1998 on my case. He did not identify my right to freedom of expression as being engaged by charges 1 and 2. Nor did he identify my right to respect for my "correspondence" as being engaged by charge 3. I received no advice or reminiscence about his own experiences of robing room 'banter' during his own career. There was no assessment of the chilling effect that my case might have on the freedom of expression of other barristers in robing rooms or elsewhere. I was not advised, as now I have been, that the Visitors to the Inns of Court had in a significant unreported case warned the Bar Council (when *it* was the regulator) about the dangers of straying too far into territory protected by Article 8 of the European Convention."

28. The appellant says that had he been so advised he would have pleaded not guilty. He nonetheless expresses his gratitude to Leading Counsel, whom he does not reproach for his omissions.

29. At the appellant's request, Mr Simpson QC has made a witness statement, in which he confirms that he did not advise on or discuss with his client any specific cases, or Articles 8 or 10 of the Convention. He says his advice to plead guilty was based on his knowledge of the relevant law, his experience of acting in disciplinary proceedings, and his assessment of the facts of the case. He adds that he believes that his advice was correct.

30. The issue for me is whether it was "quite probably" wrong, such that Mr Khan would "quite probably" have been able successfully to defend the charges if differently advised. I do not believe that is so. In my view, Mr Simpson was correct, and Mr Khan was right to accept his advice and plead guilty. I accept that he would have defended the charges, had he been advised that he had the defences now advanced on his behalf. But defences on those lines would have failed.

The first ground: insufficient gravity

31. Mr Khan relies on a principle which is by now firmly established in the jurisprudence of professional disciplinary proceedings, and is not in itself controversial: that misbehaviour must attain a certain level of gravity before it can qualify as professional misconduct.

32. The authorities were considered in some detail in an unreported decision of the Visitors to the Inns of Court in 2013: *Walker v Bar Standards Board* PC 2011/0219, 19 September 2013. Mr Walker, cross-examining an expert witness in a criminal trial, had asked a question imputing dishonesty, without reasonable grounds for doing so. This was contrary to an express prohibition in paragraph 708 of the then Code of Conduct. (Counsel had also failed to seek leave to introduce bad character). This was a momentary lapse in the heat of the moment, which was swiftly withdrawn and apologised for, and did not derail the trial. But the Code of Conduct at that time provided, by paragraph 907.1, that "*Any* failure by a barrister to comply with *any* provision of this Code other than [certain specified provisions] shall constitute professional misconduct." (emphasis added). The BSB Disciplinary Tribunal found Mr Walker guilty of misconduct. On appeal, the Visitors quashed this decision.

33. Sir Anthony May, giving the decision of the Visitors, held that paragraph 907.1 should not be taken literally. The Visitors accepted a submission on behalf of Mr Walker that a review of the authorities, from "the early cases" such as *Felix v General Dental Council* [1960] 2 AC 707 (PC), showed that the courts had been "astute to differentiate the isolated, albeit negligent, lapse from acceptable conduct from the serious kind of culpability which attracts the opprobrium of a finding of professional misconduct." The Visitors held that the

> "11. …consistent authorities (including, it appears, other decisions of Bar Standards Board Tribunals) have made clear that the stigma and sanctions attached to the concept of professional misconduct across the professions generally are not

> to be applied for trivial lapses and, on the contrary, only arise if the misconduct is properly regarded as serious.
>
> 16. …the quite plain theme that comes from the … authorities … require[s] us to modify the literal effect of paragraph 907.1 …. The reason for this is the concept of professional misconduct carries resounding overtones of seriousness, reprehensible conduct which cannot extend to the trivial."

34. The case of *Howd* involved an appeal and cross-appeal by the parties to proceedings before a BSB disciplinary tribunal, in which the barrister was found guilty of six charges of professional misconduct arising from his behaviour towards female colleagues and staff at a party at his former chambers. Lang J, DBE allowed an appeal by the barrister against the findings of guilt. One ground of appeal was that the Tribunal had erred "in concluding that the facts proved against Mr Howd met the high threshold of serious professional misconduct". Dealing with this (at [49-55]), Lang J referred to *Walker,* and noted that the BSB Handbook "curiously" did not contain any guidance on the meaning of professional misconduct and "in particular, there is no reference to the requirement that the misconduct must be serious". I share her surprise at this, and note that it apparently remains the position. But Lang J accepted that the Tribunal had been aware of this requirement, and had faithfully applied it. Her reason for upholding this ground of appeal was that further medical evidence adduced on appeal showed that the Tribunal had erred in fact, when concluding that the barrister's medical condition had not made a significant contribution to his behaviour. Her finding, at [55], was that

> "The medical evidence established, on the balance of probabilities, that his inappropriate, and at times offensive, behaviour was a consequence of his medical condition. It also established that his excessive consumption of alcohol was very likely to have been a response to the onset of his medical condition, and it probably had the unfortunate consequence of exacerbating his disinhibition and loss of judgment. In these circumstances, Mr Howd's behaviour plainly was not reprehensible, morally culpable or disgraceful, as it was caused by factors beyond his control. In my judgment, it did not reach the threshold for a finding of serious professional misconduct."

35. The threshold criterion drawn from these authorities by Mr Beaumont is that behaviour must be "seriously reprehensible" before it can amount to professional misconduct. He submits that the conduct which was the subject of the robing room charges, and the conduct which was the subject of the LinkedIn charge, failed to cross this threshold of seriousness.

36. The authorities make plain that a person is not to be regarded as guilty of professional misconduct if they engage in behaviour that is trivial, or inconsequential, or a mere temporary lapse, or something that is otherwise excusable, or forgivable. There is, as Lang J put it, a "high threshold". Only serious misbehaviour can qualify. I am not sure that the threshold of gravity is quite as rigid or hard-edged as Mr Beaumont suggests. I do not believe that in *Walker* Sir Anthony May was seeking to crystallise an exhaustive definition of professional misconduct. Rather, he was reaching for a touchstone to help distinguish the trivial or relatively unimportant from that which

merits the "opprobrium" of being labelled as professional misconduct. Nor do I read Lang J's decision in *Howd* as seeking to set out precise parameters for what can and cannot qualify as professional misconduct. Indeed, in the passage cited she used three separate terms, "reprehensible, morally culpable or disgraceful". I think it is perhaps unhelpful for this principle to be tied too firmly to particular phraseology. But even on the footing that the right test is that of "seriously reprehensible" it seems to me that, when Mr Khan's behaviour is properly evaluated, it comfortably meets this standard, and that this is in effect the approach which the Tribunal adopted.

37. In one sense, Mr Khan's vigorous complaints about the severity of the sanction imposed are at odds with his complaint that the Tribunal erred in law on this issue. The fact that the Tribunal saw fit to suspend Mr Khan for as long as 7 months makes clear enough that the Tribunal members regarded what Mr Khan had done as worthy of serious reproach. But one does not need to rely on inference to work out how the Tribunal viewed the matter. In the Judgment, the Chairman said "… we have come to the unanimous view that Mr Khan's conduct and behaviour is so serious as to undermine public confidence in the profession…" and "we have come to the view that these are serious matters and warrant us looking at a serious sanction …looking at this case in the round, we take the view that it is serious … suspension … is a proportionate response to these serious allegations."

38. The Judgment explained how the Tribunal saw it: Mr Khan, "as a member of the Bar of some seniority, was in possession of highly confidential and sensitive information which hitherto was unproven, and he should have known could not and should not have been repeated in a public environment of the two robing rooms" The Tribunal was "particularly concerned" by the LinkedIn messages, for which it was not provided with a "coherent explanation ... as to why he did just that." It cannot be said that the Tribunal approached the behaviour in this case on the legally unsound basis that this was professional misconduct, even though it was not serious. Although it did not describe Mr Khan's behaviour as "seriously reprehensible" in terms, it clearly concluded that it was. One factor in that, no doubt, was the Tribunal's finding of fact that Mr Khan's conduct was "pre-meditated".

39. It is wholly improbable that the Tribunal would have taken a different view had Mr Khan denied his guilt and argued that the threshold of gravity was not crossed on these facts. Indeed, it is not, in my judgment, seriously arguable that the Tribunal was wrong in its conclusion.

The robing room charges

40. So far as the robing room charges are concerned, Mr Khan was present in a professional workplace, among professional colleagues, in his capacity as a member of the Bar, speaking about allegations of which he had learned from a professional client. The conduct which was the subject of those allegations was undoubtedly (to coin a phrase) seriously reprehensible. Stalking, rape, and conspiracy to cover up that behaviour by threats of serious injury could hardly be described in any other terms. A person guilty of such conduct would inevitably be sentenced to a substantial term of imprisonment. The person against whom these serious allegations were made was a professional man, a member of Mr Khan's own profession, whom he did not know personally. He named that man when making the allegations. He spoke in such a way that Mr Lewis understood him to mean that the allegations were true (Agreed Facts para 19). He did

this in a place which, though not public, was open to many. He did not do so discreetly, to a single targeted individual, but openly to all who could hear. He took no precautions to avoid anyone hearing what he said. Hence his admission of charges using the word "broadcasted". He went into detail, over a period of time long enough for Mr Lewis to leave the room for some time, and return to find him still talking about the same matter. There were, on Mr Khan's own case, "an unknown number of third party barristers who listened to him or engaged with him [whose] identities were mostly unknown". A number of strangers, in other words. He acted on the basis of his client's instructions, and no other information. He did not know whether the allegations had been tested in court. He had no good reason to believe that the allegations were public, in any real sense, at the time. Given the location, he had every reason to suspect that one or more of those who heard what he said would know Adrian Jones (as was in fact the case). He knew that Adrian Jones was not there to answer the allegations, or to put his side of the story. He did all of this twice. He had no need to do any of this. Ms McBride was no longer his client. He may have been interested to find out about her case, but this was not by any means an appropriate way to go about that process. He made no other attempts to enquire about the progress of the investigation.

41. Mr Beaumont has advanced a "floodgates" argument, suggesting that if this behaviour is professional misconduct there is a great deal that goes on in the robing room that members of the Bar and Judges could and, on this view, should be sanctioned for. It is a fact, I accept, that barristers are prone to gossip among themselves. The robing room is exclusively for advocates, and is in one sense a sanctuary, though experience shows that it is also a venue for pre-court sparring, including "robing room advocacy" which can sometimes verge on bullying behaviour. There are things that can be said in such a context that count as nothing more than "gossip" or "tittle-tattle". To some extent, professional people of all kinds may need a space in which they can speak freely about their private lives, and their work, to colleagues, without fear that the regulator or an informer is looking over their shoulder, contemplating the instigation of professional disciplinary proceedings. Barristers may speak about their cases. They may use colourful language. Often there may be nothing wrong with any of this, let alone anything that counts as professional misconduct. Often, the cases spoken about will be – by their very nature – public knowledge. But these considerations do not support the submissions made in the present case, about what this barrister did, in these robing rooms, on these occasions. The robing room cannot be viewed as a "no-go area" for the regulator. All depends on the facts.

42. Mr Beaumont makes nine points on the facts, to support his submission that the robing room conduct fell short of the necessary threshold of seriousness. I can deal quite shortly with seven of these. Mr Beaumont suggests that this was (1) "boastful gossip", at worst and (2) about "his own case". That is on the basis that Mr Khan was boasting about what he had done for Ms McBride. I do not consider that the Agreed Facts support this claim. And the case was not "his case", to say whatever he wished about to whomsoever he chose. Not only was it his client's case, it also – and critically – involved the personal life and reputation of his client's opponent, Mr Jones, whose rights required consideration. Information about Mr Jones was provided to Mr Khan by Ms McBride for use in the course of his professional services, and not otherwise. What was said cannot properly be characterised as "mere" gossip. Mr Beaumont makes the point (3) that Mr Khan was only repeating what Ms McBride had said, and that he believed her to be credible. That may mitigate his culpability somewhat, but there is

nothing in the point so far as the effect of his words is concerned. From the point of view of the listener and the subject, as Lord Reid famously said in *Lewis* v *Daily Telegraph Ltd.* [1964] AC 234, 260, "repeating someone else's libellous statement is just as bad as making the statement directly." This is not an arcane rule of defamation law, but a fact of life, reflected in Mr Lewis's response to what was said (Agreed Facts paragraph 19). I see no real force in the point (4), that conduct such as this is not among the 10 non-exhaustive examples of "serious" misconduct set out in the current BSB Handbook. The fact (5) that Mr Khan did not act with malice reduces culpability, but does not deprive his misconduct of its serious character. The fact (6) that the size of the audience is unknown is a point against Mr Khan, not one in his favour; he was speaking to a randomly selected audience of strangers, with no reason to suppose that any had a proper interest in the topic. The point (7) that nobody can specify exactly what he said goes nowhere, as the Agreed Facts are a sufficient basis for reaching proper conclusions about his utterances.

43. One point on which Mr Beaumont spent some time in the course of argument is a suggestion that the serious allegations and cross-allegations which Ms McBride and Mr Jones had made about one another were "already in the public domain". This might, in principle, have been a point of some real importance. As a rule, information ceases to be confidential once it is in the public domain, in the sense that it is so generally accessible that it cannot any longer be regarded as confidential: *Attorney General v Observer Ltd* [1990] 1 AC 109, 282 (Lord Goff). It is well arguable that a barrister would not be guilty of professional misconduct if she chose to talk about aspects of "her" case that she knew from her client, but which had already been widely publicised in the media, or become public knowledge in some other way following a public hearing. Disclosure in the genuine and reasonable belief that information was public knowledge, or a slip involving reference to some relatively minor aspect of a case which had not entered the public domain, might not be grave enough to qualify as misconduct. But that is not this case.

44. The most that Mr Beaumont can say, on the material he has been able to draw together, is that there were public hearings in February, March, and May 2015 and the LinkedIn disclosure by Ms McBride. But there is no evidence, nor can it sensibly be inferred, that the hearings led to any actual public knowledge of the allegations. It is, moreover, obvious that what both parties were striving to achieve in the civil litigation was to close down publicity which was, or which they claimed was, being generated by their opponent. Injunctions were in place to prevent publicity, on the grounds of harassment. Nor can it be said, and it is not said, that when he spoke in the robing rooms Mr Khan believed the detailed allegations of which he spoke were public knowledge.

45. Mr Beaumont submits that there is much that was in the public domain in the different sense that it was *accessible* to the public, either as of right or with the Court's permission. It is true that, on the face of it, the hearings were in public despite the private nature of at least some of their content. Statements of case and orders made in court are available to the public as of right: CPR 5.4C. Transcripts of public hearings are generally available, upon payment. It is necessary to be cautious about derogations from the open justice principle, which may infringe Article 10(1); see *Harman v United Kingdom* (1985) 7 EHRR CD146. In this context, therefore, Convention considerations leach into the territory occupied by Ground 1. There is much else to which a member of the public may be able to gain access, with the permission of the Court. The Court

of Appeal has recently reviewed the law on the topic, so far as civil proceedings are concerned: *Cape Intermediate v Dring* [2018] EWCA Civ 1795.

46. It may well be that there are circumstances in which the disclosure by a barrister of facts about "his" case that are public property in this sense ought not to be treated as committing a disciplinary wrong. But this part of the argument for Mr Khan is lacking in focus on the facts, and does not seem to me to bear directly on the question of the gravity of his misconduct in this case. Not only did nobody in fact seek out the information in question here. It is highly improbable that any journalist or member of the public would have sought access to records of this litigation. Above all, it seems most unlikely that, if that had occurred, the application would have enabled the enquirer to obtain, for pre-trial publication, the very information the disclosure of which the parties had successfully sought to enjoin. This, after all, was litigation, the aim of which was to protect the integrity of the litigants' private lives. Reporting by a third party of information which is the subject of an anti-harassment injunction would seem to undermine the purpose of such an injunction; it might thus risk contempt of court under the *"Spycatcher"* doctrine, at least if done pre-trial: cf *Attorney General v Newspaper Publishing Ltd* [1988] Ch 333 (CA). Moreover, it has not been demonstrated that there was a complete overlap between the information deployed in public and that which Mr Khan disclosed or used, when behaving in the ways that led to the disciplinary process. Indeed, a review of the civil judgment of HHJ Hampton QC shows that although Ms McBride's rape allegations featured in the case, they did so as one of Mr Jones' allegations of harassment by Ms McBride. His case was that she had made false allegations to numerous police forces and to the Bar Standards Board. No charges were ever brought against him.

47. This highlights the fact that, most pertinently, Mr Khan was not reporting or disclosing information about, or derived from, any public hearing in the civil proceedings. He was speaking publicly of criminal allegations, his knowledge of which derived from his professional involvement, at the pre-charge stage, in a matter where no charges had in the event been brought. The open justice principle does not extend this far; the starting point in such a case is that the person under criminal investigation has a reasonable expectation of privacy: *Richard v BBC* [2018] EWHC 1837 (Ch). The information which Mr Khan deployed in this case was, as he knew or should have realised, personal, private, sensitive, and highly damaging to reputation. He had obtained it as a professional. Its disclosure by him to people who otherwise knew nothing about the matter was manifestly inappropriate, in all the circumstances as they stood, and in the circumstances as he knew or believed them to be.

48. I note that Mr Simpson QC, mitigating for Mr Khan before the BTAS Tribunal, conceded that his client's behaviour was "unacceptable". I agree. Indeed, I share the view expressed by HHJ Hampton QC, giving judgment in the harassment litigation, that this conduct was "wholly unacceptable". The reason she said anything at all about it is that, understandably, Mr Jones regarded Mr Khan's statements in the robing room as harassing in nature. It was part of his case against Ms McBride that she had orchestrated it. In fairness to her and, in particular, to Mr Khan, I should say that this allegation was not upheld. But that does not undermine the force of Judge Hampton's description of the conduct of Mr Khan.

49. Mr Beaumont's ninth point is that disciplinary proceedings were inappropriate as there was a satisfactory alternative remedy in the form of a claim for defamation. This was

not only available but was in fact resorted to by Mr Jones when he sought, and Mr Khan readily provided, undertakings not to repeat the allegations. I cannot help feeling that this point has been mis-filed. It is surely a point that goes to proportionality and/or penalty, and not to the gravity of the misconduct. Logically, behaviour cannot be any less serious just because there is another remedy available for it. But since the point has been made in this context it is convenient to deal with it now. It seems to me to be misconceived. Disciplinary proceedings have quite different purposes from civil claims for damages or injunctive relief. A barrister who, in the course of his practice, gravely libels an individual by speaking or writing defamatory words on an occasion which enjoys no privilege against suit for defamation, may properly be (1) sued for damages and an injunction to vindicate the reputation of the claimant and (2) brought before a disciplinary tribunal, for the purposes of vindicating professional standards, and upholding the public interest. An award of damages and costs in the civil proceedings might have an impact on the question of sanction, but it would not do away with the need for disciplinary proceedings.

50. Finally, I should mention a discussion in the course of argument about the concept of "integrity". Mr Beaumont refers to the two core duties which Mr Khan was alleged to have infringed, and submits that these cannot be resorted to as a means of outflanking or trumping the threshold of seriousness to be derived from *Walker.* In the course of this submission Mr Beaumont has drawn attention to a passage in *Howd* at [45], in which Lang J accepted that the word "integrity" in CD3 "takes its colour from the context" in which it appears, that is to say, in association with the word "honesty". I confess to being a little puzzled by this submission. It seems clear that when it brings a disciplinary charge, the BSB must establish, by admissions or otherwise, that the conduct in question involved a breach of one or more of the core duties <u>and</u> that it was sufficiently serious to amount to professional misconduct. I understand the BSB to accept this analysis. Mr Beaumont did not go so far as to say that the conduct in this case could not qualify as a lack of integrity, if that term is properly construed. The only question, therefore, seems to be gravity.

51. I add that Mr Beaumont was, in my judgment, right to hold back from any argument that Mr Khan's behaviour could not be characterised as lacking integrity. As Jackson LJ observed in *Wingate v The Solicitors Regulation Authority* [2018] EWCA Civ 366 [95-96] "integrity is a broader concept than honesty" and somewhat "nebulous". However:-

> "97. In professional codes of conduct, the term "integrity" is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members. See the judgment of Sir Brian Leveson P in *Williams* at [130]. The underlying rationale is that the professions have a privileged and trusted role in society. In return they are required to live up to their own professional standards.
>
> 98. I agree with Davis LJ in *Chan* that it is not possible to formulate an all-purpose, comprehensive definition of integrity. On the other hand, it is a counsel of despair to say: "Well you can always recognise it, but you can never describe it."

> 99. The broad contours of what integrity means, at least in the context of professional conduct, are now becoming clearer. The observations of the Financial Services and Markets Tribunal in *Hoodless* have met with general approbation.
>
> 100. Integrity connotes adherence to the ethical standards of one's own profession. That involves more than mere honesty. To take one example, a solicitor conducting negotiations or a barrister making submissions to a judge or arbitrator will take particular care not to mislead. Such a professional person is expected to be even more scrupulous about accuracy than a member of the general public in daily discourse.
>
> 101. The duty to act with integrity applies not only to what professional persons say, but also to what they do. …"
>
> 102. Obviously, neither courts nor professional tribunals must set unrealistically high standards, as was observed during argument. The duty of integrity does not require professional people to be paragons of virtue. In every instance, professional integrity is linked to the manner in which that particular profession professes to serve the public. Having accepted that principle, it is not necessary for this court to reach a view on whether *Howd* was correctly decided."

52. I note, in addition, that the focus of the Tribunal in its Judgment was on the other core duty relied on by the BSB: see the passages cited at [38] above. It is perfectly clear to me that the Tribunal was entitled to and did form the view that, by broadcasting in two robing rooms serious allegations of wrongdoing against a named professional, Mr Khan engaged in conduct that was likely to diminish public confidence in Mr Khan himself, and the profession. The Tribunal was entitled to take that view because, as Mr Goudie QC has argued, a barrister who comes into possession of sensitive information in the course of his profession has a responsibility to exercise judgement about disclosure of that information. For the reasons I have given, Mr Khan's disclosures on these occasions were more than ill-judged. It was conduct so seriously wrong as to qualify as professional misconduct.

The LinkedIn charge

53. The same is true, in my view, of the conduct that led to the LinkedIn charge, though this is certainly less grave in character. This was not a "broadcast". It was, as Mr Beaumont has submitted, a brief, private exchange of communication. I accept that it was not malicious, and may indeed have been intended to be sympathetic. It was devoid of substantive content. It did not spell out what it was that Mr Khan thought would have upset Mrs Davies. The Agreed Facts do not tell us what her state of knowledge was, or what her emotional state was in fact, at the time of this communication. It would therefore be wrong to assess the gravity of Mr Khan's behaviour by making assumptions about how hurtful and upsetting his communication actually was. But, at the same time, there is no reason to suppose that Mrs Davies passed it off as something of no consequence. On the contrary, she complained about

it. And it is possible to assess what Mr Khan did, the tendency of his communications, and his culpability.

54. Mr Khan had learned from a client that she accused a male barrister of stalking her, raping her, and conspiring to cover up these things by threatening her with serious harm when she complained. Months after the alleged events, and after his instructions had come to an end, he chose to rely on that information to write to the wife of the man accused, about the impact of these matters on her. These were matters that were very personal and private, and which he had every reason to believe (and apparently did believe) would have been very upsetting for Mrs Davies. He used a professional website to do this. He did not know Mrs Davies, other than as someone with whom he had connected via that website. He wrote to her uninvited, without prompting from her; the only prompt was an automated one, generated by the website because he had linked with her. There was a strong probability that she would object to such intrusion, as she evidently did. He has failed to offer any justification or even any explanation of why he did so.

55. This was not just indiscreet and ill-judged. It was, as the Tribunal evidently concluded, a serious failure of standards. In my judgment, it was a significant failure to separate the professional from the personal, and to respect the privacy of those involved on the "other side" of a legal dispute. It was conduct likely to lower public confidence in the professional standards of the Bar. I cannot accept the suggestion that Mrs Davies had an alternative, and sufficient remedy available to her in the form of a claim for harassment. As I have said, that could not reduce the gravity of the misconduct even if it were the case.

The second ground: infringement of Convention rights

56. Having said what I have, I can take this aspect of the appeal rather more shortly.

57. Articles 8 and 10 of the Convention are fundamental, but qualified rights. The provisions of both articles are familiar. For ease of reference, however, they are set out in the Appendix to this judgment.

58. The argument for Mr Khan involves the following four core propositions:

(1) The BSB and the BTAS Tribunal are both public authorities for the purposes of the Human Rights Act 1998. They are therefore subject to the duty imposed on all public authorities by s 6(1) of the HRA, not to act incompatibly with the Convention Rights. (This Court is under the same duty, of course).

(2) Mr Khan's utterances in the robing room are speech protected by Article 10(1) of the Convention, which extends to cover speech which offends, shocks or disturbs, or which is painful or distasteful satire, iconoclasm, rudeness, unpopular and unfashionable opinion, banter, humour, and speech which is no more than abuse. The pursuit of disciplinary proceedings in respect of those utterances (and the imposition of sanctions in respect of them) interferes with Mr Khan's right to freedom of expression. It therefore requires justification pursuant to Article 10(2).

(3) Mr Khan's LinkedIn messages to Mrs Davies are "correspondence" within the scope of Article 8(1), and hence entitled to respect. The pursuit of disciplinary

proceedings in respect of those messages represents an interference with the right to respect for correspondence. It therefore requires justification pursuant to Article 8(2).

(4) An interference can only be justified if it is prescribed by law, and pursues a legitimate aim, and it is convincingly established that the measure in question is necessary and proportionate in pursuit of that aim. The legitimate aims specified in Article 10(2) are to be construed strictly. "Necessary" does not mean indispensable, but nor is it to be treated as synonymous with "useful", "reasonable" or "desirable". And the test of necessity requires the party charged with the interference to persuade the court that the measure at issue corresponds, and is proportionate, to a "pressing social need".

59. Thus far, I can readily accept the analysis, and Mr Beaumont's argument. It is supported by the familiar authorities which Mr Beaumont has cited, as to the ambit of these Convention Rights, and the principles by which the Court must test whether there is an interference with those rights, and whether such interference is justified: see in particular, *Silver v United Kingdom* (1983) 5 EHRR 347 [97], *Lindon v France* (2008) 46 EHRR 35 [45], and, domestically, *Redmond-Bate v DPP* (1999) BHRC 375 [20], *Livingstone v Adjudication Panel for England* [2006] EWHC 2533, and *Chambers v DPP* [2013] 1 WLR 1833. I am not persuaded by Mr Goudie's submission that the disciplinary proceedings did not involve an interference with the Article 8(1) right, because they did not interfere with the correspondence, either by interception or some other form of censorship. In principle, a public authority interferes with correspondence, and the right to respect for correspondence, if it relies on a communication as a basis for a finding of guilt and a sanction.

60. When it comes to the appeal against conviction based on Articles 8 and 10, the real issue is whether the interference with those rights which the proceedings represented is justified under Articles 8(2) or 10(2), as appropriate. In my judgment it is, and clearly so.

The robing room charges: Article 10

61. Mr Beaumont's argument is that barristers should not be prevented from discussing their cases with other barristers. The exchange of information between professionals is in many ways the very essence of a liberal profession. Those with whom they discuss their cases should not be prevented from *receiving* the same information (a discrete Art 10 right). There can be no Art 10(2) basis for preventing such discussion, save perhaps in the case of a breach of client confidence. That was not alleged here. Mr Beaumont questions whether the institution of disciplinary proceedings in respect of the robing room charges serves any of the legitimate aims specified in Article 10(2), and submits that in any event it cannot be said to be necessary in a democratic society. It does not correspond to any "pressing social need", nor is it proportionate to any such need. Part of the argument relies on the point about alternative remedies to which I have already referred. The availability to Mr Jones of remedies in defamation is said to exhaust the need for any action in this case.

62. A separate strand of the argument emerged in oral submissions: that if, and so far as necessary, the core duties – being subsidiary legislation - should be "read down" by the Tribunal and the Court in accordance with s 3 of the HRA, in order to ensure

compliance with human rights law. Mr Beaumont lays particular emphasis on *Livingstone*, where the pursuit and imposition of disciplinary sanctions was held to be unlawful. The Mayor of London was disciplined for conduct when leaving an official event. He abused a Jewish journalist by comparing him to a Nazi prison camp guard. Collins J quashed the decision, holding that the Mayor was off-duty when he spoke, and that the panel's decision relied on an overly broad interpretation of rules against bringing the office of Mayor into disrepute, which could not stand with Article 10. I am invited to adopt similar reasoning in this case.

63. I have already given many of the reasons for rejecting these submissions, when dealing with Ground 1 - the threshold of seriousness argument. But let me start with the question of legitimate aims. In my judgment a, if not the, central function of the BSB's regulatory regime is "the protection of the reputation and rights of others". Core duty 5, which the Tribunal found to have been breached in this case, is expressly aimed at maintaining public confidence in barristers and the profession generally. That is a reputational matter. Other barristers have a proper and legitimate interest in ensuring that their reputations are not tarnished by association with those who misconduct themselves professionally. But this duty is also concerned with the rights of others which include, importantly, the rights of those who employ barristers. They are entitled to expect adherence to high ethical standards. On the facts of this case, the "reputation and rights of others" engaged by the facts also include, prominently, the rights of Mr Jones. His rights under Article 8 were engaged. Further, in this case, the disciplinary measures served the function of "preventing the disclosure of information received in confidence."

64. That is not so say that the disciplinary proceedings prevented the disclosures made by Mr Khan. Nor is it to say that what he did was a breach of the duty of confidence he owed to Ms McBride. That was not, as I have said, the basis for the charges or the findings of guilt or sanctions. But it does not follow that disclosure was legitimate. It is commonplace for A to confide to B information of a confidential character about C. It is well-established that in such a situation B may owe a duty of confidence to C, even if they are not in any contractual or other relationship with one another. The authorities show that, even if such information is false, that does not deprive it of its confidential character: see, for instance, *McKennitt v Ash* [2006] EWCA Civ 1714 [2008] 1 QB 73 [79] (Buxton LJ), [85-86] (Longmore LJ). In addition, if the information is private in character, C may have a reasonable expectation that B will keep it private; if B does not do so, that is liable to be a misuse of the information, actionable by C. Whether, as a matter of law, a barrister owes duties to the opponent of his client, enforceable by that client, is not the issue here.

65. The question of whether the use or disclosure of such information is or is not legitimate will turn largely on the aims pursued by such use or disclosure, and the application of the tests of necessity and proportionality. Here, the aim of Mr Khan's speech is somewhat obscure. It is not, and could not be said, that it served any higher public interest purpose. On the contrary, his case is that it was mere gossip, nothing more. That is speech which ranks low in the hierarchy of free speech values. The need for a compelling justification for interference is correspondingly less. But there was in my judgment a compelling justification. The disciplinary process served an important purpose by making clear to Mr Khan, to others in the profession, and to the public at large, that disclosures such as these are not an acceptable way to make use of sensitive

personal information, with the potential to cause serious reputational harm, which has been imparted to a barrister by a client in confidence, for the sole purpose of enabling him to perform professional services in relation to actual or prospective litigation. This purpose corresponds to a pressing social need and, making all due allowance for the wide parameters of the Article 10(1) right, the pursuit of disciplinary proceedings was a proper and proportionate means of serving those needs. I do not consider this case comes close to *Livingstone.*

66. Nor could any of the aims I have identified be satisfactorily achieved merely by civil proceedings for defamation by Mr Jones. Indeed, the public might reasonably question the effectiveness of the regulator's public interest role, if it treated such a matter as fit only for private law proceedings by the affected individual.

The LinkedIn charge: Article 8

67. Similar reasoning applies, when it comes to the LinkedIn charge. Article 8 is relied on. Because the communications are a form of expression, it seems to me that Article 10(1) is also engaged. But again, the pursuit of disciplinary proceedings in respect of this wholly inappropriate communication with the spouse of a former client's opponent served more than one legitimate aim, corresponded to a pressing social need, and was in itself, proportionate to such need. Emma Davies' private life rights under Article 8 were plainly engaged. It is hard to see any justification for Mr Khan's interference with those rights. A person whose spouse gets caught up in disputes and litigation in which lawyers are instructed on the other side has a reasonable expectation that the other side's lawyers will respect their privacy, and refrain from exploiting what they have learned in that capacity for the purposes of unwanted intrusions into their lives, with unwelcome comments on inherently hurtful, private and personal matters. Beyond this, again, the facts engage the reputation of the profession at large, and the rights of those who instruct the Bar. None of these aims could be satisfactorily achieved by civil litigation at the instance of Mrs Davies.

Overall conclusion

68. The "conviction" appeal is dismissed, because there is no good reason to set aside or disregard Mr Khan's pleas of guilty. Mr Khan was right to plead guilty. There is no probability that a re-hearing following a not guilty plea would lead to a different conclusion. The Tribunal was entitled, indeed right, to conclude that the admitted misconduct in this case was serious. It comfortably crossed the threshold of gravity which the authorities show must be exceeded before behaviour can be characterised as professional misconduct. Although the pursuit of disciplinary proceedings was an interference with Mr Khan's Convention rights under Articles 8 and 10, it was a justified interference. It pursued legitimate aims prescribed by law, and was a proportionate measure, corresponding to a pressing social need to uphold and maintain standards in a profession of critical importance to the public welfare.

The challenge to sanction

69. I take a different view, when it comes to sanction. As Mr Goudie QC has fairly and rightly reminded me, it is not the function of the Court on an appeal of this kind to substitute its own view for that of the expert disciplinary tribunal. Appropriate deference should be paid to the experience and expertise which that tribunal enjoys;

there is a high threshold for interference: See *Salsbury v Law Society* [2009] EWCA Civ 1285 [2009] 1 WLR 1286 [30] (Jackson LJ).

70. That said, the need for deference of this kind is somewhat less when it comes to judicial scrutiny of sanctions imposed on legal professionals. This is a profession which the Court knows something about. Further, there is little room for deference so far as evaluation of the facts is concerned. The facts were all agreed, and no other facts were relied on by the Tribunal. Its Judgment does not disclose any inferential conclusions of fact, which this Court might perhaps hesitate to disturb. Mr Goudie concedes that the sanction "could be viewed as being at the higher end of the scale". In my judgment, it goes further. Making all due allowance for the advantages enjoyed by the Tribunal, the sanction in this case was manifestly excessive and should be set aside.

71. The BTAS Sanctions Guidance contains the following general principles, which are consistent with the Convention:

> "Deterrence and upholding standards
>
> 3.3 In some cases, the sanction imposed may be necessary to act as a deterrent to other members of the profession. Therefore, when considering a sanction, it may be necessary not only to deter the individual barrister or authorised body from repeating the behaviour, but also to send a signal to the profession and the public that the particular behaviour will not be tolerated. A deterrent sanction would be most applicable where there is evidence that the behaviour in question seems to be prevalent in relation to numbers of barristers within the profession.
>
> Proportionality
>
> 3.4 In deciding what sanctions (if any) to impose, the decision maker should ensure that the sanctions are appropriate, weighing the interests of the public with those of the practitioner or authorised body. Proportionality is not a static concept and will vary according to the nature of the breach and the background of the individual barrister or authorised body. For example, a first time breach of the practising requirements would rarely, if ever, warrant a suspension or disbarment but a similar breach, having been committed many times without remorse or any attempt to remedy the situation, might warrant consideration of suspension or disbarment. Repeated breaches of relatively minor provisions of the Handbook may indicate a significant lack of organisation, integrity, or insight on the part of the barrister or authorised body which could represent a risk to the public and undermine confidence in the profession. Sanctions should be reflective of the seriousness and circumstances of the conduct e.g. where the incentive for breaching the Handbook was for financial gain the sanction should reflect that. The sanction imposed should be no more onerous than the circumstances require, the lowest proportionate punishment should be imposed in any particular

> case. The decision maker should consider the totality of the breaches when considering proportionality."

72. Page 32 of the Sanctions Guidance identifies categories of suspension. The "long" category is "over 6 months and up to three years." A "medium" suspension is "over 3 months and up to 6 months", and a "short" one is "up to three months". Pages 33 and following of the Sanctions Guidance give illustrative examples of appropriate starting points and ranges for a variety of disciplinary offences. The Tribunal did not expressly refer to these pages in its Judgment, but I infer that it had them in mind. The first example is "recklessly misleading the Court", for which the suggested starting point is a reprimand. Other examples include "recklessly making allegations of fraud", the appropriate sanction range for which is said to be a "medium level fine to short suspension". A "medium level fine" is "£1,000 and up to £3,000". A "high level" fine is more than "£3,000 and up to £50,000". For "A conviction for an act of violence causing injury" is given a starting point of a "medium level suspension". For harassment over a prolonged period, the Guidance suggests a starting point of "a high level fine and a short suspension". For discourtesy, in the form of "high level" discourtesy with a "significant impact on the victim", the Guidance recommends a "reprimand accompanied by a medium to high level fine."

73. At the hearing, the BSB presented a Note on Sanction which highlighted two possible analogies: discourtesy and abusing the position of the advocate (as, for instance, by reckless allegations of fraud).

74. The Panel had regard to the Sanctions Guidance, including the guidance on the applicability of suspension, and on illustrative sanctions. It considered the aggravating factors. These were "premeditation" on all three dates; persistent conduct over a lengthy period; and previous disciplinary findings against Mr Khan. (In 2004, he had been suspended for six months for submitting an excessive fee note, and in 2006 he was reprimanded for a false assertion about an agreement.) By this process the Tribunal arrived at a global starting point. It then considered the mitigating factors: Mr Khan's early admissions; the apology he had made for his "inappropriate" behaviour; and the undertaking he gave when asked for one by Mr Jones' lawyers. It thus arrived at the global sanction of 7 months' suspension, concurrent. In the Judgment, the Panel said this:

> "Bearing in mind the Sanctions Guidance and the breaches as summarised in Version 4, we have come to the unanimous view that Mr Khan's conduct and behaviour is so serious as to undermine public confidence in the profession and therefore a signal needs to be sent to Mr Khan, the profession and the public, that the behaviour in question is unacceptable.
>
> … the relevant factors to be taken into account if we are thinking of suspension are not *limited* to but include the following: "(b) the seriousness of any breach of the Handbook" and "(e) the barrister has shown lack of integrity that is not so serious as to warrant disbarment" but (and these are our words) serious enough to warrant suspension whether the charges admitted are taken together or individually.

> … We have looked at the Guidance given at page 32 and, in our judgment, for the reasons that I have just given, and the seriousness we take of Mr Khan's actions, whether considered individually or collectively, this conduct and behaviour – unacceptable as it is – falls into the higher level of suspension, recognising that the allegation made by [Ms McBride and Mr Jones], at the time that these things were said, were unproven. We have taken a period of time looking at the levels of suspensions at the higher level which has a range of over six months and up to three years. That is the band we feel that Mr Khan's case falls into.
>
> We started with a period of suspension of nine months. Taking into account of his admission, his remorse and apology, the undertaking that he gave near the time of the offending behaviour, that starting point of nine months should be reduced to seven months to reflect these features and the other mitigation that we have heard."

75. I have no doubt that it was appropriate for the Tribunal to consider these three separate offences in the round, and to impose a single penalty to reflect the totality of the misconduct. I have concluded that the Tribunal was entitled to conclude that suspension was the appropriate penalty. The sanctions exercise in this case was not straightforward, as the offending was not easy to compare with any of the illustrative examples. But in my judgment the Tribunal fell into error in at least four ways, the combination of which led to a penalty that was well beyond what was proportionate.

(1) I see the force of Mr Beaumont's submission that the Panel imposed a deterrent sanction, beyond what the individual facts of the case merited, in the absence of evidence that there is or was any systemic problem requiring such deterrence.

(2) Secondly, the Tribunal's reasoning shows no evidence that it considered the impact of suspension on Mr Khan. Mr Beaumont has submitted that this was tantamount to a fine of over £140,000 and thus represents an unprecedented sanction, of "breath-taking" severity. The figure is supported by a statement from Mr Khan. Means are relevant to financial penalty, but I agree with Mr Goudie that assessment of the precise financial impact is not the right "metric" by which to assess suspension. However, a Tribunal must give at least some consideration to the impact on the barrister. Whatever the scale of his or her practice, to prevent a barrister from practising and earning a living is a serious matter, impinging – as Mr Beaumont points out – on the barrister's Convention rights.

(3) The third point is or may be linked to the second. Although I find that the Tribunal was right to view this offending as meriting suspension, I consider the starting point of 9 months' suspension to be clearly excessive. Even with the aggravating features of the case, a suspension of 9 months represents – to any self-employed individual – a very severe penalty indeed. The charges, though serious in nature, were not so serious as to call for the deprivation of the right to practise one's profession for as long as that. Comparison with the illustrative examples leads me to the conclusion that these sanctions were out of kilter with the guidance.

(4) Fourth and finally, the Tribunal failed to give sufficient credit for Mr Khan's early acceptance of guilt and the other mitigation that was available to him. A discount of 2 months is a mere 20%. The early guilty plea alone merited more than this. It would be hard to justify credit of less than one third for these matters, taken together.

76. The BSB accepts that if I conclude the sanction was clearly inappropriate I can and should reassess the position, and substitute a lesser sanction, as Mr Khan invites me to do. Mr Goudie submits, however, that in doing so this Court cannot or should not give credit for the early admissions, because the pursuit of the appeal against conviction deprives Mr Khan of any right to such credit. I disagree. Mr Khan's admissions spared the complainants the need to attend, and saved costs. The arguments I have rejected were made only on appeal, after conviction and penalty, pursuant to advice from a fresh legal team. The additional expense generated can be dealt with by an appropriate costs order.

77. In my judgment, the appropriate global starting point for all three charges, after consideration of aggravating features and applying the principle of totality, could not have exceeded 5 months' suspension. After due allowance for mitigation, and an appropriate discount for Mr Khan's early admissions, the sanction which I substitute is one of 3 months' suspension on each of the robing room charges, to run concurrently, and 5 weeks' suspension on the LinkedIn Charge, also concurrent. That, in my judgment, is amply sufficient to mark the seriousness of the matter, and to send an appropriate signal to the profession and the public.

APPENDIX

Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.