Neutral Citation Number: [2014] EWHC 2681 (Admin)

Case No: CO/923/2013

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2014

Before :

LORD JUSTICE FULFORD

and

MR JUSTICE STEWART

- -

Between :

Giles Norton
- and -
Bar Standards Board

- -
- -

Richard Horwell QC (instructed by **Carters Solicitors**) for the **Appellant**
Nikki Singla (instructed by **Bar Standards Board**) for the **Respondent**

Hearing dates: 20th June 2014

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Approved Judgment

Lord Justice Fulford :

The Background

1. The Honourable Society of the Inner Temple called the appellant, Giles Norton, to the bar of England and Wales on 25 November 2004. When he earlier applied for admission as a student of the Inner Temple he certified that he had no convictions for any relevant criminal offence (certificate dated 31 June 2003). Furthermore, he represented that between 1994 and 1997 he attended Harvard University, Cambridge, Boston, United States of America where he was awarded first class degrees in Chinese and Information Technology. Additionally he suggested that he had studied at Staffordshire University between 2002 and 2003 and was awarded an "*LLM International Trade & Company laws, Postgraduate Distinction*".

2. The Bar Standards Board ("BSB") received a letter in November 2012 suggesting that the appellant was practising without having disclosed a criminal conviction and an investigation was launched.

3. The Investigations and Hearings Team of the BSB wrote to the appellant on 6 March 2013 informing him of the suggestion that he had failed to disclose his convictions and asking him to provide copies of the qualifications set out above. A reply was sought by 28 March 2013. The letter was addressed to the appellant at Troway Hall, Troway, Marsh Lane, Sheffield, S21 5RU. I interpolate to note that this is the address provided to the Bar Council by the appellant and it is said by the respondent that the appellant's mother is the owner of the property: indeed, this was confirmed by a land registry search on 6 February 2014. He was reminded on 21 March 2013 that he was required to respond by 28 March 2013.

4. A telephone call took place on 4 April 2013 during which the case officer, Ms Ashworth, rang the telephone number at Troway Hall. The full note made by Ms Ashworth as to what was said is as follows:

> *"TC to Mr Norton at Troway Hall on 01246 413 809. A lady answered the phone. Mr Norton was not available to speak to as he was ill. Confirmed that the Troway Hall address is a business address and that Mr Norton would receive letters sent to that address (albeit that there may sometimes be a slight delay in him getting it of 1 – 2 weeks). The lady provided Mr Norton's mobile number: 07779 576 499. I telephoned the mobile number and left a voicemail explaining that was calling regarding his response to my letter of 6 March 2013. I left my direct dial and also advised that he could contact me by email, my email address being on the letter of 6 March 2013."*

5. After a number of further failed attempts to reach the appellant, on the 8 May 2013 Ms Ashworth made contact with him on the mobile telephone number set out above ending 499, as provided on 4 April 2013. The note of their conversation is as follows:

> *"Telephone call to Giles Norton on 07779 576 499. Mr Norton answered. I told him who I was and that I was calling in relation to my letter of 6 March 2013. I was waiting for his response. Mr Norton said he was aware of the letter and he would provide a response by the end of this week. I explained that this was a serious matter. He repeated that he would respond this week. "*

6. On 30 May 2013 Ms Ashworth wrote to the appellant indicating that he had failed to respond to the letter of 6 March 2013. He was also asked to sign a consent form in order to enable Staffordshire University to provide confirmation of his qualification from that institution and he was told that Harvard University had been unable to locate either the degree or the relevant enrolment record. The appellant was requested to provide a copy of his degree certificate. He was reminded of his duty to respond promptly under paragraph 905(d) of the Code of Conduct. This communication was sent to Troway Hall and to the appellant's professional email address: gilesnorton@enigmachambers.co.uk

7. On 25 July 2013 Ms Ashworth wrote to the appellant by recorded delivery informing him that the Professional Conduct Committee had decided the complaint against him was to be considered by a five-person Disciplinary Tribunal. He was sent the charge sheet, again by recorded delivery, on 18 September 2013.

8. There were a number of further attempts by the BSB to communicate with the appellant, all of which were seemingly ignored.

9. In due course the appellant was charged with four offences of professional misconduct, which in their amended form are in the following terms:

   i) Professional misconduct contrary to paragraph 902 of the Code of Conduct of the Bar of England and Wales 8 edition, the particulars being that on 1 April 2004 he made a declaration on his call to the Bar which was false in a material respect in that he failed to declare that he had been convicted of three criminal offences on 27 March 1998 at the Sheffield Magistrates' Court, namely two offences of unlawful possession of a CS spray and an offence of wilfully obstructing a police officer in the execution of his duty.

   ii) Professional misconduct contrary to paragraphs 301(a)(i) and 901.7 of the Code of Conduct of the Bar of England and Wales 8 edition, the particulars being that he engaged in conduct that was discreditable to a barrister and which was not fairly disclosed in writing to the Benchers of the Inn before his Call, namely the three offences set out in i) above (this was an alternative to charge i)).

   iii) Professional misconduct contrary to paragraph 902 of the Code of Conduct of the Bar of England and Wales 8 edition, the particulars being that on 1 April 2004 he made a declaration on his call to the Bar that he had an LLM degree from Stafford University in International

Trade and Export and degrees from Harvard University in Chinese and Information Technology.

iv) Professional misconduct contrary to paragraph 905(d) of the Code of Conduct of the Bar of England and Wales 8 edition, the particular being that he failed to respond promptly to requests by the Bar Standards Board for comments and information in letters dated 6 March 2013, 21 March 2013 and 30 May 2013 (having been reminded of his obligation in this regard).

10. On 25 October 2013 Flaux J ordered that a five member Disciplinary Tribunal of the Council of the Inns of Court should hear and determine the charges. The appellant was sent a copy of the directions on 29 October 2013, and on 4 December 2013 the appellant was informed in writing and by email that the hearing was to take place on Friday 7 February 2014.

11. On 31 January 2014 the appellant was provided with details in an email of a slight and purely technical amendment to the second charge, which is of no relevance to the present application.

12. On 4 February 2014 an email was sent by the appellant from an email address sales@medibee.co.uk to Michael Carter at the BSB in which he indicated he had "*just received your email*" on an old computer system. He claimed he had previously been unaware that the hearing had been listed. He also maintained that his address was Ridgefield, Monayash Road, Bakewell, DE45 1FG. He suggested all the earlier emails from the BSB had been "spammed". He requested an adjournment in order to prepare and to obtain representation.

13. Michael Carter replied on the same day. He highlighted that the correspondence had been sent to his chambers address, Enigma Chambers, at Troway Hall, which Mr Carter observed is the address at which the appellant is currently registered as a sole practitioner by the Bar Council. It was pointed out that the charges had been served on 19 Sept 2013 by recorded delivery at that address, which the appellant had informed the Bar Council was his home address. The charges were signed for on delivery. In those circumstances, it was suggested that for the purposes of the disciplinary proceedings the appellant had been validly served at his current or last known address. It was observed that the Code of Conduct required and, since 6 January 2014, the BSB Handbook requires the appellant to notify the Bar Council of any change as to his practising address. The BSB therefore adopted the position that the appellant was to be treated as having been aware of the entirety of the relevant correspondence. The appellant was also informed that if he wished for the proceedings to be adjourned he needed to apply to the Bar Tribunal and Adjudication Service. The appellant was given the email address at which any application to adjourn should be addressed, and it was indicated the request needed to be directed at the chairman of the tribunal.

14. On 6 February 2014 Mr Carter wrote again to the appellant (at 8.08 am), noting that no application to adjourn the proceedings had been received. At 12.35 the appellant replied stating that he was "*totally unaware of the process*" and that he did not know how to request an adjournment. He asked if there was a specific

form that needed to be used. He claimed that "*I have been unable to comply with anything in this case due to receiving your email on an old computer system we were searching, as all our email accounts changed, it was only due to the old system having old settings that I became aware of this."*

15. Mr Carter replied at 13.45 indicating that no specific form had to be used and he provided, once again, the relevant email address for the application. Mr Carter noted that at no stage had the appellant denied receiving the papers that had been served at Troway Hall.

16. At 14.05 the appellant sent a further email, stating that he did not live at Troway Hall, which he maintained was purely a business address. He suggested that any mail would have been redirected "*whilst I have been away*", returned to sender or simply left at the address. He suggested he had no control over these matters because several other companies were based at the property. He said he intended to draft an adjournment application.

17. At 15.51 the appellant sent, via email, submissions in support of an adjournment. He said he would be unable to attend the hearing on the following day because he lived in Bakewell Derbyshire which was a "*several hour round trip*", he needed to arrange suitable child care, the train fare at peak times would be "*highly excessive*" and he had an appointment at 9.30 am in Derbyshire. He suggested he had only first heard of these proceedings on the 3 or 4 February 2014. He argued that this was the first proposed adjournment of the case, the adverse consequences of granting this request were "minimal", the case needed to be dealt with "*justly, expeditiously and fairly*" and he had made the application at the earliest opportunity.

18. As to the history, he suggested that he first became aware of the relevant email communications about 3 February 2014 when he had *"to find some past legal correspondence and in order to do so obtained the old computer he used to use. On loading the computer up and on it connecting to the email and internet, it downloaded an email from Michael Carter from 31 January 2014. It has subsequently downloaded 7 other emails dating back to 17/10/2013".* He claimed that "[s]*ince having new computers, I had new email settings, user names etc. Accordingly, the email address Mr Carter used was directed to the old settings/old computer. Accordingly I still do not have these emails on my new computer, only on the old computer, which was shelved.*" As regards conventional mail, the appellant set out the following "[f]*rom around early January 2013 any mail sent to* [Troway Hall, Sheffield] *for my attention was either to be (1) redirected (2) returned if redirection is not allowed and a possibility of (3) mail being left at the premises, which I would not have access to. Whilst being abroad in Europe, I understand no mail has been received at my home address of Ridgefield, Monyash Road, Bakewell, Derbyshire from the Bar Council/Bar Standards etc and on my return I have seen nothing. I am unaware of the need to update my home address, whilst being abroad. I am sorry if that has caused any inconvenience. In Europe I have been involved in Forestry and Apiarist matters".* He dealt with the potential consequences as follows: "*[i]f an adjournment is not allowed this will create an injustice as I will not be present, will not be able to obtain any evidence I wish to rely on and will not be able to obtain representation. […] The likely consequences of the proposed adjournment are*

minimal". He recited the need to deal with the case "*justly, expeditiously and fairly*" and he asked for 8 weeks in order to prepare for the hearing.

The Proceedings before the Tribunal

19. At the outset of the hearing on 7 February 2014, the appellant was contacted at 10.45 at the request of the Tribunal. He was asked if there were any additional submissions he wished to make or factors that he wanted the Disciplinary Tribunal to consider. In response, the appellant stated his emails were "*very full*" and he was content to rely on their contents.

20. The tribunal refused the application to adjourn and the hearing took place in the appellant's absence. The relevant part of the tribunal's reserved decision, dated 10 February 2014, sets out the following:

> ***Preliminary Matters***
>
> *6. The Panel convened and noted the absence of the Defendant. They instructed the Clerk to call the Defendant and enquire whether there was anything he wished to add to the emails he had previously sent to TBTAS on the question of the adjournment.*
>
> *7. The Clerk duly called and spoke to the Defendant, who indicated that he did not wish the Tribunal to consider when ruling on his application for an adjournment any material other than that contained in the aforementioned emails.*
>
> *8. The Panel having reconvened the Clerk related the substance of the telephone conversation with the Defendant to the Panel.*
>
> *9. The BSB addressed the Panel and urged them to proceed notwithstanding the Defendant's absence and his application for an adjournment. It submitted that the Defendant was aware of these proceedings and had been validly served. We found the relevant documents had been sent to the last known address. The application for an adjournment was made at the very last minute and did not even express innocence or any indication of what the Defendant's defence would be if the adjournment was granted. The absence of prejudice was not conclusive given that the BSB was not a commercial entity but a regulator acting in the public interest.*
>
> *10. The Panel (having retired to consider the matter) noted that the Defendant was not present but had sent in documents requesting an adjournment and had indicated via the Clerk that he was content for the Panel to consider his application solely on the basis of those documents.*
>
> *11. The Panel found that the Defendant's application was predicated on the fact that he only became aware of the proceedings on 4 February 2013. However, documents had been [sent] to Troway Hall, which was plainly his last known address, from January 2013 onwards, and it is evidence from subsequent communications that he had received them. The Tribunal therefore rejected the Defendant's contention. The next question is whether to*

exercise the discretion in favour of an adjournment. The Defendant said that this was his first application and the consequences of granting an adjournment would be minimal. However, there is a public interest in matters being concluded without undue delay and the Defendant had not made the Panel aware of his intended defence or any evidence he would rely on in support of it; it was therefore doubtful whether an adjournment would achieve anything. In conclusion we decided that it would be inappropriate to grant an adjournment and that it would be in the public interest to proceed.

21. The tribunal found charges 1, 3 and 4 proven to the criminal standard. Charge 2 was not considered separately as it was an alternative to charge 1. The appellant was disbarred on charges 1 and 3 and he was fined £3000 on charge 4. The Bar Standards Board was ordered not to issue the appellant with a practising certificate.

22. The tribunal reached the following findings:

13. The first three charges were based on declarations made by the Defendant when applying to become a Student of Inner Temple and then to be Called to the Bar, read in conjunction with a certificate of conviction for the relevant offences. The overwhelming evidence is that he signed the relevant declarations which required him to disclose any criminal convictions. We are entitled to rely on the certificate from the Magistrates' Court as evidence of his conviction and it follows that the statements he made were false. We therefore find Charge 1 proven.

14. We have considered Charge 2 separately given that it is an alternative charge.

15. As to charge 3, we are satisfied that the Defendant did hold himself out as having the qualification in question. The BSB cannot prove a negative, but it asks us to draw an inference from the fact that it would have been straightforward for the Defendant to produce evidence of the qualifications if he indeed held them (and indeed he was specifically ordered to do so by the directions order of Flaux J).

16. We are satisfied that we can draw that inference. It would have been very easy to produce the required evidence and the BSB could not have been more assiduous in seeking to obtain it. We are satisfied to the relevant standard (i.e. we are sure) that the charge is made out.

17. As to charge 4, there has been a total failure to engage substantively with the BSB, let alone to do so constructively. We consider the charge is made out.

The Appellant's Submissions

23. The appellant's arguments have significantly developed between the grounds of appeal and accompanying skeleton argument, on the one hand, and the oral submissions of Mr Richard Horwell Q.C., on the other.

The Appellant's Written Grounds of Appeal and Skeleton Argument

24. There were originally eight grounds of appeal.

25. It was argued, first, that the tribunal failed to demonstrate that it had exercised the utmost care and caution in proceeding when the appellant was absent and when he was unrepresented. It is suggested that he had only had minimal notice of the charges and the proceedings, and that he had been denied the opportunity of "*explaining which charges he denied and which he admitted and as to the latter, to present his mitigation and to secure representation by counsel*".

26. Second, it was suggested the tribunal focussed inappropriately on the course that it considered was appropriate and in the public interest, and it failed to consider whether it was just to adjourn the case.

27. In the third ground of appeal it was contended that the Tribunal relied excessively on the appellant's suggested failure to reveal whether or not he was contesting the charges, and if they were denied, the nature of his defence. It was suggested he had self-evidently had insufficient time to consider his position and to take advice on the materials served by the Bar Standards Board.

28. In grounds four and eight it was suggested that the Tribunal was over influenced by the risk that an adjournment might prejudice the BSB or the administration of justice, together with the need to deal with the case without delay.

29. In the fifth ground of appeal it was contended that the Tribunal should not have been influenced to the extent that it was by the late application to adjourn.

30. Sixth, it was suggested the Tribunal failed to consider the reasons why the appellant failed to attend.

31. In ground seven was it was argued that the Tribunal erred in holding that the appellant had received correspondence from the BSB from January 2014.

32. Finally, it was contended that the Tribunal gave undue weight to the lack of any evidence from the appellant.

The Oral Submissions on the Appeal

33. Mr Horwell suggested that there was one point of merit on this appeal and his argument focussed solely on whether the tribunal should have granted an adjournment. It is submitted the tribunal applied the wrong test in its consideration of this issue.

34. In the result, he suggests that under section 24(6) Crime and Courts Act 2013 this court should quash the decision of the tribunal and remit the matter for a rehearing, on the basis that the Divisional Court "*can make such order as it thinks fit*".

35. Section 24 provides, as relevant:

Appeals relating to regulation of the Bar

(1) Section 44 of the Senior Courts Act 1981 (extraordinary functions of High Court judges) ceases to have the effect of conferring jurisdiction on judges of the High Court sitting as Visitors to the Inns of Court.

(2) The General Council of the Bar, an Inn of Court, or two or more Inns of Court acting collectively in any manner, may confer a right of appeal to the High Court in respect of a matter relating to—

(a) regulation of barristers,

[…]

(3) An Inn of Court may confer a right of appeal to the High Court in respect of—

(a) a dispute between the Inn and a member of the Inn, or

[…]

and in this subsection any reference to a member of an Inn includes a reference to a person wishing to become a member of that Inn.

(4) A decision of the High Court on an appeal under this section is final.

(5) Subsection (4) does not apply to a decision disbarring a person.

(6) The High Court may make such order as it thinks fit on an appeal under this section.

[…]

36. Practice Direction 52D makes provision for appeals from decisions from Disciplinary Tribunals of the Council of the Inns of Court to the High Court under section 24, in that the appellant's notice is to be served in the Administrative Court (52DPD.28.1) (for appeals made on or after 7 January 2014).

37. As regards applications for adjournments, the Disciplinary Tribunals Regulations 2014 (in force from 6 January 2014) provide as regards absent defendants:

Rule E148
If a Disciplinary Tribunal is satisfied that the relevant procedure has been complied with and the defendant has been duly served (in accordance with [the relevant regulations]) with the [necessary] documents […] but that defendant has not attended at the time and place appointed for the hearing, the Tribunal may nevertheless proceed to hear and determine the charge(s) […] relating to that defendant if it considers it just to do so, […].

38. Mr Horwell accepts that the relevant procedure had been followed and that the appellant had been duly served. He reminded the court that these were grave charges. Indeed, a five-member tribunal was constituted – itself an unusual procedure – and under the sentencing guidelines the starting point in this case was disbarment. Therefore, it is said the potential consequences for this appellant must have been obvious from the start. As no mitigating factors were to be advanced in the appellant's absence, the almost certain result was disbarment. Against that background, Mr Horwell asks whether it was proportional and just not to grant an adjournment.

39. It is stressed that the application was directed at a limited purpose, in that the appellant was simply seeking a delay of eight weeks in order to secure evidence and to obtain representation.

40. As set out above, rule 148 makes it clear that the central issue that needed to be addressed was whether it was just to determine the charges in the absence of the defendant and it is highlighted that the Tribunal failed to address this test in its decision. Instead, it is argued that the Tribunal misdirected itself. The appellant was criticised for not indicating that he intended to plead not guilty to the charges and for failing to describe his defence to the charges. Mr Horwell suggests that it is not a requirement of an application to adjourn a case to outline the anticipated defence or defences to the charges, and the tribunal's conclusion that *"it was […] doubtful whether an adjournment would achieve anything"* was impermissible, given the lack of any proper material before the tribunal on which to base this conclusion.

41. Mr Horwell argues that the starting point for an application of this kind is the House of Lords decision in *R v (Anthony) Jones* 2002 UKHL 5; [2003] 1 AC 1, and particularly the oft-quoted words of Lord Bingham that "[…] *the discretion to commence a trial in the absence of a defendant should be exercised with the utmost care and caution*" [13]. The House of Lords broadly approved the approach adopted by the Court of Appeal in this context, along with the "checklist" it formulated, with one exception (*viz.* the seriousness of the offence was discounted as a relevant consideration). However, it is to be noted that there was some tension in the speeches as to whether it was appropriate to conclude that the absent defendant had waived his right to be present or to be represented, but the majority of the Judicial Committee was clearly of the view that the court was entitled to proceed in the absence of a defendant who has voluntarily absconded (Lord Bingham [15], Lord Nolan [18], Lord Hoffman [19] and Lord Hutton [38]).

42. The relevant paragraph of the Court of Appeal's decision is as follows:

> *"22. (5) In exercising that discretion (viz. to proceed in the absence of an accused), fairness to the defence is of prime importance but fairness to the prosecution must also be taken into account. The judge must have regard to all the circumstances of the case including, in particular: (i) the nature and circumstances of the defendant's behaviour in absenting himself from the trial or disrupting it, as the case may be and, in particular, whether his behaviour was*

> *deliberate, voluntary and such as plainly waived his right to appear;(ii) whether an adjournment might result in the defendant being caught or attending voluntarily and/or not disrupting the proceedings;(iii) the likely length of such an adjournment;(iv) whether the defendant, though absent, is, or wishes to be, legally represented at the trial or has, by his conduct, waived his right to representation;(v) whether an absent defendant's legal representatives are able to receive instructions from him during the trial and the extent to which they are able to present his defence;(vi) the extent of the disadvantage to the defendant in not being able to give his account of events, having regard to the nature of the evidence against him;(vii) the risk of the jury reaching an improper conclusion about the absence of the defendant;(viii) […];(ix) the general public interest and the particular interest of victims and witnesses that a trial should take place within a reasonable time of the events to which it relates;(x) the effect of delay on the memories of witnesses;(xi) where there is more than one defendant and not all have absconded, the undesirability of separate trials, and the prospects of a fair trial for the defendants who are present. "*

43. Although this decision relates to criminal proceedings, it is suggested that the approach in *Jones* should be followed in the instant case given particularly the serious consequences that were likely to result from an adverse conclusion against this appellant. In *Alan Roderick Tait v The Royal College of Veterinary Surgeons* Privy Council Appeal No. 67 of 2002, the Judicial Committee decided that in the case of a practising veterinary surgeon the Disciplinary Committee of the Royal College of Veterinary Surgeons did not have an unfettered discretion when ruling on an application by the accused to adjourn the hearing on the grounds of ill health. Instead, "*the discretion was a severely constrained one"* which needs to comply with the requirements of *Jones* [8]. There have been similar decisions relating to other disciplinary tribunals such as *Yusuf v The Royal Pharmaceutical Society of Great Britain* [2010] EWHC 867 (Admin) and *R (on the application of Abigail Abiodun Raheem) v The Nursing and Midwifery Council* [2012] EWHC 2549 (Admin). In the latter case Holman J emphasised that Lord Bingham's exhortation to proceed with the utmost caution before hearing the case in the accused's absence "*is much more than mere lip service to a phrase used by Lord Bingham of Cornhill. If it is the law that in this sort of situation a committee or tribunal should exercise its discretion 'with the utmost care and caution', it is extremely important that the committee or tribunal in question demonstrates by its language (even though, of course, it need not use those precise words) that it appreciates that the discretion which it is exercising is one that requires to be exercised with that degree of care and caution. […]"* [34].

44. Mr Horwell particularly underlines that in deciding whether or not it was just to proceed in the appellant's absence, foremost in the minds of the tribunal should have been the question of fairness to the defendant, given it was impossible to conclude sustainably that he had "voluntarily absconded" or he had issued a plain

or unequivocal waiver. Indeed, it is argued that the appellant had made clear that he had not waived those rights, and instead he had set out he needed time to secure representation and to obtain documents, and in any event the tribunal did not find that he had deliberately avoided the hearing. Rather, it concluded that he had had notice of the proceedings, there was a public interest in matters being concluded without undue delay and it was doubtful whether an adjournment would achieve anything.

45. The appellant argues there was no identifiable prejudice to the BSB's case given there were no lay witnesses, and this was the first occasion when a hearing date had been fixed. Although Mr Horwell accepts that it is not necessary for the Tribunal to use a particular formula, he suggests it must nonetheless demonstrate that the principles in *Jones* had been followed.

The Respondent's submissions

46. Mr Nikki Singla for the board emphasises that these were not criminal proceedings, although the standard applied is that of proof beyond a reasonable doubt. He argues that the court should consider "the practical realities". He suggests that in applying the correct test the tribunal is not required to indicate in terms that it has proceeded with the "utmost caution". Instead, it is necessary to consider the decision overall. This was a five-person bench and the chairman was an experienced judge. Mr Singla submits that tribunals are presumed to act justly without being reminded of this requirement and that it is reasonable to expect that the chairman was aware of the test he needed to apply. Mr Singla had brought the terms of rule 148 to the tribunal's attention before they retired. He accepts that *Jones* was not expressly mentioned but it is suggested it was applied in everything the tribunal did.

47. Mr Singla emphasises that the judge postponed the commencement of the proceedings in order to make enquiries as to the position of the appellant. This, it is submitted, does not usually happen and accordingly the judge took exceptional steps in the appellant's interests. It is stressed that the defendants in these cases are barristers and that they will necessarily be aware that if an adjournment request is unsuccessful, the trial will go ahead. It was open to the appellant to assert his innocence and he would have been aware if the application was unsuccessful he would run the risk of losing the opportunity to establish that the charges were unfounded. Yet in his written submissions he relied on procedural considerations as opposed to addressing the underlying merits.

48. Mr Singla emphasises that there is no presumption of law that an accused is entitled to an adjournment. Counsel suggested that the appellant's explanation as regards his lack of knowledge of the proceedings is not worthy of belief. Furthermore, he must have known there was a panel of pro bono barristers available to represent him. The consequences, suggests Mr Singla, were not necessarily minimal: reconvening the Tribunal may take some time (there is a significant backlog of cases) and it creates the possibility that a barrister may be accepting work who should not be in practice (albeit there is a power to suspend that requires a separate hearing: rule E251).

49. Mr Singla highlights that the appellant had failed to provide his certificates as ordered and he suggests that it was doubtful that an adjournment would achieve anything useful.

Discussion

50. During the discussion between the bench and Mr Singla prior to the tribunal reaching the decision to proceed in the appellant's absence, Mr Singla submitted that the case should not be adjourned. He criticised the appellant's contention that a delay of eight weeks would not involve prejudice to the BSB, and it was suggested that the appellant's argument ignored the board's responsibility to protect the public interest in the context of serious allegations. He reminded the tribunal that the power to proceed without the accused was set out in rule 148. When the chairman asked if there was any part of this provision that ought to be read out, Mr Singla responded "*[n]o, it simply says that you have the power to proceed with the jurisdiction to do so, obviously subject to your discretion. Prejudice is really neither here nor there, it is not dealing with the point"* [transcript page 8]. The chairman thereafter asked to what extent the panel was able to take into account that there was an allegation of non-cooperation, to which Mr Singla indicated this factor had been reflected in a distinct charge.

51. In my judgment, this exchange contains a number of troubling features. The attention of the bench was not drawn to the authority of *Jones*, and the submissions made to the tribunal tended to suggest that the discretion to proceed in the absence of the person charged was general or unfettered, and that prejudice was not a relevant issue. I accept Mr Singla's submission that in his response to the bench (set out above) he meant to indicate that prejudice **to the BSB** was not a factor to be taken into account, but that is not what he said. Instead, the issue of prejudice was simply described as being irrelevant and the tribunal was not reminded that fairness to the accused – including any disadvantage to him that may result from a decision to proceed in his absence – needed to be considered when resolving the application to adjourn.

52. The procedures of the tribunal do not require the accused – at any stage – to indicate whether he intends to contest the charges or to provide a description of the defence that he proposes to advance. Although I accept that the extent of the information provided by the accused is a relevant consideration when ruling on an application on his behalf to adjourn, this must be accorded proportional treatment. The tribunal is obliged to focus on the *Jones* criteria, amongst which is the need for the tribunal to bear in mind the extent of the disadvantage to the defendant in not being able to give his account of events, having regard to the nature of the evidence against him. In this sense, it will be of assistance to him to indicate his intended plea and the nature of the case he will be unable to present if an adjournment is not granted. However, this is simply one of the factors that need to be borne in mind by the tribunal.

53. The central matters referred to by the tribunal in its decision as regards the proposed adjournment were: i) the BSB had urged that the case should continue; ii) the appellant had been served with the relevant documentation at his last known address, and therefore his contention that he had only lately received notice of the proceedings was rejected; iii) the application had been made at the

last moment; iv) in his request, the appellant failed to express his innocence or provide any indication of his defence, and as a result it was doubtful whether an adjournment would achieve anything; and v) prejudice was relevant because the BSB represented the public interest, and that it was appropriate – in the public interest – to proceed.

54. There are fundamental problems with this analysis, particularly when it is set alongside the non-exhaustive list of factors which the Court of Appeal in *Jones* indicated needs to take into account in these circumstances. First, although the tribunal decided that the appellant had been served with the documents substantially in advance of the hearing, it made no finding as to whether he had deliberately avoided attending the trial, thereby waiving his right to appear, or that he had voluntarily chosen to be absent. Accordingly, the tribunal failed to address whether the reasons advanced by the appellant justified his absence, regardless of when he had received the documentation. Second, the tribunal failed to consider whether an adjournment might result in the accused attending at the next hearing. Third, although the tribunal expressed the conclusion that delaying the trial was unlikely to achieve anything, this was based solely on the appellant's failure to set out his defence in the application to adjourn as opposed to a more general review of the issues and evidence in the case. Fourth, although the tribunal correctly expressed the view that it is in the public interest for proceedings of this kind to be concluded timeously, there was no consideration of the lack of any victims or witnesses who would be prejudiced by a delay, or that this was not a case in which the memories of witnesses would be adversely affected.

55. In summary, therefore, in order to exercise the "*severely constrained*" discretion to conduct a trial in the accused's absence, the tribunal must proceed with the "*utmost care and caution*" and it must apply those parts of the *Jones* criteria that are relevant. The incorrect indication given to the bench – which was seemingly accepted – was that its discretion was general or unfettered; there was no reference to the *Jones* criteria; and there is, in the result, a real risk that the tribunal did not properly apply the factors which are of "*prime importance*" in order to secure fairness to the defence, whilst taking into account the need to be fair to the prosecution.

56. It follows that I consider the tribunal misdirected itself when it decided not to grant an adjournment. I would quash the decision and remit the case for a rehearing before a fresh Disciplinary Tribunal.

Mr Justice Stewart:

57. I agree.