Neutral Citation Number: [2021] EWHC 2830 (Admin)

Case No: CO/4017/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/10/2021

Before :

THE HONOURABLE MRS JUSTICE COLLINS RICE

- -

Between :

MR EHI ANDREW UKIWA

- **Appellant**

and -

BAR STANDARDS BOARD

Respondent

- -
- -

Dr Anton van Dellen (instructed on a direct access basis) for the **Appellant**
Mr Robert Clay (instructed by the Bar Standards Board) for the **Respondent**

Hearing date: 12th October 2021

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Approved Judgment

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Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10am Friday 22nd October 2021.

Mrs Justice Collins Rice:

Introduction

1. Mr Ukiwa appeals against a determination dated 16th October 2020 of a Bar Tribunals and Adjudication Service (BTAS) Tribunal ('the Tribunal'). As a result of that determination, he has been disbarred.

2. The determination followed disciplinary proceedings in which four charges of professional misconduct were found proved against him. The first three related to a course of conduct in 2013, associated with Mr Ukiwa's divorce proceedings. The fourth concerned his failure to report to the Bar Standards Board (BSB) a finding of dishonesty made against him by a court dealing with those proceedings in 2016.

3. In summary, Mr Ukiwa was found to have deliberately, and in order to deceive the court and his wife, misstated her address to a court. That was found to be so that someone other than his wife would receive the divorce papers at the address given, return an acknowledgement of service purporting to be signed by her from that address, and thereby enable him fraudulently to obtain a divorce from her without her knowledge.

Procedural Background

4. Mr Ukiwa obtained a decree nisi and decree absolute on the basis of an acknowledgment of service apparently signed by his then wife. His wife applied for these to be set aside on the grounds that she had not in fact been served with papers, her signature had been forged, and the divorce had as a result been obtained fraudulently.

5. The matter came before HHJ Karp in the Family Court at Barnet on 15th December 2016. By the day of the hearing, Mr Ukiwa had accepted that the signature on the papers was not his wife's, and that the divorce decrees had to be set aside. HHJ Karp nevertheless proceeded with the hearing and received written and oral evidence on the question of whether the decrees had been obtained fraudulently. It seems that this was in response to an earlier suggestion from the Queen's Proctor (who has functions in relation to cases that may be about sham marriages or fraudulent divorces) for a ruling on fraud.

6. In a short extempore judgment, HHJ Karp found the wife an honest witness and accepted she had not received or signed the papers. She found Mr Ukiwa 'an unconvincing and unreliable witness'. She noted he had admitted he had had contact details for his wife but had made no attempt to obtain an address for service by those means. She rejected his account that he did not want to approach her directly for fear of her being abusive. She found his explanation for giving the wrong address to court – that the address he had been given had been supplied to him second or third hand by another in good faith – to be 'wholly incredible'. She ruled out any possible innocent or accidental explanation for the forged signature.

7. She satisfied herself to the criminal standard of proof:

> "I am sure that [Mr Ukiwa] deliberately and in an attempt to deceive the court and his wife wrongly stated that the wife's address was [… Peckham …], knowing that the wife had no connection with that address, and that someone else at that address would complete and return the acknowledgment of service with the intention of obtaining a divorce fraudulently."

8. Her Order set aside the decrees, but did not include a finding or other provision on the issue of obtaining the divorce fraudulently.

The Tribunal Proceedings

9. Both the BSB and Mr Ukiwa were represented by Counsel at his disciplinary Tribunal, and both Counsel submitted written notes in advance.

10. The note on behalf of Mr Ukiwa set out that the central factual issues raised by the charges against him were whether he had as a matter of fact pursued the course of conduct alleged in relation to his wife's address, and whether he did so with the intention to obtain a divorce fraudulently, and that '*that will be determined at or by the hearing*' – that is, by the Tribunal's procedures and decision. It noted that HHJ Karp's finding of fraud '*appears to have played no part in the case other than eventually to have founded the evidence for this Complaint*'.

11. Mr Ukiwa's note continued by referring to Rule E169.4, part of the set of rules governing BTAS Tribunal proceedings. Rule E169 appears in the section dealing with 'evidential regulations'. It says this:

> In proceedings before a Disciplinary Tribunal which involve the decision of a court or tribunal in previous proceedings to which the respondent was a party … the following regulations shall apply:
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> …
>
> 4. The judgment of any civil court … may be proved by producing an official copy of the judgment or order, and the findings of fact upon which that judgment or order was based shall be proof of those facts, unless proved to be inaccurate.

12. Mr Ukiwa's note observed that Rule E169.4 might suggest that HHJ Karp's findings of fact would stand as proof of Mr Ukiwa's (fraudulent) conduct unless proved to be inaccurate – in other words that it shifted the burden of proof to Mr Ukiwa to show that any finding of fact was 'inaccurate'. The note asked the Tribunal to rule on burden and standard of proof in relation to departing from HHJ Karp's findings of fact.

13. The BSB's written note (prepared by Mr Clay, who continued to represent the BSB in this appeal) also addressed itself to Rule E169.4. It said it meant HHJ Karp's findings should *prima facie* stand, but that the Tribunal needed to be alert to evidence which

might disprove those findings; if there were no such evidence, or the evidence did not disprove the findings, then the findings would prove the facts.

14. The Tribunal decided in the event to approach fact-finding afresh – reviewing all the evidence before it, including material which had not been before HHJ Karp. It also noted that much of the evidence of the fraud on which her findings had been based was circumstantial, and that that had to be treated with care to see whether it was reliable and whether it did prove guilt – and whether it revealed any other circumstances '*which may be of sufficient reliability and strength to weaken or destroy the case against the respondent*'. It directed itself to the criminal standard of proof, and noted that it would have to reject on *reasonable* grounds any innocent explanation before deciding that the only inference proper to draw was one of guilt.

15. The Tribunal concluded it was 'patently impossible' that whoever forged the signature and returned the papers was *not* working in concert with either Mr Ukiwa or his wife. It disagreed, however, with the Judge's rejection of Mr Ukiwa's explanation that he did not approach his wife because he feared her being abusive, and concluded that fear well-founded. But it agreed the Judge had been right to reject the story of how the address might have been obtained from another and given in good faith; the account was unsupported by any documentary evidence, was inherently improbable, was not capable of being tested in person with any of the other alleged participants and was weak. It concluded in all the circumstances that Mr Ukiwa had believed his wife would not agree to the divorce petition and '*so he decided to go behind her back in the way that we are sure he did*'.

16. The Tribunal reminded itself of Rule E169 and concluded:

> "although some of the findings of fact on which [HHJ Karp's] judgment was based were flawed, the conclusion was not, and the burden on the balance of probabilities passes to the respondent to prove it to have been inaccurate. He has failed to do so."

Basis of Appeal

17. This is a statutory appeal from a BTAS tribunal to the High Court by virtue of rules made further to section 24 of the Crime and Courts Act 2013. Mr Ukiwa appeals as of right.

18. The parties agree that it is governed by Civil Procedure Rule 52. An appeal will be allowed if the decision of the Tribunal was (a) wrong or (b) unjust because of a serious procedural or other irregularity in the proceedings of the Tribunal.

19. Mr Ukiwa says the Tribunal misdirected itself on Rule E169, and that was a serious procedural irregularity rendering its decision unjust. He says the Rule imposes a threshold test to be addressed by the Tribunal at the outset. It is a test of 'inaccuracy', which must be construed narrowly, and only if inaccuracy is established may the Tribunal depart, or consider departing, from a court's findings of fact. It is otherwise bound by those findings. He says the Tribunal erred by addressing the factual issues

de novo and considering new evidence without first having directed itself to the test of inaccuracy. He says this is an absolute – in other words a jurisdictional – requirement: failure to observe it is inevitably vitiating, regardless of any merits arguments, because it is something the Tribunal was not entitled and had no power to do at all. He says the Tribunal's approach to fact-finding was therefore in breach of the express requirements of natural justice in the Tribunal's rules, and inconsistent with established authorities indicating that fact-finding tribunals of this sort must defer to previous factual decisions of authoritative adjudicative bodies.

20. He also says the Tribunal was wrong to characterise evidence of the conversation on which Mr Ukiwa relied to support his account of giving the address in good faith as being incapable of being tested and to draw adverse inferences from the lack of documentary evidence for it.

Analysis

21. Mr Ukiwa does not say the Tribunal's decision was 'wrong' in the sense that its conclusions lay outside the range of decisions it might have been entitled to make on a proper basis. He contends instead that the Tribunal's hearing was fatally flawed by procedural irregularity so that the decision must, properly and in fairness, be set aside and taken again.

22. I have reflected with great care on what it is said the Tribunal did wrong here. That is because this appeal is a somewhat counter-intuitive procedural challenge. On the face of its adjudication, the Tribunal's approach, procedure and thought processes went to considerable lengths to give Mr Ukiwa the benefit of any and all possible doubts, notwithstanding the highly adverse, and unhesitating, factual findings in the judgment of HHJ Karp. Instead of simply relying on those findings, which would surely have made determinations of misconduct inevitable, the Tribunal decided that it would be fairer to Mr Ukiwa, and in the interests of justice more generally, to test them itself.

23. There were good reasons for the Tribunal to proceed with this sort of caution. The extempore judgment of HHJ Karp is brief. It is quite short on evidential analysis. It turns to a significant degree on emphatic negative findings about the credibility of Mr Ukiwa and emphatic positive findings about the credibility of his wife. And it was a rather unusual exercise in addressing the issue of fraud, when that had become largely academic in the family proceedings (even an unnecessary digression) in view of Mr Ukiwa's agreement that the divorce decrees had to be quashed in any event. If there were any doubts about simply adopting the court's conclusions for the rather different purposes of a disciplinary tribunal, then they were doubts that it might not be fair to Mr Ukiwa to do so without rather more investigation and probing of the case against him.

24. The Tribunal itself evidently saw the fresh fact-finding exercise on which it embarked as double-checking whether it really was right and fair to rely on HHJ Karp's findings. It set itself the task of being satisfied (to the criminal standard) that HHJ Karp's findings were not flawed, or inaccurate in the sense of being wrong or insufficiently supported, and that it would have reached the same conclusions itself. It took pains to direct itself carefully on the limits of circumstantial evidence. It reached some conclusions on the evidence – particularly as regards his wife – that were considerably more favourable to Mr Ukiwa than HHJ Karp's. It explored in some detail all the conceivable alternative explanations for events – including those put forward by Mr Ukiwa - and gave detailed

reasons for being unable to accept they could ultimately raise any reasonable doubts in his favour. And it found in the end no basis for coming to any other conclusion than that reached by HHJ Karp. It had, in other words, stress-tested the adverse conclusions the court had reached and concluded that they were, even when subjected to anxious scrutiny in the interests of Mr Ukiwa, the right ones.

25. So when it is put to me that the Tribunal should instead simply have adopted HHJ Karp's findings as a default, considered whether an issue of 'inaccuracy' arose on a rather narrow interpretation, meaning something closer to a case for rectification than a disagreement over the weighing and balance of the evidence, and only if that gateway threshold was crossed proceed to review the evidence for itself, it seems counter-intuitive to hear that that was a procedural entitlement of which Mr Ukiwa was wrongly deprived.

26. A BTAS Tribunal has broad evidential powers, subject to 'the rules of natural justice' (rule E165) and of course the overriding objective of doing justice in a case and respecting respondents' rights (including by virtue of the Human Rights Act 1998) to a fair trial.

27. Rule E169 reads, in this context, as a familiar sort of provision exempting a regulator from its burden of proving facts (and a Tribunal from establishing them) in a case where those facts have already been established by other courts. Its opening subclauses deal with criminal conviction cases – which in the case of professional people may often lead to disciplinary proceedings based on those convictions – and establishes that a certificate of conviction *shall be conclusive proof* that the respondent committed the offence. Rule E169.4 is different – it is drafted permissively ('a judgment of a civil court *may* be proved' by its certificate) and provisionally ('unless proved to be inaccurate').

28. The public policy underlying provisions such as these is self-evident – that disciplinary proceedings should not be thought of as providing an opportunity for informal collateral appeal against past court decisions, or requiring unnecessary re-proving of facts where all the relevant facts have already been found, either by a jury or by a court, in proceedings bound by principles of justice and rules of evidence at least as exacting as those binding a disciplinary tribunal if not more so. In the case of a criminal trial, it also acknowledges the impossibility of going behind a jury verdict and the impermissibly of trying to do so. In the case of a civil trial, where findings of fact will be set out in a reasoned judgment, it is a matter of avoiding wasteful reduplication of time and effort.

29. It is worth noting in that connection, that E169.4 applies even where facts have been found by a court only to the civil standard (balance of probabilities) whereas the BSB can otherwise be required to satisfy a BTAS Tribunal of facts to the criminal standard (so that it is sure). Where, as in the present case, fraud is alleged, the ordinary civil standard is elevated in any event, and HHJ Karp had properly addressed herself to the criminal standard. But the general effect of Rule E169.4 goes wider.

30. The interpretation of Rule E169.4 was not in active contention at the Tribunal proceedings, and the Tribunal's procedure does not appear to have been objected to at the time. The question originally raised by Mr Ukiwa about burden and standard of proof was not answered by the Tribunal before it had tested the position on the

hypothesis most favourable to him. The interpretation of Rule E169.4 now contended for by Mr Ukiwa in this appeal – that it amounts to a jurisdictional fetter on a Tribunal considering evidence, where relevant facts have been found in other proceedings, without first addressing itself to the inaccuracy of the record of the findings, and for that purpose alone (as opposed to considering sustainability of the findings on the evidence) – was not put to the Tribunal. That is not surprising. In its context – both generally and in Mr Ukiwa's case in particular – it is an interpretation which at first sight is unnecessary, improbable and capable of producing real injustice.

31. Mr Ukiwa says that I am nevertheless driven to it, if not as a simple matter of interpretation then by principle and by authority: the principle of deference by a tribunal of this kind to decisions of the courts, and the authority of the Supreme Court in *R oao G v The Governors of X School* [2011] UKSC 30. I am not persuaded that that case can be read in support of any general legal principle that tribunals are deprived of fact-finding jurisdiction in any case where another tribunal or court has exercised *its* fact-finding jurisdiction. On the contrary, it supports the opposite proposition, that where a statutory scheme means to exclude the possibility of a tribunal receiving representations that findings of fact made by another competent decision-making body were wrongly made, it will say so clearly and explicitly.

32. The jurisdiction of fact-finding tribunals depends on their individual statutory context. The proposition that BTAS tribunals are subject to a jurisdictional fetter on finding facts and doing justice in a case where another adjudicative body has exercised fact-finding functions (absent narrow 'inaccuracy') does not appear from its immediate context and is not apparent from general principle and authority. I find no basis for it and nothing to commend it.

33. Rule E169 is not a jurisdictional provision, it is a rule of evidence. It provides a default for pre-existing fact-finding to be adopted by the BSB and the Tribunal without re-proof. In the case of previous civil proceedings, that is subject to the proviso that if the relevant factual findings are proved to the satisfaction of the Tribunal to be inaccurate – untrue or wrong, so that it would be unfair for the findings to be relied on – the default is disapplied. (As an aside, that is likely to be rare, at any rate where no significant new evidence is adduced and routes of appeal against the earlier findings have lapsed or been exhausted. Mr Ukiwa's case was unusual, in that facts had been found in proceedings which were technically unnecessary for the disposal of the substance of the case.) For all these reasons, I am entirely satisfied that no jurisdictional error appears in this case.

34. I can discern no other procedural irregularity, even of a non-jurisdictional nature, in this case. The Tribunal was addressed on, and addressed itself properly to, the potential relevance of Rule E169. It could have relied on the findings of HHJ Karp, and could have put Mr Ukiwa to the whole task of proving them inconsistent with the truth, but decided instead, in the particular circumstances, to deprive the BSB and itself of the benefits of the provision. I do not consider that an irregularity.

35. I have also reflected on the separate objection made to the basis on which the Tribunal rejected Mr Ukiwa's account of acquiring the address he gave the court in good faith from another. I do not agree that the Tribunal went wrong here. It did not simply make assumptions, or rely on presumptions, based on lack of documentation or incapability of being tested. It looked at the positive evidence in support of this account – from Mr

Ukiwa himself and in a written statement from the alleged supplier of the address – and rejected it as unconvincing. It was an improbable story in its own right. The alleged supplier was not available to be examined on his statement. The account relied on the part played by unnamed and untraceable third parties who could not be examined either. It had left no discernible record in places where such records would be expected – for example in messages to and fro, including via alleged professional intermediaries. The Tribunal, and HHJ Karp, considered the evidence substantively and on its merits and found it not to justify any weight being placed on it. They were properly entitled to do so, and for the reasons they gave.

36. I cannot see that the Tribunal failed to do its procedural job properly in any material respect in this case. In any event, if, as I have found, an alleged procedural irregularity is not jurisdictional (that is, does not go to the validity of proceedings, regardless of the merits or the results) then it is of concern to an appeal court only to the extent that it is productive of injustice.

37. Even if the Tribunal's decision to go back to first principles on its fact-finding could be described as irregular, it is not arguable – and was not argued before me – that it was productive of injustice to Mr Ukiwa in substance. On the contrary, it was from start to finish an exercise in going the extra mile to ensure that Mr Ukiwa was not subjected to prejudice or unfairness in the proceedings before it, whether as a result of the decision of HHJ Karp or the default application of Rule E169. The Tribunal made no new finding of fact adverse to him. In the end it found no reason to depart from the conclusions HHJ Karp had reached or to disturb the findings of fact she had made on the questions which were ultimately dispositive of the proceedings, and it explained why not.

38. On the specific issue of Mr Ukiwa's account of obtaining and providing the address in good faith, then whether the Tribunal relied on HHJ Karp's finding or came to its own decision about it, and *even if* real weight could or should have been given to this account, it is not clear what difference it could have made. Both the Tribunal and the Judge had found that Mr Ukiwa had in fact supplied the wrong address to the court, a specific postal address with which his wife had no connection at all. They had also found a clear link between the wrong address and the forged signature. They had found it impossible to conclude that there could be an innocent explanation for this link: the address could not have been an honest mistake because no mistaken recipient would have known the wife's signature, copied it, and filed the acknowledgment of service at court. They found the fraud proven on these facts alone, and they were entitled to do so.

Conclusion

39. The BTAS Tribunal proceedings were not seriously irregular, on a jurisdictional, procedural or any other basis. The Tribunal gave Mr Ukiwa a proper and very fair hearing. His appeal against its determinations is dismissed.