Case No: PC 2008 0341/A

BEFORE THE VISITORS TO THE INNS OF COURT
ON APPEAL FROM THE DISCIPLINARY TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 14th December 2012

Before:

SIR MICHAEL HARRISON
MISS BUSHRA AHMED
and
MR. BRIAN JENNINGS

- -

Between:

MANJIT PANESAR	**Appellant**
- and -	
THE BAR STANDARDS BOARD	**Respondent**

- -
- -

THE APPELLANT appeared **In Person**
MR. TOM CROSS (instructed by **The Bar Standards Board**) for the **Respondent**

- -

Approved Judgment
(ON PRELIMINARY ISSUE)

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SIR MICHAEL HARRISON:

Introduction

1. This is our unanimous judgment on a preliminary issue which has arisen in this case as to whether the Disciplinary Tribunal which heard the case against the appellant on 1st July 2009 was properly constituted and, if it was not, what the effect of that is.

Background

2. By way of background, on 10th May 2006 the Council of the Inns of Court ("COIC") adopted arrangements for establishing the Tribunals Appointment Body ("TAB") with the intention of recruiting people interested in being on lay or barrister panels for sitting on Disciplinary Tribunals. Under its terms of reference, lay and barrister panel members were to be appointed for five years renewable once for a further five years, but existing barrister panel members were permitted to remain on the panel for up to three years, that is to say, until 9th May 2009.

3. It has recently been discovered that some historic decisions by Inns of Court Disciplinary Tribunals may have been reached by panels, the appointment of one or more of whose members may have been technically defective. As a result, on 9th March 2012 the Directions Judge, Sir Anthony May, directed the Bar Standards Board ("BSB") to make enquiries to determine the relevant facts concerning the appointment of the non-judicial members of the Disciplinary Tribunal in the circumstances of this case.

4. The Tribunal in this case was nominated by the President of COIC by a Convening Order dated 16th June 2009 to hear three charges of professional misconduct against the appellant. The Tribunal consisted of the Chairman, His Honour Judge Bathurst-Norman, two lay members and two barrister members. One of the barrister members was Ms. Ros Carne. It is her appointment which is in issue in this case.

5. The information obtained as a result of the inquiries directed by the Directions Judge was that, according to COIC, prior to the adoption of TAB's Terms of Reference on the 10th May 2006, no rules governed the recruitment of individuals to COIC's list of panels. The terms of office were indefinite and appointment letters were not regularly, if ever, sent out. However, following the adoption of TAB's Terms of Reference on 10th May 2006, Ms. Carne, who first sat on a Disciplinary Tribunal in June 2002, would not have been eligible to remain on the list of barrister panel members after the expiration of the three-year period from 10th May 2006, namely, after 9th May 2009. It follows that at the time when the Disciplinary Tribunal sat in this case, namely, on 1st July 2009, Ms. Carne was not eligible to be on the list of barrister members to sit on Disciplinary Tribunals.

6. More importantly, it has been discovered that Ms. Carne, who was apparently called to the Bar in November 1986, only held a practising certificate between 6th April 1989 and 31st December 2001.

7. The position therefore is that, when Ms. Carne sat on the Disciplinary Tribunal in this case on 1st July 2009, she, firstly, was not eligible for inclusion on the list of barrister members to sit on the Tribunal and, secondly, she was not a practising barrister. That

factual situation is accepted to be the position by both the appellant and the BSB in this case.

8. So far as the first of those defects is concerned, that is to say, not being on the list of barrister members eligible to sit on a Disciplinary Tribunal, a similar situation arose in the case of ***Russell v. The Bar Standards Board*** (12th July 2012) which was a decision of the Visitors of the Inns of Court chaired by Rabinder Singh J. In that case, a barrister member of the Disciplinary Tribunal was, under the TAB Terms of Reference, no longer eligible for inclusion on the list of barrister members. It was submitted that his nomination by the President was *ultra vires* the Disciplinary Tribunals Regulations 2009. The Visitors rejected the submission that the Regulations and the TAB Terms of Reference should be read as a code to govern the composition of Disciplinary Tribunals. They held that it was the Regulations alone which governed the validity of the nomination of members of the Tribunal by the President. The ineligibility of the Tribunal member for inclusion on the list of barrister members under the TAB Terms of Reference did not, therefore, invalidate the constitution of the Tribunal in that case, as the requirements of the Regulations had been met.

9. As a result of that case, the appellant in this case has quite properly not pursued the point that Ms. Carne was not eligible for inclusion on the list of barrister members under the TAB Terms of Reference. The point at issue in this case, therefore, relates to the fact that Ms. Carne was not a practising barrister when she was nominated by the President.

Statutory provisions

10. Regulation 2(2), which deals with the composition of a Disciplinary Tribun

Tribunal, provides that:

> "A five-person panel shall (subject to paragraph (4) below) consist of the following five persons nominated by the President:
>
> (a) as Chairman, a Judge; and
>
> (b) two lay members; and
>
> (c) two practising barristers of not less than seven years' standing."

11. We were informed that, prior to the 2009 Regulations, the 2005 Regulations had not required a barrister member to be a practising barrister.

12. Regulation 8(1)(c) requires the President to issue a Convening Order specifying, amongst other things, the names and status of the persons constituting the Disciplinary Tribunal to hear the case, and paragraph (3) of that Regulation gives the defendant the right to object to any members of the Tribunal.

The issue

13. There is no dispute in this case that Ms. Carne was not a practising barrister when she was nominated by the President to sit on the Tribunal or when she sat on the Tribunal on 1st July 2009. Her appointment did not, therefore, comply with Regulation 2(2)(c). The issue in this case is what effect that failure to comply with Regulation 2(2)(c) has on the validity of the constitution of the Tribunal. That, in turn, gives rise to the question whether the doctrine of *de facto* authority applies in the circumstances of this case.

De facto authority

14. In the case of ***Russell v. The Bar Standards Board,*** the Visitors considered the issue of *de facto* authority in the event that they were wrong in their conclusion that the Tribunal was validly constituted in accordance with the Regulations. They held that membership of a Disciplinary Tribunal is an office to which the *de facto* doctrine applies as being part of the system of the public administration of justice. In the circumstances of that case, they held that the impugned member did have colourable authority in accordance with the principles mentioned by Butler CJ in the Connecticut case of ***State v. Carroll*** [1871] 38 Conn 449, as approved by Hale LJ (as she then was) in ***Fawdry v. Murfitt*** [2003] QB 104, and that he was not a "usurper" as described in paragraph 18 of the Court of Appeal judgment in ***Coppard v. HM Customs & Excise*** [2003] EWCA (Civ) 511 in the sense that he was not exercising an authority which he knew he did not possess or as to which he was wilfully blind.

15. Of course, the facts of the ***Russell*** case are different from this case because, although both cases involved a Tribunal member who was ineligible for inclusion on the list of barrister members under the TAB Terms of Reference, the Tribunal member in the Russell case was a practising barrister of not less than seven years' standing as required by Regulation 2(2)(c) of the Regulations, whereas in this case Ms. Carne was not a practising barrister as required by that Regulation.

Submissions

16. Having set out the background to this matter, we turn to deal briefly with the submissions that have been made. Mr. Panesar, in his written submissions, submitted that Ms. Carne did not and could not have had *de facto* authority to sit on the Disciplinary Tribunal as she did not have the requisite qualifications to be considered, let alone appointed, as a practising barrister member of the Tribunal as required by Regulation 2(2)(c). He submitted that the Convening Order cannot validate a defective appointment simply by virtue of the Convening Order itself. He submitted that the Convening Order must be in accordance with the Regulations and that, if it is not, it is *ultra vires*, invalid and defective.

17. In his further submissions this morning, Mr. Panesar stressed the mandatory nature of the wording of Regulation 2(2)(c), including the word "shall", and submitted that it would make a mockery of that mandatory requirement if it could not be relied on and if the BSB were simply able, in those circumstances, to rely on the *de facto doctrine.* He said it could result in 'the baker's wife' being on the Panel.

18. He stressed the importance of the Convening Order and submitted that only a cursory investigation in this case would have revealed that Ms. Carne was not a practising barrister. He pointed out, firstly, that it was not known in this case whether or not Ms. Carne was wilfully blind to the fact that she did not qualify under the Regulations to sit on the Tribunal and, secondly, that there had been no statement obtained from her. There had been, he said, no effort to substantiate that she was not wilfully blind to her ineligibility.

19. Mr. Panesar sought to rely on paragraphs 25, 27 and 28 of the ***Russell*** case, but Mr. Cross pointed out, on behalf of the BSB, that those same paragraphs show that the second issue in the case of ***Russell*** is predicated on the nomination not being in accordance with the Regulations. Mr. Panesar then agreed that the *de facto* doctrine can apply to a nomination which is not in accordance with the requirements. His point was that insufficient enquiries had been made to find out what the factual situation was. He said that a witness statement should have been obtained from Ms. Carne and proper enquiries should have been made about the eligibility of the members of the Tribunal and about Ms. Carne's state of knowledge about the validity of her nomination.

20. Mr. Cross pointed out that Mr. Panesar had not suggested anything in the circumstances of this case to make the BSB think she knew or had shut her eyes to the fact that she did not have authority. He explained how the BSB has had to spend a great deal of time this year in correspondence with COIC about potential defects in Disciplinary Tribunals going back years and years. He also suggested that there could have been a difficulty in the BSB approaching Ms. Carne about her knowledge of her eligibility to be a member of the Tribunal because the BSB is a party to the dispute.

Conclusions

21. The doctrine of *de facto* authority is an ancient one. The central requirement for the operation of the doctrine is that the person exercising the office must have been reputed to hold it. In the ***Fawdry*** case, Hale LJ (as she then was) quoted with approval the following passage from the 8th edition of Wade and Forsyth, Administrative Law at pages 291 to 292:

> "The acts of [an] officer or judge may be held to be valid in law even though his own appointment is invalid and in truth he has no legal power at all. The logic of annulling all his acts has to yield to the desirability of upholding them where he has acted in the office under a general supposition of his competence to do so."

22. Applying that statement to the circumstances of this case, the appointment of Ms. Carne was invalid because she was not a practising barrister at the relevant time, contrary to the requirement of Regulation 2(2)(c). In truth, she had no legal power at all, yet she acted in her office under a general supposition at the time that she was competent to do so. In our view, the doctrine of *de facto* authority is capable of applying in those circumstances. Whether it should apply in those circumstances will

depend, amongst other things, on whether Ms. Carne had a colourable title and whether or not she was a "usurper".

23. So far as the question of colourable title is concerned, in the ***Fawdry*** case Hale LJ (as she then was) cited with approval the following passage from the judgment of Butler CJ in the ***Carroll*** case at pages 471 to 472 as follows:

> "An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised. First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be. Second, under colour of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like. Third, under the colour of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public …"

24. In our view, Ms. Carne had colourable authority in accordance with those principles. Her nomination fell within at least the third category mentioned in that extract because she was not eligible for appointment as she was not a practising barrister at the time, and also because there was a want of power in the appointing body, and those matters were unknown to the public. She was specifically named in the Convening Order dated 16th June 2009 and that order demonstrated that she was sitting as a member of the Tribunal. Even though Ms. Carne was not eligible to be nominated, her apparent nomination gave her, in our view, a colourable title.

25. So far as the question of being a "usurper" is concerned, the description arises from the following passage in paragraph 18 of the Court of Appeal in the ***Coppard*** case:

> "We would hold that the de facto doctrine cannot validate the acts, nor therefore ratify the authority, of a person who, though believed by the world to be a judge of the court in which he sits, knows that he is not. We accept, on well-known principles, that a person who knows he lacks authority includes a person who has shut his eyes to that fact when it is obvious, but not a person who has simply neglected to find it out. We will call such a person a usurper."

26. Mr. Panesar had not previously taken the point in his written submissions that a witness statement should have been taken from Ms. Carne, nor had Mr. Panesar requested the BSB to do so. Whilst a witness statement might have been useful, we have to deal with the matter on the evidence before us. There is no evidence as to the state of Ms. Carne's knowledge of her authority to sit on the Tribunal. She must be

taken to know that she was not a practising barrister, but that is a different thing to knowing that she had to be a practising barrister to sit on the Tribunal, as opposed to just being a barrister as had been the case under the previous Regulations.

27. There is nothing in the papers before us to suggest that she knew or deliberately closed her eyes to any obvious lack of authority on her part. She would have been served with the Convening Order naming her as the member of the Tribunal and she must have believed that she had been validly appointed otherwise she would not have sat. Similarly, the other four members of the Tribunal, which included a Judge, must have believed that she had been validly appointed. She was plainly believed, and must have believed herself, to have the necessary authority to sit. In our view, she was not a "usurper" within the meaning of that word as described by the Court of Appeal in the ***Coppard*** case.

28. We have therefore concluded that the fact that Ms. Carne was not a practising barrister as required by Regulation 2(2)(c) of the Regulations does not prevent the operation of the doctrine of *de facto* authority in the circumstances of this case. That doctrine, in our view, applies in this case. We consider that Ms. Carne had *de facto* authority to sit as a member of the Disciplinary Tribunal appointed by the Convening Order of the 16th June 2009.

29. We therefore decide this preliminary issue in favour of the BSB.

30. Now we turn to the question of appeal against sentence.

(The hearing continued)