Michaelmas Term
[2017] UKSC 78
On appeal from: [2016] EWCA Civ 775

JUDGMENT

O'Connor (Appellant) *v* Bar Standards Board (Respondent)

before

Lady Hale, President
Lord Kerr
Lord Wilson
Lady Black
Lord Lloyd-Jones

JUDGMENT GIVEN ON

6 December 2017

Heard on 4 October 2017

Appellant	*Respondent*
Mark Anderson QC S Chelvan (Instructed by Pegasus Legal LDP)	Alison Padfield (Instructed by BLM)

LORD LLOYD-JONES: (with whom Lady Hale, Lord Kerr, Lord Wilson and Lady Black agree)

1. In these proceedings the appellant, Ms O'Connor, a practising barrister, claims damages under the Human Rights Act 1998 against the respondent, the Bar Standards Board ("the BSB"), alleging discrimination in her enjoyment of the right to a fair trial, in breach of article 14 of the European Convention on Human Rights ("ECHR") considered in conjunction with article 6 ECHR. The appellant, who is black, alleges that the BSB discriminated against her on grounds of her race in bringing disciplinary proceedings which ended in her acquittal on appeal in August 2012.

2. On 9 June 2010 the BSB Complaints Committee brought 6 disciplinary charges against the appellant. Charges 1-3 each alleged professional misconduct in that she had conducted litigation by signing a statement of truth on behalf of a party to litigation. Charge 4 alleged professional misconduct in that, in conducting litigation by signing a statement of truth on behalf of a party to litigation, she failed to have regard to Public Access Work Guidance for Barristers, issued by the General Council of the Bar. Charge 5 alleged professional misconduct in that she engaged in conduct discreditable to a barrister by committing an offence under section 70(8) of the Courts and Legal Services Act 1990 as a member of an unregulated limited liability partnership which "filed" a defence and counterclaim with the claimant's solicitor, thereby unlawfully conducting litigation. Charge 6 alleged professional misconduct in that she engaged in conduct likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute by committing the offence contrary to section 70(8) of the Courts and Legal Services Act 1990 referred to in Charge 5.

3. On 23 May 2011 a Disciplinary Tribunal found Charges 1-5 proved. Charge 6 was dismissed.

4. The appellant appealed to the Visitors to the Inns of Court ("the Visitors"). (It should be noted that the procedure for an appeal to the Visitors with which we are concerned in this case is no longer in force, having been replaced by an appeal to the High Court. See section 24(1) of the Crime and Courts Act 2013 which came into force on 7 January 2014; *Tariq Rehman v The Bar Standards Board* [2016] EWHC 1199 (Admin), at para 22, Hickinbottom J.) On 17 August 2012 her appeal was allowed. The Visitors found that none of the conduct alleged against the appellant involved any breach of the Code of Conduct of the Bar of England and Wales. Sir Andrew Collins, delivering the judgment of the Visitors, observed that

they had no doubt that none of these charges should stand. In the light of this conclusion it was not necessary for the Visitors to rule on two further submissions, namely that there had been procedural unfairness in the course of the hearing and that there was a lack of reasons in the decision of the tribunal. The Visitors observed, however, that there was in their view considerable force in those submissions.

5. The appellant issued the present proceedings against the BSB on 21 February 2013. The appellant relied on various causes of action including allegations of violation of articles 6 and 14 ECHR, contrary to section 6 of the Human Rights Act 1998. By its defence the BSB denied the appellant's allegations and also maintained that the claims under the 1998 Act were time-barred. On 9 October 2013 the appellant issued an application for directions. These included an application for permission to amend her particulars of claim and directions for the service of a reply. The draft amended pleading did not answer the BSB's plea that the claim was time-barred. The appellant did not serve a reply.

6. On 3 January 2014 the BSB issued an application seeking an order that the statement of case be struck out pursuant to CPR rule 3.4(2) on the grounds that it disclosed no reasonable grounds for bringing the claim or that summary judgment be given in its favour pursuant to CPR Part 24. On 28 March 2014 Deputy Master Eyre heard the application. The BSB maintained that none of the claims had a real prospect of success and that, in any event, the limitation defence was bound to succeed. Deputy Master Eyre granted the application with costs. He held:

> "(1) The allegation is on its face time-barred and there is no application to extend the time limits; and
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> (2) So far as the allegation rests on the allegations supporting misfeasance it must fail.
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> (3) The allegation rests also on a general assertion that the defendant is habitually or systematically unfair to black barristers, an allegation which is demurrable.
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> (4) The evidence is quite to the contrary."

7. The appellant's appeal was heard by Warby J [2014] EWHC 4324 (QB) who on 18 December 2014 held that there was sufficiently pleaded a case that the BSB indirectly discriminated against the appellant on racial or ethnic grounds by bringing the disciplinary proceedings against her. He did not consider that it was possible for the court to determine that the appellant had no real prospect of establishing that the

statistics on which she relied were significant (at paras 63, 65). However, he held (at para 79) that the claim was time-barred by section 7(5) of the 1998 Act.

> "Here, the 'act complained of' in the one human rights claim that I have held to be both adequately pleaded and sustainable for the purposes of a summary judgment application is the BSB's 'prosecution' of the appellant. The decision to bring proceedings was taken on 9 June 2010 or at the latest in late July 2010 when the charges were served on the appellant. If time runs from either of those dates then the one-year time limit expired some 17 or 18 months before the issue of these proceedings in February 2013. If the BSB's 'prosecution' of the appellant is considered to be a continuing state of affairs up to the tribunal decision, time under section 7 expired in May 2012."

Warby J also rejected (at para 81) the submission on behalf of the appellant that the deputy master had been wrong not to grant her an extension of time under section 7(5)(b) of the 1998 Act.

8. The appellant appealed to the Court of Appeal. In its judgment of 25 July 2016 the Court of Appeal (Lord Dyson MR, Elias and Sharp LJJ) [2016] 1 WLR 4085 held that the one year time limit under section 7(5)(a) of the 1998 Act had started to run when the Disciplinary Tribunal had found the charges against the claimant proved and so had expired before she had issued her claim. The Court of Appeal refused a renewed application for permission to appeal on the ground that the limitation period should have been extended pursuant to section 7(5)(b) of the 1998 Act.

9. On 8 December 2016 the Supreme Court granted permission to appeal only in respect of the issue under section 7(5)(a) of the 1998 Act.

10. The following issues arise on this appeal.

> (1) Are the disciplinary proceedings brought by the BSB against the appellant to be considered a series of discrete acts or a single continuing act for the purposes of section 6(1)(a) of the 1998 Act?
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> (2) If the latter, does that act end with the verdict of the Disciplinary Tribunal or with the verdict of the Visitors?

Furthermore, by a respondent's notice, the BSB contends that the decision of the Court of Appeal should be affirmed on grounds other than those relied on by that court, namely that Warby J erred in holding that the article 14 claim had a real prospect of success. In this regard, the BSB also seeks permission to adduce new evidence of fact, thereby replicating a respondent's notice and related application to adduce new evidence which were before the Court of Appeal.

Relevant Provisions

11. Article 6(1) ECHR provides in relevant part:

> "(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. …"

12. Article 14 ECHR provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

13. Section 6 of the 1998 Act provides in relevant part:

> "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> …
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> (6) 'An act' includes a failure to act …"

14. Section 7 of the 1998 Act provides in relevant part:

> "(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may -

> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal; or
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> (b) rely on the Convention right or rights concerned in any legal proceedings,
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> but only if he is (or would be) a victim of the unlawful act.
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> …
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> (5) Proceedings under subsection (1)(a) must be brought before the end of -
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> (a) the period of one year beginning with the date on which the act complained of took place; or
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> (b) such longer period as the court or tribunal considers equitable having regard to all the circumstances,
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> but that is subject to any rule imposing a stricter time limit in relation to the procedure in question."

The nature of the discrimination claim

15. Before addressing the application of section 7(5)(a) to the present proceedings, it is necessary to consider the precise nature of the discrimination claim which the appellant wishes to make. In particular it is necessary to establish whether the complaint is directed at the conduct of the BSB in bringing and pursuing the prosecution against this appellant or, more generally, at alleged systemic discrimination against BME barristers.

16. The discrimination claim is pleaded in the Particulars of Claim in very general terms which are vague and unclear. The relevant paragraphs provide:

> "22. The defendant infringed the claimant's right to a fair trial on grounds of her race, in breach of article 14 of the Convention.

> 23. The refusal to allow sufficient time to prepare is in line with the defendant's general complaints process which impacts disproportionately on black and ethnic Barristers. Black and ethnic Barristers are more likely to have a complaint referred for disciplinary action, are more likely to be convicted, and are more likely to have those convictions upheld. The claimant avers that the fact that every element of the defendant's disciplinary system impacts on black and ethnic Barristers more adversely indicates that there is a systemic bias against black and ethnic Barristers.
>
> 24. There is no objective or reasonable reason why, given that black and ethnic Barrister make up such a small proportion of the Bar, they are more likely to be investigated following a complaint, more likely to have a complaint referred for prosecution, more likely to be prosecuted, more likely to be convicted and more likely to have those convictions upheld. There is no objective reason why the defendant ignored its own rules and prosecuted the claimant.
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> …
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> 29. The defendant discriminated against the claimant indirectly in breach of section 53(2), 53(3) of the Equality Act 2010, section 1 of the Race Relations Act 1976 and article 14 of the Convention. The defendant's rules are applied in such a way that although the Code of Conduct of the Bar applies to all Barristers in England and Wales it particularly disadvantages ethnic Barristers who make up only a small proportion of the membership of the Bar. The claimant again repeats para 20 of these Particulars."

The reference in para 23 to refusal to allow sufficient time to prepare is no longer relevant as that basis of claim did not survive the hearing before Warby J. Para 20 of the pleading had alleged, inter alia, that the BSB had acted knowing that it had no power to act because its actions were in breach of its own rules and knowing that its action would injure the claimant.

17. Warby J had this to say about the pleaded case:

> "63. The relevant parts of the appellant's particulars of claim could be more clearly formulated and do contain some surplus wording. In my judgment however she has, within paras 22-24 and 29, sufficiently pleaded a case that the BSB indirectly discriminated against her on racial or ethnic grounds by bringing the disciplinary 'prosecution' against her. At 23 and 24 she alleges that in practice the complaints process impacts disproportionately on BME barristers in particular ways. These include the allegation that BME barristers are more likely to have a complaint referred for prosecution. She also alleges, though it may not be necessary for her to do so, that there is no objective reason to justify this different treatment. At 29 she expressly alleges indirect discrimination in that the relevant rules 'are applied in such a way' by the BSB that 'it particularly disadvantages black barristers'."

18. At para 79 he concluded that the "act complained of" in the one human rights claim that he held to be both adequately pleaded and sustainable for the purposes of a summary judgment application was "the BSB's 'prosecution' of the appellant". However, he also considered (at para 62) that the decision of the Grand Chamber of the European Court of Human Rights in *DH v Czech Republic* (2008) 47 EHRR 3 showed that in an appropriate case statistics may be relied on to establish that an applicant is a member of a group which has been treated differently in practice from others in a comparable situation in a way which is disproportionately prejudicial to members of that group, and thereby shift the onus to the public body concerned to provide evidence of an objective and reasonable justification for the difference.

19. In the Court of Appeal Lord Dyson MR (at para 21) approached the issue of limitation on the basis that the complaint was that the proceedings against the appellant were in breach of article 14. Elias LJ (at paras 38 and 39) suggested that some confusion had arisen over the article 14 claim. He distinguished between an allegation of discriminatory treatment of the appellant herself and a distinct, wider allegation that there is systemic discrimination against BME barristers. In the former case the focus had to be on the act or acts directed against the appellant and the limitation period fell to be determined by reference to that act or those acts. In that regard the disproportionate treatment of BME barristers was potentially evidence of discrimination against the appellant herself. In the latter case each BME barrister subjected to the disciplinary process would, on the analysis of *DH*, be a victim with the right to take action to challenge the wider systemic discrimination. The remedy for such a claim would, however, be different and it was highly arguable that the limitation period would run from a different time. In his view the operation of the limitation period had at all points in the present proceedings been argued on the assumption that it ran by reference to acts directed against the appellant. Accordingly, that gave rise to the question whether the decision to bring disciplinary

proceedings against her, as an alleged act of discrimination, was a continuous act or not and if so, whether it ran until the appeal was determined.

20. On this appeal counsel for the appellant, Mr Mark Anderson QC and Mr S Chelvan, neither of whom appeared below, have made clear in their written case and in the oral submissions of Mr Anderson that the appellant's complaint is that the disciplinary proceedings were brought against her for reasons which infringe her Convention rights. The BSB's written case states that the only act complained of which survived the hearing before Warby J is the alleged violation of article 14 by indirect discrimination pursuant to the *DH v Czech Republic* line of Strasbourg case law. However, it later states that the only surviving allegation of discrimination is that by bringing disciplinary proceedings against the appellant, the respondent indirectly discriminated against her contrary to article 14 pursuant to the *DH v Czech Republic* line of Strasbourg case law.

21. I agree with Elias LJ as to the basis on which the claim has been presented and I gratefully adopt his analysis. The appellant's challenge is to the conduct of the BSB in bringing and pursuing disciplinary proceedings against her, not to an alleged state of affairs in which BME lawyers were more likely to be the subject of such proceedings. The appellant's reliance on *DH* is intended to demonstrate that the disciplinary proceedings against her were discriminatory. This has an important impact on the issue of limitation. The bringing and pursuit of disciplinary proceedings must be the focus of the investigation into "the date on which the act complained of took place".

Section 7(5)(a): A series of acts or a single act?

22. The question which then arises in relation to the application of section 7(5)(a) to the present proceedings is whether the bringing of disciplinary proceedings by the BSB is to be considered a series of discrete acts or a single continuous act.

23. The expression "the date on which the act complained of took place" is apt to address a single event. However, the provision should not be read narrowly. There will be many situations in which the conduct which gives rise to the infringement of a Convention right will not be an instantaneous act but a course of conduct. The words of section 7(5)(a) should be given a meaning which enables them to apply to a continuing act of alleged incompatibility. While it is correct that section 7(5)(b) may often empower a court to grant an extension of time to bring proceedings in respect of a course of conduct which has extended over a period of longer than a year, leaving a claimant to have recourse to such a discretionary remedy is inappropriate. It cannot justify limiting the scope of section 7(5)(a). The primary

provision in 7(5)(a) must be capable of providing an effective and workable rule for situations where the infringement arises from a course of conduct.

24. It is then necessary to consider whether the alleged infringement of Convention rights in the present case arises from a course of conduct as opposed to a single act.

25. On behalf of the appellant, Mr Anderson submits that where a barrister complains that she was prosecuted for reasons which infringe her Convention rights, she is not complaining about each of the individual steps which comprise the prosecution but about the fact that the BSB prosecuted her, a state of affairs which lasted until the prosecution came to an end. He also draws attention to section 6(6) of the 1998 Act which provides that an act includes a failure to act. He submits that the BSB had the power to decide at any moment after preferring the charges and before the verdict of the Visitors that it would offer no evidence and, in certain circumstances, a duty to offer no evidence. However, he accepts that the Court of Appeal was correct to conclude that a failure to act does not arise in this case, provided that it is accepted that the prosecution is a single continuous act.

26. On behalf of the BSB, Ms Padfield submits that the decision to refer the appellant to a disciplinary tribunal, even if indirectly discriminatory, was a one-off act with potentially continuing consequences rather than a continuing violation. She submits that this is a case of alleged indirect discrimination and that any unlawfulness does not automatically continue for as long as the prosecution continues. She accepts that there is evidence of disproportionate impact in relation to the decision to refer BME barristers to disciplinary tribunals but submits that there is no evidence of disproportionate impact in relation to the continuation of disciplinary prosecutions or the failure to bring them to an end.

27. The only authority to which we were referred on this issue is *Somerville v Scottish Ministers* [2007] UKHL 44; [2007] 1 WLR 2734. This decision is, however, not particularly illuminating on this point because of the variety of views expressed. The petitioners were serving sentences of imprisonment and were at various times segregated from other prisoners by monthly orders and authorisations that were made over a period of time. They sought judicial review of the decisions to segregate them on the ground that their Convention rights had been infringed. Several of the periods of segregation had concluded more than one year before the proceedings were brought. The House held that the time limit in section 7(5) did not apply to the proceedings and the observations on its operation were therefore obiter. Lord Hope of Craighead stated (at paras 51-52) that he would hold that the phrase "the date on which the act complained of took place" in section 7(5)(a) means, in the case of what may properly be regarded as a continuing act of alleged incompatibility, that time runs from the date when the continuing act ceased, not when it began.

Otherwise it would not be open to a person who was subjected to a continuing act or failure to act which was made unlawful by section 6(1) to take proceedings to bring it to an end without relying on section 7(5)(b) while it was still continuing after the expiry of one year after its commencement. He also considered that, so long as the proceedings were brought within the time permitted by section 7(5)(a) and any longer period allowed under section 7(5)(b), damages may be awarded as just satisfaction for the whole of the period over which the continuing act extends, including any part of it that commenced before the period of one year prior to the date when the proceedings were brought. The question whether the acts complained of in that case were continuing acts or one-off acts with continuing consequences was not easy to determine on the pleadings and he preferred to reserve his opinion on that point.

28. Lord Mance, by contrast, (at para 197), considered that each monthly order and authorisation constituted for the purpose of section 7(5) a separate act in respect of which separate one year limitation periods would run. If a period of segregation has lasted for more than a year the claimant would be left to seek an extension of time under section 7(5)(b). Lord Rodger of Earlsferry (at paras 145-146) preferred to express no view on the point but considered Lord Mance's approach at least arguable. Lord Walker of Gestingthorpe (at para 167) did not expressly address the point but said he agreed on all other issues with Lord Hope and Lord Rodger. Lord Scott of Foscote (at para 81) observed that "act" includes "a failure to act". In his view it therefore followed that the one year beginning with the date on which the act complained of took place should simply be calculated back from the date on which the section 7(1)(a) proceedings were commenced.

29. I consider that the alleged infringement of Convention rights in the present case arises from a single continuous course of conduct. Although disciplinary proceedings brought by the BSB necessarily involve a series of steps, the essence of the complaint made here is the initiation and pursuit of the proceedings to their conclusion, ie the entirety of the course of conduct as opposed to any component steps. As Lord Dyson MR observed in the Court of Appeal (at para 21) without expressing a concluded view on this issue, prosecution is a single process in which the prosecutor takes many steps. It cannot have been the intention of Parliament that each step should be an "act" to which the one year limitation period should apply. I also note in this regard that, were it otherwise, a prosecution which lasted longer than one year could not be relied on in its entirety as a basis of complaint unless proceedings were commenced before the conclusion of the disciplinary proceedings or relief were granted under section 7(5)(b). A claimant would be placed in the difficult position of having to bring a human rights claim within one year of the commencement of what might be lengthy proceedings, without knowing the outcome which might be very material to the claim.

30. On the basis that we are concerned here with a single continuing act of alleged incompatibility, I agree with Lord Hope in *Somerville* (at para 51) that time runs from the date when the continuing act ceased, not when it began.

31. In view of my conclusion on this issue, it is not necessary to consider the appellant's alternative argument based on a failure to act. I would, however, suggest that it may, in certain other circumstances, be necessary to guard against reliance on a failure to reverse an out-of-time decision which would have the potential to subvert the limitation scheme of the Act.

When did the continuing act cease?

32. On the basis that the conduct challenged in these proceedings is the single continuing act of bringing and pursuing disciplinary proceedings against the appellant, it is necessary to consider when that continuing act ceased.

33. In the Court of Appeal Lord Dyson MR, with whom the other members of that court agreed, considered, at para 22, that the question for consideration here was whether "opposing an appeal by a convicted defendant should be regarded as a continuation of the prosecution". His view was that it should not be so regarded. He considered that a prosecution comes to an end with the verdict when the prosecution has run its course. In opposing an appeal by a convicted defendant a prosecutor is not continuing the prosecution but is seeking to uphold the decision of the court or tribunal that has convicted the defendant. In his view, seeking to uphold a conviction is a categorically different act from that of prosecuting.

34. It appears that throughout the current proceedings the disciplinary proceedings brought by the BSB against the appellant have been described as a "prosecution". This is, perhaps, an understandable analogy but it is imprecise and may tend to obscure the fact that the complaint is of discrimination in bringing disciplinary proceedings not a criminal prosecution. There is a danger that this characterisation may influence the outcome on the current issue. Whatever may be the position in relation to an appeal against a criminal conviction, in considering whether in the present case the BSB's conduct in proceedings before the Visitors should be considered as forming part of the same continuing act as its conduct in proceedings before the Disciplinary Tribunal for the purpose of the rules on limitation, it is necessary to have regard to the nature of the regulatory scheme and the precise features of such conduct.

35. Several features of the regulatory scheme and the Visitors' jurisdiction, as applicable to the disciplinary proceedings against this appellant lead me to the

conclusion that the BSB's part in proceedings before the Disciplinary Tribunal and those before the Visitors should be regarded for this purpose as part of a single continuing act.

(1) In *In re S (A Barrister)* [1970] 1 QB 160 five judges sitting as Visitors of the Inns of Court stated (at p 166G-H), that "[t]he judges as visitors have always had supervisory powers and their decision, upon an appeal by a barrister or student to them, has always been the final determination of such matter". The precise origins of the long-established visitorial jurisdiction of the judges to hear disciplinary appeals from the Inns of Court are obscure. (See J H Baker, Judicial Review of the judges as Visitors to the Inns of Court, (1992) Public Law 411.) For present purposes it is sufficient to record that in 1886 the Council of Judges resolved that "the jurisdiction as to appeals from decisions of the benchers of the several Inns of Court is now vested in the judges of the High Court". (See *R v Visitors to the Inns of Court, Ex p Calder* [1994] QB 1 per Sir Donald Nicholls V-C at pp 35D-E). This arrangement continued notwithstanding the transfer by the Inns of Court of their disciplinary function (other than the power to pronounce and carry into effect any sentence) to the Senate of the Inns of Court in 1966 and to the Council of the Inns of Court in 1986. The first Hearings before the Visitors Rules were issued in 1980.

(2) One aspect of the continuing supervisory jurisdiction of the Visitors was apparent in their role in hearing applications and giving directions for the conduct of the disciplinary proceedings. Regulation 9(1) of The Disciplinary Tribunals Regulations 2009 (Annexe K to the Code of Conduct of the Bar of England and Wales) required the President of a Disciplinary Tribunal to designate a judge or judges to perform this function. The directions to be given by a designated judge might concern (inter alia) the severance or strike out of charges, the attendance of witnesses, the admission of documents, the admission of facts and such other matters as the judge deemed expedient for the efficient conduct of the hearing. In the proceedings against this appellant Field J heard the appellant's application to strike out the proceedings and gave directions for their conduct.

(3) The function of the Visitors in hearing appeals from Disciplinary Tribunals was a further aspect of this supervisory jurisdiction. The appeal brought by this appellant was governed by the Hearings before the Visitors Rules 2010 (Annexe M to the Code of Conduct).

(4) In cases where one or more charges of professional misconduct had been proved, an appeal against conviction or sentence could be lodged by the

barrister as of right (Regulation 25(1) of The Disciplinary Tribunals Regulations 2009).

(5) In certain circumstances (which did not arise in this case) the BSB could appeal against the dismissal of a charge of professional misconduct with the consent of the Chairman of the BSB or the Chairman of the Complaints Committee or the permission of the visitors (Regulation 25(1)(c), 25(5) of The Disciplinary Tribunals Regulations 2009).

(6) On an appeal the Visitors were required to look afresh at the matters in dispute and to form their own views. They were required to consider whether the charge had been made out to their satisfaction, to the requisite standard of proof. The proper approach was that of an appellate court rehearing the case on its merits. (*R v Visitors to the Inns of Court, Ex p Calder* [1994] QB 1 per Sir Donald Nicholls V-C at pp 42D-F, 42H; per Stuart-Smith LJ at pp 61H - 62D. See also *Lincoln v Daniels* [1962] 1 QB 237, per Devlin LJ at p 256.)

(7) It was open to the Visitors to correct procedural defects and to remedy procedural unfairness before the Disciplinary Tribunal. As Sir Andrew Collins observed in delivering the judgment of the Visitors in the present case, the Visitors were able to hear the matter entirely on its merits. They would give the necessary protection to an appellant and it was not necessary for the matter to be remitted for further consideration by the Tribunal.

(8) Following a finding or sentence of the Tribunal on a charge of professional misconduct, the Treasurer of a defendant's Inn was required to pronounce and implement the sentence. However, the Treasurer was required first to wait for 21 days to allow a notice of appeal to be lodged. Where a defendant had given notice of appeal to the Visitors against a finding or sentence of the Tribunal on a charge of professional misconduct, the pronouncement and implementation of the sentence by the Treasurer of the defendant's Inn were automatically deferred (Regulation 27, The Disciplinary Tribunals Regulations 2009). The verdict of the Tribunal could not be put into effect until after the decision of the Visitors on the appeal.

36. These features, considered cumulatively, persuade me that the role of the BSB in initiating and pursuing these proceedings before the Tribunal and before the Visitors is essentially one continuing act. In these circumstances it is not necessary to express any view as to whether the same conclusion should be drawn in relation to an appeal against a criminal conviction.

37. Before leaving this issue, I should refer to a further submission of Mr Anderson based on *Delcourt v Belgium* (1970) 1 EHRR 355 where the Strasbourg court, in rejecting a submission that article 6 had no application to the Belgian Court of Cassation because it was concerned not with the merits of the case but with the validity of the judgment, observed:

> "Thus, a criminal charge is not really 'determined' as long as the verdict of acquittal or conviction has not become final. Criminal proceedings form an entity and must, in the ordinary way, terminate in an enforceable decision. Proceedings in cassation are one special stage of the criminal proceedings and their consequences may prove decisive for the accused. It would therefore be hard to imagine that proceedings in cassation fall outside the scope of article 6(1)." (at para 25)

38. I do not find this passage of any assistance, even by way of analogy. The Strasbourg court was there concerned with the distinct question as to the scope of application of article 6. As Lord Dyson MR observed in the Court of Appeal (at para 23) in relation to a similar submission based on *Eckle v Federal Republic of Germany* (1982) 5 EHRR 1, this does not touch on the question whether the role of a prosecutor in appeal proceedings is to be considered as a continuation of the act of prosecuting the defendant in the first place.

39. I would therefore allow the appeal. I consider that the conduct of the BSB in bringing and pursuing the disciplinary proceedings was, for the purposes of section 7(5)(a), a single continuing act which continued until the Visitors to the Inns of Court allowed the appeal on 17 August 2012. The present proceedings against the BSB, which were commenced on 21 February 2013, were therefore commenced within a period of one year beginning with the date on which the act complained of took place.

The respondent's notice

40. By its Notice of Objection dated 12 January 2017 the BSB asks this court to uphold the Court of Appeal's decision on the alternative ground that Warby J was wrong to hold that the article 14 claim had real prospects of success. In addition, it seeks permission to adduce new evidence of fact to counter the conclusion of Warby J on this point.

41. The Notice of Objection and the application to adduce new evidence replicate a respondent's notice and related application that were before the Court of Appeal.

Warby J had concluded that the particulars of claim both in their unamended and draft amended forms adequately stated a case, which was not fanciful, that by bringing disciplinary proceedings against the appellant, the BSB indirectly discriminated against her contrary to article 14. In the light of its conclusion as to the limitation period under section 7(5)(a) the Court of Appeal did not address these matters in any detail or express any concluded view. However, Lord Dyson did refer to the main submission made by Ms Padfield for the BSB in this regard which, as before us, was, essentially that the discrimination claim founded on Strasbourg decisions such as *DH v Czech Republic* could have no real prospect of success without statistics sufficient to raise a prima facie case of discrimination, general statements of disproportionate impact being unlikely to be sufficient. In this regard Ms Padfield relied on *Oršuš v Croatia* (2011) 52 EHRR 7. Lord Dyson MR observed (at para 35) that, in his view, there was considerable force in these points and that, at best, the appellant's case, on the basis of the evidence she had adduced so far, was very thin.

42. Had this point been raised in isolation by BSB on an application for permission to appeal to the Court of Appeal, it seems most unlikely that permission would have been granted. It would have been a second appeal and it would not have satisfied the second appeal criteria in that it does not raise an important point of principle or practice and there is no other compelling reason why an appeal should be heard (CPR 52.7 and 52.13). The point is now before this court only because BSB took a limitation point which in my view should fail. It is adventitious that it is before the court at all. Moreover, it cannot be said that the respondent's notice raises a point of law of general public importance. In these circumstances, it would certainly be open to this court to decline to entertain the ground in the respondent's notice.

43. Nevertheless, in the light of the history of these proceedings, I consider it appropriate to address the merits of the respondent's notice. I can do so briefly. I consider that Warby J was correct to conclude on the basis of the evidence before him that there were reasonable grounds for bringing the claim and that it had a real prospect of success. The appellant's case is based, in part, on a 2013 report by Inclusive Employers into the BSB's complaints system. That report analysed data from the period 2007-11 and concluded that (i) BME barristers were disproportionately over-represented in the complaints process in relation to the outcomes of external complaints; (ii) BME barristers were more likely to have a complaint referred to disciplinary action; and (iii) BME barristers were more likely to have complaints upheld. The report went on to find that although there were steps the BSB could take to improve the complaints process from an equality and diversity perspective - in particular the provision of more prompt training for tribunal members which included training in unconscious bias - the procedure itself was not discriminatory and that other factors, as yet unidentified, were causing the disproportions shown in the data. Ms Padfield for the BSB objects that the mere fact of a statistical difference in treatment between two groups is not sufficient to

establish that there is prima facie evidence that the effect of a measure or practice is discriminatory. I accept that in *DH* and in *Sampanis v Greece* (Application No 32526/05), 5 June 2008, the difference in treatment between different groups was so striking as to amount, of itself, to *prima facie* evidence that the effect was discriminatory and to require explanation. That may not be the position in the present case. Nevertheless, I consider that the appellant is entitled to rely on this evidence, so far as it goes, in conjunction with the unhappy history of the proceedings against her, as supporting her case that she has been the victim of discrimination. The BSB's submission in the present case rests on the fallacious assumption that an inference from statistical difference in treatment is the only way in which a claimant can establish an infringement of article 14. As the Strasbourg court has made clear, indirect discrimination can be proved without statistical evidence (*DH* at para 188; *Oršuš* at para 153).

44. Finally, Ms Padfield seeks, by her application to adduce new evidence, to produce a further report by the BSB's research department dated January 2016 and entitled "Complaints at the Bar: An Analysis of ethnicity and gender 2012-2014", in order to counter the 2013 report. I would refuse the application. It is not appropriate for this court to address, for the first time in the course of these proceedings, competing submissions of fact on a strike out application.