Case No: CO/5202/2017

Neutral Citation Number: [2018] EWHC 761 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 April 2018

Before :

THE HONOURABLE MR JUSTICE SUPPERSTONE

- -

Between :

JOSEPH SYKES	**Appellant**
- and -	
BAR STANDARDS BOARD	**Respondent**

- -
- -

The Appellant appeared in person
Guy Micklewright (instructed by **Blake Morgan LLP**) for the **Respondent**

Hearing date: 01 March 2018

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Judgment

Mr Justice Supperstone :

Introduction

1. Mr Sykes appeals against the decision of the Bar Standards Board Authorisations Review Panel (referred to as "the Panel" or "BSB") by letter dated 18 October 2017 refusing his application for a review of the decision of the Inns' Conduct Committee ("ICC") dated 25 July 2017 to re-admit him to the Bar by way of membership of the Honourable Society of Gray's Inn ("Gray's Inn"). This is an appeal from the decision of the Panel brought pursuant to s.24 of the Crime and Courts Act 2013.

2. On 23 May 2003 a disciplinary tribunal of the Council of the Inns of Court found various charges of professional misconduct and inadequate professional service proved as a result of work undertaken by Mr Sykes during the period 2001-2002 and imposed a penalty of disbarment. On 11 January 2005 his appeal to the Visitors to the Inns of Court against this decision (and decisions following further hearings in November 2003 and February 2004) was allowed in respect of three charges, but the appeals against all other findings of professional misconduct and inadequate professional services, and against orders of disbarment, were dismissed. He was disbarred with effect from 23 July 2003 and expelled from Gray's Inn on 16 March 2005.

3. His application to Gray's Inn for re-admission was made on 21 September 2016.

The Regulatory Framework

The ICC Rules (dated 21 February 2014)

4. The material parts of the rules provide:

> "**Part 1 – Purpose and Objective**
>
> 3. The function of the Inns' Conduct Committee is:
>
> (a) To determine any question whether an applicant for admission to an Inn is a fit and proper person to become a practising barrister;
>
> 4. To be eligible for admission to an Inn or Call to the Bar, a person must be a fit and proper person to become a practising barrister.
>
> **Conduct of the Hearing**
>
> 26. The Panel shall treat:
>
> (b) a finding of misconduct by a regulatory … body exercising a regulatory, disciplinary … jurisdiction as sufficient evidence of the commission of the offence in question
>
> but may give such weight to that conviction or offence as it considers reasonable in all the circumstances.

Review of the decision of the Inns' Conduct Committee

34. If in accordance with r.Q19 and r.Q110 of the Handbook, the Inns' Conduct Committee decides that the applicant… is not a fit and proper person to become a practising barrister…, the applicant… shall when sent the written notice of the Inns' Conduct Committee decision be informed in writing that a review of the decision under B10 of the Bar Training Rules may be requested, provided that a request is made in writing to the Bar Standards Board within one month of the date when notice of the Inns' Conduct Committee decision is given."

Statement of Principles and Guidelines for the Inns' Conduct Committee

5. The material parts of this Statement provide as follows:

"**General principles**

4. To be a fit and proper person to practise at the Bar, that person must be honest, of integrity and of good reputation and character. Appendix A to the present Statement ('Fitness to become a practising barrister') contains a statement of the principles to be applied in determining whether an Applicant to an Inn is a fit and proper person.

Appendix A

Fitness to become a practising barrister

A2. By BTR r.Q9, an Applicant is a fit and proper person to become a practising barrister if:

(1) There is no reason to expect that that person, if admitted to an Inn, will engage in conduct which is dishonest or which otherwise makes that person unfit to become a practising barrister;

General

A4. The ten Core Duties which govern practice at the Bar, and the rules which supplement those duties, are set out in The Code of Conduct (Part 2 of the BSB Handbook).

A5. The proper administration of justice requires that:

(1) Clients must feel and be secure in confiding their most personal affairs to a barrister;

(2) The public must have confidence in barristers because of the central role which they play in the administration of justice;

(3) The judiciary must have confidence in those who appear before them in court.

(4) Fellow lawyers must be able to depend totally on the behaviour of their colleagues.

In considering whether an Applicant is a fit and proper person to become a practising barrister, the Panel must be satisfied that the Applicant will be able to fulfil these requirements.

A6. Without prejudice to Paragraph A5 above, there are three fundamental characteristics that any Applicant must display: that he or she is

(1) Honest;

(2) A person of integrity; and

(3) Currently of good reputation and character.

The Panel must be satisfied that any Applicant has all of these characteristics in order to be satisfied that he or she is a fit and proper person to become a practising barrister.

Reputation and Character

A10. The applicant must be of good reputation and character at the date of the application. In making a determination of reputation and character, however, past actions may be taken into account as indicative of future behaviour, unless that inference is rebutted by any relevant or mitigating circumstances. …

Re-admissions

A11. The BTRs relating to an application for admission apply also where the application is for re-admission. … Where there has been a previous finding that the Applicant was not a fit and proper person, the ICC will treat that finding as sufficient evidence that the Applicant was not a fit and proper person (as at the date of the finding). The ICC will want to be provided with full information as to the full facts and circumstances surrounding that finding. The ICC will attach such weight to any previous findings as appears appropriate in all the circumstances.

A12. The ICC will need to be satisfied in re-admission cases that the Applicant is at the date of the application to join an Inn a fit and proper person. This will generally require the Applicant to provide to the ICC evidence of personal progress and change.

> A13. The ICC will always have regard to and proceed in accordance with the Rehabilitation of Offenders Act 1974 and related secondary legislation."

6. The "Criteria and Guidelines" (dated 1 August 2017) that apply to the review decision taken by the Panel provide:

> "2.4 Review Panels deal with reviews of decisions as if the application was being dealt with afresh. A Review Panel shall be entitled to have such regard to the original decision, and to uphold, vary or take into account such decision, as in its absolute discretion it feels appropriate."

7. In *Rehman v Bar Standards Board* [2016] EWHC 1199 (Admin), an appeal against the decision of a Disciplinary Tribunal panel, Hickinbottom J (as he then was) set out at paragraphs 18-25 the regulatory regime and the approach on appeal to be adopted by the High Court. He said:

> "23. CPR Part 52 governs a statutory appeal under section 24 and rule r.E183, CPR rule 52.11(1) restricts an appeal to a 'review' of the tribunal decision; but, by rule 52.11(3)(a), the High Court as the appeal court will allow an appeal where the decision of the Disciplinary Tribunal is (a) wrong or (b) unjust because of a serious procedural or other irregularity in the tribunal's proceedings. The role of this court therefore goes beyond a simple review of the decision on public law grounds – it is possible to challenge factual findings as well as the law – but neither is it a full re-hearing. Because of the important public interest in the finality in litigation, the starting point is that the decision below is correct unless and until the contrary is shown. Laws LJ put it thus in *Subesh v Secretary of State for the Home Department* [2004] EWCA Civ 56 at [44]:
>
> > 'The burden so assumed [by the appellant] is not the burden of proof normally carried by a claimant in first instance proceedings where there are factual disputes. As appellant, if he is to succeed, he must persuade the appeal court or tribunal not merely that a different view of the facts from that taken below is reasonable and possible, but that there are objective grounds upon which the court ought to conclude that a different view is the right one. The divide between these positions is not caught by the difference between a perceived error and a disagreement. In either case the appeal court *disagrees* with the court below, and, indeed, may express itself in such terms. The true distinction is between the case where an appeal court might *prefer* a different view (perhaps on marginal grounds) and one where it concludes that the process of reasoning, and the application of the relevant law, *require* it to adopt a different view. The burden which an appellant assumes is to show that the case falls within this latter category.' (emphasis in the original).

> 24. However, even if to that extent the court has to engage in the merits of the case, the court is required to give due deference to the tribunal below, because (i) with the authority of the elected legislature, the tribunal has been assigned the task of determining the relevant issues; (ii) it is a specialist tribunal, selected for its experience, expertise and training in the task; and (iii) it has the advantage of having heard oral evidence.
>
> 25. Of course, the extent of the deference to be given will depend upon the nature of the issue involved, and the circumstances of the case; but the deference is likely to be great where the issue is one of disputed primary fact which is dependent upon the assessment of oral testimony, or where the issue concerns inferences the court is asked to draw, or where the issue involves an evaluative judgment on the basis of the primary facts, involving a number of different factors that have to be weighed together, which involve balance and degree, in respect of which different tribunals could legitimately come to different conclusions."

8. *Anoom v Bar Standards Board* [2015] EWHC 439 (Admin) was an appeal from the decision of the BSB brought pursuant to s.24 of the Crown and Courts Act 2013. The decision which was the subject of the appeal was that issued by the BSB's Qualifications Committee, now the Authorisations Review Panel. Rose J stated:

> "3. Section 24(4) provides that the decision of the High Court under that section is final. It is agreed that the hearing before the High Court is limited to a review of the Bar Standards Board's decision unless that court considers in the circumstances of an individual appeal that it would be in the interests of justice to hold a re-hearing. In this case, I do not consider that it would be in the interests of justice to carry out more than a review.
>
> 4. This is not, therefore, a re-hearing of the facts but my task is to review, as did the Qualifications Committee, the decision of the ICC panel. I have the powers under the CPR to make whatever decision the Qualifications Committee could have made."

9. *Butt v Solicitors' Regulations Authority* [2010] EWHC 1381 (Admin) was an appeal against a decision of the Solicitors' Regulation Authority (SRA) in which it refused the appellant admission to the Roll of Solicitors. Elias LJ said at para 17:

> "The onus lies firmly on an applicant who is seeking to establish that he has the character which is suitable to be a solicitor. The appropriate approach is set out in the judgment of Sir Anthony Clarke MR in *Jideofo v Law Society* [2007] EWMisc 3 (31 July 2007). The Master of the Rolls endorsed submissions made on behalf of the Law Society to the

> following effect: (1) the test of character and suitability is a necessarily high test; (2) the character and suitability test is not concerned with the punishment, reward or redemption but with whether there is a risk to the public or a risk that there may be damage to the reputation of the profession; and (3) no-one has the right to be admitted as a solicitor and it is for the applicant to discharge the burden of satisfying the test of character and suitability."

Factual Background

10. Mr Sykes was born on 14 December 1957. In 1976 he graduated from Oxford University with a degree in English Language and Literature. Thereafter it appears that he spent some years in New Zealand doing legal work which involved representing clients before tribunals before he returned to England to qualify for the Bar. He studied for the Common Professional Examination ("CPE") in 1996 to 1997, an LLB by conversion in 1997 to 1998, and the Bar Vocational Course ("BVC") from 1998 to 1999.

11. Mr Sykes started his pupillage on 1 October 2000 with Mr Martin Burr, the head of a set of chambers at 146 Temple Chambers, Temple Avenue, London EC4. He was called to the Bar by Gray's Inn on 8 March 2001. His second six-months pupillage began on 1 April 2001.

12. Mr Sykes states that from the start of his second six-month pupillage he was instructed by solicitors in a series of employment, criminal, landlord and tenant, and other cases, specialising in difficult employment law cases, particularly in race discrimination and sexual harassment law.

13. The decision of the Visitors concludes:

> "103. Looking at the matter in the round, Mr Sykes had by July 2002 committed a large number of offences of professional misconduct in the first sixteen months of practice as a barrister. The offences involved taking instructions direct, supplying legal services through a company; handling client settlement money; directly demanding a payment for a client as a pre-condition of working on his case; leaving two separate clients in the lurch, close to Employment Tribunal hearings, and racial abuse of a solicitor with whom he had a commercial dispute. All the offences were serious and some led to specific findings of professional misconduct which was likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.
>
> 104. In our judgment the combination of these offences not only justifies but demands disbarment. It was in that sense, we believe, rather than the sense suggested by Mr Sykes, that the February 2004 tribunal concluded that the gravity of the

> charges which it considered and Mr Sykes' previous record led to no alternative to disbarment being realistically available."

14. In his skeleton argument for this appeal Mr Sykes states:

> "5.4 From 24 July 2003 to date, he continued to enjoy a successful practice as a trial advocate in employment, immigration and tax tribunals, and as an advisor and draftsman in civil matters and appeals, instructed by solicitors, companies and individuals. 40 of [his] appeal cases have been reported…
>
> 5.5 [His] application for readmission as a barrister in September 2016 was made as the result of, firstly, repeated requests by solicitors and clients that he re-gain the right to practise as a barrister, so that he could provide advocacy in civil courts at first instance and on appeal. Secondly, in the last five years, repeated encouragement from members of the judiciary to return to the Bar. Thirdly, [he] would like if permitted to broaden his practise to include civil and criminal work.
>
> 5.6 [His] current practise is free of the multiple client complaints that undid him in 2003."

The Decisions of the ICC and the Panel

15. The ICC (Simon Browne QC (Chair), Heather Rogers QC and Ms Veronica Thompson) in their decision concluded at para 29:

> "Consequently, this Panel is of the view that as of now Mr Sykes is a man of good character. We considered very carefully what he has said, both in his two written submissions and at the hearing. We accept that there is and was no question of dishonesty (that was not a feature of the decision to disbar him, as upheld by the Visitors). Nevertheless, unanimously we are of the view, for the reasons given, that there are not sufficient relevant/mitigating factors to rebut the inference that the past record is indicative of future conduct. The personal progress and change since the disbarment in 2003 as reaffirmed in 2005 is not sufficient to allay the concern of this Panel that the ten Core Duties and matters set out in the Guidelines would not be followed."

16. Accordingly the ICC determined that Mr Sykes is not a fit and proper person to become a practising barrister. There is, the ICC stated, reason to expect that he will engage in conduct which makes him "unfit" to become a practising barrister (see para 30 of the ICC decision).

17. The Panel in their decision letter of 18 October 2017 stated:

"The Panel noted all of the issues that you have raised, but did not agree that these give any reason to depart from the finding of the ICC. In summary, the Panel noted:

- That the ICC Panel was of the view that as of now, you are 'a man of good character'. The Panel was in agreement with this assessment.

- That the ICC Panel was of the view that 'there are not sufficient relevant/mitigating factors to rebut the inference that [your] past record is indicative of future conduct'. The Panel agreed that your reform of character has not been documented sufficiently to provide the necessary evidence (e.g. through customer testimonials, examples of customer care contracts, documented processes covering practice management issues such as complaints/case handling, conflict management or any details of training you have undertaken or are willing to undertake) to rebut the presumption that your past improper conduct would not be repeated. For this reason, the Panel concluded that you are currently not a fit and proper person to become a practising barrister.

The Panel was therefore satisfied that the decision of the ICC that you should be refused re-admission to Gray's Inn was correct and should be upheld."

Grounds of Appeal

18. Mr Sykes advances six grounds of appeal:

i) The Panel erred in law and was wrong, firstly, in failing to find that he had satisfied the ICC criterion of progress and change.

ii) The decision erred in law, in following the ICC, secondly, in failing to find that he is a fit and proper person to be a barrister in all the circumstances.

iii) The decision erred in law in following the ICC, thirdly, in being tainted by pre-determination and bias against him.

iv) The decision erred in law upholding the ICC's decision in that it operated a reverse burden of proof.

v) The BSB review decision erred in law in failing to find against the ICC for finding he had not shown progress and change, without having first identified to him the type of progress and change they considered relevant, either in advance of the ICC hearing or following that hearing with an adjournment to adduce further evidence.

vi) The BSB decision was unlawful as it was made without giving him an oral hearing, or a right to respond to the Panel's preliminary or final views, and

was therefore unjust and contrary to the overriding objective to do justice in CPR 1.1.

The Parties' Submissions and Discussion

19. I shall consider the grounds of appeal in the order taken by Mr Sykes in his oral submissions.

Ground 4: the ICC decision operated a reverse burden of proof

20. Mr Sykes submits that the ICC erred (at para 29) by taking as a starting point that he had to rebut the inference that past misconduct would be repeated in the future given the opportunity. What the ICC failed to do, Mr Sykes submits, was to examine the matter afresh as required by A11-A13. Instead the ICC applied the test set out at A10 for reputation and character, despite finding that he was a person of good character. In so doing the ICC applied the wrong test and one which is necessarily much higher, as it can relate to criminal conduct putting character into doubt and raising the real possibility of re-offending or future criminal conduct. Mr Sykes submits that "it was entirely inappropriate, biased and/or merely confused and prejudicial, for the ICC to apply the Reputation Character test to the broader test of personal progress and change to which a reverse burden of proof did not apply" (see para 25 of his skeleton argument). He suggests that it was as a result of applying the wrong test that the ICC "made no objective, impartial, thorough attempt to test [his] actual personal progress and change" (see para 26 of his skeleton argument).

21. I agree with Mr Micklewright, who appears for the Respondent, that this ground of appeal is misconceived. Paragraph A12 in Appendix A to the ICC Guidelines states that the ICC will need to be satisfied in re-admission cases that the Applicant is at the date of the application to join an Inn a fit and proper person, which will generally require the Applicant to provide to the ICC evidence of personal progress and change. In the context of the regulation of solicitors, the onus of satisfying the Solicitors Regulation Authority that the applicant has met the criteria to be admitted to the Roll of Solicitors "lies firmly on an applicant who is seeking to establish that he has the character which is suitable to be a solicitor… and it is for the applicant to discharge the burden of satisfying the test of character and suitability" (see *Butt* at para 9 above). The same principle applies to the regulation of barristers. It was for Mr Sykes to satisfy the ICC and the Panel that he met the criteria for admission to an Inn of Court, as set out in Section B of the BSB Handbook.

Ground 3: the decisions of the ICC and the Panel were tainted by pre-determination and bias

22. Mr Sykes made clear in his oral submissions that he was alleging actual bias against both the ICC and the Panel.

23. In support of his submissions Mr Sykes referred to the cases of *Porter v Magill* [2002] 2 AC 357 and *In Re Medicaments and Related Classes of Goods (No.2)* [2001] ICR 564.

24. He pointed to seven matters as indicating bias by the ICC against him, which he set out at paragraph 22 of his skeleton argument:

"(1) The ICC's reliance on, and reiteration of, the adverse but historic Visitors' appeal decision on disbarment in January 2005, as determinative of the application for reinstatement as a barrister heard in 2017;

(2) The operation of a reverse burden of proof only permitted in the ICC's Principles and Guidelines in relation to Reputation and Character (at A10), which the ICC determined were not in issue as they found the Appellant a person of good character, to the different question of 'personal progress and change' on a re-admission application;

(3) The ICC's failure to call the Appellant's professional witnesses;

(4) The ICC's failure to read his documented evidence in two lever arches of progress and change;

(5) The ICC attributing no weight to the fact that in 2003 the Appellant was a newly qualified barrister, while by 2017 he was an experienced and successful litigator and advocate;

(6) The ICC criticising him for not complying with professional rules when that was not a criterion in their rules, he had been precluded from complying with Bar rules, it was unlikely he would have been able to requalify as a solicitor or legal executive given disbarment, and the 40 law reports was evidence of compliance with clients' instructions, court rules and advocacy practices over a long period;

(7) The ICC's failure to consider the Appellant's detailed post-hearing submissions concerned with their pre-determination and bias against him."

25. I do not accept any of these criticisms of the ICC decision:

i) The ICC did not consider the Visitors' decision to be "determinative" of the current application. At paras 18-24 and 29 of their decision the ICC examined the circumstances giving rise to the previous disbarment, as it was bound to do, and "ask[ed] questions of Mr Sykes as to his views and current attitude towards the finding of the Visitors in early 2005" (para 18). I agree with the ICC that not only was it "clearly relevant to determine the applicant's views of his previous behaviour and the findings of the Visitors. Further, it was of note to explore what Mr Sykes may have done to alter his conduct and whether and to what extent there had been personal progress and change – as we are invited to do by the applicant's own written submissions" (para 24). The ICC continued (at para 24):

"In the view of this Panel, Mr Sykes seems not to have understood why these matters were important. Good behaviour in support of his professed personal progress and change since

those findings only takes him so far. It is how he has reflected upon those findings, whether he has learned his lesson and his attitude towards going forward which is important."

These were plainly proper matters for the ICC to consider.

ii) As I have already said (see para 21 above), I consider Mr Sykes' submission with regard to the operation of the reverse burden of proof to be misconceived.

iii) At para 16 of the decision the ICC refer to the two character witness statements Mr Sykes provided in relation to his good character. The paragraph refers to paragraph 36 of his further submissions where he states that the two referees were not called. The ICC observes (at para 16): "As to that, no application was made to call them and no indication was given as to what they could add. In any event, as Mr Sykes would not have known when writing his further submissions, the Panel treats Mr Sykes as of good character since 2004 to date".

iv) Mr Sykes included in two lever arch files transcripts of 40 cases in which he had been involved between 1998 and March 2016. He submits that the 40 reports showed that he continued to receive instructions over the period 2003-2016 which indicated client confidence, and showed progress and change from 2003 when there were many client complaints. Further, they showed the continuing confidence of the judiciary in him in that the judges either agreed with the case he was putting forward, or treated him with respect if they did not. At paragraph 14 of the decision the ICC stated that: "it was not necessary for the Panel to consider the *detail* of those cases". The Panel accepted that he acted for a number of clients as a consultant in the Employment Tribunals and on appeal. Many of the cases pre-dated his suspension. In any event, there is no criticism of his legal ability. I invited Mr Sykes to refer to the 40 cases and indicate to me any matter that he considered the ICC should have taken into account. He did not refer to any matters to which the ICC should have had regard.

v) The ICC did have regard (at para 25 of the decision) to Mr Sykes' submission that at the time of his previous conduct "he was younger and inexperienced". The ICC noted that he was then aged in his mid forties, and in their view "the matters giving rise to the disciplinary findings against him (and to his disbarment) could not realistically be said to be attributable to youth or lack of any experience in the world. … The Panel would have expected any person (irrespective of their age) to learn from the experience of being disbarred and from having such a Judgment against them".

vi) Mr Sykes accepted that in his work as an advocate, he had not been subject to the stringent regulation which would have been applicable to him had he been a barrister, and the ICC accepted that no regulatory sanction had been imposed on him since his disbarment (para 13). Nevertheless the ICC was plainly entitled to consider whether his personal progress and change since the disbarment in 2003 was "sufficient to allay the concern of [the ICC] that the ten Core Duties and matters set out in the Guidelines would not be followed" (para 29). The ICC was entitled to investigate whether he was aware of and

would be likely to comply with the various rules and regulations now in force (para 28).

vii) It is clear from the decision of the ICC that it did consider the further submissions made by Mr Sykes. The ICC did refer to his complaints of bias in his further written submissions. At paragraph 24 of their decision they said:

> "In paragraphs 8 and 9 of his further written submissions Mr Sykes complains that findings some 12½ years before may be used against him forever. In the view of this Panel, Mr Sykes seems to not have understood why these matters were important. Good behaviour in support of his professed personal progress and change since those findings only takes him so far. It is how he has reflected upon those findings, whether he has learned his lesson and his attitude going forward which is important."

26. In addition Mr Sykes suggested that the ICC had in paragraph 24 of their decision imported a statement that he did not make at the hearing, namely that he complained that being asked about the Visitors' findings was a "little unfair". However on reflection he accepted, as is the case, that the ICC had correctly recorded that that complaint was made in paragraph 7 of his further written submissions.

27. In my judgment there is no proper basis for the allegations of pre-determination and bias made against the ICC. I similarly reject Mr Sykes' allegation that "the BSB uncritically accepted the ICC's analysis, despite the worrying nature of the ICC's adverse bent" and his submission "that was evidence pointing to the (again) uncomfortable conclusion the BSB was pre-determined and biased against the Appellant" (see para 23 and 23.1 of his skeleton argument).

Ground 5: failure to identify the type of progress and change considered relevant

28. Mr Sykes submits that neither the ICC nor the Panel identified to him the type of progress and change they considered relevant. The ICC did not do so either in advance of the hearing or following the hearing; the Panel did not do so in advance of the hearing but in the review decision did provide guidance on the issue. If the Panel had indicated the documentation referred to in their decision in advance then Mr Sykes says he could have put the documents before the Panel. In the light of the review decision Mr Sykes now seeks to introduce new evidence of his progress and change.

29. I reject this submission. The BSB publishes the criteria that must be satisfied for an applicant to be admitted to an Inn of Court. The ICC Guidelines inform both decision-makers and applicants as to how those criteria are applied. Paragraph 3 of those Guidelines states:

> "It is intended to allow Applicants, Students and other interested parties to be aware of and, as required, assess material factors about the principles and practice of the ICC, and to consider its likely approach to the particular Applicant's

> or Student's conduct, in particular in relation to an anticipated hearing, so as to prepare themselves for any such hearing."

I accept Mr Micklewright's submission that given that it was Mr Sykes who bore the burden of demonstrating that he satisfied the criteria, it was not for the ICC or the Panel to advise him as to how to meet those criteria. I also agree with Mr Micklewright's observation that it would be inappropriate for the BSB to be overly prescriptive about what material should be provided as that would have the potential to adversely impact on the ICC's ability to adapt its approach to the circumstances of the individual case, which could be to an applicant's detriment. In the present case Mr Sykes, in my view, should have been well aware of the type of evidence that he would need to produce to show that there had been progress and change since 2003.

30. The Panel in the review decision merely gave examples of the sort of documentation that it considered could evidence his reform of character (see para 17 above). It is too late now for Mr Sykes to apply for permission to rely on evidence of progress and change as specified in the Panel's letter of refusal, as he does in section 10 of the Appellant's Notice.

31. I do not accept that the evidence that Mr Sykes now seeks to adduce is admissible. It consists of three judicial references: from Employment Judge Hall-Smith, Her Honour Judge Eady QC, and Employment Judge Smail. Their evidence was obtainable with reasonable diligence; and in any event if it had been before the ICC and the Panel I consider it highly unlikely it would have made any difference to the outcome.

32. The first reference dated 3 November 2017 from EJ Hall-Smith stated that he was impressed by the way in which Mr Sykes conducted a case before him in May 2016 on behalf of his client and by his written submissions; and in his second reference, in relation to the same case, he said that "Mr Sykes performance as the Claimant's representative was impressive. I remember the case particularly because it was not straightforward and involved evidence of a technical nature. Mr Sykes was courteous throughout the hearing and conducted the case vigorously on behalf of his client, exhibiting at all times the standards which would be expected of a professional advocate. I reserved judgment in the case and directed the parties' representatives to provide written submissions. Mr Sykes subsequently provided exemplary written submissions which included a number of relevant authorities".

33. HHJ Eady QC in her letter dated 22 February 2018 to the BSB said that Mr Sykes had appeared as an advocate before her on a number of occasions (estimated as being 5-10 times). She said: "Although I can recall at least one occasion when Mr Sykes failed to comply with a direction of the EAT (from recollection, to submit a skeleton argument within a particular time), I am unaware of any conduct on his part similar to that recorded in the previous charges considered by the BSB".

34. EJ Small referred to one case in which Mr Sykes appeared before him where there were three hearings. In respect of the main hearing the judge wrote:

> "Mr Sykes regularly fell out with [Ms X], counsel for the Respondent, before the tribunal. The atmosphere was sometimes heated and often irritable. At one point he sought to adduce into evidence a letter he had composed complaining

> about [Ms X's] behaviour addressed to her Head of Chambers … intimating a complaint to the Bar Standards Board. Whilst [Ms X] occasionally reacted to Mr Sykes inappropriately, we saw nothing that would merit reporting her. I have been an Employment Judge, fee paid and salaried, for 13 years. No-one has ever sought to adduce such a letter in any case I have conducted before or since. Mr Sykes' actions here were unusual."

The judge continued:

> "After this liability hearing, I believe the Claimants, represented by Mrs Jane Arkan [the wife and mother of the Claimants respectively] fell into a dispute with Mr Sykes. He did not appear at a costs hearing where costs were ordered against the Claimants given the misconceived nature of their claim and the unreasonable bringing of it, given the clear evidence of dishonesty against them. To be clear, I am not saying Mr Sykes was dishonest here. I also rejected Mrs Arkan's application for a reconsideration on 26 September 2014."

35. Mr Sykes also wished to adduce evidence from clients who expressed their opinion about the legal services provided by him (see pp.22-33 in the bundle). Certainly some of them were complimentary. Mr Sykes submitted that they showed his change in progress and that he was not the same person as before the tribunal in 2003. Again, this evidence was obtainable with reasonable diligence for the hearings before the ICC and the Panel; and in any event I consider it highly unlikely that this evidence would have made a difference to the outcome.

36. Accordingly for the reasons I have given none of the new evidence is admissible.

Ground 6: the Panel's failure to give the Appellant an oral hearing, or a right to respond to its preliminary or final views

37. Mr Sykes submits that given the nature of the matters complained of, and the multiple grounds of review he advanced in his application for review, and having regard to the manifest defects in the ICC decision, it was contrary to the interests of justice to hold a private hearing from which he was excluded.

38. Further he submits that it was contrary to the BSB's duty as a public body or body performing a public function, namely the regulation of court advocates, not to give him an opportunity to be heard, and to respond to their concerns, contrary to s.6 of the Human Rights Act 1998 and Article 6(1) ECHR. In support of this latter submission Mr Sykes relied on the decision of the European Court of Human Rights in *Fischer v Austria* [1995] 20 EHRR 349 at para 44.

39. Mr Micklewright accepts that Mr Sykes' application for readmission amounts to a determination of his civil rights and obligations. Accordingly Article 6(1) ECHR is engaged. It is not alleged that the hearing before the ICC involved a breach of Article 6(1), but the hearing before the Panel, Mr Sykes submits, did.

40. Mr Sykes did not request an oral hearing before the Panel, nor did he challenge the fact that no oral hearing was to take place. The reason for that may be that the Guidance Notes for a review (amended 18 March 2014) that were operative at the time he made his application for review in July 2017 stated that "all reviews are dealt with on paper only" (para 2.4). However the fact remains that the published Guidance Notes in operation at the time of the review itself did not include that provision and stated that the application for a review will be dealt with "afresh" (see para 6 above). No request for an oral hearing was made by Mr Sykes.

41. In any event compliance with Article 6 does not always require an oral hearing. Whether it does or does not depends on the nature of the decision-making regime and the individual circumstances of the case. In the present case Mr Sykes had the opportunity to make both written and oral submissions before the ICC and to call evidence. That hearing was in public, as is the appeal to this court where again Mr Sykes has had the opportunity to make written and oral submissions.

42. I am entirely satisfied that Mr Sykes has not suffered any prejudice as a result of not being able to make oral submissions to the Panel. I agree with Mr Micklewright that all of the issues in the present case were perfectly capable of being adequately resolved by the Panel on paper.

43. The decision in *Fischer v Austria* does not assist Mr Sykes. When considering compliance with Article 6(1) of the Convention the Court said:

> "43. It remains to be examined whether in the present case Article 6(1) conferred on the applicant the right to an oral hearing. As stated earlier, only the proceedings before the Administrative Court are in issue; …
>
> 44. The practice of the Austrian Administrative Court is not to hear the parties unless one of them asks it to do so. Contrary to what happened in the *Zumtobel* case, Mr Fischer expressly requested an oral hearing in the Administrative Court. This was refused on the ground that it was not likely to contribute to clarifying the case. There is accordingly no question of the applicant's having waived that right.
>
> Furthermore there do not appear to have been any exceptional circumstances that might have justified dispensing with the hearing. The Administrative Court was the first and only judicial body before which Mr Fischer's case was brought; it was able to examine the merits of his complaints; the review addressed not only issues of law but also important factual questions. This being so, and having due regard to the importance of the proceedings in question for the very existence of Mr Fischer's tipping business, the court considers that his right to a 'public hearing' included an entitlement to an 'oral hearing'."

That case, unlike the present case, concerned the decision of a court which, to all intents and purposes, was a court of first and only instance.

Grounds 1 and 2: the failure to find the Appellant had satisfied the criterion of progress and change, and that he was a fit and proper person to be a barrister in all the circumstances

44. The key issue in this application is whether Mr Sykes provided sufficient evidence of both insight into and remediation of the conduct that gave rise to his disbarment.

45. Both the ICC and the Panel concluded that he did not.

46. Mr Sykes submits that the BSB was wrong in failing to find that he had satisfied the ICC criterion of progress and change (Ground 1), and in failing to find that he was a fit and proper person to be a barrister in all the circumstances (Ground 2).

47. In support of these submissions Mr Sykes makes six points:

    i) The ICC Rules do not provide any definition or indication as to the meaning of "progress and change" which suggests that this criterion should be given a wide interpretation.

    ii) The 40 law reports produced by him covering the period 2003-2016 provide documentary evidence of his progress and change.

    iii) The ICC chose not to call his two professional referees to give evidence.

    iv) The ICC accepted that he now had "happy" clients, the predominant issue at the time of his disbarment and appeal having been client complaints.

    v) The ill-founded concern by the ICC that "happy clients" were no substitute for compliance with the rules when he had been precluded from compliance with Bar rules since disbarment and his 40 law reports evidenced compliance with legal and procedural obligations over a long period time. If he had known that the ICC or the Panel required evidence, for example, of training that he had done (see para 17 above) he would have taken the training courses on Professional Negligence, Chambers' Complaints Handling and Civil Litigation Costs that he subsequently took.

    vi) There was oral evidence from him at the ICC hearing as to his personal progress and change. Mr Sykes referred, in particular, to the transcript of the ICC hearing at pp.7C-G, 8A-C, 9D-F, 12D-F, 12G-13B, 22C-E, 22H-23A, and 16(m)-(cc).

48. I do not consider any of that any of these points, individually or cumulatively, indicate that the ICC and/or the BSB erred in respect of the proper interpretation or application of the progress and change criterion.

49. First, there was no misinterpretation of the criterion of progress and change. The meaning of the criterion is clear. What amounts to progress and change depends on the facts of the individual case. The ICC and the BSB had proper regard to all material facts when considering whether there had been progress and change in the instant case.

50. Second, the conduct that led to the disbarment of Mr Sykes related to the matters identified by the Visitors at paragraph 103 of their decision (see para 13 above). What the ICC and the BSB needed to be satisfied of was that there was no reason to expect this sort of conduct to recur. I agree with Mr Micklewright that evidence of courtroom advocacy skills is not probative of the likelihood of recurrence of such conduct. I invited Mr Sykes to refer me to any material in any of the 40 law reports that he produced that he considered the ICC and/or the BSB should have taken into account which they failed to do. There was nothing material that he was able to refer to (see para 25(iv) above).

51. The Panel did however note (at para 14):

> "… that the files lodged by [him] (i.e. the 40 cases) did not include a case against [him] in the *Matter of Costs of Sykes v Wrighton Ors* (UKEAT/0270/15/BA) before Mr Justice Singh, where a wasted costs order made against him was upheld. … The Panel asked Mr Sykes what he had learned from that case. [He] accepts the order was made, and not appealed, although in so doing imparts criticism on the High Court Judge for his failure to consider relevant authorities as to acting on client's instructions."

The Panel recorded that "Mr Sykes further states that the Panel Chair in the present proceedings 'regarded me dubiously as I said this'." However, as the Panel observed, they had sought "to explore with Mr Sykes what he had *learned* from his involvement in this case".

52. Third, no application was made before the ICC by Mr Sykes for his two character referees to give evidence. It was not for the ICC to call evidence on his behalf (see para 25(iii) above). The ICC noted (at para 16) that the two character witness statements confirmed his good character to date, and the ICC treated Mr Sykes as of good character since 2004. Mr Sykes made no complaint in his application to the BSB regarding this issue. During the course of his oral submissions Mr Sykes accepted that it was his error in not calling his referees to give evidence before the ICC.

53. Fourth, the ICC observed (at para 28) that to leave his clients happy is, of course, "welcome". However, ultimately the ICC did not consider that the personal progress and change made by Mr Sykes since his disbarment was sufficient to allay the concern of the Panel that the ten Core Duties and matters set out in the Guidelines would not be followed (para 29).

54. Fifth, the ICC accepted the point made by Mr Sykes that in his work as an advocate he had not been subject to the stringent regulations which would have been applicable to him had he been a barrister or solicitor, and the Panel accepted that no regulatory sanction had been imposed on him since his disbarment (para 13). Nevertheless the ICC was entitled to consider the extent to which he was aware of the various rules and regulations under which he would have to operate if he was re-admitted as a barrister and assess the likelihood of him complying with them. That is precisely what the ICC did and what the BSB considered on the review.

55. Sixth, I am not persuaded that there is any material evidence given by the Appellant to which the ICC or the BSB failed to have regard.

56. On what the ICC correctly described as "the central issue" which it had to consider it noted (at para 26) that:

> "Mr Sykes stated that as his previous problems stemmed from the running of his practice, he would have to undertake some form of training. Nevertheless, no details were given. It was evident Mr Sykes had not researched the courses available through the Bar Council upon Direct Access and Conducting Litigation. There was guidance as to the running of practices, there was guidance as to Equality and Diversity. There was no evidence from Mr Sykes as to any positive efforts from him to even begin to learn about these matters and alter his approach to the running of a practice. The single reference is in paragraph 24 of the further written submissions when he states taking instructions from lay clients 'is no longer an issue given Public Access'. It was striking that during the hearing Mr Sykes said that he 'didn't really draw breath' after the decision to disbar him but, rather, he continued to work for clients much as he had done before. It appeared to the Panel that there had been a lack of adequate or appropriate reflection by Mr Sykes upon the disbarment decision, either at the time or since. By way of further example, on the charge of using racist language he first accepted he was blameworthy but later in the hearing denied calling the lawyer a liar who was more convincing than he was. At best, this was confusing evidence – at worst another example of his failure to show how he has acknowledged any wrongdoing and moved forward."

57. I am entirely satisfied that when considering whether there had been change and progress the ICC properly focussed on whether Mr Sykes had provided sufficient evidence of both insight into and remediation of his conduct that gave rise to his disbarment. In the view of the Panel "it was clearly relevant to determine the Applicant's views of his previous behaviour and the findings of the Visitors. Further, it was of note to explore what Mr Sykes may have done to alter his conduct and whether and to what extent there had been personal progress and change – as we are invited to do by the Applicant's own written submissions" (para 24). Mr Sykes plainly knew that he had to demonstrate progress and change.

58. In my judgment these were findings that the ICC was entitled to make on the evidence and the BSB was equally entitled to conclude as it did on the review.

Conclusion

59. For the reasons I have given none of the grounds of appeal are made out. Accordingly this appeal is dismissed.