Neutral Citation Number: **[2022] EWHC 52 (Admin)**

Case No: CO/1286/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 January 2022

Before :

MR JUSTICE SOOLE

- -

Between :

ROBERT MICHAEL KEARNEY **Appellant**

- and –

BAR STANDARDS BOARD **Respondent**

- -
- -

Mr Simon Csoka QC (instructed by direct access) for the **Appellant**

Ms Harini Iyengar (instructed by the Bar Standards Board) for the **Respondent**

Hearing date: 14 December 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Soole :

1. By decisions of the Disciplinary Tribunal of the Council of the Inns of Court ('the Tribunal')[1] made on 19 March 2021 the appellant barrister ('RK') was found guilty of three charges of professional misconduct towards a mini-pupil (Ms A) committed in January 2015 and suspended from practice for a period of 6 months together with an order of costs in the sum of £3000. At the outset of the disciplinary hearing on 21 December 2020 the Tribunal had rejected two preliminary applications made on his behalf that the case should be stayed (i) because of procedural error and unfairness in the investigation of the complaint and (ii) as an abuse of process in consequence of the delay between the date of the alleged misconduct and the first indication of the complaint to the BSB in November 2018.

2. By this appeal RK advances four grounds of challenge to these decisions. First and secondly, against the refusals of a stay. Thirdly, against the adverse findings of fact in the circumstances of the delay in the making of the complaint. Fourthly, against the sanction.

3. The right of appeal is conferred by s.24 Crime and Courts Act 2013 and Regulations made thereunder by the Respondent ('the BSB'). By s.24(6) the High Court may make such order as it thinks fit on an appeal. As with many appeals from professional disciplinary and other bodies, the appeal is also governed by CPR Part 52, whereunder'*The appeal court will allow an appeal where the decision of the lower court was – (a) wrong; or (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court'*: 52.21(3). CPR 52.21(1) provides that an appeal at this level is usually by way of a review of the decision or decisions below, rather than a rehearing. The parties agree that this appeal is by way of review.

4. The relevant BSB Handbook is the 1st edition (January 2014) which includes the 9th edition of the Code of Conduct. In Section B the Code identifies the Core Duties which include *'CD3 You must act with honesty and integrity'* and *'CD5 You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession'*. In Section C the Conduct Rules include *'rC8 You must not do anything which could reasonably be seen by the public to undermine your honesty, integrity (CD3) and independence (CD4).'*

5. In Part 5 Section A the Complaints Regulations include:

> ***'rE29*** *In determining whether a complaint raised by a person other than the Bar Standards Board potentially discloses a breach of the Handbook, a potential case of professional misconduct or a breach of the Handbook satisfying the disqualification condition, and whether, if it does, it is apt for further consideration, the PCC* [Professional Conduct Committee] *must first consider:*
>
> *…2 whether the complaint has been made:*

[1] HH Judge Andrew Goymer (in the chair), Mr John Walsh, Ms Sarah Baalam, Miss Isabelle Watson, Ms Naomi Davey

.a within twelve months of the conduct of which complaint is made

*…**rE31** Where the PCC decides that the complaint has not been made within the period identified in rE29.2 above it must dismiss the complaint unless it decides that further consideration of the complaint is justified in the public interest, having regard to the regulatory objectives.*

***rE32** Where the PCC has not dismissed a complaint in accordance with…rE31 above, the PCC must next consider, having regard to the enforcement strategy, whether further consideration of the complaint is justified. If the PCC considers that:*

.1 the complaint for any reason lacks substance; or

.2 the complaint cannot be properly or fairly investigated; or

.3 the complaint or its consequences are insufficiently serious to justify further action; or

.4 for any other reason the complaint is not apt for further consideration, then the PCC must dismiss the complaint, although it may also elect in such circumstances to refer the matter for to [sic] *the supervision team in accordance with rE27 above…*

***rE33** If a complaint is not dismissed by the PCC after its initial consideration, it must be investigated and dealt with in the manner set out in Section 5.A3 below and the complainant and barrister must be informed, in writing, that such an investigation is to take place.'*

6. The Complaints Regulations make provision for delegation and extension of time:

***rE3** The PCC and the Chairman of the PCC shall each have the power to authorise any person, group or body to fulfill any function or exercise any power given to them by this Section 5.A. Any authorisations given under rE3 must be in writing and may be either or both retrospective and prospective, and either or both general and for a particular purpose.*

***rE4** Save in respect of the matters dealt with at rE29.2 (time limits for making a complaint), the PCC or the Chairman of the PCC shall have the power to extend any time limits prescribed by this Section 5.A, in their absolute discretion, whenever it appears to be appropriate to do so.'*

7. Ms A was granted anonymity by the Tribunal and so referred to in its decisions. By Order made at this appeal hearing I also granted her anonymity, pursuant to CPR 39.2(4).

Background

8. RK was called to the Bar in 1996 and has practised in criminal law on the Northern Circuit from Chambers in Manchester. Ms A met him in the summer of 2014 while working as a waitress at a restaurant which is in the same building as his Chambers. As she told him, she was a law student and aspiring barrister. He gave his card and offered to help her find a mini-pupillage. In January 2015 she undertook a three-day mini-pupillage (26-28 January) with him.

9. Shortly after the completion of the mini-pupillage she complained to family and friends - in particular her mother, aunt and boyfriend (now husband) – about RK's behaviour to her during the mini-pupillage. In the light of their advice, she decided not to take the matter further. However on 30 November 2018 she raised the matter in an e-mail to the BSB and followed this with the completion of a the complaint form dated 1 February 2019. At this stage she stated that the mini-pupillage had been in the summer of 2014.

10. Ms A's e-mail of 30 November 2018 was triggered by her reading a press report of the result of BSB disciplinary hearing concerning RK in that month. This concerned his admitted professional misconduct towards a male pupil in October 2017 when he 'engaged in excessively physical and unwanted contact' and directed 'uncomfortable, hostile and intimidating' statements to him; for which he received a reprimand and a fine.

11. Her complaint having been made more than 12 months after the alleged conduct, the PCC had to determine the preliminary issues identified in rE31 and rE32. These decisions were delegated by the PCC to Ms Teresa Murphy and Ms Maithili Sreen. By their successive decisions made on 5 March 2019 the matter was allowed to proceed to an investigation of the complaint.

12. By letter dated 27 March 2019 the BSB notified RK of the complaint; and that it had decided to undertake an investigation thereof. As to the passage of time between the alleged conduct and the complaint, it stated: *'Please note that although this complaint was not made within 12 months of the conduct complained of, further consideration of the complaint is justified, despite the lapse of time, pursuant to Regulation E31 and E32 of the Complaints Regulations, given the seriousness of the conduct and the public interest.'* The letter enclosed supporting documents including a 'summary of the complaint'; identified the potential breaches as CD3, CD5, CD8, CD 10 and rC8; and asked for written comments by 18 April 2019.

13. The 'summary of complaint' stated that in the course of the mini-pupillage the barrister had engaged in unwanted sexual conduct towards her, namely:

    i. *said that he kept his nails short as he can't finger a woman with long nails;*

    ii. *asked if* [she] *had sex in her parents' house;*

    iii. *said that eating pineapple makes semen taste better;*

    iv. *on a separate occasion during the three days, during an evening at the Neighbourhood bar in Manchester Spinningfields, told* [her] *to wear short skirts and heels rather than trousers and asked her bra size;*

    v. *During the same evening at the Neighbourhood bar, leant in and smelt* [her] *neck and asked her what perfume she was wearing.*

    vi. *spoke about sex with his wife; was physically too close to* [her] *and had inappropriate contact and hand placement throughout the 3 days.*

14. By his reply dated 23 April 2019 RK referred to the normal time limit of 12 months for complaints; acknowledged that it could be extended; and observed that there were good

reasons for the normal time limit, as it enabled all parties to be able to look back and recollect with some clarity the matters alleged. He continued: *'This is simply not the case here. The passing of so much time places me at such a disadvantage that a fair hearing could not take place. I do not remember a* [Ms A]*, never mind the matters which she has asserted.* [Ms A] *in an email to yourself states that she has 'only been able to remember some things', how then am I supposed to recall what occurred so long ago'*. Ms A had also written to his Chambers. He had not been shown the documents, but his Head of Chambers had mentioned in an email *'…that there was at least one other member of Chambers there, in reference to the night out. This of course would have been a valuable witness to what went on, what was or was not said, the context upon which things were said and the demeanour of the parties. That opportunity is of course now lost to me. I cannot fairly counter this allegation.'*

15. RK continued that he presumed that the genesis for the application was news coverage of the complaint which had been upheld against him in 2018, the reporting of which was unfair and untrue. He referred to the adverse consequences of that matter to his reputation, practice, financial position and career prospects. He concluded that *'I accept that it is in the public interest to investigate this matter, but bearing in mind the punishment given by the tribunal for similar matters, the additional problems I have faced and the insurmountable unfairness due to the delay, it is my submission that it is not in the public interest for the matter to go any further'*.

16. In her response of 26 April 2019 Ms A stated, amongst other things, that *'As stated in my complaint, there was a third person present at the lunch at the Greek restaurant near Chambers, and maybe also someone with us at Oast House when we went for lunch, but I can't say for certain. When we were in the lift in Crown Square, in the robing room and in Neighbourhood bar, there was no one with us'*.

17. In his further response of 16 May 2019 RK observed that he regularly had mini-pupils *'sometimes up 2 or 3 a week, sometimes 2 at a time depending how busy Chambers was. There has never before been any complaint. I have declined to have any further mini-pupils until this matter is resolved.'*

18. By e-mail to the BSB dated 9 June 2019 Ms A advised that she had mistaken the date of her mini-pupillage. She had met RK in the summer of 2014 but the mini pupillage was not until January 2015. She had discovered this from a combination of looking at an old CV and from texts found on her aunt's phone. Her aunt was a barrister who knew RK and had exchanged texts during the week of the mini pupillage.

19. By a 'PCD Report – Analysis Sheet' dated 10 September 2019 and a subsequent Case Examiner's Report a recommendation was made to prefer charges of professional misconduct against RK.

20. In consequence the BSB preferred three such charges of professional misconduct towards Ms A during the course of her mini pupillage between 26 and 28 January 2015. Each Charge alleged the same misconduct, as set out in a Schedule to the charge sheet; contrary, respectively, to Core Duty 3, Core Duty 5 and rC8 of the Code of Conduct. The contents of the Schedule were essentially the same as in the 'summary of complaint', save that item ii added 'and the details about it'; item iv did not refer to the place where the alleged remarks were made; and item v added that the two were alone inside the lift when the alleged conduct occurred.

21. In support of the charges the BSB served witness statements from Ms A, her aunt, mother and boyfriend. Shortly before the hearing it also served a statement on procedural issues from Alfonso Tucay, Head of Conduct Assessment at the BSB.

22. In due course RK submitted his own witness statement dated 10 December 2020. This included that he did not recall the complainant as a mini-pupil; had seen well over 100 mini-pupils since January 2015; and therefore did not recall particular conversations their context. His *'general response'* to the allegations was *'that it did not happen'*. He supplied a witness statement from the Chambers telephonist/receptionist as to the help which he gave to the large number of mini-pupils in the absence of complaint; and character references including three female members of the Manchester Bar and a female instructing solicitor.

23. At the outset of the hearing on 21 December 2020 Mr Simon Csoka QC made a number of preliminary applications on behalf of RK. These included applications that the charges should be dismissed or stayed on the basis that (i) the investigation had been procedurally flawed in a number of respects, in particular concerning the delegation of decision-making to one or more individuals and/or (ii) as an abuse of process and the circumstances of the delay in making the complaint. I will deal with the essential submissions when I consider those renewed arguments in this appeal.

The first application

24. In its oral ruling on the first basis of application, the Tribunal's focus was on the delegation of the decision-making within rE32. It referred to the terms of that rule and rejected the argument that the relevant decision could not be delegated. As to the substance of the judgment that had been exercised, it stated: *'We take the view that we have to look at the substance of the complaint and we have to look overall at the fairness of the judgment that was exercised. It is not a question of ticking boxes or counting up scores in order to do that. One has to look at the nature of what was alleged. It is an allegation that is analogous to workplace sexual harassment against a person who, at the material time, was a mini-pupil. We do not, of course, have to look at it in the context of the criminal law. I know that in the course of the argument I have drawn analogies with the processes of the criminal law, but it is not right that we should apply those indiscriminately. What Mr Csoka eventually complains of is this: that there was no proper investigation as to whether it could be fairly investigated; that matters were not properly pursued; the respondent was not given the opportunity to reply at that stage; other witnesses were not investigated; and matters of that nature. Mr Csoka, of course, is right that one should not look at it retrospectively and say that whatever flaws there were can be cured by the result, that it is prospective in nature. But we are satisfied overall that the investigation was fairly and properly conducted and that this was a proper judgment that the PCC reached in accordance with the Rules.'*

The second application

25. This was followed by the distinct application to dismiss or stay on grounds of abuse of process. In this oral ruling, the Tribunal began by stating that it must not *'…fall into the trap of importing into these proceedings the principles that apply both to the criminal law and employment law. They, of course, provide a helpful analogy but one must not simply translate them slavishly. If I may put it colloquially, we must not just "copy and paste" the criminal rules into this case.'*

26. In the criminal context of abuse of process, the effect of the governing authorities was that *'…it is an exceptional jurisdiction to be exercised only in exceptional circumstances. On that, it is not a matter of evidence or burden of proof; it is a matter for the exercise of judgment. Of course, in the criminal context (which is quite different) the judge has power to control the admissibility of evidence and to give appropriate directions to the jury. But in this particular context of this hearing, we, of course, are perfectly capable of taking into account those relevant matters. We are perfectly capable of discarding irrelevant matters even to the extent, if necessary, declining to hear the evidence at all because we think it would be so unreliable.'*

27. It then recorded RK's account that he did not remember the complainant at all; that he had a large number of mini-pupils; and that the alleged conduct was a good many years ago. He identified the criticisms of the process as essentially twofold. First, that the PCC had made an investigation which was limited and unduly focused on the complainant, her mother, aunt and boyfriend to whom she had made a complaint at the time. The contention was that there should have been further enquiry of barristers and judges who might have material evidence about the circumstances or any complaints. Secondly, that the delay in making the complaint was prejudicial.

28. As to the absence of other witnesses, the Tribunal concluded: *'The complaint is that there were a number of witnesses, one of whom, sadly, is now deceased but others who are alive cannot, after this lapse of time, remember accurately or at all what happened. The suggestion is that if they did not hear the complaint made by the complainant, that that is a reason why we should stop the proceedings. Of course, if they did not hear the complaint, there may be a variety of reasons: they may have been out of earshot or there was no opportunity to complain. These are all matters that, in our judgment, go to the weight of the evidence.'*

29. As to prejudice from delay *'In effect, what he is saying is he cannot remember but he certainly did not do anything of that nature and there is the inability for him to muster defence witnesses; they either cannot be traced or there is no recollection. In addition, the complaint is made that we know nothing of the credibility of the complainant. Mr Csoka rightly submits that the test of abuse of process is perhaps not as stringent as it is in a criminal case.'*

30. The Tribunal expressed its conclusion as follows: *'The question, it seems to be to us, at the end of it all is: is it possible for there to be a fair hearing given the gaps that there may be in the evidence: that witnesses who overheard have not been contacted; no opportunity to find out who they are, to make an assessment that is important and matters of that nature. In the end, of course, when we apply, as I think we must, the principle that this is an exceptional and unusual jurisdiction – whether it be in the criminal law, employment law or Disciplinary Tribunals such as this – we are not in any sense satisfied that we should stop these proceedings. Indeed, forming a judgment about it, we come to the conclusion that we are perfectly capable of assessing all those matters to which Mr Csoka has referred when we come to hear the evidence.'*

The substantive decision

31. Oral evidence was given by Ms A, her mother, aunt and boyfriend (now husband), and by RK.

32. Before turning to the evidence, the Tribunal reminded itself of the *'fundamental and core principles of law that we must apply'*, namely that the burden of proof was on the BSB and that the standard of proof was the criminal standard. The latter reflected the fact that the alleged events occurred before 1 April 2019.

33. As to the potential impact of delay: *'These incidents are undoubtedly a long time ago. Delay is one of the issues that we must address in making our assessment of the evidence…'*. Having referred to the two preliminary applications: *'We ruled against the respondent on both of those submissions but we said that we must, and would, take account of the delay in assessing the evidence that we have heard. I start almost as though it were the directions at the beginning of a summing-up.'*

34. There followed a self-direction in these terms: '*We also need to direct ourselves in much the same way as a jury might need to be directed on the effects of delay. I set that out so that it is quite clear to what we have had regard. First, delay, obviously, affects the recollection of witnesses and it may make their account of events unreliable. The passage of time can distort the memory. People can remember events that they think they have done accurately or sometimes they remember events as they wish they had been or become quite convinced that they had been. It is possible for people to become quite convinced that events happened in that way when any other objective evidence shows that they are entirely mistaken in that. That generalisation, of course, is true but it needs to be applied with precision to the particular facts and issues that we have to decide. But we do bear in mind that even a witness who is utterly honest and convincing and convinced in their own mind can, nevertheless, be mistaken as a result of the passage of time. Secondly, delay in this type of situation can put the respondent at a serious disadvantage in answering the charges. Witnesses who could assist may have died. Sadly, we have heard that this is the case of one particular barrister though it is not suggested that he was ever an eyewitness of any of the incidents or that he spoke to the respondent about them. Witnesses may have disappeared. This is unlikely to have happened in this case because no doubt any witnesses coming from the Bar will still be traceable. All the witnesses seem to be traceable. But even if a witness is alive and well and available and can be located, it may well be that they no longer have any recollection of events, that they had no particular reason to note down or to keep any kind of documentary record. A further factor that we have to bear in mind consequent upon this is that the respondent's defence is, in effect, a denial save for one incident where he accepts that he might have asked the complainant about what perfume she used:… Those matters are ones that we have very much in mind. But we also bear in mind that when dealing with the question of missing witnesses/missing documents, it is important that one does not become too fanciful or speculative about this. One has to look at real rather than those fanciful or speculative possibilities. But we have all that in mind and it is, as it were, a backdrop to our assessment of the evidence.'*

35. The decision then sets out an account of the evidence from Ms A. This included reference to her family connections with the Bar, through her aunt and her grandfather. As to the absence of any complaint to the BSB until November 2018: *'I am not going to spend too long about this because the reasons why she did not complain at the time may not really assist us as to whether we can rely on her evidence or not. The fact is that there was delay. It came about in these circumstances, that she read a report in the press of some other incident involving the respondent. We have had to be particularly careful, and we have made a point of not going into any detail of this for fear of*

prejudicing a fair hearing for the respondent. But it was that that was the trigger for her complaint.'

36. Having referred to the *''Me too' phenomenon in which a person, usually a prominent public figure, is accused of some sexual misconduct and this causes others to come forward with similar complaints about conduct by that person'*, the Tribunal observed that the phenomenon, although not its name, was nothing new. However *'…what we have to guard against is the possibility that in this situation those others who have come forward may make complaints which, if they are not deliberately false and malicious, are not motivated, for example, by some desire to obtain compensation, but they are still unreliable or exaggerated or that person has become convinced that what at the time was otherwise innocuous or only mildly questionable behaviour has taken on a more sinister character. We have addressed the issue of delay and will address the issue of delay on the two aspects of it to which I have already referred.'*

37. The Tribunal then referred to evidence of Ms A's complaint made to several people around the time of the alleged incidents; including her mother and boyfriend who had given evidence. It noted that the complaints had been given only in general terms that his behaviour *'was sleazy and that she felt uncomfortable about it'*; it was not in the specific terms now advanced. However the fact of a complaint made in general terms was *'…important, in our judgment…While it may not provide independent supporting evidence of what she says, it does show consistency and it disposes of any suggestion that the complaint that she eventually made in November 2018…has been a recent invention or fabrication or something that she has a long time afterwards put an interpretation upon that it is not warranted'*.

38. The Tribunal had heard *'…quite a lot of evidence about a lunch subsequently at which Ms A's parents and her grandparents were there (that is the judge and his wife) and a family friend, a barrister, now sadly deceased. There is a lot of hearsay in the mother's statement about what was said about whether complaint should be made. We do not find any of that really assist us in deciding the truth and accuracy of the complaint one way or the other.'*

39. The Tribunal then stated that it needed to concentrate on the specific allegations which were made. It would ignore suggestions in the witness statement which were *'too vague and too unspecific to get us anywhere near the criminal standard of proof*'. Furthermore the reference to touching could not be made out on the evidence, with one particular exception in one of the specific allegations.

40. Having considered the detail of the allegations, the Tribunal referred to Ms A's demeanour. In doing so it bore in mind *'the limitations of demeanour generally, that demeanour can be misleading and it is not the definitive test of whether a witness is telling the truth or is reliable. We also bear in mind the risks with demeanour that it can bring prejudice into a case, the danger of believing a person that one likes and disbelieving a person that one does not like. So we bear that in mind; the limitations of demeanour. But we have had the advantage of observing her demeanour.'*

41. With that prelude, the Tribunal stated that her evidence had been consistent and restrained: *'She did not exaggerate anything. She did not claim to remember things that she had not remembered and when she did not remember something, for example, those rather general things about the rest of his behaviour, she was very specific and*

forthright in saying that she could not remember. That is something that we bear in mind when we look at her evidence.'

42. The Tribunal continued that it found Ms A to be *'a reliable witness to that extent. It is not the end of the case but we are satisfied, for those reasons and having observed her, that she is an accurate and reliable witness. We can certainly rule out any question that she is a liar or a fantasist about what happened. That is by no means, of course, the end of the matter because in due course we shall have to consider what the respondent has to say. We shall also have to consider whether there is any other evidence that assists us in deciding whether these charges are proved or not.'*

43. As to the failure to complain at the time, the Tribunal pointed to the *'disparity of power, status and age'* between the two of them. In addition to the inherent unacceptability of such behaviour, it was even more unacceptable *'because such a person may feel intimidated from protesting at the time or from making a complaint even though there is no actual or implied threat coming from the respondent or the person accused of the consequences of complaining. Such a person may also fear that if they do complain, it will impede or damage their career prospects. This was very much uppermost in the complainant's mind in her decision, concurred in at the time by her family members, not to make any kind of complaint about it.'* The Tribunal likewise accepted the boyfriend's *'convincing and compelling'* evidence that he did not think it would serve any useful purpose for him to make a complaint.

44. Turning to the question of whether there was supporting evidence, the Tribunal referred in particular to the evidence of the aunt. This included an undisputed text exchange between her and the Appellant *'around 27 January 2015'*, i.e. during the mini-pupillage, of which she had provided screenshots. These included: Aunt: 'I gather you have my niece with you on mini-pupillage'; RK 'Yes but she can't talk at the moment she has a mouth full of my cock'; Aunt: 'I will kill you'; RK: 'Why she needs to learn the art of lovemaking'; Aunt: 'She probably knows. My mother is desperate to know what you wrote tee hee. Glad you are teaching her all you know'. The aunt's evidence was that RK had a reputation for using sexualised language in the robing room; and that she had sent the original text (and in reply adopted the 'jokey tone') in the hope that it would curb his behaviour.

45. Whilst acknowledging that there was no suggestion that any of these remarks were literally true or that RK had done anything of that kind, the Tribunal stated that they were *'capable of indicating…what one might call a low-level sexual interest not necessarily directed specifically at her, but of that kind.'* It was capable of providing some support for the things that RK was alleged to have said. In addition the aunt had given evidence of a party at his Chambers where she had taken the opportunity to tackle him about what he had said; and he had not protested his innocence. This conversation was disputed. The Tribunal concluded that it was not necessary or fair to express any conclusion and that it did not treat it as supporting evidence.

46. Turning to the RK's evidence, this was described as in effect a total denial of any such misconduct *'with, perhaps, two exceptions where he seeks to accept some of the facts but offer an explanation which would put a completely different gloss on it.'* The first was that there may have been some confusion with talk about fingernails with his opponent barrister in the context of the unpleasant appearance of the defendant in a case involving a sexual offence. The Tribunal observed that the problem with that

explanation was that it did not involve anything said in the presence of Ms A. The second was that he might at some stage have asked her about what perfume she used, but that he did not get inappropriately close to her. In any event he had no recollection of her as a mini-pupil.

47. The Tribunal reminded itself that RK had to prove nothing. It expressed surprise that he had no recollection of Ms A as a mini-pupil, particularly given her family connections. It concluded: *'We are bound to say, with the best will in the world, that we do not find this statement that he does not have any recollection of this satisfactory. Indeed, it is something that verges on the evasive.'*

48. The Tribunal then considered the various submissions on credibility urged on his behalf; in particular as to Ms A's lack of any recollection of the type of cases she witnessed in mini pupillage; a lack of clarity in the terms of the complaint; inconsistency between the mother and the aunt about the correct context for the text messages; the absence of context of the text messages through the unavailability of the surrounding messages; the 'frank' character references from female members of the Bar; and the effects of delay: *'we bear in mind the delay and the consequences of it'*.

49. The Tribunal concluded: *'But at the end of it all we are left with clear evidence from the complainant supported, in our view, by that text message which comes from a source completely independent, indeed it comes from the respondent himself. We bear in mind what the respondent has said but we are sure that the respondent's evidence is unconvincing on many points and it does not leave us in any reasonable doubt about the correctness and the accuracy of the complainant's account. Accordingly, we find each of these charges proved to the extent of those specific allegations.'*

50. However *'We do not find the general allegations that he had been sleazy on other occasions proved. We do not find the evidence of that satisfactory. Nor do we find any evidence that there was physical touching other than standing too close to her in the lift and speaking about the perfume. But those findings do not detract from the nature of each of these charges. This was, clearly, totally inappropriate and unacceptable behaviour for a member of the Bar to show towards somebody who was a mini-pupil and towards whom he was in a position of responsibility.'*

Sanction

51. The decision on sanction began with the Introduction to the 'Sanctions Guidance' and its citation of Bolton v Law Society [1994] 1 WLR 512 where Lord Bingham observed *'Lawyers practising in this country…should discharge their professional duties with integrity, probity and complete trustworthiness…A profession's most valuable asset is its collective reputation and the confidence which that inspires…The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price and it carries with it responsibilities.'*

52. The parties agree that the Tribunal's reference to the 'Sanctions Guidance/Guidelines' was, correctly, to the Sentencing Guidance (Version 3 implemented January 2014 and revised July 2015); rather than the subsequent Sanctions Guidance Version 5 dated 15 October 2019. This is further confirmed by the Tribunal's subsequent Record sheet which refers to 'Annex 1' and 'Annex 2' of the Sentencing Guidance.

53. The Tribunal then considered the aggravating and mitigating features: *'When we look at the Sanctions Guidelines and we consider the general aggravating and mitigating features, many of these we think overlap and do not conveniently fit into pigeon holes.'*

54. As to aggravating features, it particularly identified (i) premeditation (ii) breach of trust/position of responsibility (iii) the effect on the complainant (iv) lack of insight and (v) the earlier disciplinary finding.

55. As to premeditation, *'There is some pre-meditation here. It is clear that this was not something that happened on impulse. That is to be gleaned, to some extent, from what we saw in the text messages.'*

56. As to breach of trust/position of responsibility, *'In a sense it is discriminatory behaviour because this was clearly picking on a young woman who was 19 and there is the question here of the disparity in age and power between them. That feeds into the aggravating features, a breach of trust and being in a position of responsibility. He was in a position of power…He was something approaching 20 years' call…She was very much younger than him and simply a student and a mini-pupil. That, of course, meant that he was in a position – so he thought – to behave in this way without anybody doing anything about it.'*

57. As to the effect on Ms A:*'The effect of the respondent's behaviour on her was, whatever else she wanted to do with her career – and we accept, of course, that for many other reasons she went to practise in London – the one thing she did not want to do was to practise at the Bar in Manchester. This, quite clearly, was a direct consequence of the way in which the respondent had behaved towards her.'*

58. As to insight, *'…although he is perfectly entitled to put the BSB to proof of the charges, he has shown a complete lack of insight into this and the effect. This, again, can be seen in the text message that he sent'*.

59. As to the earlier disciplinary finding, that *'.. arose out of a drunken episode…when he was the worse for drink and he used grossly obscene language towards a younger person in Chambers, a pupil.'*

60. Turning to the mitigating features, the Tribunal took into account the references that have been submitted, *'…but they have a limited effect. They have to be seen in the context of the Disciplinary finding. These individuals have been entirely frank in acknowledging that there were certain aspects of the respondent's behaviour - that did not go as far as this - that he was inclined towards a sense of humour that left quite a lot to be desired.'*

61. It continued: *'When we consider the effect of this on the profession and its reputation we are bound to take a serious view of it. Anybody wanting to gain experience of knowledge about the Bar as a mini-pupil is entitled to expect that they are not going to be subjected to obscene and sexualised language, intrusive comments about their own sex lives and matters such as that. We have to take a serious view of it and we have to take a serious view of it that although it happened over a relatively limited period of about three days, it did have a serious effect on the complainant and it would have a serious effect on the reputation of the Bar.'*

62. As to the type of penalty to be imposed: *'Looking at the Sanctions Guidelines that would be relevant, we think that it merits a relatively short, but not a very short, period of suspension. We do not think that a fine is appropriate. We think a fine is inappropriate for this kind of behaviour. It gives the wrong impression to the complainant and to the public that this is something to be equated, for example, with a minor motoring offence'.*

63. In considering the length of the suspension, the Tribunal bore in mind the effect of the *'current situation upon the Bar generally and probably upon the Criminal Bar in particular'*, i.e. the pandemic and its effect: *'We bear in mind - we hope the present situation is improving - that it may have the effect, of course, of making it difficult for him to pick up the threads of his practice if he is suspended for any lengthy period of time.'*

64. However, returning to the observations of Lord Bingham, *'It needs to be made clear that this type of behaviour by a member of the Bar is entirely unacceptable and will be met with an appropriate sanction. In all the circumstances, the least penalty we feel we can impose is one of suspension for six months and an order for costs in the sum of £3,000.'*

65. The sanction was imposed on Charge 1, with no separate sanction on Charges 2 and 3. This reflected the fact that each Charge related to the same conduct.

66. The Tribunal then completed the formal Record of its determination and outcome. From the non-exhaustive list of 'Mitigating and Aggravating circumstances' in Annex 1 of the Sentencing Guidance, it circled as aggravating factors: 'A. Premeditation', 'G. Undermining of the profession in the eyes of the public', 'I. Effect on the complainant/particular vulnerability of the complainant', 'J. Actions accompanied by discriminatory behaviour or motivation (does not require intent)' adding the manuscript words 'in part', 'K. Breach of trust', 'L. Position of responsibility within the profession', 'M. Previous disciplinary findings for similar breaches', and 'O. Lack of remorse for having committed the offence/s'. As to mitigating factors, it circled '15. Good references (only of limited applicability and very much dependant [sic] on the nature of the offence and the role and identity of the referee)'.

The appeal: Ground 1

67. The first ground of appeal challenges the refusal to stay the case because of flaws in the investigation process: *'The Tribunal ought to have stayed the case because the decision to proceed with investigating the complaint, which was more than one year old, was procedurally flawed, not properly exercised by the PCC and was unfair'.*

68. Given that the complaint had been made more than 12 months after the alleged misconduct, it is common ground that the provisions of rE31 and rE32 were in play. Mr Csoka challenges the Tribunal's refusal of a stay on three essential bases. The Tribunal should have held: first, that the PCC had no power to delegate the decision, at least in the circumstances of the case; secondly, that the decision to extend time had been made unfairly and with inadequate consideration. Thirdly, the Tribunal had wrongly considered the fairness of the rE32 investigation retrospectively rather than prospectively.

69. As to the power of delegation, Mr Csoka accepts that the combined effect of Regulation rE3 of the Complaints Regulations 2014 (Part 5A of the BSB Handbook) and the PCC 'Table of Authorisations' thereunder allows for the delegation of the power to dismiss complaints under rE31 and 32 to a range of people including 'Senior Case Officer' and 'Assessment Officer'; and that the specific authorisation by the Chair of the PCC (Aidan Christie QC) dated 9 February 2017 extends the authorisation conferred on those officers to *'Teresa Murphy in her capacity as a consultant barrister'*.

70. However he submits that the extent of the power to delegate those decisions is strictly confined. The starting point was the general power of delegation in rE3 and the general power under rE4 for the PCC or its Chairman to extend the time limits 'in their absolute discretion'. However the saving provision in rE4 (*'Save in respect of the matters dealt with at rE29.2 (time limits for making a complaint'*) gave a 'strong steer' that the power of delegation for that purpose must be construed and applied much more sparingly.

71. This led to the Table of Authorisations. Properly construed, the reference in the Table to rE31 to delegation of the power to 'dismiss complaints out of time' extended only to the power of dismissal; not to the power to extend time and thereby allow the complaint to proceed to the next stage under rE32.

72. In consequence, and in any event, the delegated power to dismiss could only be exercised on in a clear case, e.g. where the complaint was obviously vexatious. Where the decision was unclear/'borderline', it could only be determined by the PCC as a body.

73. The same reasoning applied to rE32. In anything but a case where a clear-cut decision could be made that one or more of the specified factors applied so that the complaint must be dismissed, the decision had to be made by the PCC as a body. This would give the benefit of what Mr Csoka described as a more discursive approach, through its members testing in discussion whether there could be a fair investigation. There was more likely to be error when such a decision was made by a single delegate.

74. In consequence, and in the circumstances of the long delay in the making of the complaint in this case, neither Ms Murphy (e-mail to Ms Maithili Sreen 5.3.19) nor Ms Sreen (Preliminary Assessment Form, also 5.3.19, paragraphs10-10c) had the authority to extend time pursuant to rE31. Likewise Ms Sreen did not have the authority (Preliminary Assessment Form, sections 17-20a) to make the decisions which arose under rE32.

75. Further, although this postdated the decisions under rE31 and 32, the 'PCD Report – Analysis sheet' dated 10.9.19 which recommended the referral of the matter to a three-person Disciplinary Tribunal, had wrongly been determined by one individual.

76. The potential for error when the decision was made by a single individual was exemplified by Ms Sreen's affirmative answers in the Preliminary Assessment Form to the questions 'Does the information appear to amount to a criminal offence related to supply of drugs, a sexual offence or an offence of violence?' and 'Does the information appear to amount to a criminal offence?' No criminal sexual offence had been disclosed by the complaint. The evidence went no further than the statement in the complaint form that RK had *'inappropriate contact and hand placement throughout the three days'*. In its ruling the Tribunal had accepted that no criminal offence was revealed in the complaint: *'We had some discussion about that and I am bound to say that I could*

not see that it fitted into any of the known categories of criminal offence. Certainly it did not amount to a sexual assault because there was no actual touching': ruling p.2G-H.

77. In a similar way, the assessment by the author of the Analysis sheet of 10 September 2019 was made on the erroneous basis that RK did not deny the events: *'B does not say that the events did not happen, but that B does not remember, either C or the incidents, given the passage of over four years since the alleged incidents took place'*; also *'Given the nature of the matters complained of…no denial by B, and the supporting evidence of three witnesses, there is sufficient evidence, both on balance of probabilities and to the criminal standard…'*. RK said that he did not remember Ms A, which was a 'far cry' from a failure to deny the alleged misconduct. The assessment was fundamentally flawed because it did not address why he ought to be able to remember an uneventful mini-pupillage would took place over four years ago; nor did it consider the extent to which the passage of time would impair the quality of the investigation and the ability to defend himself.

78. Furthermore the author of the Analysis sheet had in reality deferred the question of the fairness of the investigation to the Tribunal:*'It would not appear, given the totality of the evidence, that B would be denied a fair hearing, if this matter were to proceed, for example, to a tribunal. In any such proceedings, B would be able to apply for a stay of proceedings on the grounds of abuse of process'*: para.15. This was contrary to the requirement of rE32 which required the PCC to consider whether, having regard to the passage of time, the complaint could be properly or fairly investigated; and to do so prospectively.

79. Turning to the quality of Ms Sreen's rE32 consideration of the questions in the Preliminary Assessment Form 'Are there issues that will prevent a complaint, if referred, being properly investigated?' and 'Are there reasons why the subject of the information would be unable to respond fairly to the complaint', the completed answer was simply 'No'. There was no evidence of any reasoned assessment for those conclusions.

80. The Tribunal had then considered the fairness of the investigation of the complaint retrospectively, not prospectively as rE32 required. This was apparent from the concluding paragraphs of its ruling and in particular: *'Mr Csoka, of course, is right that one should not look at it retrospectively and say that whatever flaws there were can be cured by the result, that it is prospective in nature. But we are satisfied overall that the investigation was fairly and properly conducted and that this was a proper judgement that the PCC reached in accordance with the Rules.'*

81. In any event, even if a retrospective assessment were permissible, the Tribunal had not identified how the investigation after such a delay could be fair; nor had it considered how it could be a proper exercise of the rE32 powers to defer that decision to the Tribunal.

82. The strategy of the BSB and its purported delegate had been merely to take statements from some of the people referred to; and limited to close relatives and Ms A's boyfriend. By contrast it did not seek any representations on the issue of fairness from RK and proceeded on the erroneous basis that the matter was not denied. He was thereby denied the right to be heard at the investigative stage and suffered serious prejudice.

83. In all the circumstances the Tribunal ought to have concluded that there had been no proper decision to extend the time limit nor any good basis to conclude that the matter could be fairly investigated given the passage of time; and to have stayed the proceedings accordingly.

Ground 2

84. The second ground relates to the refusal of the application to stay the complaint as an abuse of process: *'The Tribunal ought to have stayed the complaint as an abuse of process because a fair hearing was not possible as a result of the delay.'*

85. Mr Csoka submitted that the Tribunal had wrongly applied the principles of criminal law to the effect that stay of proceedings on the grounds of abuse of process arising from delay was an exceptional and unusual remedy. In criminal law there were generally no limits. By contrast, the starting point should have been that it was exceptional and unusual for a complaint to be entertained by the BSB when more than 12 months had elapsed between the alleged conduct and the making of the complaint. He contrasted the position with time limits in civil law, in particular employment law and the conduct of disciplinary investigations. The Tribunal should have approached the application on the basis that the threshold for the grant of a stay in circumstances of delay was considerably lower than in the Crown Court.

86. The Tribunal had again failed to take sufficient account of the prejudice that RK had suffered by reason of the delay and the inadequacies of the BSB's investigation. The reality of the investigation was that it went no further than taking statements from friends and family named by the complainant. There was no investigation of matters which might have revealed the intractable difficulties that RK faced in defending an historic allegation. There was no reason why he should be able to remember a three-day mini pupillage in January 2015; not least in circumstances where he had supervised more than 100 mini-pupils in the course of his career. The only reason to assert that it should be memorable was an a priori assumption that it was true. The Tribunal had in effect reversed the burden of proof; on the basis that he should have been able to recollect this mini-pupil and the occasions and matters to which she referred.

87. There was serious prejudice to the Appellant from the passage of time. His recollection of the mini-pupillage was inevitably substantially diminished or non-existent; it was impossible for him now to account for his movements at the bar and restaurants alleged; the other barristers alleged to be present in such places were not named and so could not be contacted; there had been no attempt to speak to the senior barrister before his death, nor to the various people (in particular members of the Bar and judiciary) alleged to have been informed of the matter; and the reason for not making a complaint was open to serious doubt, particularly given the complainant's family connections with the law. There had been no proper investigation into the allegation that his conduct had put Ms A off a career of the bar in Manchester; nor into the suggestion that at least two others had challenged him over his treatment of her.

88. Ms A's explanation was that she had decided not to pursue the complaint after a meeting with her grandfather, a retired circuit judge, her parents and a senior barrister. If that meeting had taken place as described, there was a considered and voluntary decision by Ms A to take no action. The grandfather had not made a statement and the barrister had died in August 2020. No attempt had been made by the BSB to take a statement from

either; nor from the list of those who, according to the aunt in an email, were 'people who to varying degrees are aware of the alleged misconduct'. The potential relevance of such evidence was as to whether Ms A had made complaints about RK's conduct in the terms subsequently made to the BSB or whether they had been made in very different and less serious terms.

89. Had the complaint been made within 12 months, RK would in all probability have been able to trace the other barristers referred to in the complaints and assisted in his recollection of where he had been in the three days of the mini-pupillage; and in a better position to answer the 'vague' claims which were made including whether or not anybody else had been present. In all the circumstances of the long delay and its adverse consequences for RK, the Tribunal should have granted a stay.

Ground 3

90. Next, *'The Tribunal's decision when finding the facts proved was unreasonable because they did not take account of delay in* [RK's] *favour, despite indicating that they would do so when refusing the application for the stay'.*

91. Mr Csoka accepted that there could be no criticism of the Tribunal's detailed self-directions on the issue of delay. His complaint was that it had failed to apply those directions when considering and assessing the evidence. In particular, examination of its reasoning showed that the Tribunal had taken account of the passage of time when making allowances for discrepancies and errors in the evidence by and on behalf of Ms A; but had not done so when considering the account from RK.

92. Thus it made such allowances for discrepancies between the evidence of Ms A's mother and aunt, Ms A's original belief that the mini-pupillage occurred in the summer of 2014, and her absence of recollection of the cases which she had witnessed in the course of the mini-pupillage. By contrast, it made no such allowance when rejecting RK's account that he had no recollection of Ms A, describing it as *'something that verges on the evasive'* and his evidence as *'unconvincing on many points'*.

93. The Tribunal had given Ms A, but not RK, the benefit of the doubt when considering the impact of delay on their recollection and reliability. Thus it found RK's lack of recollection of the complainant 'surprising' given her family connections with the law. There was no particular reason for this to bring the particular mini-pupillage to mind, particularly on Circuit where a family connection was not unusual. In any event it would not necessarily follow that the events of the mini-pupillage would be memorable. By contrast it was surprising, and relevant to credibility and reliability, that Ms A had no recollection of the cases witnessed during the mini-pupillage.

94. There was a similar failure to make allowance for the passage of time in the Tribunal's rejection of RK's explanation that there may have been confusion on the 'fingernail' issue with his conversation with an opponent barrister.

95. This difference in approach to the effect of delay on the reliability of the rival evidence had been fundamental to the Tribunal's decision. The essential reason for its conclusion that RK's evidence was unconvincing was because it concluded that he should have

been able to recollect Ms A; but that both reversed the burden of proof and overlooked the self-directions on the effect of delay.

Conclusions on grounds 1-3

96. For the reasons given by the Tribunal and as further advanced by Ms Iyengar, I am not persuaded that the decisions of the Tribunal were wrong in any respect.

Ground 1

97. First, the Tribunal was right to reject the argument that the decisions to be made pursuant to rE 31 and 32 could not be delegated by the PCC. The delegation in the Table of the 'function' to 'dismiss complaints out of time' (rE31) and to 'Dismiss complaints where further consideration of it is not justified for any of the reasons set out in sub-sections rE32.1-rE32.4' (rE32) necessarily includes the delegation of the power not to do so.

98. In the case of rE31, the effect of that decision to dismiss or not dismiss is to refuse or allow an extension of time. I therefore see nothing in the suggested distinction between a delegable power to dismiss the complaint for being out of time and a non-delegable power to extend time and thereby refuse dismissal; nor in the associated suggestion that the delegation is confined to dismissal in a clear-cut case. Nor does rE4 provide any support for the argument. That simply draws a distinction between the absolute discretion to extend time in all cases apart from the time limits in rE29.2 and the condition for the extension of those time limits which is provided by rE31. Likewise in the case of rE32, the decision as to whether or not to dismiss necessarily requires the delegate to consider each of the four identified matters, e.g. whether or not the complaint cannot be fairly investigated.

99. Secondly, I see no reason for the Tribunal to conclude that that there had been procedural error or unfairness in the way in which the delegate in each case had carried out the respective exercise in rE31 or 32.

100. In each case, as attested by the statement of Mr Alfonso Tucay, the Head of Conduct Assessment, guidance was provided by the BSB Policy and Guidance on Decision Making Criteria. As to rE31, this states in respect of the Regulatory Objectives that *'If one or more of the Objectives would be served by proceeding with consideration of the complaint, despite the lapse of time, the time limit should be waived'* : para.6.4. The Regulatory Objectives include protecting and promoting the public interest and promoting and maintaining adherence to the professional principles. Those principles include that authorised persons should act with independence and integrity.

101. As to rE32, the Guidance as to whether the complaint can be properly and fairly investigated states: *'This criterion should not be applied unless there is clear evidence showing that there is no reasonable prospect of either a fair investigation or the barrister being able to respond properly to the complaint. Factors to be taken into account by decision-makers when assessing the application of this criterion include: whether the lapse of time would clearly impact on the memories of witnesses or parties to the complaint e.g. solicitors, opposing counsel or judges to the extent that it will be impossible to rely on the evidence provided by such witnesses…Key witnesses have*

moved away and are not contactable due to the lapse of time; and/or The barrister has died or is physically or mentally unable to respond…'.

102. As to rE31, I see nothing to question Ms Murphy's conclusion that there was sufficient evidence of a potential breach of the Handbook; that the conduct complained of was serious because it alleged sexual misconduct towards a pupil barrister; and that in the circumstances it was in the public interest for the complaint to be considered notwithstanding the passage of time. The extension of time under rE31 was further considered by Ms Sreen in her Preliminary Assessment Form completed later on the same date (5.3.19) which identified the relevant Regulatory Objective as 'RO1 Protecting and promoting the public interest' and the reasons for further consideration as 'serious allegations, sexual in nature': see paras.10-10c.

103. As to rE32, I see no reason for the Tribunal to have doubted the integrity or reasonableness of Ms Sreen's conclusion that the complaint should be investigated; and in particular her answers 'No' to the questions of whether there were issues that would prevent proper investigation of the complaint or that the subject of the complaint would be unable to respond fairly to it. The fact that the Assessment Form provides for answers to be recorded in the yes/no form provides no basis to question the adequacy of the consideration or the reasonableness of the conclusion.

104. I do not accept that the Tribunal fell into the error of judging the fairness of the investigation retrospectively rather than prospectively. In its ruling, the Tribunal correctly recorded the criticism that there had been no proper investigation as to whether the complaint could be fairly investigated; and accepted that the issue should be considered prospectively rather than retrospectively. This is immediately followed by the conclusion *'But we are satisfied overall that the investigation was fairly and properly conducted and that this was a proper judgment that the PCC reached in accordance with the Rules'*. On a fair and natural reading of this conclusion, the Tribunal was judging the matter prospectively. Thus its reference to 'the investigation' was evidently to the investigation which had to be carried out under rE32 in order to determine, prospectively, whether the complaint could be fairly investigated. The Tribunal asked and answered the correct question.

105. I see no grounds for criticising the Tribunal's answer. The effect of the Appellant's argument is that the only reasonable conclusion in March 2019 was that, viewed prospectively, there could be no fair investigation because of the passage of time since the mini-pupillage in January 2015. I do not accept that argument on any of the bases advanced. In this respect it is important to recall that Ms A's account was that there was no one else present at the time of the incidents particularly specified, i.e. in the bar, the robing room and the lift. The suggestion that other people could have given material evidence as to the comparative terms of contemporaneous accounts of the incidents given by the complainant is no more than speculative.

106. I do not accept that the rE32 decision was compromised by the decision-maker's affirmative answers to the questions as to whether the information appeared to amount to a sexual offence; nor that this should have been a factor to support the grant of a stay. Whilst the complaint did include an allegation of 'inappropriate contact and hand placement throughout the three days', the Tribunal discounted the suggestion of any sexual offence; but held that its assessment of the fairness of the rE32 investigation required it to look *'overall at the fairness of the judgment that was exercised. It is not*

a question of ticking boxes or counting up scores in order to do that'. I see no error in that approach or the conclusion.

107. I do not accept that there was a failure to seek further representations from RK on the issue of fairness. His account of alleged prejudice was set out in his response of 23 April 2019.

108. I also do not accept that the PCC 'deferred' to the Tribunal the questions raised by rE32. The statement in the PCD Report - Analysis Sheet dated 10 September 2019 under the heading 'Fair hearing', that if the matter proceeded to a tribunal *'B would be able to apply for a stay of proceedings on the grounds of abuse of process'*, was no more than a reference to that additional potential protection. In any event, the rE32 decision had been made in March 2019.

109. Further the conclusion of the rE32 decision-maker, and by extension the Tribunal, was consistent with the BSB Guidance that when considering whether the complaint cannot be properly or fairly investigated *'This criterion should not be applied unless there is clear evidence showing that there is no reasonable prospect of either a fair investigation or the barrister being able to respond properly to the complaint'*.

Ground 2

110. The Tribunal did not accept the primary submission on behalf of the BSB that it should apply the principles of the criminal law on abuse of process, nor the rival submissions that related to aspects of employment law. It agreed with Mr Csoka that the test of abuse of process was *'perhaps not as stringent as in a criminal* case'; and held that the principles from other areas of law *'provide a helpful analogy but one must not simply translate them slavishly'*. Whichever area of law was in consideration, stay of proceedings as an abuse of process was *'an exceptional and unusual jurisdiction'*. The ultimate question was whether it was *'possible for there to be a fair hearing given the gaps that there may be in the evidence'*.

111. I see no error in that approach by the Tribunal; and in particular do not accept the argument that its starting point should have been in the opposite direction, i.e. that it must be an exceptional case which reaches the Tribunal where the complaint was made more than 12 months after the alleged conduct. Any such starting point would be at odds with the provisions of rE31 and 32 and the issues which these identified.

112. I do not accept that the Tribunal started with an assumption that RK should be able to recollect Ms A or thereby or otherwise reversed the burden of proof. As to the Analysis sheet (10.9.19) and the issue of denial, the account of RK at that stage (23.4.19) was focussed on the absence and difficulties of recollection. In any event, the relevant (rE32) decision had been made back in March 2019.

113. As to the decision to refuse a stay, the Tribunal set out RK's various contentions as to the adverse effect of the passage of time on his own recollection and on the ability of other potential witnesses to recall what may have been said to them at the time; and that the investigation had itself been too narrowly focused on Ms A, her mother, aunt and boyfriend. The Tribunal correctly identified it as a matter for their judgment and noted its ability to take account of such matters and to discount the irrelevant matters including *'even to the extent, if necessary, of declining to hear the evidence at all*

because we think it would be so unreliable'. As to potential evidence that witnesses had not heard a complaint, it observed *'they may have been out of earshot or there was no opportunity to complain'*.

114. All in all, I do not accept that the Tribunal were wrong to conclude, in the exercise of their judgment, that the application for a stay should be refused.

Ground 3

115. As Mr Csoka rightly accepted in argument, the Tribunal gave a correct and sufficient self-direction on the issue of delay. That is apparent from the extended section of its substantive decision at pp.5G-7A. I do not accept his essential argument that the Tribunal nonetheless failed adequately to take that direction into account when considering the evidence.

116. The Tribunal gave close and detailed attention to the delay in making formal complaint; and expressly asked itself the question whether it may have been *'a recent invention or fabrication or something that she has a long time afterwards put an interpretation upon it that it is not warranted'*. It took into account inconsistencies between the evidence of Ms A's aunt and mother but concluded that this was not of particular significance.

117. I do not accept that the Tribunal acted inconsistently between the parties when considering the effect of the delay on their evidence and credibility. As to RK's evidence that he did not have any recollection of the complainant as a mini-pupil, the Tribunal took specific account of the counter-argument in respect of Ms A's inability to recall the type of cases that she had witnessed in the mini-pupillage. It also kept firmly in mind the need to focus on the 6 specific allegations; and rejected the broad allegation of inappropriate conduct and touching as *'too vague and too unspecific to get us anywhere near the criminal standard of proof*'.

118. As to the fingernails issue, its proper reason for the rejection of his explanation was because it was no part of RK's case that Ms A had been present at the time of any discussion with the opponent barrister: see also his witness statement (10.12.20) at para.11.

119. Applying the correct burden and standard of proof, the Tribunal ultimately had to make a decision on the rival accounts of RK and Ms A. With the advantage of seeing and hearing their tested evidence, it concluded that Ms A was an *'accurate and reliable witness'* in respect of the 6 specific allegations; that RK's account was *'unconvincing on many points'* and *'verging on the evasive'*. It found further support for Ms A's account from the text message between RK and her aunt. It concluded that it had no reasonable doubt about the correctness and accuracy of the complainant's account. This was all a classic issue of fact for this 5-person tribunal. I reject the contention that there was any error in the approach of the Tribunal to that task or in its conclusion.

Ground 4

120. The Appellant submits that the sanction was *'contrary to the published guidelines, excessive, too focused upon general deterrence and unnecessarily punitive.'*

121. As the parties agree, on an appeal against sanction the Court should pay appropriate deference to the experience and expertise of the expert disciplinary tribunal; there is a high threshold for interference; and the Court must not fall into the error of mere substitution of its own judgment: Khan v. BSB [2018] EWHC 2184 (Admin) at [69] citing Salsbury v. Law Society [2009] 1 WLR 1286 [2009] EWCA Civ 1285 per Jackson LJ at [30]. However as Warby J (as he then was) added in Khan: *'That said, the need for deference of this kind is somewhat less when it comes to judicial scrutiny of sanctions imposed on legal professionals. This is a profession which the Court knows something about'*: [70]. In addition Mr Csoka points to s.24(6) and the provision that the Court may make such order as it thinks fit on an appeal.

122. The parties likewise agree that the relevant Guidance in respect of this complaint is provided by the BSB Sentencing Guidance of 2015. The Introduction by the President of the Council of the Inns of Court concludes: *'Decision makers are free to depart from the guidance but if they do they must explain their reasons with clarity.'* In addition the full Introduction section (Part1, Section 1) states, in terms which include bold and underlined passages: *'The guidance provides decision makers with a basis for considering what sanctions are appropriate in any given case and is intended to promote proportionality, consistency and transparency in sentencing.* ***However, it must be stressed that it is not intended to interfere with decision makers' powers to impose whatever sanctions are appropriate in the circumstances of individual cases. Decision makers must exercise their own judgement when deciding on the sanctions to impose and must also ensure that any sentence is appropriate and fair, based on the individual facts of the case.*** *Written reasons should be given for all sanctions imposed including any aggravating or mitigating factors.* ***Care should be taken to include in the written reasons the basis for departing to a significant extent from this guidance.'***

123. The relevant subject section of the Guidance is B.6, headed 'Discrimination and harassment'. This states that the section *'…relates to behaviour in the course of a barrister's…professional work that amounts to any form of harassment or bullying. The starting point for a finding of either discrimination or harassment should be a medium level fine, although a suspension or disbarment…would be appropriate in the circumstances where the behaviour is of a serious nature and/or continues over an extended period of time.'*

124. There follows a list which sets out two columns headed 'Possible circumstances' and 'Starting point'. The parties agree that the conduct falls within the second part of circumstance 'b', namely *'The behaviour took place over an extended period of time and/****or the barrister was in a position of power or acting in a supervisory role'*** (emphasis supplied). This produces a starting point for sanction of *'A high level fine and a short suspension.'*

125. The section concludes with a list of 3 aggravating factors (a significant negative impact on the victim; failure to accept responsibility for actions; and the vulnerability of the victim in the circumstances) and one mitigating factor (immediate apology).

126. An earlier section of the Guidance defines a high level fine as *'over £3,000 and up to £50,000'* and a 'short' suspension as *'up to 3 months'*. A medium suspension is over 3 months and up to 6 months; a long suspension is over 6 months and up to 3 years.

127. By way of comparison, the 2019 Guidance makes provision in the like terms for 'Discrimination and harassment' but adds a new section (B.7) headed 'Misconduct of a sexual nature'. The listed 'possible circumstances' are 'a. Inappropriate sexual conduct in a professional context; b. A conviction for a sexual offence; c. A conviction for a serious sexual offence'. The starting point for circumstance 'a' is 'Reprimand and medium level fine to a short suspension'. The aggravating factors include premeditation, lack of remorse and effect on the victim. The mitigating factors are 'Isolated incident and difficult and unusual circumstances' and 'cooperation with the investigation'. The definitions of levels of fine and lengths of suspension are in the same terms as in the 2015 Guidance.

128. Mr Csoka's principal challenge to the sanction depends on the Tribunal's statement that *'Looking at the Sanctions Guidelines that would be relevant, we think that it merits a relatively short, but not a very short, period of suspension.'* He submits that this use of language can only be understood by reference to the definitions of short, medium and long suspensions in the Sanctions Guidance. A short sentence is thereby 'up to 3 months'. The phrase 'relatively short' must mean relative to the identified bandings. By contrast, suspension for 6 months was a penalty at the top of the identified range for a medium suspension. If the Tribunal had intended to depart from the Guidance, it should and would have said so and set out its reasons as required by the Introduction. Further, he contrasted suspensions of this length in cases where there had been a conviction for an offence of assault: see also the 2019 Guidance which identifies a medium level suspension as the starting point for a conviction for a sexual offence.

129. Mr Csoka acknowledged that the Guidance identified only the starting point, which was then subject to adjustment in the light of the aggravating and mitigating factors. However the Tribunal's statement that it merited a 'relatively short' period of suspension was made after it had considered those factors. Accordingly it must represent the conclusion that this was the appropriate finishing point. Thus, applying the Tribunal's own language, there could be no justification for a suspension in excess of 3 months.

130. In any event, some of the aggravating factors marked by the Tribunal on the Record, e.g. 'position of responsibility within the profession' and 'breach of trust', were inherent in the Guidance where the 'circumstances' involved 'the barrister in a position of power or acting in a supervisory role'; and hence involved double-counting. He also questioned the Tribunal's conclusion as to the effect of the conduct upon Ms A's career plans.

131. By its statement that *'It needs to be made clear that this type of behaviour by a member of the Bar is entirely unacceptable and will be met with an appropriate sanction'*, the Tribunal had imposed what amounted to a deterrent sentence with no evidential basis for its necessity.

132. Further if (as suggested by Ms Iyengar) the period of suspension in excess of three months had been in substitution for the high level fine which it could have imposed as an additional sanction, only a huge fine could have matched the doubling of the suspension period.

133. As at the sanctions hearing, Mr Csoka also submitted that the sanction was particularly harsh in the context of the financial hardship suffered by the criminal Bar generally,

and by RK in particular, by reason of the pandemic. By the time of the Tribunal's decision in March 2021 this had in effect suspended his practice for 12 months. Further no instructions in respect of trials postdating the six-month suspension could be accepted, thus prolonging the effective period without income.

Conclusion on sanction

134. I am not persuaded that the Tribunal was wrong to impose the sanction which it did. First, there is and can be no dispute that the appropriate starting point for this conduct, before consideration of aggravating and mitigating factors, was a high level fine and a short suspension. This was conduct when RK was both in a position of power and acting in a supervisory role.

135. Secondly, two of the three aggravating factors specifically identified in the Guidance section B6 applied in this case, namely failure to accept responsibility for actions and a significant negative impact on the victim. The Tribunal identified these factors by the reference to his 'complete lack of insight'/'lack of remorse' and the fact that, whilst there are many other reasons for her decision to practice in London 'the one thing she did not want to do was to practice at the Bar in Manchester'. These were pure questions of fact for the Tribunal to determine. As Mr Csoka rightly accepted, neither of these factors involved any double-counting.

136. Thirdly, the Tribunal properly found other aggravating factors from the non-exhaustive list in Annex 1 of the Guidance. They included premeditation, undermining the profession in the eyes of the public and the earlier disciplinary finding. Although the latter involved behaviour which post-dated Ms A's mini-pupillage, it was relevant as another marker of unacceptable conduct when in a supervisory role and position of power.

137. I see some force in Mr Csoka's submission that others of the identified aggravating factors – 'breach of trust', 'being in a position of responsibility', 'he was in position of power' - could involve double-counting with the terms of the identified conduct. However the Tribunal was entitled to give particular and additional weight to the contrast between his relative seniority as a member of the Bar and her young age and position as a mini-pupil.

138. Fourthly, the mitigating factors were limited. The Tribunal took full and express account of the personal references and of the impact of the pandemic on his practice.

139. Fifthly, the Guidance makes clear that the Tribunal must ultimately exercise its judgment as to the sanction which is appropriate and fair on the particular facts and circumstances.

140. Sixthly, there can be no disagreement with the Tribunal's conclusion on the gravity of the matter and its serious effect on the reputation of the Bar; that *'It needs to be made clear that this type of behaviour by a member of the Bar is entirely unacceptable and will be met with an appropriate sanction.'*; and its conclusion that a fine (by inference, on its own) would be inappropriate for this type of behaviour. Indeed Mr Csoka rightly did not suggest that there could be any objection to the principle of a period of suspension. The issue is its length.

141. On this issue, the principal pause for thought has arisen from the Tribunal's statement that *'Looking at the Sanctions Guidelines that would be relevant, we think that it merits a relatively short, but not a very short, period of suspension'*; and from Mr Csoka's linked references to the Guidance definition of a 'short' suspension and to the absence of any statement of reasons for departure from the Guidance.

142. Given the immediately preceding references to aggravating and mitigating factors, I accept that the Tribunal's statement can only be read as a reference to its finishing point. Furthermore I am not persuaded by Ms Iyengar's submission that the Tribunal increased the period of suspension as some form of quid pro quo for the absence of a fine.

143. However in my judgment and on a fair reading the Tribunal was using the phrase 'relatively short' in a broader sense than the definitions in the Guidance. Its five members will have been fully aware both of the Guidance definition of short/medium/long periods of suspension and of its emphasis on the broad entitlement and duty to impose an appropriate and fair sanction in all the circumstances of the case. In consequence this is not a case (nor rightly was it so argued) where the Tribunal had somehow mistakenly imposed a longer suspension that it intended. I am satisfied that the period of suspension which it ordered reflected its overall conclusion as to what was appropriate in the circumstances. Taking all the factors and submissions into account, I am not persuaded that there is any reason to interfere with that assessment by the Tribunal.

144. Accordingly the appeal must be dismissed on all grounds.