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IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE RIGHT HONOURABLE LORD JUSTICE MOSES
THE HONOURABLE MR JUSTICE KENNETH PARKER
AND MR JUSTICE DINGEMANS
CO/2985/2012, CO/9851/2011, CO/12383/2011

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/12/2014

Before :

LORD JUSTICE JACKSON
LORD JUSTICE RYDER
and
LADY JUSTICE SHARP

- -

Between:

THE QUEEN ON THE APPLICATION OF **YASH MEHEY** **JOSEPHINE HAYES** **CARRON-ANN RUSSELL**	**Claimants/ Applicants**
- and -	
VISITORS TO THE INNS OF COURT	**Defendant**
- and -	
BAR STANDARDS BOARD	**Interested Party/ Respondent and Cross-Applicant in respect of costs**

- -
- -

Mr John Hendy QC and **Mr Marc Beaumont** (instructed by Howard Kennedy LLP) for **Miss Russell**
Mr Mehey and **Miss Hayes** appeared in person

Mr Paul Nicholls QC and **Mr Tom Cross** (instructed by Berrymans Lace Mawer) for the **Interested Party**

Hearing date: 26th November 2014

- -

Approved Judgment

Lord Justice Jackson:

1. This judgment is in eight parts, namely:

Part 1. Introduction

2. This is a group of applications for permission to appeal raising related issues. The one overarching question is whether, arguably, disciplinary proceedings against a number of barristers are invalid on the ground that some of the individuals who heard those proceedings or appeals therefrom were disqualified from sitting. Three cases are now before us. Other cases are pending which raise similar issues.

3. The three barristers who are seeking permission to appeal are Yash Mehey ("Mr Mehey"), Josephine Hayes ("Miss Hayes") and Carron-Ann Russell ("Miss Russell"). I shall refer to those three applicants collectively as "the three barristers" or "the barristers".

4. Each of the three barristers has brought judicial review proceedings challenging the validity of disciplinary proceedings brought against him or her. Having been unsuccessful at first instance, each of the barristers now seeks permission to appeal.

5. The fourth applicant for permission to appeal is the Bar Standards Board, to which I shall refer as "BSB". The BSB is an interested party in the judicial review proceedings. The BSB is seeking permission to appeal in respect of costs.

6. I shall refer to the Legal Services Act 2007 as "the 2007 Act". Under section 20 of the 2007 Act and Schedule 4 the General Council of the Bar of England and Wales

("the Bar Council") is an approved regulator. The reserved activities in respect of which it is regulator include the exercise of a right of audience and the conduct of litigation. The Bar Council discharges its regulatory functions through the BSB, which is independent of the Bar Council.

7. Section 21 (1) of the 2007 Act defines "regulatory arrangements" as follows:

> "(1) In this Act references to the "regulatory arrangements" of a body are to —
>
> ....
>
> (e) its disciplinary arrangements in relation to regulated persons (including its discipline rules),
>
> (f) its qualification Regulations."

8. Section 176 of the 2007 Act provides:

> "Duties of regulated persons
>
> (1) A person who is a regulated person in relation to an approved regulator has a duty to comply with the regulatory arrangements of the approved regulator as they apply to that person.
>
> (2) A person is a regulated person in relation to an approved regulator if the person —
>
> (a) is authorised by the approved regulator to carry on an activity which is a reserved legal activity, or
>
> (b) is not so authorised, but is a manager or employee of a person who is so authorised."

9. In this judgment I shall use the following abbreviations:

"BMIF" means Bar Mutual Indemnity Fund.

"The Browne Report" means the final report from the Council of the Inns of Court Disciplinary Tribunals and Hearings Review Group, chaired by Mr Desmond Browne QC.

"COIC" means the Council of the Inns of Court.

The "COIC pool" or "the pool" means the pool of persons which COIC established in 2006 for the purpose of dealing with disciplinary proceedings or appeals concerning barristers. The COIC pool comprises four lists, namely (i) lay representatives, (ii) barristers, (iii) Queen's Counsel and (iv) clerks.

"CPR" means the Civil Procedure Rules 1998, as amended.

"ECHR" means the European Convention for the Protection of Human Rights and Fundamental Freedoms.

"MOU" means the Memorandum of Understanding signed by the President of COIC and the Chairman of the Bar on 29th September 2010.

"The President" means the President of COIC.

"TAB" means the Tribunals Appointments Body set up by COIC in 2006.

"TOR" means the terms of reference of TAB.

"The 2009 Regulations" means the Disciplinary Tribunals Regulations 2009.

"The 2010 Rules" means the Hearings before Visitors Rules 2010.

10. After these introductory remarks, I must now explain the arrangements for the discipline and regulation of barristers.

Part 2. The discipline and regulation of barristers

11. From the thirteenth century onwards the judges of the King's courts determined who was entitled to appear before them as advocates. At an early date it became the normal practice of the judges to grant rights of audience to persons who had been called to the Bar by one of the Inns of Court. By the mid-seventeenth century that practice had become invariable. Every person called to the Bar by one of the Inns of Court was entitled to practise in the courts. Accordingly it was the function of the Masters of the Bench ("benchers") of each Inn to determine (a) who was fit to be called to the Bar and (b) who should be disbarred, alternatively temporarily suspended from practising, by reason of misconduct. The benchers of each Inn exercised these powers on behalf of and with the consent of the judges: see the excellent historical summary in *In re S (A Barrister)* [1970] 1 QB 160.

12. These arrangements remained in place following the enactment of the Judicature Acts 1873 to 1875, which established the Court of Appeal and the divisions of the High Court. In 1966 each of the Inns of Court passed a resolution creating a new body, the Senate of the Four Inns of Court ("the Senate"). By those resolutions the Inns transferred to the Senate their former function of disciplining barristers. At the same time the judges of the three divisions of the High Court passed a resolution confirming that the Senate should exercise disciplinary powers over barristers. In this way all the powers to discipline barristers, which historically had been exercised first by judges and then by benchers, devolved upon the Senate. The Senate established a Disciplinary Committee to consider allegations of misconduct and to determine the appropriate punishment for any misconduct which was proved. The only residual role of the benchers of each Inn was to promulgate and give effect to any punishments which the Senate's Committee may impose upon errant members of that Inn.

13. In 1986/7 there was another upheaval. The Senate was dissolved and a new body, the Council of the Inns of Court ("COIC"), was created. COIC's constitution has been amended from time to time. It currently includes the following provisions:

> **"COMPOSITION OF THE INNS' COUNCIL**
>
> 2. The Inns' Council shall be composed of the following members:
>
> (a) The President
>
> (b) (i) The Treasurers of the Inns
>
> (ii) Eight members to be appointed by the Inns
>
> (c) The Officers
>
> (d) The Chairman of the Bar Council's Training for the Bar Committee.
>
> (e) The Chair and Vice Chair of the Bar Standards Board.
>
> (f) The Chair of the Bar Standards Board's Education and Training Committee.
>
> **THE PRESIDENT**
>
> 3. The President shall be elected by the members of the Inns' Council specified in clause 2(b) hereof. The President shall be a Bencher of one of the Inns, but shall not be one of the members specified in such clause 2(b), (c) or (d). The President shall hold office for three years and shall be eligible for re-election. The President shall be entitled to vote on any matter at any meeting of the Inns' Council. If the President resigns or ceases for any reason to be able to act, a successor shall be elected as soon thereafter as practicable.
>
> ....
>
> **THE BAR COUNCIL AND THE BAR STANDARDS BOARD**
>
> 7. The Bar Council and Bar Standards Board members specified in Clause 2 (c), (d), (e) and (f) shall not be entitled to vote."

14. During 1986 the four Inns of Court passed resolutions transferring the disciplinary powers of the Senate to COIC. On 26th November 1986 the Lord Chancellor and the three heads of divisions of the High Court (on behalf of all High Court judges) signed a resolution confirming the transfer of disciplinary powers to COIC.

15. I turn now to clause 1 (f) of COIC's constitution. It will be necessary to trace the history of that provision. Clause 1 (f) (as originally drafted) stated that one of COIC's functions was "to appoint Disciplinary Tribunals in accordance with the provisions of

Schedule A hereto". Clause 1 of Schedule A provided that the Professional Conduct Committee of the Bar Council should have the duty of preferring charges of misconduct against barristers. Clause 4 (a) of Schedule A provided that a Disciplinary Tribunal should consist of a judge as chairman, a lay representative "from a panel appointed by the Lord Chancellor" and three barristers. Clause 4 (b) of Schedule A provided that the President may appoint two barristers to fill any vacancies on the Tribunal before the start of the hearing. Clause 4 (c) of Schedule A gave the President power to make further changes to the membership of the Tribunal before the hearing began.

16. In 2000 COIC resolved that Schedule A should be replaced by the Disciplinary Tribunals Regulations 2000 ("the 2000 Regulations"). Clause 1 (f) of COIC's constitution was duly amended to refer to the 2000 Regulations, which became an annexe to the Bar's Code of Conduct. Regulation 2 of the 2000 Regulations required a Disciplinary Tribunal to consist of a judge or retired judge, two barristers and two lay representatives. The requirement that the lay representatives be drawn from a panel appointed by the Lord Chancellor was dropped. A new requirement was added, namely that retired judges were only eligible for nomination if they were on a panel of retired judges appointed by the President.

17. The Disciplinary Tribunals Regulations 2000 were amended on a number of occasions over the years. An amendment made in 2005 removed the requirement that any retired judge had to be drawn from a panel appointed by the President. The version of the Disciplinary Regulations which is most relevant for present purposes is the Disciplinary Tribunals Regulations 2009 ("the 2009 Regulations").

18. The Bar Standards Board ("BSB") was established under the 2007 Act. The BSB has replaced the Bar Council as the body which prosecutes cases of alleged misconduct by barristers before Disciplinary Tribunals. The BSB has entrusted some of its functions in that regard to the Professional Conduct Committee of the BSB.

19. Regulation 2 of the 2009 Regulations provides:

> "**Composition of Disciplinary Tribunals**
>
> (1) A Disciplinary Tribunal shall consist of either three persons or five persons.
>
> (2) A five-person panel shall (subject to paragraph (4) below) consist of the following five persons nominated by the President:
>
> (a) as Chairman, a Judge; and
>
> (b) two lay members; and
>
> (c) two practising barristers of not less than seven years' standing.
>
> (3) A three-person panel shall consist of the following three persons nominated by the President:

(a) as Chairman, one Queen's Counsel or a Judge; and

(b) one practising barrister of not less than seven years' standing; and

(c) one lay member."

The remainder of Regulation 2 sets out further details about the composition of Disciplinary Tribunals. Those details are not relevant for present purposes.

20. Regulation 8 of the 2009 Regulations provides that, after receiving charges against a barrister from the BSB representative, the President shall issue a convening order. The convening order will set out the names of the members of the Tribunal, the date of the hearing and other details. Thereafter the Tribunal will proceed in the manner prescribed by the Regulations.

21. I turn now to the procedure for appeals. For many years all High Court judges have been "Visitors" to the Inns of Court and in that capacity been empowered to hear appeals by barristers who were aggrieved by findings of misconduct and/or the sentences imposed for such misconduct. In *In Re S*, to which I referred in paragraph 11 above, a panel of five High Court judges sat in that capacity to hear a barrister's appeal against conviction and sentence.

22. From time to time the heads of the divisions of the High Court have promulgated Visitors Rules, which set out the procedure to be followed in dealing with appeals by barristers. The rules which are relevant for present purposes are the Hearings before Visitors Rules 2010 ("the 2010 Rules").

23. An appellant barrister commences his or her appeal by sending a petition of appeal to the Clerk to the Visitors. Rule 12 of the 2010 Rules provides, so far as material:

"**Appointment of panel to hear appeal**

12. (1) When a petition is served upon the Clerk to the Visitors (whether or not served in time), and after the period for service of any answer in accordance with rule 11(1) above has elapsed, the Lord Chief Justice shall nominate the persons who are to hear the appeal.

(2) An appeal against a decision of a Disciplinary Tribunal presided over by a Judge of the High Court shall be heard by a panel comprised of-

(a) a Judge of the Court of Appeal.

(b) a Queen's Counsel; and

(c) a lay representative.

> (3) Subject to paragraph (c) below, an appeal that is not of a type mentioned in paragraph (2) and is an appeal against a decision of a Disciplinary Tribunal shall be heard by a panel comprised of-
>
> (a) a Judge of the High Court or the Court of Appeal;
>
> (b) a barrister (who, where the defendant is a Queen's Counsel, shall himself be a Queen's Counsel); and
>
> (c) a lay representative."

24. That completes my outline of the arrangements for the discipline and regulation of barristers. I shall deal with certain aspects of those arrangements in more detail in Part 6 below. My next task, however, must be to summarise the relevant facts.

Part 3. The facts

Mr Mehey

25. In 2010 the BSB brought charges of misconduct against Mr Mehey on a variety of grounds. They included the following:

    i) He drafted an application for judicial review of a criminal decision, which he knew was not properly arguable.

    ii) He misled the Worcester Crown Court when making an application for adjournment.

    iii) He withdrew from a criminal trial when there were no proper grounds for doing so, causing prejudice to his client.

26. The President of COIC issued a convening order on 23rd July 2010. This nominated His Honour Frederick Marr-Johnson as chairman of the Tribunal, Miss Patricia Steel OBE and Mr David Hall as lay members, Mr Michael Simon and Mr Gabriel Fadipe as barrister members. The Tribunal heard the charges on 15-17 September 2010. The Tribunal found the charges proved and ordered that Mr Mehey be disbarred. It gave reasons for its decision in a letter from the chairman dated 22nd September 2010.

27. Mr Mehey appealed to the Visitors. The Lord Chief Justice nominated Mr Justice Royce, Mr Lawrence Jacobson (barrister) and Mr Kenneth Crofton-Martin (lay representative) to hear the appeal. The Visitors heard and dismissed Mr Mehey's appeal. The date of the Visitors' decision is not apparent from the bundles before us, but that date is not relevant for present purposes.

Miss Hayes

28. Miss Hayes, a chancery barrister of long experience, faced two charges, namely:

i) She failed to complete the required twelve hours continuing professional development.

ii) She failed to pay a fine of £100 imposed upon her for failing to complete the required twelve hours.

29. Miss Hayes denied the charges. She asserted that she should have been credited with more hours for time spent drafting Atkin's Court Forms.

30. On 31st March 2009 the President of COIC issued a convening order appointing His Honour Roger Connor DL as chairman of the Disciplinary Tribunal and the following as members: Ms Christine Jackson and Mr Peter Thompson (lay representatives), Ms Sacha Ackland and Mr Jonathan Barnes (barristers).

31. The Disciplinary Tribunal heard this matter on 24th April 2009. In a decision dated 5th May 2009 the Tribunal found both charges proved. It ordered Miss Hayes to complete the outstanding four hours of continuing professional development and to pay fines totalling £1,600 plus costs.

32. Miss Hayes appealed against both conviction and sentence to the Visitors. The Lord Chief Justice nominated Mrs Justice Baron, Mr Lawrence Jacobson (barrister) and Mrs Veronica Thomson (lay representative) to hear the appeal. The Visitors heard Miss Hayes' appeal on 3rd June 2011. By a decision dated 13th June 2011 the Visitors dismissed the appeal and upheld the Tribunal's decision.

Miss Russell

33. Miss Russell was a non-practising barrister, who had formerly been a solicitor. She faced a single charge of misconduct. This was that, when practising as a solicitor, she had knowingly made an untrue statement to a Law Society investigator.

34. On 15th April 2010 the President of COIC issued a convening order, by which he appointed His Honour Judge William Barnett QC as chairman of the Tribunal and the following as members: Ms Mary Chapman and Mrs Veronica Thompson (lay representatives), Mr John Elliott and Mr John Smart (barristers). The Tribunal heard the matter between Monday 17th May and Thursday 20th May 2010. In a decision dated 21st June 2010 the Tribunal by a majority found the charge proved.

35. Miss Russell appealed against the Disciplinary Tribunal's decision on a variety of grounds, including the proposition that the Disciplinary Tribunal had been unlawfully constituted. The Visitors dealt with that appeal in two stages. On 12th July 2012 a panel of Visitors, presided over by Sir Rabinder Singh, held that Mr Smart had been entitled to sit as a member of the Disciplinary Tribunal. On 23rd May 2013 a panel of Visitors presided over by Sir Wyn Williams rejected all of Miss Russell's other grounds of appeal.

36. Mr Mehey, Miss Hayes and Miss Russell were all aggrieved by the Visitors' dismissal of their various appeals. Accordingly each of them commenced proceedings for judicial review.

Part 4. The judicial review proceedings

Mr Mehey and Miss Hayes

37. Both Mr Mehey and Miss Hayes commenced judicial review proceedings in 2011, naming the Visitors to the Inns of Courts as defendants and the BSB as an interested party. In addition to a variety of individual grounds, the claimants both advanced one important contention of general application. This was that certain persons who had sat on the Disciplinary Tribunals or as Visitors were not qualified to do so.

38. The basis of the claimants' argument was this. In 2006 COIC established a pool of persons who were suitable to sit as members of Disciplinary Tribunals or as Visitors ("the COIC pool" or "the pool"). A body called the Tribunals Appointments Body ("TAB") was created, which would select suitable persons for inclusion in the pool. COIC drew up Terms of Reference ("TOR") to govern the functioning of TAB. Paragraph 19 of TOR specified limited periods for both barristers and lay representatives to remain in the pool. Some of the individuals who had sat on the claimants' disciplinary hearings or appeals were time-expired.

39. The applications of Mr Mehey, Miss Hayes and one other barrister (David Leathley, who is not a party before this court) were listed for hearing before the Divisional Court, comprising Lord Justice Moses and Mr Justice Kenneth Parker, on 16th-18th July 2013. The matter was listed as a "rolled-up" hearing, with the full argument to follow if permission was granted. The Visitors were not represented at the hearing. The BSB was represented by leading and junior counsel.

40. The Divisional Court handed down its decision on 16th October 2013. The full judgment can be found as *The Queen on the application of David Leathley and others v Visitors to the Inns of Court* [2013] EWHC 3097 (Admin). Lord Justice Moses gave the leading judgment, with which Mr Justice Kenneth Parker agreed. The court granted permission on some grounds only, but having done so dismissed all the claimants' claims. The court refused the BSB's application for costs. I would summarise the court's reasons as follows:

    i) When the President appointed persons to sit on Disciplinary Tribunals pursuant to regulation 2 of the 2009 Regulations, he or she was not obliged to appoint people who were current members of the COIC pool.

    ii) When the Lord Chief Justice appointed persons to sit as Visitors hearing appeals from Disciplinary Tribunals pursuant to rule 12 (1) of the 2010 Rules he or she was not obliged to appoint people who were current members of the COIC pool.

    iii) Alternatively, the time-expired Tribunal members or Visitors had authority under the *de facto* judge doctrine.

    iv) The mismatch between the various regulatory documents did not reflect well on those who organised the barristers' disciplinary scheme.

    v) Miss Hayes had an arguable case based on delay. Therefore she should have permission to pursue that ground. Nevertheless, after hearing full argument, the court rejected that claim.

vi) All of the other grounds of challenge advanced by Mr Mehey and Miss Hayes were unarguable. Therefore the court refused permission on those grounds.

41. Mr Mehey and Miss Hayes were aggrieved by the rejection of their claims. Accordingly they applied for permission to appeal. The BSB was aggrieved by the rejection of its application for costs. Accordingly it too applied for permission to appeal.

Miss Russell

42. On 26th June 2013 Miss Russell commenced judicial review proceedings challenging the two decisions of the Visitors dismissing her appeal. Although Miss Russell advanced a variety of contentions, only one is relevant for present purposes. That is the argument that the Disciplinary Tribunal before which she appeared in May 2010 was unlawfully constituted.

43. On 20th May 2014 Mr Justice Blake, after considering the matter on the papers, refused permission to proceed with the claim for judicial review. Mr Justice Dingemans made a similar order at an oral hearing on 10th July 2014. At that hearing the claimant appreciated that her claim could not succeed at first instance, but she wished to pursue the matter in the Court of Appeal. Accordingly, following the decision of Mr Justice Dingemans, Miss Russell applied for permission to appeal to the Court of Appeal.

44. Thus by 2014 there were four separate applications for permission to appeal to the Court of Appeal. The applicants were Mr Mehey, Miss Hayes, Miss Russell and the BSB. I must now turn to the course of proceedings in the Court of Appeal.

Part 5. The proceedings in the Court of Appeal

45. Earlier this year the Civil Appeals Office referred each of the four applications for permission to appeal to me for consideration on the papers. I took the view that the applications were interlinked and they were not straightforward. To order a rolled-up hearing in the Court of Appeal would in practice be tantamount to granting permission to appeal. I therefore ordered that the four applications for permission be listed for hearing together with all parties to attend or be represented.

46. The four applications for permission to appeal came on for hearing on 26th November 2014. Mr Mehey and Miss Hayes appeared in person. Mr John Hendy QC, leading Mr Marc Beaumont, appeared *pro bono* for Miss Russell. Mr Paul Nicholls QC, leading Mr Tom Cross, appeared for the BSB.

47. Since Miss Russell was the only barrister with legal representation, her counsel addressed the court first. Both Miss Hayes and Mr Mehey adopted the arguments of Mr Hendy and Mr Beaumont on the main issue of principle. Thereafter they developed points which were specific to their own individual appeals.

48. Mr Nicholls QC on behalf of the BSB submitted that the various grounds advanced on behalf of the three barristers could not succeed. Therefore this court should refuse permission to appeal. As a separate matter Mr Nicholls pursued the BSB's application for permission to appeal in respect of costs.

49. Having set the scene, I must now address matters in the same order that counsel argued them. Accordingly I shall begin with the main issue of principle.

Part 6. The main issue of principle

50. The main issue of principle is whether individuals who were not properly appointed and current members of the COIC pool were entitled to sit on Disciplinary Tribunals or as Visitors. If they were not so entitled, then a secondary issue arises, namely whether the decisions in which those individuals participated were valid by reason of the *de facto* judge doctrine. What I have to focus on at this stage of the proceedings is whether the three barristers have a real prospect of success in appealing against the Divisional Court's decision on the main issue. This is not a case where, absent a real prospect of success, there is "some other compelling reason why the appeal should be heard" within CPR 52.3 (6) (b).

51. I should begin by setting out the relevant background. The Visitors' decision in *In Re P (A barrister)* [2005] 1 WLR 3019 emphasised the separate roles of those who prosecute and those who adjudicate upon allegations of misconduct by members of the Bar. In *P* a Disciplinary Tribunal convened by the President of COIC pursuant to the 2000 Regulations found the appellant barrister guilty of misconduct and suspended her from practice for three months. The Visitors appointed to hear the barrister's appeal included N, who was also a member of the Bar's Professional Conduct and Complaints Committee. That Committee was responsible for prosecuting allegations of misconduct, although N had not been involved in prosecuting the current case. The appellant barrister objected to N's participation and the Visitors upheld that objection. N was obliged to recuse herself both on common law principles and in order to secure compliance with ECHR article 6.

52. Following the decision in *P* COIC took steps to secure that only eligible persons would be appointed to serve on Disciplinary Tribunals or panels of Visitors. COIC decided to create a pool of suitable persons for that purpose. COIC set up the Tribunals Appointments Body ("TAB"), whose function was to appoint appropriate persons to the COIC pool. COIC also drew up terms of reference ("TOR") under which the TAB would operate.

53. The TOR included the following:

> "**TERMS OF REFERENCE**
>
> 1. The Tribunals Appointments Body (the Body) is a COIC appointed body. It is established to vet the applications of those people desirous of being members of the panel of persons to sit and decide on issues of misconduct and inadequate professional service and fitness to practise brought by the BSB and certify that those they select to the panels are fit and properly qualified to conduct the business for which they have been selected.
>
> **Composition**

2. The Body shall consist of a Chairman, two barristers one of whom should be in silk and a lay representative. The Body will be appointed by the President of COIC in consultation with the Treasurers of the four Inns after canvassing the Inns for volunteers.

....

Terms of Office

4. Persons appointed to the Body will normally serve three years, save that in the first three years of operation one barrister will change after one year, the lay representative and the other barrister member after two years and the chairman after three years.

....

Method of Operation

7. The Body will meet as necessary and at least once per year, as directed by the Chairman. They will consider applications to sit on disciplinary and other hearings from Barristers and Lay Representatives which will be made in response to advertisements in Counsel magazine and the national press respectively. Barristers may put themselves forward for consideration at other times and such applications may be reviewed as a paper exercise. The Body will be responsible for designing and amending as necessary an application form.

8. The Body's task will be to vet such applications, take up references as necessary to ensure that members of the Barristers and the Lay Representatives panels are representative of their groups and suitably qualified to sit on disciplinary and fitness to practise panels and hearings. A separate list will be maintained of those selected to be clerks to tribunals.

9. The Body will review the entire lists at least once each calendar year.

10. The Body will be assisted by the Tribunals Secretary who will maintain both lists.

....

19. The Tribunals Secretary will maintain the following lists:

a. Lay representatives available for hearings: 30-40 each appointed for five years, renewable once.

b. Barristers volunteering for hearings: approximately 150. Existing panel members will be permitted to remain on the

> panel for up to a further three years. Barristers once appointed may serve on the panel for five years, renewable once. It is intended that up to 50 new barristers will be recruited each year in the first three years to replace those who have taken no active part in the recent past. The aim should be to have completely vetted panels by October 2009.
>
> c. Silks volunteering to sit on and chair hearing: approximately 30. Save for the numbers, recruitment and service will be as for barristers at paragraph 19.b above.
>
> d. Clerks engaged by COIC on a case by case basis: 10. Clerks will be engaged for five years, renewable once."

54. Unfortunately matters did not proceed in the manner envisaged by the TOR. In particular the initial members of TAB did not stand down in rotation, as required by clause 4 of TOR. Instead they all remained in post until February 2012. TAB did not annually review the four lists of persons who comprised the COIC pool, as required by clause 9 of TOR. Indeed TAB did not meet at all between November 2008 and February 2012. Numerous members of the COIC pool remained in the four lists after they had become time-expired under clause 9 of TOR. Such persons continued to be appointed to Disciplinary Tribunals or panels of Visitors, as and when the President or the Lord Chief Justice so decided. Between 2006 and 2011 one member of TAB, Ms Desiree Artesi, was also a member of the BSB's Professional Conduct Committee.

55. For a fuller account of the administrative mishaps which occurred, reference should be made to the Browne Report. These matters did not come to light during the period 2006-2011.

56. In the meantime, unaware of the mishaps, on 29th September 2010 the President of COIC and the chairman of the BSB signed a memorandum of understanding ("MOU"). This set out the arrangements between COIC and the BSB for arranging and administering disciplinary proceedings. Paragraph 1 of the MOU defined panel members as:

> "Judges, barristers and lay people appointed by COIC to determine a proceeding under the relevant provisions of the Annexes to the Code of Conduct namely: the Complaints Rules, the Disciplinary Tribunal Regulations and the Adjudication Panel and Appeal Rules, the Fitness to Practise Rules, the Interim Suspension Rules and the Hearings before the Visitors Rules."

57. Paragraph 3.2 said that the MOU was not intended to be legally binding. Thereafter the MOU provided:

"6.1 COIC will have the responsibilities set out in this paragraph and outlined in more detail in the relevant sections below:

a) Recruitment of clerks and Panel members;
b) Induction and training of Panel members and clerks;
c) Providing hearing venues for all relevant hearings;
d) Recording of relevant hearings;
e) Appointment of Panel Members for all relevant hearings.

....

Recruitment of Panel Members and Clerks

7.1 COIC will retain a pool of suitably qualified clerks and Panel Members to meet the needs of all relevant hearings for any one year.

7.2 In determining the size of the pool of clerks and Panel Members required, COIC will liaise with the BSB on an annual basis, early in the second half of each calendar year, to forecast the number of hearings for the year ahead and thereby assess whether that pool is sufficient to meet the projected demand.

7.3 COIC will also conduct an assessment every three years to determine whether all clerks and Panel Members in the current pool wish to remain and whether they are suitable to continue to do so.

....

11.1 COIC will be responsible for appointing all Panel Members for all relevant hearings. Such appointments will be made by the President of COIC in accordance with the relevant provisions of the Code of Conduct. Where appropriate, COIC will delegate authority to the Tribunals Administrator to undertake this task.

....

Appeals to the Visitors

14.1 COIC will be responsible for the appointment of the barrister member and the lay member of Visitors' panel, appointed under Rule 10 of the Hearings before the Visitors Rules 2005, to hear appeals against decisions of Disciplinary Tribunals."

58. On 23rd November 2011 COIC appointed a Review Group, chaired by Desmond Browne QC, to review the current disciplinary arrangements. Once the Review Group had started work it uncovered the problems to which I have referred above.

59. I turn now to the impact of those matters on the applications before this court. In Mr Mehey's case two members of the Disciplinary Tribunal, namely Mr Fadipe and Mr Simon, were time-expired members of the COIC pool. One of the Visitors who heard Mr Mehey's appeal, Mr Jacobson, was a time-expired member of the COIC pool.

60. In Miss Hayes' case, it is not entirely clear to me which members of the Disciplinary Tribunal and/or the Visitors were time-expired, but it is at least established that one of the Visitors was: see paragraph 4 of the Divisional Court's judgment, to which there has been no challenge on the facts.

61. In Miss Russell's case one member of the Disciplinary Tribunal, Mr Smart, was time-expired. By the time Miss Russell's appeal came on before the Visitors, the earlier administrative errors had come to light. Miss Russell was therefore able to rely upon the expiry of Mr Smart's tenure as one of her grounds of appeal to the Visitors. The Visitors rejected that ground, holding that the 2009 Regulations did not require members of the Disciplinary Tribunal to be drawn from the COIC pool.

62. Mr Hendy submits that the court should read all the relevant documents together. These are the TOR, the 2009 Regulations, the MOU, the 2010 Rules and the Constitution of COIC. It was, he submits, the clear intention that both the President and the Lord Chief Justice should only nominate persons from the COIC pool to hear disciplinary cases or appeals.

63. Regard should also be had to the information packs and guidance documents given to members of the COIC pool. I take those lengthy documents into account, but will not extend this judgment with quotations from those sources.

64. I have carefully considered all of the materials upon which Mr Hendy relies. The MOU and the TOR lead the reader to expect that both the President and the Lord Chief Justice will make appointments from the COIC pool, but they do not impose any express obligation to that effect. On the contrary they simply set out procedures for securing that each person in the COIC pool would be suitable to serve as a Tribunal member or Visitor, in the event that he or she is nominated for any particular case.

65. I turn now to COIC's constitution and the 2009 Regulations. Clause 1 (f) of COIC's constitution requires COIC to appoint Disciplinary Tribunals in accordance with the Disciplinary Tribunals Regulations. Regulation 2 of the 2009 Regulations provides that the President shall nominate the members of Disciplinary Tribunals. Neither COIC's constitution nor the 2009 Regulations place any limit on which judges, barristers and lay representatives the President may select. Earlier versions of the Disciplinary Tribunals Regulations did impose such restrictions (as recited in Part 2 above) but those restrictions were subsequently dropped. There was once an express requirement that lay representatives should be drawn from a panel appointed by the Lord Chancellor, but that requirement has been deleted. Likewise there was once a requirement that retired judges be drawn from a panel appointed by the President, but that requirement has been deleted.

66. I turn next to the Hearings before Visitors Rules. Rule 12 of the 2010 Rules provides that the Lord Chief Justice is to nominate the persons who are to hear appeals as Visitors. The Rules place no limit on which judges, barristers and lay representatives the Lord Chief Justice may select.

67. Since there is no express obligation upon the President or the Lord Chief Justice to make nominations from the COIC pool, the real question becomes whether any such obligation is to be implied. Mr Hendy submits that, when the various regulatory documents are read together, it was plainly the intention that nominations should only be made from the COIC pool; indeed the documents must be read in this way in order to give them efficacy: see the reasoning of the Court of Appeal in *Virdi v Law Society* [2010] EWCA Civ 100; [2010] 1 WLR 2840. Mr Hendy argues that if a Disciplinary Tribunal or Panel of Visitors is appointed from outside the COIC pool, it could not be independent or guaranteed to be free from outside pressure. Thus any Disciplinary Tribunal or Panel of Visitors appointed from outside the COIC pool would not comply with ECHR article 6.

68. I do not accept these submissions. It is helpful to begin by considering the position in 2006. The decision in *P* alerted COIC and the Bar Council to the fact that things could not go on as before. Steps had to be taken to prevent persons vulnerable to accusations of apparent bias from being appointed to hear disciplinary matters. The result was (i) the creation of the TAB and the COIC pool and (ii) the drafting of the TOR. If it had been intended to restrict appointments to members of the COIC pool, both the Disciplinary Tribunals Regulations and the Hearings before Visitors Rules would have been amended at that time to say so. But this did not happen.

69. In my view the only possible conclusion to be drawn from the documents is this. The architects of the new scheme in 2006 were creating a pool of barristers, lay representatives and others from which nominations could safely and properly be made for the purpose of disciplinary hearings and appeals. They were not placing an absolute ban on appointing persons from outside the pool as members of Disciplinary Tribunals or as Visitors. To imply such a ban would be contrary to the express provisions of the documents. It would also be surprising if there were such a prohibition, because some barristers do very specialist work; on occasions it may be appropriate to appoint a barrister or lay representative with particular expertise which is not available within the COIC pool. Furthermore there was no need for a complete ban. The court or the Visitors would step in to protect a defendant barrister, if an ineligible person were appointed to sit. This is precisely what happened in *P*.

70. I do not accept the proposition that a Disciplinary Tribunal or a panel of Visitors appointed from barristers or lay representatives outside the pool would not be independent or would not be guaranteed to be free from outside pressure.

71. If the President of COIC or the Lord Chief Justice nominated barristers or lay representatives who in his or her opinion were suitable to hear a disciplinary charge or appeal, that would constitute compliance with ECHR article 6. The discharge of this function by the President or the Lord Chief Justice is in itself a sufficient guarantee that the Disciplinary Tribunal members or Visitors would be independent and free from outside pressure. The President and the Lord Chief Justice are senior members of the Judiciary and Inns of Court, to whose jurisdiction the barrister submitted upon call to the Bar. It goes without saying that if the President or the Lord Chief Justice

had any personal connection with the case he or she (like any other judicial office-holder) would stand aside, so that a deputy could perform the function.

72. Mr Hendy submits that all the documents referred to above form part of the Bar's "regulatory arrangements" as defined in section 21 of the 2007 Act. Barristers are "regulated persons" under the Act. Section 176 requires that all barristers comply with the Bar's regulatory arrangements. Therefore the time-expired barristers in the COIC pool were prohibited from serving as members of Disciplinary Tribunals or as Visitors.

73. The Divisional Court did not accept this argument. Nor do I. If the 2009 Regulations, the 2010 Rules, the TOR, the MOU and COIC's constitution have the meaning which I attribute to them, then the regulatory arrangements for the Bar do not prevent barristers outside the COIC pool from sitting on Disciplinary Tribunals or as Visitors. Therefore there is no breach of section 176.

74. In the result, I conclude that the three barristers have no prospect of successfully appealing on the ground that the President or the Lord Chief Justice could only make appointments from the COIC pool.

75. I now turn to the *de facto* judge issue. The Divisional Court held that even if the impugned Tribunal members or Visitors were not entitled to sit, nevertheless they had authority to act as *de facto* judges.

76. Mr Beaumont submits that the three barristers have a real prospect of overturning this decision on appeal. He submits that in the light of developments in European law and other international instruments, the common law doctrine of *de facto* judges cannot stand.

77. I do not propose to linger on this issue. I acknowledge that Mr Beaumont has put forward formidable arguments which require consideration in the context of an appeal. I do not say that those arguments will prevail, merely that they are not suitable for final resolution in the context of a permission application. If this case turned on the *de facto* judge doctrine (which it does not), I would be minded to give permission to appeal.

78. I would add that more research on this issue would help. For example, how do other common law and civilian jurisdictions deal with the problem which arises if a historic technical defect emerges in the appointment of a serving judge? England and Wales cannot be the only country where administrators occasionally make mistakes. Is the *de facto* judge doctrine a quirk of English common law or are similar practical solutions adopted elsewhere? See e.g. *In re Aldridge* (1897) 15 NZLR 361. If we are going to look at the matter from an international perspective, as Mr Beaumont invites the court to do, it would be helpful to know the answer.

79. There is one final point which Mr Hendy raises. This concerns the role of Ms Artesi, who was a member of the BSB's Professional Conduct Committee between 2006 and 2011. She was also a member of TAB during that period. She was therefore one of the four people appointing members of the COIC pool. Mr Hendy submits that it was quite wrong for a member of the prosecuting body to have a say in deciding who

would be the judges in cases of alleged professional misconduct. Also this was contrary to paragraphs 2 (e), 2 (f) and 7 of the COIC constitution.

80. In my view Ms Artesi's membership of TAB, although inappropriate, cannot vitiate any of the disciplinary proceedings with which we are concerned. This case is a far cry from *P*. Contrary to the position in *P*, Ms Artesi did not herself sit on a Disciplinary Tribunal or as a Visitor in any of the cases under challenge. She was merely one of four people who selected members of the COIC pool. For the reasons previously stated, membership of that pool was not a precondition for hearing disciplinary proceedings or appeals. Furthermore the fair minded and informed observer would not suspect that members of the COIC pool might be biased simply because Ms Artesi was one member of the appointing body.

81. I should add that the rights and protection of barristers are not the only public interest which is in play. There is also a high public interest in protecting parties to criminal or civil litigation against misconduct by barristers. The courts will be slow to strike down any regulatory system which protects that public interest. The courts will only do so where illegality has been demonstrated, which is not the case in this instance.

82. Let me now draw the threads together. In my view the three barristers have no prospect of successfully appealing on the grounds that certain Disciplinary Tribunal members or Visitors were not members of the COIC pool. Nor does Miss Russell have any prospect of establishing that Ms Artesi's dual membership of TAB and the BSB's Professional Conduct Committee invalidated the proceedings against Miss Russell.

83. On the main issue, therefore, I refuse the applications of the three barristers for permission to appeal. I add that in arriving at this conclusion I place no reliance on the *de facto* judge argument deployed by the BSB. Although the Divisional Court accepted that argument, if it were critical for the present case (which it is not), I would have been minded to grant permission to appeal on that issue, coupled with a request for more research.

84. Having dealt with the main issue, I must now turn to the remaining issues before the court.

Part 7. The remaining issues

Mr Mehey

85. Mr Mehey advanced a number of additional grounds for claiming judicial review, which the Divisional Court regarded as unarguable. Accordingly it refused permission for Mr Mehey to pursue those judicial review claims.

86. Mr Mehey objected to Mr Simon being a member of the Disciplinary Tribunal because he was an examiner for the Bar Professional Training Course. The Divisional Court held that this in no way disqualified him or impaired his objectivity. I agree.

87. Mr Mehey also contended that his judicial review claim had been conceded in correspondence. The Divisional Court held upon examining the relevant letters that this was not the case. I see no reason to disagree.

88. Mr Mehey submitted that he had been treated unfairly by the Divisional Court. He said that Lord Justice Moses had been unduly hostile in exchanges with him. In the absence of a transcript there is no basis for this court to say that there is any substance in this complaint.

89. Mr Mehey drew attention to various medical reports concerning his state of health. He also made submissions about the underlying incidents for which he has been disbarred. I am afraid that none of these matters can possibly be a ground for granting permission to appeal against the Divisional Court's refusal of permission to apply for judicial review.

Miss Hayes

90. As noted in Part 3 above, there was a substantial delay between the decision of the Disciplinary Tribunal (5th May 2009) and the hearing of Miss Hayes' appeal to the Visitors (3rd June 2011). The Divisional Court noted that the BSB's attempted justification for the delay was unsatisfactory. It considered that Miss Hayes had good reason to complain and, indeed, it granted permission on this ground. Nevertheless the court concluded that in all the circumstances the delay was not such as to warrant quashing the Visitors' decision: see paragraph 58 of the judgment of Lord Justice Moses.

91. The Court of Appeal will not interfere with an assessment of this nature by a first instance court, unless that court has clearly gone wrong. That is not the case here. I therefore refuse Miss Hayes' application for permission to appeal this limb of the Court of Appeal's decision.

92. Miss Hayes has also advanced claims for judicial review on a number of other grounds, all of which the Divisional Court regarded as unarguable. Accordingly it refused permission for Miss Hayes to pursue those other judicial review claims.

93. I agree with the view of the Divisional Court and will therefore deal with those other matters quite shortly.

94. The fact that Ms Christine Jackson had in the past been a member of the Bar's Professional Conduct and Complaints Committee did not prevent her subsequently being a member of Ms Hayes' Disciplinary Tribunal. By 2009 Ms Jackson had long since ceased to have any involvement in prosecuting cases of misconduct. Miss Hayes questions whether it is possible to "de-taint" people. The short answer must be yes. Otherwise counsel who regularly appear for the prosecution or indeed the defence could never be appointed to the bench. There is no analogy between *P* and the present case.

95. Miss Hayes makes numerous criticisms of the presence in the COIC pool of other individuals who heard her case or her appeal. I see no force in any of those points. Nor do I accept that there is any basis for Miss Hayes' contentions of bias or apparent bias. Miss Hayes has had a perfectly fair hearing and a perfectly fair appeal. Neither her offences nor her punishment are as serious as those of the other two barristers involved in the present applications.

96. Miss Hayes rightly reminded us that she is a chancery barrister and accustomed to dealing with matters of detail. She has certainly done so in her skeleton argument before this court. But it is fanciful to suggest that any of Miss Hayes' additional arguments could be a proper basis for judicially reviewing the Visitors' decision of 13th July 2011. It is now time for her to move on from this case.

Bar Standards Board

97. The BSB seeks permission to appeal against the Divisional Court's refusal to make a costs order in favour of the BSB in the cases of Mr Leathley (a barrister who is not before this court), Mr Mehey and Miss Hayes.

98. It is common ground that if the BSB succeeds in its proposed appeal, BMIF will pay whatever costs are ordered. Mr Hendy and Mr Beaumont have been instructed to represent BMIF on this issue. Accordingly Mr Leathley is not prejudiced by the fact that he has neither been present nor represented before this court.

99. In the course of his judgment Lord Justice Moses, though finding in favour of the Visitors and the BSB on the issues of law, was strongly critical of the situation which COIC and the BSB had created. He criticised the apparent mismatch between different sets of rules which had given rise to the current litigation. He also criticised the administrative errors which the Browne Report had revealed.

100. I see force in the criticisms which Lord Justice Moses has made and with which Mr Justice Kenneth Parker has agreed.

101. It would be much better all round if (a) TAB comply properly with the TOR and (b) the Disciplinary Tribunals Regulations and the Hearings before Visitors Rules are amended so as to require nominations to be made from the COIC pool, save where there is good reason to look outside the pool. If COIC and the BSB take these obvious steps, the disciplinary arrangements of the Bar and the Inns of Court will be more transparent and more satisfactory.

102. Lord Justice Moses said that the Bar should be at the forefront of setting standards as to how institutions should regulate themselves. I agree. I would add that instead of being at the forefront, the Bar and COIC seem to have been lagging behind. That is not acceptable.

103. Mr Nicholls submits that any criticisms of this nature should be directed against COIC, not the BSB. In my view the BSB cannot shirk its responsibilities so easily. The BSB carries out functions on behalf of the Bar Council, which is the statutory regulator under the 2007 Act. Furthermore the BSB writes the Bar's Code of Conduct, to which the Disciplinary Regulations form an annexe. In this litigation the BSB has assumed the burden of defending the position of both COIC and itself, whilst not denying the series of administrative errors which have occurred.

104. It is also significant that the BSB has obtained a decision of the Divisional Court, which clarifies the law in an area that has been the subject of much controversy ever since the publication of the Browne Report. There is a case for saying that the BSB (in the unusual circumstances of this case) should bear the cost of obtaining that benefit.

105. The court has a wide discretion in respect of costs, as set out in CPR 44.2. In the particular circumstances of this case the Divisional Court decided to make no order as to costs. In my view the BSB would not be able to persuade the Court of Appeal to interfere with that exercise of discretion.

106. I therefore refuse permission for the BSB to appeal on the issue of costs.

Part 8. Executive summary and conclusion

107. These are applications for permission to appeal by three barristers with separate judicial review claims and by the Bar Standards Board, which is an interested party in the proceedings. The Visitors to the Inns of Court, who are named as defendants in the various claims, have not appeared or been represented.

108. The Divisional Court has held that barristers and lay representatives are entitled to hear disciplinary proceedings against barristers or appeals therefrom, even if they are not members of the pool established by the Tribunals Appointments Body which the Council of the Inns of Court set up in 2006. After hearing full argument, I am satisfied that the Divisional Court was correct in this conclusion and that there is no prospect of a successful appeal against it. I would therefore refuse permission to appeal against that decision.

109. The Divisional Court also held that the delay in hearing Miss Hayes' appeal to the Visitors to the Inns of Court was not such as to warrant quashing the Visitors' decision. There is no prospect of the Court of Appeal substituting a different evaluation of the effect of that delay. I would therefore refuse Miss Hayes' application for permission to appeal against that decision.

110. The barristers seek permission to appeal on the ground that the Divisional Court was wrong to rely upon the *de facto* judge doctrine. On this point, I think that the barristers have an arguable case. I would be minded to grant permission to appeal if this matter were critical. But it is not. For the reasons set out above, even if the barristers prevail on the *de facto* judge issue, they cannot succeed in their appeal.

111. The barristers also seek permission to appeal on a variety of grounds in respect of which the Divisional Court refused permission to apply for judicial review. I see no merit in any of those claims.

112. The Bar Standards Board is aggrieved that the Divisional Court did not make a costs award in its favour and seeks permission to appeal solely on the costs issue. The Court of Appeal is slow to permit costs appeals, as such matters lie in the discretion of the first instance court. It is not appropriate to grant permission for such an appeal in the circumstances of this case.

113. Since we have heard lengthy argument and we are a three judge court, this judgment may be cited on future occasions, in the event that it is relevant.

114. If my Lord and my Lady agree, all the applications before this court are refused.

Lord Justice Ryder:

115. I agree.

Lady Justice Sharp:

116. I also agree.