



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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 July 2012

Before:

THE HONOURABLE SIR RABINDER SINGH

MR ANDREW O'CONNOR

DR MANJU BHAVNANI

Between:

Carron Ann Russell

- and -

Bar Standards Board

Appellant

Respondent

**Anthony Speaight QC and Marc Beaumont (instructed by Weightmans) for the Appellant
Clive Lewis QC and Tom Cross (instructed by the Bar Standards Board) for the
Respondent**

Hearing date: 29 June 2012

Approved Judgment

Sir Rabinder Singh:

This is our unanimous judgment.

Introduction

1. The Appellant has appealed against the decision of a Disciplinary Tribunal (“the Tribunal”) appointed by the President of the Council of the Inns of Court (“COIC”) dated 21 June 2010. The Tribunal was governed by the Disciplinary Tribunals Regulations 2009 (“the Regulations”).
2. By agreement between the parties, pursuant to para. 3 of the Directions made by Sir Anthony May on 17 May 2012, the sole purpose of this part of the appeal is to deal with preliminary issues as to whether the Tribunal was properly constituted. The substantive part of the appeal is to be heard on a future date if it is necessary to do so.
3. There are two issues before us:
 - (1) Whether there was a defect in the Tribunal’s constitution. By the time of the hearing before us, it had become clear that the only complaint made in this regard concerns the participation of Mr John Smart, one of the barrister members of the Tribunal.
 - (2) If there was some defect in the constitution of the Tribunal, because Mr Smart should not have been a member of it, whether he had *de facto* authority to act, with the consequence that the Tribunal proceedings were valid in any event.

Factual background to the Appellant’s case

4. The Appellant was a non-practising barrister who had been a solicitor. On 11 August 2005 she was struck off the Roll of Solicitors following a hearing before the Solicitors’ Disciplinary Tribunal. She was then charged with conduct unbecoming a barrister contrary to paragraph 301(a)(i) of the Code of Conduct of the Bar of England and Wales.
5. By its decision of 21 June 2010 the Tribunal found proved, by a majority, a single charge that on 14 September 1998, when the Appellant was practising as a solicitor, she told a Law Society investigator (Mr Norton) that a solicitor called Mr David Rippon had been in partnership with her at the firm until 1 September 1998, when that was untrue.

Factual background in relation to the composition of the Tribunal

6. On 15 April 2010 the President of COIC (at that time Etherton LJ) issued a Convening Order, pursuant to regulation 8 of the Regulations. By that Convening Order the President nominated five persons to constitute the Tribunal, namely a judge, HHJ William Barnett QC; two lay members, Ms Mary Chapman and Ms Veronica Thompson; and two barristers, Mr John Elliott and Mr John Smart. The Tribunal sat on 17 to 20 May 2010 and 21 June 2010.
7. On 10 May 2006, COIC had adopted arrangements for establishing the Tribunals Appointments Body (“TAB”) “to vet the applications of those people being desirous of being members of the panel of persons to sit and decide on issues of misconduct and inadequate professional services and fitness to practise brought by the BSB [Bar Standards Board] and certify that those they select to the panels are fit and properly qualified to conduct the business for which they have been selected”: see para. 1 of the TAB Terms of Reference. The minutes of a meeting of COIC on 10 May 2006, at para. 32, record in relation to the TAB that: “The papers prepared by the Under Treasurer of Lincoln’s Inn were noted and copies are attached to the Minute Book.” Strictly speaking, the arrangements in the TAB Terms of Reference were not expressly adopted or even approved. The BSB drew to our attention that a contrast can be drawn with, for example, minutes of a COIC meeting dated 25 January 2006, para. 4, where there is express reference to approval of a document, which seems to have been an earlier draft of the TAB Terms of Reference. Nevertheless, it appears to be clear that the intention of COIC was to recruit people interested in being on lay or barrister panels in accordance with the TAB Terms of Reference.
8. Those arrangements contemplated that lists would be maintained of lay representatives available for hearings: they would be appointed for five years, renewable once for five years (see para. 19(a) of the TAB Terms of Reference). Lists would also be maintained of barristers volunteering for hearings. Barristers would be appointed for five years, again renewable once for five years (see para. 19(b) of the TAB Terms of Reference and para. 19(c), which dealt separately with Silks). In relation to barristers, existing panel members were to be permitted to remain on the panel for up to three years. Those barristers previously on the list of barristers available for hearings would be able to remain on the list of barrister volunteers for three years (i.e. up to 10 May 2009). There was nothing to stop them applying to be on the new list of barrister volunteers.
9. At the hearing before us no objection was taken to the presence on the Tribunal of the judge, the two lay members or Mr Elliott. The only complaint made before us concerned Mr Smart, one of the barrister members. He was informed on 2 May 2001 that his name had been added to a “Volunteers list of Panel Members for Disciplinary Tribunals”. Had the arrangements in the TAB Terms of Reference been applied to him he would, as an existing panel member, have remained on the list of barrister volunteers only until 10 May 2009. However, the arrangements were not applied to him and, as a matter of fact, he remained on the list after that time. None of this was drawn to the attention of Mr Smart, who did not apply to be on the list of barrister volunteers after 10 May 2009.

A brief history of the discipline of advocates

10. As a matter of history the origins of discipline over advocates began with the King's (or Queen's) Justices. The judgment of the Visitors delivered by Paull J. in *In re S (a barrister)* [1970] 1 QB 160, at 168, records that as early as 1292 the Lord Chief Justice and other justices were exercising control over those who might appear before them. By the middle of the 17th century the judges were allowing a right of audience to anybody who had been called to the Bar by an Inn of Court. The Inns exercised a role not only in respect of admission to the Bar but also in relation to suspension and disbarment.
11. In 1967 each of the Inns of Court passed a resolution that their disciplinary powers, other than the formal pronouncement of a sentence such as disbarment, should vest in, and be exercised by, a new body, to be known as the Senate of the Inns of Court and the Bar. The judges of the High Court passed a resolution to similar effect. The case of *In re S* confirmed that the judges had thereby validly altered the machinery of discipline over barristers.
12. In 1987 that arrangement was replaced by the two separate bodies which exist today, namely COIC and the General Council of the Bar ("the Bar Council"). The procedures by which that change was effected again involved a resolution by the judges, dated 26 November 1986, conferring a delegated function on the new body, COIC. This resolution of the judges is still stated by COIC to be the foundation of its authority when it convenes Disciplinary Tribunals today.
13. In 1990 there was for the first time statutory intervention by Parliament in relation to rights of audience: see the Courts and Legal Services Act 1990, in particular s.27(3).
14. Following the report by Sir David Clementi in 2004 into the regulation of the legal profession the Bar Council decided to establish a separate body, called the BSB, to undertake its regulatory functions. In relation to disciplinary matters, the BSB now prescribes the content of the Code of Conduct and is the body which brings charges against barristers before Disciplinary Tribunals.
15. In 2007 Parliament again legislated with regard to the regulation of the legal profession. By the Legal Services Act 2007 the exercise of reserved legal activities, which includes the exercise of rights of audience, is confined, for most practical purposes, to authorised persons, in the sense of those authorised by an approved regulator: see ss. 12, 18 and 20 of the 2007 Act. The Act provided that the General Council of the Bar was an approved regulator in respect of the activity of the exercise of a right of audience. The existing regulatory arrangements of each approved regulator were treated as approved for the purposes of the Act: see Schedule 4, paras. 1 and 2(1).

The 2009 Regulations

16. Regulation 3 of the Regulations provides that:

“The President [of COIC] shall appoint Disciplinary Tribunals to sit at such times as are necessary for the prompt and expeditious determination of charges brought against defendants in accordance with the provisions of these Regulations.”

17. Regulation 2 sets out the composition of the Tribunal. In the case of a five-person panel, it must have a judge in the chair, two lay persons and two barristers of not less than seven years’ standing, all of whom have been nominated by the President: see regulation 2(2) and, in particular, sub-para. (c), which applies to barristers.
18. Regulation 2(4) provides that, in constituting a panel, the rules set out in it shall be respected. Those rules include, at sub-para. (e):

“The President may publish qualifications or other requirements required in those appointed to be barrister or lay members of a Disciplinary Tribunal.”
19. The President is required by regulation 8 of the Regulations to issue a Convening Order including, amongst other things (at sub-para. (1)(c)):

“the names and status (that is, as Chairman, as lay member, or as barrister) of those persons who it is proposed should constitute the Disciplinary Tribunal to hear the case”.
20. Regulation 12 requires the hearing before a Disciplinary Tribunal to be in public unless it has been directed that it shall not be in public.
21. It is also important to note the general provision in regulation 1(2), which states that:

“Anything required by these Rules to be done or any discretion required to be exercised by, and any notice required to be given to, the President may be done, or exercised by, or given to, any person authorised by the President (either prospectively or retrospectively and either generally or for a particular purpose).”

The First Issue: Constitution of the Tribunal

22. It is common ground that Mr Smart was a barrister of not less than seven years’ standing and that he was nominated by the President of COIC to sit on the Tribunal in the Convening Order of 15 April 2010. On the face of it, therefore, he would appear to be a person who could lawfully be nominated by the President under regulation 2(2)(c) to be a member of the Tribunal. However, the Appellant contends that, as Mr Smart was no longer a person who, under the TAB Terms of Reference, was eligible for inclusion on the list of barrister volunteers, his nomination by the President was *ultra vires* the Regulations. In fact, Mr Smart continued to be on the list of barrister volunteers even after May 2009 but, the Appellant submits, he should no longer have been on it and so that vitiates his nomination.
23. The Appellant’s main submission is that, at all material times, the Regulations and the TAB Terms of Reference should be read as constituting a “code” as to the composition

of Disciplinary Tribunals, which should be read together. The Appellant submits that, when those documents are read together, their effect was that the five-person Disciplinary Tribunal to hear and determine a charge of professional misconduct against the Appellant was to contain two barristers and two lay members, in each case drawn from the panels of barristers and lay members maintained by the COIC. The selection from those panels of the particular persons to sit on the Tribunal was to be undertaken by the President of COIC. Accordingly, the Appellant submits, the nomination of Mr Smart was of a person who was not qualified to sit on a Disciplinary Tribunal and therefore it was invalid.

24. In support of this submission, the Appellant argues that the provisions of the TAB Terms of Reference as to membership of panels, in particular the provisions as to the length of time that volunteers could be on the various lists, were of importance to maintain the high standing of, and public respect for, Disciplinary Tribunals.
25. We do not accept the Appellant's submissions. We do not accept that the Regulations and the TAB Terms of Reference should be read as a "code" to govern the composition of Disciplinary Tribunals. In our view, it is the Regulations which govern the *vires* of the President in nominating members to sit on a tribunal, in particular regulations 2, 3 and 8, which we have cited above. There is no further limitation or restriction on his *vires* over and above the Regulations. There is not even any cross-reference to the TAB Terms of Reference, so it cannot be said that they have been incorporated by reference into the requirements of the Regulations.
26. We do not doubt that there are good reasons to have available a pool of potential nominees who have been recruited after an open competition and whose terms are limited, although they may be able to apply for renewal once. All of this accords with good modern practice, both for reasons of fairness and because sound procedures should produce good outcomes, so that the best people are recruited on merit. It was no doubt for such reasons that the TAB Terms of Reference were arrived at in 2006. It would appear that a mistake was made in the present context and what should have happened, as a matter of good practice, did not happen. However, those considerations cannot alter what, in our view, is the correct interpretation of the Regulations.
27. At the hearing before us it was submitted on behalf of the Appellant that the power conferred on the President to nominate a person to be a member of the Tribunal must be construed to mean a power to make a *valid* nomination. We did not understand that proposition to be in dispute. However, it begs the question of what constitutes a valid nomination. The BSB submits that, to be valid, a nomination must be in accordance with the requirements of the Regulations and no more than that. We accept that submission.
28. In accordance with that submission we have come to the view that, in order to be validly constituted as a matter of law, the Tribunal members (1) had to meet the requirements of regulation 2(2) of the Regulations (which included the requirement that a barrister member should be one of seven years' standing, as Mr Smart was); and (2) had to be nominated by the President of COIC (as Mr Smart was). The fact that Mr Smart was no longer eligible under the TAB Terms of Reference for inclusion on the list of barristers volunteering for hearings does not render his nomination by the President invalid. The Regulations do not require the persons nominated to be on the list

of barrister volunteers maintained by the TAB as a pre-condition of their nomination to the Tribunal.

29. The Appellant also relies on regulation 2(4)(e) of the Regulations, which we have quoted earlier. The Appellant submits that the TAB Terms of Reference set out the “qualifications or other requirements required in those appointed to be barrister or lay members of a Disciplinary Tribunal” which were published under that provision.
30. We do not accept that submission for several reasons. First, the TAB Terms of Reference set out the arrangements to be made by COIC for determining the numbers to be kept on the panels on lists and establishing who was available for hearings: see the heading to paragraph 19 and the words of sub-paragraphs (a) and (b). They had the effect of making available to the President a pool of people who would be suitable to be nominated under regulation 2(2). They did not, even on their terms, have the effect of limiting the power of the President to appoint other people if he thought that was the right thing to do. He might do so, for example, if there were a particularly senior barrister with specialist experience who would make a good member of a Tribunal in a particularly sensitive case but who had not applied to be a member of the TAB list, perhaps because he or she was very busy.
31. Secondly, the TAB Terms of Reference were not published. It was submitted on behalf of the Appellant that the word “published” in regulation 2(4)(e) should be construed broadly, to accord with its meaning in the context of the law of defamation, where any statement by one person about another to a third person will suffice to constitute publication. We are unable to accept that submission. In the context of defamation the underlying policy of the law is served by giving the concept of publication a wide meaning, since the purpose of the torts of libel and slander is to protect a person’s reputation. In the present context, the requirement of publication serves other purposes. In particular, it enables those potentially affected to know what rules are to govern them and to regulate their affairs accordingly, if necessary after taking advice.
32. A better analogy can be found with recent developments in administrative law, which places an increasing emphasis on the importance of regulating the exercise of discretionary powers by policies which are published, for example a policy which governs the exercise of a discretion to detain an immigrant pending deportation: see *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, at paras. 28-38 (Lord Dyson JSC). If the Appellant’s argument were right, a policy could be kept secret from the public, including those who were potentially affected by its application, but merely because it had been circulated internally within a regulatory body, that would suffice to constitute “publication”. We do not think that interpretation can be right in the present context.
33. Thirdly, we do not accept that the TAB documents were published by the President of COIC, as is required by regulation 2(4)(e). In this regard, it was submitted on behalf of the Appellant that the President could and should be equated with COIC, especially as there is evidence before the Court that he was present at some of the meetings at which the TAB documents were discussed. We cannot accept that submission. The language of the Regulations is clear. It confers the relevant power of publication on the President. By regulation 1(2) he is given express power to authorise others to exercise certain of his powers. There is no suggestion that he authorised COIC to exercise his

power of publication in regulation 2(4)(e). If the Regulations had intended to confer that power on COIC as a body, they would have said so. It may be that, in appropriate contexts, the President of a body has the power to act on behalf of that body. However, regulation 2(4)(e) does not confer power on COIC; it confers it only on the President. It cannot be said, as the Appellant submitted before us during the hearing, that the President of a body is the same as that body. For example, the President of the Supreme Court cannot exercise the powers which are given by law to the Supreme Court nor could it be said that the President of the Court can be treated as if he were the Court.

34. At the hearing before us, the Appellant made a further submission, to the effect that she and other barristers had a legitimate expectation that the appointment of Tribunals would be in accordance with the TAB Terms of Reference. Even though the precise content of those documents might not be available or known to them, it is submitted that they would have a legitimate expectation that whatever they said from time to time would be complied with.
35. We accept the BSB's submission that there was no legitimate expectation of the kind contended for. There was no promise, assurance or any representation that the President would only nominate people who were eligible to be on the lists maintained by COIC under the TAB documents of 2006. The TAB Terms of Reference do not say that. Nor did any other document to which our attention has been drawn, e.g. advertisements which sought volunteers to be on the relevant lists. More fundamentally, there is no evidence before us that the *President* made any such representation. After all, it is the President who has the power of nomination in regulation 2(2).
36. In our judgment, the Tribunal was therefore validly constituted in accordance with the Regulations.

The Second Issue: *de facto* authority

37. The second issue only arises if we are wrong on the first issue. However, since we heard full argument on it, we will address it here.
38. A historical account of the doctrine of *de facto* authority can be found in the judgment of Hale LJ in *Fawdry v Murfitt* [2003] QB 104; her account was adopted by the Court of Appeal in the two subsequent cases of *Coppard v Customs & Excise* [2003] QB 1428 and *Baldock v Webster* [2006] QB 315: in the latter case, at p.319, Laws LJ described Hale LJ's judgment as "required reading for any proper study of the subject." At para. 18 Hale LJ quoted with approval the following passage from the 8th edition of Wade and Forsyth, Administrative Law (2000), pp.291-292:

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

The same passage now appears in the 10th edition of that work (2009) at p.241.

39. At para. 19 Hale LJ noted that, despite the lack of modern English authority, the doctrine had been held still to be part of the English common law by Sir Jocelyn Simon P in *Adams v Adams* [1971] P 188. At p.211 he referred to “two masterly judgments of great learning” from other common law jurisdictions, namely the Connecticut case of *State v Carroll* (1871) 38 Conn 449, and the New Zealand case of *In re Aldridge* (1893) 15 NZLR 361. Hale LJ also referred, at paras. 19-20, to “an even more learned article” by Sir Owen Dixon, to which we will return later.
40. The Appellant disputes the applicability of the doctrine of *de facto* authority in the present context for three main reasons. We will address each in turn.
41. First, the Appellant contends that the doctrine applies only to holders of a “public office” and that the Tribunal members were not such persons. The mainstay of the Appellant’s argument in this context is the decision of the Court of Appeal in *Sumukan v Commonwealth Secretariat* [2008] 1 Lloyd’s Rep. 40.
42. It was there held that the doctrine did not apply to the Commonwealth Secretariat Arbitral Tribunal (“CSAT”). The Appellant places particular reliance on a statement by Sedley LJ at para.52, where he explained why the *de facto* doctrine did not apply to CSAT:

"Even with its statutory foundation, the Commonwealth Secretariat's arbitral tribunal is not a court of law or otherwise part of the system of public justice."

The Appellant submits that, likewise, the Disciplinary Tribunal here is not a court of law or part of the system of public justice.

43. The Appellant submits that the discipline of barristers is no different from the discipline of other professions and that a particular feature of such disciplinary mechanisms is that individuals "opt-in" to them even if it is a requirement of their ability to practise their chosen profession that they must subject themselves to those mechanisms. For this purpose, she places reliance on a decision by Morison J, who emphasised this feature in *R (Fleurose) v Securities & Futures Authority Ltd* [2001] 2 All ER (Comm) 481, at paras.30-31:

"30. The characteristics of the professional discipline procedure are these. A person is only capable of being disciplined if he or she has become a registered person. The process applies only to those who have 'chosen' to be governed by the rules, although all those who wish to trade in securities are effectively obliged to exercise that choice....

31. On the other hand, the disciplinary process stems from an individual's particular activities and his or her willingness to become susceptible to the disciplinary system; it does not apply to all members of society; it applies only to volunteers.... there is no distinction in principle between this type of disciplinary process and, say, the disciplinary procedures of other professions under their own rules."

44. The BSB submits that there is no basis for limiting the doctrine in this way but, in any event, submits that membership of the Tribunal, however described, is an office to

which the *de facto* doctrine applies. We accept that submission. Although, as the BSB accepts, the Tribunal is not a court of law, it is part of the system of public administration of justice.

45. This is not just because there is a strong public interest in ensuring the quality of advocates in this country: that could also be said about other professions like medicine. It has more to do with the fact that advocates appear in the Queen's courts. The courts have to be able to have complete and implicit trust in those who appear before them to argue cases. Regulation of their fitness to practise is indeed a part of the public system of justice. We recall that, as we have noted earlier, the powers of discipline over advocates belonged historically to Her Majesty's judges. They have delegated the exercise of those powers to COIC but have retained their appellate role as Visitors to the Inns of Court.
46. Visitors exercise powers derived initially from the Crown and exercisable by judges to regulate lawyers: see *R v General Council of the Bar, ex p. Percival* [1991] QB 212, at 227, where Watkins LJ (giving the judgment of the Divisional Court) said:

“From as early as the late 13th century the judges, deriving their authority from the Crown, had both the duty and the right to provide and regulate lawyers to conduct the business of the Royal Courts.”
47. In modern parlance, there is therefore a public law source for the discipline of barristers and not merely a public interest in the nature of the powers being exercised. It is also of interest to note that persons exercising those powers are amenable to judicial review: see *R v Visitors to the Inns of Court, ex p. Calder* [1994] QB 1.
48. In our view, the decision in *Sumukan* is distinguishable. That case involved a contract between two parties which provided for arbitration by a particular body. The Court held that the doctrine of *de facto* office does not apply in the context of a commercial contract providing for arbitration: see paras. 9, 34 and 52. This case does not concern a contractual arbitration body.
49. Furthermore, the doctrine of *de facto* authority has been applied to the Visitors to the Inns of Court hearing an appeal from a decision of a Disciplinary Tribunal appointed under the Regulations: see the decision of the Divisional Court in *R (Argles) v Visitors to the Inns of Court and BSB* [2008] EWHC 2068 (Admin), at paras. 33-41 (Rafferty J).
50. *Argles* was a challenge by way of judicial review to a decision of Visitors to the Inns of Court. The Visitors comprised a panel of a High Court judge, a barrister and a lay person. It transpired that the wing members had not been properly nominated. The Visitors' Rules stipulated that wing members were to be nominated by the Lord Chief Justice. The Court held that the wing members were "*de facto* judges".
51. The Appellant seeks to distinguish *Argles*. First, the Appellant says that the individuals in *Argles* were on the list of those eligible, and that is not so here. However, in our view, *Argles* did not decide that a person would only have colourable title to sit if he or she was included on a list of eligible persons. Rather, in that case, the persons were not properly nominated by the Lord Chief Justice (see para. 33) but still had colourable title

to sit and were not usurpers because, in their case, they were included on the list of persons deemed competent and eligible to sit.

52. The Appellant further submits that there is a fundamental difference between the COIC Disciplinary Tribunal and the Visitors. In our view, this is not a ground of distinction for at least two reasons. First, the Visitors sit not as judges but as Visitors to the Inns of Court: see *Calder* [1994] QB 1, at 41; and *In re S* [1981] QB 683, at 685. Furthermore, we can see no relevant distinction between the persons who exercise the power at first instance and the Visitors who exercise those same powers on appeal. It is the nature of the power or function that matters, not the level in the hierarchy of the person concerned: at both first instance and on appeal, the function is that of a public office.
53. The Appellant also asserts that, if *Argles* cannot be distinguished, we should not follow it because it was wrongly decided. We do not accept that submission. Even if we had reason to doubt the correctness of that decision, and even if it were not binding on us (on which we did not hear full argument), we would give it great respect since it is the decision of the Divisional Court, setting out that Court's understanding of the common law doctrine of *de facto* authority. In any event, we regard it as being correct. In our view, it is consistent with, and applies, the decisions of the Court of Appeal on three recent occasions as to the scope of the common law doctrine of *de facto* offices: see *Fawdry*, *Coppard* and *Baldock*.
54. The second main submission made by the Appellant is that the doctrine of *de facto* authority requires that the officer in question must have a "colourable title" and that Mr Smart did not have such a title. This is said to be because the membership of the panel was not published and was not widely known. The Appellant points out that: it has been confirmed that the TAB list was not in the public domain; the *curriculum vitae* for Mr Smart posted on his chambers' website at around the date of this hearing contained no mention of him sitting on COIC Disciplinary Tribunals or being a member of the COIC barrister panel; and there has not been found publication of his appointment anywhere else. Therefore, submits the Appellant, prior to the appearance of his name on the Convening Order, there were no circumstances giving him the reputation of being a barrister on the relevant panel.
55. The Appellant places particular reliance on the article by Sir Owen Dixon on '*De Facto Officers*', published in *Jesting Pilate* (ed. Woinarski), to which we have made reference and which was cited with approval by Hale LJ in *Fawdry*. At p.236 he said:

"The exact nature of this requirement has not been worked out by English authority. Probably it will be found to be satisfied by the existence of any set of circumstances which reasonably justifies a general assumption by those dealing with or coming under the supposed authority of the *de facto* officer that he is a lawful officer.

In the United States the matter has received much consideration. As a result, the view appears to be accepted that sufficient colour exists not only when the assumption of, or continuance in, office is referable to a title supposedly good though actually defective, but also when there is such general or official

acquiescence in the *de facto* incumbent's execution of the office that, in the circumstances of the case, a public reputation or assumption of the lawfulness of his authority arises."

56. One of the American authorities mentioned by Sir Owen Dixon was the Connecticut case we have already cited, *State v Carroll*. In *Fawdry*, at para. 21, Hale LJ cited with approval the following passage from the judgment of Butler CJ in *Carroll*, at pp.471-472:

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

57. In our view, Mr Smart did have colourable authority in accordance with these principles. In the words of Sir Owen Dixon, his "title [was] supposedly good though actually defective." His nomination by the President fell within the third, and probably also the second, of the categories mentioned by Butler CJ in *Carroll*. Mr Smart was nominated by the President and specifically named by the President in the Convening Order. That Convening Order alone demonstrated that he was sitting as a member of the Tribunal. Even if there was some defect or irregularity in that nomination, his apparent nomination gave him a colourable title.

58. Furthermore and in any event, Mr Smart had been included on a list of volunteers in 2001 and met the criteria (practising barrister of not less than seven years' standing). He had received guidance on sentencing. He believed himself to be validly appointed, which is why he sat. He sat with four other members, including a judge, all of whom must have assumed that he was validly sitting or they would not have continued the hearing with him. The Appellant had to have been served with the Convening Order which named him as a member (see regulation 8(2) of the Regulations). All of those factors demonstrate that he was not a "usurper" exercising an authority which he knew he did not possess or as to which he was wilfully blind (cf. *Coppard* at para. 18). He was believed, and believed himself, to have the necessary authority (see *Coppard* at para.32). In our view, his nomination therefore fell within the first category mentioned by Butler CJ in *Carroll*. In the words of Sir Owen Dixon, there was in this case a "set of circumstances which reasonably justifies a general assumption by those dealing with or coming under the supposed authority of the *de facto* officer that he is a lawful officer."

59. The Appellant's third main submission as to why the doctrine of *de facto* authority does

not apply in the present case is that it is said that the public policy rationale for application of the doctrine does not apply, or does not apply with the same force. As Hale LJ said in *Fawdry* at para. 20, citing the American case of *Curtin v Barton* (1893) 139 NY 505, at 511, the doctrine is based on public policy. In *Coppard*, at para. 12, the justification for the doctrine was identified as “certainty and finality”; and in *Baldock*, at para. 15, the underlying policy was said to be based on “public confidence ... in a court of competent jurisdiction”.

60. The Appellant submits that these policy considerations do not apply with anything like the same force where the party to proceedings who might be said to suffer if her conviction is set aside is the BSB which (she contends):

- a. by virtue of a Memorandum of Understanding enjoys a relationship of “privileged dialogue” with COIC; and
- b. in a press release in March 2012 claimed to be in a position to be “actively managing” the situation in relation to apparently defective appointments.

61. In addition the Appellant relies on the following features of BSB’s “privileged position”:

- a. By paragraph 2 of the Constitution of COIC its membership includes the Chairman and the Vice-Chairman of the BSB.
- b. Ms Desiree Artesi, a barrister, was a member of the TAB from its first meeting on 15 February 2007 until 2 February 2012. Between 1 January 2006 and 31 December 2011 she was also a member of the BSB’s Complaints Committee (later re-named Professional Conduct Committee), which is the Committee which takes the decisions to prosecute and instructs counsel to act on the BSB’s behalf. The responsibilities of the TAB included review of the TAB lists of volunteers.

62. The Appellant submits that an analogy can be drawn with the position of the CSAT in *Sumukan* of which Waller LJ said at para. 34:

“Where one party has failed to abide by the procedure for appointing ... it lies ill in his mouth to seek to rely on any *de facto* argument.”

63. We do not accept that submission: we do not consider that the suggested analogy with the CSAT in a contractual arbitration dispute is apt. First, we do not regard the materials cited by the Appellant as showing that the BSB was in some way responsible for the apparent defect in the nomination of Mr Smart. Secondly and in any event, the disciplinary tribunal proceedings are not like a contractual arbitration. As we have emphasised earlier, there is a strong public interest at stake, not merely the interests of the parties to the proceedings. In our view, the public policy rationale which underlies the doctrine of *de facto* officers does not apply in the present context.

Conclusion

64. For the above reasons we conclude that the Tribunal was properly constituted in accordance with the Regulations and that, in any event, Mr Smart had *de facto* authority to sit as a member of the Tribunal. We therefore decide the preliminary issues on this appeal in favour of the BSB.