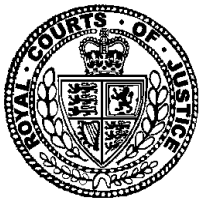

Neutral Citation Number: [2021] EWHC 2014 (Admin)

Case No: CO/1734/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 July 2021

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE QUEEN	**Claimant**
On the application of	
CLIVE ROBINSON	
- and -	
BUCKINGHAMSHIRE COUNCIL	**Defendant**
TREVOR CLAPP	**Interested Party**

- -
- -

Joshua Hitchens and Ian Browne (instructed by **Barrett & Thomson**) for the **Claimant**
Timothy Leader (instructed by **Legal and Democratic Services**) for the **Defendant**
The **Interested Party** did not appear and was not represented

Hearing date: 22 June 2021

- -

Approved Judgment

Mrs Justice Lang:

1. In this claim for judicial review, the Claimant challenges the decision by the Defendant's Deputy Monitoring Officer ("DMO"), dated 7 February 2020, to uphold the complaint made by Farnham Royal Parish Council ("the PC") that the Claimant, who is a PC Councillor, breached paragraph 3.1 of the PC's Code of Conduct for Members ("the PC Code"). Prior to local government reorganisation on 1 April 2020, the Defendant's functions in regard to this matter were carried out by South Bucks Council. The principal basis of the challenge is that the decision was in breach of section 6 of the Human Rights Act 1998 ("HRA 1998") as it violated his right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR).

2. Partial permission was granted on the papers by Linden J. on 25 June 2020. Although the Claimant was refused permission to challenge the Defendant's decision in respect of the complaint against Councillor Clapp, he was given permission to rely on the contrast between the Defendant's treatment of the two complaints.

Facts

3. The Claimant was elected to the PC in 2009. Mr Clapp was elected as a Councillor in 2008, and he was elected Chairman of the PC in 2015, until he resigned from the PC in 2018. Mrs Holder was the Clerk to the Council until she resigned in 2018.

4. The parish of Farnham Royal in Buckinghamshire has a large area of Green Belt land within its boundaries, and it is next to the ancient woodland of Burnham Beeches. In March 2016, the Defendant published its review of Green Belt land in which it stated that most of the Green Belt land in Farnham Royal now only contributed weakly to the Green Belt, due to the intensification of housing on it, or adjacent to it. The prospect of development on the Green Belt in and around Farnham Royal generated some interest among developers, but was controversial among local residents who wanted to preserve the Green Belt.

5. On 17 April 2018, the PC held a public meeting to discuss the Green Belt, which was chaired by Councillor Clapp. The minutes of the meeting, drafted by Mrs Holder, stated as follows:

> "Notes taken by the Parish Council Clerk at the consultation meeting of 17th April 2018 at 7.30pm Farnham Common Village Hall
>
> In attendance approximately 180 residents including Parish Cllrs. Clapp, Hodges, Rowley, Thomas, Robinson, Rolfe and Tipping, and District Cllr. Dhillon.
>
> Cllr. Clapp gave a presentation explaining that
>
> - Developers had acquired options on areas of Green Belt (GB) land in the Parish and been making approaches to the Parish Council (PC) to try and discuss these options.

- The only planning role the PC has is as a consultee after a planning application has been submitted to SBDC. At that stage we had little influence on the scheme design
- The PC opposed inappropriate development in the GB as a matter of agreed policy
- In his opinion central government were putting increasing pressure for housing and in future those pressures would increase
- Going forward if a major development is proposed the PC's options were to carry on as before or,
- Many applications get passed at planning appeals despite the Parish and District councils opposition and whilst opposing the application in general in the case of GB land nevertheless to try and influence/shape any development by engaging with developers at the pre-application stage to try and negotiate the best worst case scenario should their scheme be granted by SBDC or the Secretary of State/Inspectorate.
- Any such discussions could consider the mix of housing, balancing housing needs, location, infrastructure and any s106 contributions

In response to questions Cllr Clapp stated that

- Major development could be defined as 10 or more units but was likely to be in the 100s of units.
- The aim of any involvement with developers would be for the Parish to understand their approach and the proposed scheme and to exert pressure to develop a scheme in the best way should it be granted despite our opposition. Whatever input the PC could make would be beneficial
- On the issue of whether developers were trying to outflank us and that it was best to wait until the Local Plan was finalised in the next year or so given no sites in the parish were earmarked for GB release and any discussions would only encourage developers where no opportunities existed, Cllr. Clapp said he wasn't pushing the agenda for this. The PC had been asked by the developers whether we wanted to engage in pre application discussions and he had called the meeting to find out what residents thought. He repeated the PC's position to resist all inappropriate development in the GB and that his position had been set as a response to the parish plan questionnaire.
- In response to the assertion that the impression being given was to encourage such development or to help developers, he said he believed it was possible to resist development and still try to shape it in case the resistance failed and given he anticipated greater pressure in future.

- In response to how much difference the PC could make Cllr Clapp felt that it would at least be a minimal influence and it could be greater

Mr. Cathcart said the PC has asked for residents input and this was residents chance to tell the PC what they could tell developers. The main issues were schools, doctors and dentists, and sewage problems for Farnham Royal that could be exacerbated. It was a good initiative to communicate these issues to potential developers.

Another resident argued that getting involved at the pre application stage would be better than waiting until the planning application was circulated as that limited the time available to respond

A resident felt it was good to get involved because eg Allerds Farm was right for development and it would be good to influence what went on there.

Bill Youel said rather than develop relationships with developers we would be better off developing links with SBDC planners.

Following debate it was agreed that in respect of Green Belt land (including Green Belt land with some brownfield development eg Miles and Miles land) the PC should not be involved at the pre application stage and should therefore comment on receipt of any application as is the current situation. For all other land the PC could get involved at the pre-application stage.

Mr Clapp stated that the Parish Council would write to the developers that had made approaches with this decision.

……"

The complaint against the Claimant

6. The complaint against the Claimant was made by Mrs Holder, Clerk to the PC, on 12 June 2018. The details of the complaint were as follows:

"Mr Robinson, a councillor of Farnham Royal Parish Council, addressed (from the floor) a public meeting called by the Council on 17th April 2018 and made misrepresentations about the motivation and intentions of other councillors – namely that they were minded to allow development of the Green Belt, he met with residents and repeated those misrepresentations, he has refused to apologise or retract those misrepresentations and has added further claims against the Clerk. The Council has decided that his actions are in breach of the Council's Code of Conduct

> by bringing the Council into disrepute and failing to show respect to other Councillors. As a result of the public backlash whereby the integrity of the Chairman and Clerk have been questioned, the Chairman has already asked for himself to be referred to the Monitoring Officer for a determination as to whether he has been in breach of the Code of Conduct. That request was made by the Clerk on 23rd May 2018."

7. Mrs Holder described the steps which had been taken to resolve the complaint with the Claimant, as follows:

> "Mr Robinson was given a written letter on 18th April 2018 outlining the allegations against him and offering him a chance to respond which he did in writing before the council meeting scheduled for 23rd April 2018. The Council meeting on 23rd April heard the evidence in closed session and decided he was in breach of the Code of Conduct. He was given an opportunity to meet with a small group of councillors to try and resolve the issue but he would not apologise or retract his statements and refused to allow the Clerk to attend as he claimed she could not be objective. A subsequent closed session at the Council meeting of 21st May 2018 received the report from the group of councillors who had met with him and decided that a further letter should be sent explaining in detail why the Council felt he was in breach and formally asking for an apology. This was sent on 23rd May 2018. Nothing has been forthcoming and another closed session Council meeting was held by way of an extraordinary meeting on 12th June 2018 which decided that Mr Robinson be referred to the Monitoring Officer for being in breach of the Code of Conduct."

8. The minutes of the PC meeting on 25 June 2018 record that the PC decided to remove the Claimant from his leadership positions in the PC, as Signage Manager, Chair of the Play Area working group, and representative on the Local Area Forum. He continued to serve as a Councillor.

9. On 2 July 2018, Ms Swift, the Defendant's Monitoring Officer, wrote to the Claimant, enclosing the complaint and documents submitted in support, together with a copy of the Defendant's Complaints Procedure, and invited his comments. She formulated the complaints against him as follows:

   i) "You spoke at a public meeting on 17 April which the Council had called and made unfounded and untrue remarks which called into question and misrepresented the motivation, intentions and integrity of other parish councillors regarding development of Green Belt land in the parish."

   ii) "You subsequently met with residents and repeated those remarks and also called into questions the intentions and integrity of the Parish Clerk."

   iii) "As a result of your remarks there has been a public backlash, questioning the integrity of the Chairman of the Council and the Clerk and bringing the Council

> and its members into disrepute with local residents who now wrongly suspect the Parish Council intentions with regard to development in the parish."

iv) "You have refused to apologise or retract your remarks despite informal meetings with other councillors seeking to resolve this matter and a formal request from the Parish Council."

10. The letter then stated:

> "The complaint alleges that your conduct demonstrates a failure to comply with the following paragraphs of the Parish Council's Code of Conduct –
>
> 3.1 He/she shall behave in such a way that a reasonable person would regard as respectful and not act in a way that could bring the council into disrepute;
>
> 3.2 He/she shall not act in a way a reasonable person would regard as bullying or intimidatory;
>
> 3.3 He/she shall not seek to improperly confer an advantage or disadvantage on any person (including without limitation himself/herself."

11. The Claimant sent Ms Swift a lengthy letter in response dated 26 July 2018, denying the allegations made against him, point by point. He added:

> "It is also important to understand the motivations for all that has happened. The then Chair Trevor Clapp is a strong supporter of more housing on green belt land, the majority (not all) on the Parish Council also support some new housing on green belt land. The vast majority of the residents in the village oppose any new dwellings on the green belt. This being so, those on the Parish Council have been promoting some development on the green belt while trying to appear 'the opposite' to the general public (I will prove this with documentation later in this document). It is the desire to promote such development while concealing their support that is at the heart of everything. I know that this means that the Parish Council has gone against the ethics of openness, integrity and honesty on this issue."

12. The Claimant's account of the meeting in his letter may be summarised as follows:

i) Councillor Clapp started the meeting by saying "development on the green belt was inevitable" (heard by all but not recorded in the minutes). This was his personal opinion and not agreed PC policy.

ii) Councillor Clapp said it was PC policy to oppose inappropriate development in the Green Belt as a matter of agreed policy, but failed to tell them that he believed some new homes on the Green Belt were appropriate (PC minutes February 2018).

iii) Several parishioners asked if there were any plans for housing on the Green Belt. Councillor Clapp said that there were none, even though he had met with Berkeley Homes on 8 November 2017 (without following agreed PC policy on such contacts) and knew about Land and Partners who have their plans for the area published on their website.

iv) Councillor Clapp promoted the benefits of talking to developers pre-planning application, to help steer development in a constructive way, and called for a vote to support him in such meetings. The Claimant asked for the vote to be split between Green Belt land and non-Green Belt land. Overwhelmingly, those at the meeting opposed any contact with developers pre-planning application for Green Belt land, expressing the view that it would encourage developers. Some complained about Councillor Clapp's apparent agenda for supporting developers (which he denied) and others were concerned that the PC was not organising the opposition to the proposed development on Green Belt land.

v) Councillor Clapp stated that the PC would oppose inappropriate development on Green Belt land. The Claimant challenged this as the word 'inappropriate' had been added to the policy and could be used to justify support for new dwellings on the Green Belt. Councillor Clapp referred to the National Planning Policy Framework ("the Framework") which refers to inappropriate development.

vi) In a discussion at the end of the meeting about the Green Belt, the Claimant told the meeting that there was a majority on the PC who were minded to permit some new dwellings on Green Belt land.

13. The letter then set out in detail the Claimant's evidence in respect of past meetings and statements made to prove that his allegations against Councillor Clapp and other members of the PC were true.

14. At Ms Swift's request, an external solicitor, Ms Nawaz of Setfords, assessed the complaint on the papers and made recommendations, in a report dated 18 February 2019.

15. At paragraphs 5.3 and 5.4, Ms Nawaz noted that the minutes of the meeting did not record any statements made by the Claimant, but that Mrs Holder "refers to the following statements made by Councillor Robinson" from her own notes. Ms Nawaz then summarised the statements which Mrs Holder had attributed to the Claimant in her letter of 18 April 2018, in the following way:

> "5.4.1 That the word "inappropriate" in the policy statement adopted by the Parish Council and how it had been included in the policy. Councillor Robinson claimed that he was off ill at the time this wording was adopted into policy and that by its inclusion; it supported his view and statements that this allowed the Parish Council flexibility to support development in the Green Belt;" **[Note: the grammatical errors in this paragraph are in the original text]**

> "5.4.2 Reference to conservatives on the Parish Council and Councillor Dhillon in a derogatory way and the Green Belt not being safe in their hands,"
>
> "5.4.3 That the Chairman and Clerk had met developers about applications in the Green Belt privately but not disclosed this,"
>
> "5.4.4 That Councillor Robinson alone was minded to limit the development in the Green Belt and"
>
> "5.4.5 That residents should stand for election in May 2019 to bring change and to get a majority on the parish council who would stop development in the Green Belt."

16. Ms Nawaz summarised the evidence as follows:

> "6.4 The intention of the code is to ensure that conduct in public life does not fall below a standard which causes a lack of public confidence in democracy and those holding public office.
>
> 6.5 The use of the word "inappropriate" in relation to development in the Green Belt, was included in the Parish Council's policy statement, The Farnhams Parish Plan, adopted on 27th November 2017. In doing so the Parish Council followed a consultation process, consulted its members and formally adopted the policy. Councillor Robinson says that he was ill and not present when the Parish Council agreed to adopt this policy but accepts that it is a policy decision and correct procedure was followed, although he is not in agreement with the policy.
>
> 6.6 Councillor Robinson has stated in his written response to the Parish Council's action against him that he thinks by adopting the word "inappropriate" into the policy, the Parish Council is using a wide interpretation of this term, different to the views of the vast majority of residents at the meeting of 17th April. He appears to be relying on the fact that the majority of the Parish Council voted in favour of the development at the Wyevale Centre, which he objected to, and also because the Parish Council recommended that parts of the Green Belt in the Parish be proposed for inclusion on the Brownfield register for housing development.
>
> 6.7 Councillor Robinson has also stated in his letter dated 26th July 2018 to the Monitoring Officer that the Chairman at the time, Councillor Trevor Clapp, is a strong supporter of more housing on green belt land and that the majority of the Parish Council also support some new housing on Green Belt land. He also alleges that these members have been misleading the residents on this issue and of their true intentions. His evidence for this allegation is the wording of Parish Council's policy on considering applications for development in the Green Belt and

the fact that the Parish Council has recommended land within the Green Belt as Brownfield sites to South Bucks District Council.

6.7 Councillor Robinson says in his written submissions to the Monitoring Officer that the statements he made at the meeting are true and relies on:-

- May 2018 edition of Farnham Magazine which he says showed continuing support of evitable development in the Green Belt;

- Parish Council Minutes of 23rd April 2018 – the minutes refer to the decision by the Parish Council that Councillor Robinson had brought the Parish Council into disrepute and that there was a breach of the Code of Conduct and also that there was a discussion about Green Belt consultation. In that discussion Mr Foulds, resident, thanked the Council for calling the consultation on Green Belt and pointed out that the audience at the meeting on 17th April had missed the point that his land would inevitably be built on one day and the ability to influence what the residents wanted would be lost if there was not dialogue with the developers;

- Minutes of Extraordinary Council meeting on 21 May 2018 –

    - minutes of the extraordinary meeting held at 6.45pm refer to the report of Councillor Milne and the group of Councillors who met with Councillor Robinson which led to the Parish Council finding Councillor Robinson in breach of the Code of Conduct and that he should be written to and asked to provide an undertaking and that if he did not do so that he would be dismissed from committees and working groups;

  Full Parish Council meeting minutes of 21 May 2018:

    - Discussion of application for number of houses on an area of the Cut Heath House site, Councillor Robison said site was Green Belt and the Chairman said that a small part of the access path was in Green Belt

    - Mr Browning asked the Chairman about the site he met the developers with in November 2017 but the minutes do not record the Chairman's response due to some confusion;

- That the Chairman had supported the nomination of the development over the Broadway Tyre Garage but this was not supported by the rest of the Parish Council;

- The Parish Council had nominated two sites within the Green Belt for the Brownfield register but these had both been rejected by the District Council but not clear why;

- That the Chairman had met with Berkeley Homes on 11th October 2017 but it was in relation to Foulds Fields adjacent to, but south of, the parcel of land at Elm Close which had been nominated as Brownfield to the South Bucks District Council;

- That the notes of the meeting on 17th April did not accurately record that residents did not wish for pre applications discussions to take place with developers on Green Belt Land but Clerk said she had recorded those who supported this and those who felt that there should be some discussion;

- That the minutes of meetings did not accurately reflect discussions that took place at the meetings and

- That Councillor Clapp as the Chairman at the meeting on 17th April did not disclose the full details of the Berkeley Homes proposals and that Councillor Clapp said this was because he was of the view that there were more global issues to discuss at that stage about talking to developers.

- 25 June 2018 – when the Parish Council decided to remove Councillor Robinson from positions of leadership as he had not responded to the letter setting out that the Council felt he had breached the Code of Conduct."

17. Ms Nawaz analysed the complaints under two headings:

i) Did the Claimant make statements about Councillor Clapp as the Chairman and other members that were unfounded and untrue and therefore brought the PC into disrepute?

ii) In accusing the other five members of the PC of supporting development in the Green Belt and not being open to the public, was the Claimant acting in such a manner as to bring the Parish Council into disrepute?

18. On the first question, her findings and recommendations were as follows:

> "**Did Councillor Robinson make statements about Councillor Clapp as the Chairman and other members that were unfounded and untrue and therefore brought the Parish Council into disrepute?**
>
> 7.1 The National Planning Policy Framework (NPPF) in paragraph 89 states "A local planning authority should regard the construction of new buildings as inappropriate in Green Belt . Exceptions to this are:
>
> - Buildings for agriculture and forestry,
> - Provision of appropriate facilities for outdoor sport, outdoor recreational and for cemeteries, as long as it preserves the openness of the Green Belt and does not conflict with the purposes of including land within it,
> - The replacement of a building, providing the new building is in the same use and not materially larger than the one it replaces,
> - Limited infilling in villages, and limited affordable housing for local community needs under policies set out in the Local Plan, or
> - Limited infilling or the partial or complete redevelopment of previously developed sites (Brownfield land), whether redundant or in continuing use (excluding temporary buildings), which would not have a greater impact on the openness of the Green Belt and the purpose of including land within it than the existing development."
>
> 7.2 Further paragraph 90 of the NPPF states "Certain other forms of development are also not inappropriate in Green Belt provided they preserve the openness of the Green Belt and do not conflict with the purposes of including land in the Green Belt." The document goes on to set out these. I find that the inclusion of the word "inappropriate" in the Parish Council's policy statement, The Farnhams Parish Plan, did mirror the NPPF.
>
> 7.3 It is a fact that Councillor Clapp and the Parish Clerk did meet with developers in October 2017 and that the land under discussion was Green Belt land. At the time this meeting took place, it was Parish Council policy, Policy on Pre Applications Meetings with Developers (I have not had access to this policy, only the policy on the Parish Council website which was revised on 21st May 2018) that discussions with developers should take place at the parish council meetings or, if that was not possible,

then at meetings open to all parish councillors with the Clerk present to take minutes. There is no record of the meeting that took place with the developers until the minutes of the Parish Council meeting in November 2017. It is not clear whether the meeting was open to all councillors to attend and therefore it does appear that the Parish Council's policy at the time was not complied with. However as the meeting with the developers was reported to the next meeting of the Parish Council, I do not find that there was a deliberate attempt to conceal.

7.4 Councillor Robinson cites the Wyevale Nursery planning application as another example of Parish Council support for development in the Green Belt. The Parish Council considered this application as a statutory consultee at their meeting on 27th April 2015 and again on 26th September. The Parish Council says that Councillor Robinson was present at this meeting on 27th April 2015 when the Parish Council response to the application was agreed, led by Councillor Clapp as the Chairman, and that there was no record of Councillor Robinson objecting to this at that meeting or the next meeting. Councillor Robinson says that his statement was to the effect that the majority of the councillors had supported the Chairman's position to oppose the application on the basis that there should be increased development, and only he and one other Councillor had objected to this at the meeting on 26th September 2016. Councillor Clapp's response was that the increased development should comprise all or some of affordable housing. I find Councillor Robinson's statement on this aspect to be accurate.

7.5 On the application concerning Farnham Royal Garden Centre District Council reference number 15/1748/OUT, it is reported in the Case Officer's report under Representations and Consultations:

Parish Council Comments: The Parish Council comments can be viewed in full within the planning file, but are summarised as follows: Want to see the purpose of the Green Belt retained. It should not be eroded through incompatible uses or scale of development. A private residential development benefits a very small number of people and none of those are likely to be within the Parish. The site should be properly marketed for its existing permitted use. We believe that, with the right operator and investment, a thriving garden centre/local retail scheme would succeed. An alternative economic use should be sought in the first instance. The Applicant has not tested the viability for the retention of a compatible use. Although there are many temporary buildings on the site these should not be counted towards the built volume. A development of this nature would set a precedent which would destroy the founding principles and purpose of green belt policies. ....."

> 7.6 Subsequently on the Reserved Matters District Council reference 16/01482/REM, again the Parish Council comments are as follows: Concern is raised that the opportunity to make the most of this previously developed site is being missed. Smaller more affordable houses are needed rather than larger houses. Whilst the DC considers the release of further Green Belt for development surely the intensification of this site can remove the requirement for the release of non Brownfield sites. The DC should work with developers to set a development brief allowing an intensification of development ensuring that the resulting proposals meet the requirements of the Parish in exchange for that intensification.
>
> 7.7 It appears that the Parish Council response were consistent with the Parish Council's approach to development in the Green Belt at the time.
>
> 7.8 With regard to the Parish Council's response to the request from South Bucks District Council to nominate land for inclusion in the Brownfield land register - I find the minutes of the 23rd October 2017 meeting clearly recording a decision that due to pressure for balanced development, it was prudent for the Parish Council to come up with some ideas for sites for redevelopment. It was agreed to invite sites to be put forward and for Councillor Rowley to collate and circulate the list before submitting them to the District Council. I have not seen any evidence of whether the list was circulated to the parish councillors before submission to the District Council but note that the minutes of the meeting were approved at the next meeting on 27th November 2017 and find no criticism of this approach by the Parish Council.
>
> 7.9 Councillor Robinson alleges that Councillor Clapp told the Parish Council meeting that the Parish Council was opposed to inappropriate development in the Green Belt but that Councillor Clapp did not inform the meeting that he believed that some new homes on the Green Belt was appropriate. If Councillor Clapp did have such an opinion it would be his personal opinion and he would be entitled to such an opinion. His approach as set out in his statements is to look at matters more strategically and this was consistent with his directing the meeting to look at matters strategically rather than site specific. I find that Councillor Robinson in making the statements may have acted inappropriately but that it did not amount to a breach the Code of Conduct paragraph 3.1 against Councillor Clapp in terms of representations made at the meeting on 17th April 2018."

19. On the second question, her findings and recommendations were as follows:

> "**In accusing the other five members of the Parish Council of supporting development in the Green Belt and not being**

> **open to the public, was Councillor Robinson in doing so acting in such a manner to bring the Parish Council into disrepute?**
>
> 7.10 As stated above, the Parish Council Policy Statement on Green Belt was adopted following the consultation and adoption process, I consider that for Councillor Robinson to suggest that this was being used to allow development in the Green Belt was a misrepresentation of the Council's intentions. I have seen no evidence that the Parish Council or the majority of the councillors were acting against the interests of the parishioners or secretly.
>
> 7.11 I do find Councillor Robinson to be in breach of the Code of Conduct paragraph 3.1 against the five councillors and Councillor Clapp on these issues, as there was no evidence against them to justify the accusations that they were secretly supporting development in the Green Belt for the reasons set out above. I consider that the comments by Councillor Robinson alleging at the public meeting that the Parish Council as a whole, the conservative members and Councillor Dhillon, were made for political gain which he has succeeded in securing through the public support he has received since the meeting of 17th April.
>
> 7.12 I would recommend that Councillor Robinson be invited to apologise to the five Councillors for the allegations made against them and providing he is willing to do this that further investigation would not be in the public interest."

20. The Defendant received comments on the assessment, which Ms Nawaz reviewed in her report dated 6 September 2019.

21. The DMO (Ms Adefehinti) issued her decision on 7 February 2020, having considered the evidence and representations and Ms Nawaz's Assessment Report, and after consulting the Council's Independent Person and the Chairman of the Audit and Standards Committee.

22. The DMO's findings were as follows:

> "**Findings**
>
> 1. Having reviewed all of the information, I agree with the assessor's conclusion in paragraph 7.11 of her report that Cllr Robinson breached the Code of Conduct against the five councillors and Cllr Clapp. I find that Cllr Robinson breached pargraphs *(sic)* 3.2, 3.5 and 3.6 of the Code.
>
> 2. I also agree that there was no evidence to justify Cllr Robinson's accusations that these councillors were secretly supporting development on the Green belt.

3. I agree with the assessor's conclusion in paragraph 7.10 of her report that Cllr Robinson's suggestion that the Parish Council's Policy statement on the Green Belt was being used to allow development, was a misrepresentation of the Council's intention. Cllr Robinson had been copied into the necessary emails relating to the Council's Policy statement on the Green Belt and his statements could have been made prior to the public meeting held on 17 April 2018 rather than in public on the day.

4. At 043 on page 68 of the Case Review 2010 (2011 Edition) published by Standards for England, disrepute is defined as:-

> *" a lack of good reputation or respectability.*
>
> *In the context of the Code of Conduct, a member's behaviour in office will bring that member's office into disrepute if the conduct could reasonably be regarded as either:*
>
> *1) Reducing the public's confidence in that member being able to fulfill their role; or*
>
> *2) Adversely affecting the reputation of members generally, in being able to fulfill their role."*

5. Standards for England go on in the Case Review to advise that:-

> *"An officer carrying out an investigation does not need to prove that a member's actions have actually diminished public confidence, or harmed the reputation of the authority ...the test is whether or not a members' conduct "could reasonably be regarded" as having these effects.*
>
> *The test is objective and does not rely on any one individual's perception. There will be a range of opinions that a reasonable person could have towards the conduct in question."*
>
> *"A case tribunal or standards committee will need to be persuaded that the misconduct is sufficient to damage the reputation of the member's office or Authority, as opposed simply to damaging the reputation of the individual concerned."*

6. From this it is evident that there is a presumption that a member's misconduct might be such that it brings the office of Councillor or the Council into disrepute. In this case I have concluded that councillor Robinson's conduct at the Council meeting on 17 April 2018 was disrespectful and was sufficient to damage the reputation of the office of the Councillors and/or

the Council especially as the issues could have been raised prior to the public meeting, allowing the Council time to properly consider his allegations and respond fully.

7. Having considered all the evidence, it appears Cllr Robinson's objective was to prove to the public that the Council and/or other councillors were not being truthful about their position regarding the green belt. I find this to be damaging to the Council especially as the council had formally adopted a policy on the Green belt, one which Cllr Robinson had been privy to through all the stages before adoption. Further I also find that his allegations that the Parish Council's Policy statement on the Green Belt was being used to allow development to be disrespectful and was sufficient to damage the reputation of the office of the Councillors and/or the Council.

8. I may have concluded otherwise had the verbal allegations made by Councillor Robinson at the 17 April meeting been made during a private session. However these allegations were made in an open forum where members of the public were present and were aware of Councillor Robinson's conduct.

9. I accept that Councillors should be able to criticise their colleagues and their decisions and, depending on the circumstances, do so publicly and robustly. Criticism does not in itself amount to bullying or failing to treat someone with respect. However, if criticism is a personal attack or of an offensive nature, it is likely to cross the line of what is acceptable behaviour. Similarly, unsubstantiated comments which undermine public confidence in the administration of local government affairs is unlikely to be acceptable.

10. Bullying may be characterised as offensive, intimidating, malicious, insulting or humiliating behaviour. Such behaviour may happen once or be part of a pattern of behaviour. Amongst other things, bullying behaviour attempts to undermine an individual.

11. My decision has accorded due regard to Cllr Robinson's fundamental right to freedom of expression under Artcile *(sic)* 10 of the European Convention which includes a right to express views which others may find objectionable or even offensive. Further, comments which constitute political expression attract an enhanced level of protection under Article 10, however, there are limits. Further the right itself is limited and not absolute, consequently it has it has to be balanced against the duty to promote and maintain high standards of conduct by members. The right also has to be balanced against competing rights such as the Article 8 right to private life etc. which includes the protection of the reputation of others.

> 12. I also consider that it is not helpful that the minutes of the public meeting held on 17 April do not record Cllr Robinson's statements. In my view, to take action against Cllr Robinson on the basis of minutes that appear incomplete understandably led to criticism of the Council and concerns about a breach of natural justice and fairness. However, I note that Cllr Robinson accepts that he made those statements at the public meeting.
>
> 13. I note that Cllr Clapp resigned as the Parish Chairman on 25 June 2018 and the Clerk also resigned in 2018.
>
> 14. I note that paragraphs 3.2,3.5 and 3.6 in the code of conduct were referred to in the complaint. Having considered the allegations made and the evidence gathered I have concluded that all relevant issues have been taken into account in reaching my conclusions"

23. In her decision, the DMO concluded that the Claimant was in breach of the PC Code, but the complaint did not warrant a referral for investigation, for the following reasons:

> "Although I find that there has been a breach of the Code on Cllr Robinson's part, I do not consider the complaint warrants a referral for investigation. The conduct complained of occurred in April 2018 and a full assessment of the facts and circumstances has been undertaken by Mrs Nawaz. I consider it would be disproportionate to incur significant costs of appointing external investigators to conduct a full investigation. I am also conscious that significat *(sic)* time has now lapsed since the conduct in question occurred. Accordingly, I am satisfied that referral for a full investigation would be unlikely to reveal any further facts or matters that could influence my findings and that it is not in the public interest to make such a referral.
>
> I consider that an informal settlement is appropiate *(sic)* in this case and recommend that Cllr Robinson be invited to apologise to the five Councillors for the allegations he made against them. However, I see no justification for continuing to exclude Cllr Robinson from committees or positions in the Council.
>
> I also recommend that Farnham Royal Parish Council consider providing training to all Parish Councillors on the Code of Conduct, particularly on the obligation to treat others with respect, and reviews its procedures for removing councillors from working groups and revoking internal councillor appointments, to ensure that governance is strengthened."

24. In response to the Claimant's first pre-action protocol letter, dated 8 April 2020, Ms Swift wrote on 28 April 2020 stating:

> "Having looked at the Deputy Monitoring Officer's ("DMO") decision letter dated 7th February 2020 whilst preparing our

> response to your letter, we have noted that the words "do not" are missing in the statement "*I find that Cllr Robinson breached paragraphs 3.2, 3.5 and 3.6 of the Code*." It should read "*I do not find that Cllr Robinson breached paragraphs 3.2, 3.5 and 3.6 of the Code*." This does not alter the outcome of the DMO's decision; which agrees with the conclusion reached by Setfords that Councillor Robinson breached Paragraph[s] 3.1 of Farnham Royal Parish Council's code of conduct."

Accordingly, the DMO issued an amended decision in these terms on 28 April 2020.

The complaint against Councillor Clapp

25. Councillor Clapp referred himself to the monitoring officer on 23 May 2018, following allegations made by the Claimant and Mr Browning, a local resident. On 26 July 2018, the Defendant received a complaint from the Claimant against Councillor Clapp, alleging breaches of the PC Code, arising from the facts and matters set out in his letter of 26 July 2018 referred to at paragraphs 11 – 13 above.

26. At Ms Swift's request, Ms Nawaz of Setfords, assessed the complaint on the papers and made recommendations, in a report dated 6 September 2019.

27. Ms Nawaz summarised the complaints as follows:

> "5.3 Councillor Robinson's complaint is that in chairing the public meeting on 17th April 2018, Councillor Clapp withheld relevant information and made false statements to the residents attending the meeting which showed a lack of openness, honesty and integrity.
>
> 5.4 These statements relate to:
>
> > 5.4.1 Statements made by Councillor Clapp at the meeting that "development on the Green Belt was inevitable" which Councillor Robinson states was Councillor Clapp's personal opinion;
> >
> > 5.4.2 that it was the Parish Council policy to oppose inappropriate development in the Green Belt when this was not the case and
> >
> > 5.4.3 That Councillor Clapp was asked whether there were any plans relating to the housing threat to this land and Councillor Clapp said there were none, but had met with Berkeley Homes on 8th November 2017 and knew about Land & Partners plans for the area and therefore did not provide accurate information to the questions asked.
>
> 5.5 Whilst Councillor Robinson has stated in his correspondence that he felt that he was bullied following the meeting of 17th April

2018, this has not been included in his complaint form and I have therefore not addressed this issue.

5.6 Mr Browning's complaint is:

> 5.6.1 the lack of accurate and unbiased minutes from the meeting of 17th April 2018; belief that Councillor Clapp had an alternative agenda;
>
> 5.5.2 That Councillor Clapp and the Clerk met developers in October and November 2017 to talk about proposals to develop the Green Belt land south of Elm Close some 7 months before bringing the matter to the meetings to discuss with parishioners. That this "pro development activity" was a breach of the Chairman's and Clerk's responsibility to represent the wishes of the parishioners and
>
> 5.5.3 That the Parish Council had listed 5 sites for nomination to the Council as Brownfield sites which included the site south of Elm Close in Farnham Common which was Green Belt land, the land discussed with the developers and therefore questions the motives behind the nomination.

5.6 Councillor Clapp made a statement to the Parish Council meeting on 25th June 2018, about the serious allegations made against him, the Clerk and other members of the Parish Council. In this statement, he said that the allegations were without foundation but sufficiently serious that he asked the Clerk to refer them to the Monitoring Officer for investigation.

5.7 He also said that these allegations were made following a finding by the Parish Council that Councillor Robinson had breached the Code of Conduct and that Councillor Robinson's aspirations to be Chairman of the Parish Council had got in his way of supporting the Parish Council in what it collectively did. Councillor Clapp said that Councillor Robinson in his desire to further his own aspirations, through criticism of his fellow Councillors, had seriously harmed the credibility of the Parish Council and the work done by the Parish Council, by the allegations. Councillor Clapp felt that the mistrust of himself, the Clerk and follow Councillors was irreparable and a severe hindrance to the Parish Council's work to tackle the general threat to the Green Belt and Slough's proposed expansion north."

28. Ms Nawaz made the following findings on the evidence:

> "5.9 Use of the word "inappropriate" in the Parish Council statement was adopted by the Parish Council after following a process of consultation, including with Parish Councillors, and

whilst Councillor Robinson may disagree with this, I find no criticism of the manner in which the Parish Council adopted this document. Indeed I find that Councillor Robinson was included in the consultation process but absent, due to illness, on the date of the meeting that the policy was adopted.

5.10 That the adoption by the Parish Council of its statement to oppose inappropriate development in the Green Belt in the Farnhams Parish Plan was sufficient to demonstrate the intention of the Parish Council at the time.

5.11 The minutes of the meeting on 17th April 2018 state that "On the issue of whether developers were trying to outflank us and that it was best to wait until the Local Plan was finalised in the next year or so given no sites in the parish were earmarked for GB release and any discussions would only encourage developers where no opportunities existed, Cllr. Clapp said he wasn't pushing the agenda for this. The PC has been asked by the developers whether we wanted to engage in pre application discussions and he had called the meeting to find out what residents thought. He repeated the PC's position to resist all inappropriate development in the GB and that his position had been set as a response to the parish plan questionnaire." It appears that Councillor Clapp did not refer at the public meeting to the fact that he had already met developers in 2017 for discussions for potential development in the Green Belt and also that the Parish Council had nominated sites for Brownfield development including land within the Green Belt land south of Elm Close at the meeting. However the fact that the Councillor Clapp and the Clerk had met with developers was recorded in the next minutes of the meetings of November 2017 and that these are a public record. Further the Parish Council decision to include the Land south of Elm Close in the Brownfield site review in October 2017 again are public records and there appears to be no deliberate intention to deceive or conceal. As regards references to the previous meetings and records where such meetings were recorded, it is noted in the correspondence between the Clerk and Mr Browning, dated 22 May 2018, that it is stated "The Chairman said that he had felt there were more global issues to discuss at this stage – that is whether the Council should talk to developers before any application is put in front of us." It may have been more helpful to have notes of the meetings held with the developers but as the meeting was reported to the Parish Council in the meeting of November 2017, that would appear to be satisfactory and I note there are no allegations of personal gain or other misdemeanour and therefore find the process of reporting to the Parish Council meetings following the meeting held with the developers to be satisfactory. What is of concern is that there is no evidence that the meeting was open and that other councillors were also able to attend.

5.12 Record of minutes of 17th April 2018 – It is of concern that the minutes do not record Councillor Robinson's statements at all. The details of the statements which the Clerk had recorded appeared in correspondence written to Councillor Robinson dated 18th April 2018 setting out the view of the Parish Council that Councillor Robinson had made misrepresentations and in doing so, brought the Council into disrepute. In the Clerk's letter, she sets out under Misrepresentations, Para 3, "Your assertion that the 'Parish Council is minded to have limited development in the Green Belt; - which I noted verbatim - ...." makes clear that fuller notes were made of the meeting yet these did not transpire in the formal minutes.

5.13 That Councillor Clapp and the Clerk met developers in November 2017 to talk about proposals to develop the Green Belt land south of Elm Close some 7 months before brining *(sic)* the matter to the meetings to discuss with parishioners. That this "pro development activity" was a breach of the Chair and Clerk's responsibility to represent the wishes of the parishioners. The Parish Council had a policy that all meetings with developers, at that time, should either be brought to Parish Council meetings or that they should be made open to other councillors. I have not found any documentation or other evidence to explain why this procedure was not followed on the occasions these meetings took place and do come to the conclusion that in holding these meetings there was a failure to comply with the Council's policy on both occasions but do not conclude that this is a breach of the Code of Conduct.

5.14 That the Parish Council had listed 5 sites for nomination to the Council as Brownfield sites which included the site south of Elm Close in Farnham Common which was Green Belt land, the land discussed with the developers and therefore questions the motives behind the nomination. The minutes of the meeting held on 23rd October 2017 record "The Chairman advised that a Brownfield site review consultation was underway. Given the pressure for balanced development it was prudent to provide more affordable accommodation. He noted that back land development such as splitting large plots often did not result in affordable housing. His suggestion was the Car Park and Garage site in the Broadway on condition that car parking could be retained too – for example by building above the car park. Following debate, it was not agreed to support this proposal. Others suggestions were invited and Mr Rowley agreed to prepare a response which he would circulate for approval before submitting."

5.15 Councillor Robinson said that this was done by email and he was not aware who supported this decision but assumes it was a majority decision. Councillor Robinson states that the

> decision should have come back for ratification in November meeting but it did not and the decision to offer green belt land for new dwellings only reached the public domain in May 2018 and suggests this was an example of the Parish Council concealing its support for new dwellings. I find the minutes of the October meeting clearly giving a decision not to support the inclusion of the Broadway site in the list, an invitation for other sites to be put forward and the decision was delegated to Mr Rowley to prepare response and submit to the Council which appears to be the process that was followed. Whilst I have not seen evidence of the circulation of the list of sites by email, I also did not see a challenge in any of the meetings to the list and I do not find any criticism of this approach."

29. In considering whether Councillor Clapp's conduct was contrary to the PC Code, Ms Nawaz made the following findings and recommendations:

> "6.4 The general intention of the code is to ensure that the conduct of councillors in public life does not fall below a minimum level which causes a lack of public confidence in democracy and those holding public office.
>
> 6.5 It is important to remember that the Parish Council is not the decision making body in respect of planning applications, that is the role of the District Council. The Parish Council is a statutory consultee and makes representations to the District Council on applications which the District Council then takes into account in determining the applications. Similarly with regard to nominations for land to be include in the Brown Field Register, the listing decision is take by the District Council having regard to the relevant statutory criteria.
>
> 6.6 Councillor Clapp has said that his efforts have been to take a pro-active stance in what he sees as inevitable development in the Green Belt and he feels this is best served by engaging with those seeking to develop in the areas so that the Parish Council has a say from the outset in any one considering developing in the parish. However, with regard to this approach I note that:-
>
> > 6.5.1 Councillor Clapp attended meetings with the developers without following the Parish Council's own policy in making the meetings open meetings to which other councillors were invited;
> >
> > 6.5.2 there appeared to be a lack of transparency in the responses given to questions at the meeting on 17 April and also a lack of balance in the notes of the meeting in recording statements made by Councillor Robinson;
> >
> > 6.5.4 Councillor Clapp decided to issue a statement to the Parish Council meeting on 25th June and in particular to

allege that in his view Councillor Robinson's aspirations to be Chairman of the Parish Council had got in his way of supporting the Parish Council in what it collectively did. Councillor Clapp said that Councillor Robinson in his desire to further his own aspirations, through criticism of his fellow Councillors, had seriously harmed the credibility of the Parish Council and the work done by the allegations.

7. Findings and Recommendations

7.1 On the basis of the above conduct, I conclude that Councillor Clapp's did appear to show that he was not happy at being challenged in the public meeting and subsequently resorted to, what appears to be, a personal attack against Councillor Robinson, when making his statement on 25th June.

7.2 I do not find Councillor Clapp to be in breach of paragraph 3.1 of the Code of Conduct n *(sic)* respect of the representations and statements that he made at the meeting held on 17th April 2018 for the reasons given above. Furthermore, as the approval of meeting notes and minutes is a decision for the Parish Council at a subsequent meeting and I find no breach in this respect.

7.3 However, with regard to the allegation of meeting with the developers without complying with the Parish Council's policy and lack of transparency about this at the meeting, together with his statement about Councillor Robinson made to the Parish Council on 25th June, I find that Councillor Clapp's conduct could disclose a potential breach of paragraph 3.1 of the code and that he should therefore be given an opportunity to respond to these matters.

7.4 With regard to the allegations against the Clerk which do not form part of the formal complaint, I note that the transparency and accuracy of the notes of the meeting on 17th April have been brought into question for the following reasons:-

- Whilst there is always a difficult balance to be struck between recording the decisions at a meeting and the debate (which I imagine for a public meeting becomes even more difficult), the Clerk did appear to have a record of some of the statements made by Councillor Robinson and none of these appear that the minutes. This gave the impression that the notes were not as balanced or comprehensive as they could have been and has led to concern about the records kept by the Clerk;

- The Clerk stating that there was confusion when Chairman asked about a meeting with developers in

November 2017 and that the noted do not record the Chairman's response due to "some confusion";

- The Parish Council had nominated two sites within the Green Belt for South Bucks District Council's brown field land register but these had both been rejected by the Council and it was not clear why;

- That the Chairman had met with Berkeley Homes on 11th October 2017 but it was in relation to Foulds Fields adjacent to, but south, of the parcel of land at Elm Close which had been nominated for inclusion in the District Council's brown field land register and this had not been accurately recorded and

- That the notes of the meeting failed to record that residents did not wish for the Parish to take part in pre-applications discussions with developers on Green Belt Land but the Clerk stated she had recorded those who supported this and those who felt that there should be some discussion.

7.5 Failure to record in the notes of the meeting of 17th April 2018, the statements made by Councillor Robinson and to then take action against him for those statements, appears to suggest a deliberate lack of balance and transparency in the record of the meeting which has led to the criticism of the Parish Council and its conduct against Councillor Robinson. Again such notes are approved by the Parish Council and this issue therefore needs to be addressed by the Parish Council

7.6 Councillor Clapp resigned as Chairman of the Parish Council on 25 June 2018 and therefore it will be for the Monitoring Officer to decide whether any further action is necessary and whether it is in the public interest to pursue the matter further. I would recommend, due to the resignation of Councillor Clapp and the Clerk, that an investigation is not necessary but that Councillor Clapp be invited to respond to the findings set out in paragraph 7.3 above.

7.7 The Parish Council should be advised to review its process for recording any meetings with developers and for reporting these to parish meetings, and to ensure that such records are comprehensive and accurate."

30. The DMO issued her decision on 7 February 2020, having considered the evidence and representations and Ms Nawaz's Assessment Report, and after consulting the Council's Independent Person and the Chairman of the Audit and Standards Committee.

31. The DMO's findings were as follows:

"1. Having reviewed all of the information, I agree with the finding in Paragraph 7.1 of the Assessment Report that Cllr Clapp appeared to be aggrieved that he was challenged in public and in retaliation he attacked the person of Cllr Robinson. I also agree with Paragraph 7.3 of the Assessment Report and that Cllr Clapp should be invited to respond to these allegations. However, noting the approach taken by the former Adjudication Panel in *Capon v Shepway District Council* [2008) APE 0399 I do not consider that Cllr Clapp's actions meet the threshold for a breach of paragraph 3.2 the Code of Conduct.

2. In that case the Tribunal considered that the threshold for a failure to treat another with respect should be set at a level that allows for the passion and frustration that often accompanies political debate and the discussion of the efficient running of a Council and should also be considered within the context of who was involved in the exchange.

3. In this case, there was a controversial issue being discussed at the public meeting on 17 April 2018 and it could have been anticipated that a debate would arise possibly resulting in conflict and a tense atmosphere, with voices raised by those present at the meeting.

4. I agree with the conclusions in paragraph 7.2 of the Assessment Report that Cllr Clapp did not breach Paragraph 3.1, 3.4, 3.5, 3.6 and 3.9 of the Code of Conduct for the reasons set out below;

> (i) I do not find that Cllr Clapp failed to provide leadership to the council and communities by personal example because he provided information that was openly available to the public at the meeting on 17 April and subsequently self-referred himself to the Monitoring Officer following the meeting.
>
> (ii) I can find no evidence in any of the documents I have considered that Cllr Clapp bullied Cllr Robinson or anyone else.
>
> (iii) I have found no evidence that Cllr Clapp breached the confidentiality of information received as a member. Whilst it could be said that his article in the press was unhelpful to the whole situation, I do not consider this amounts to a breach of confidentiality, as Cllr Robinson had openly made statements at the 17 April meeting, suggesting that the Council was in support of development on Green Belt land and by extension that other councillors were being untruthful about their position. It is understandable in the circumstances that Cllr Clapp felt the

need to defend his reputation. In my view the threshold for a breach has not been met.

(iv) I do not find that Cllr Clapp misconducted himself in a manner which was likely to bring the Council into disrepute. Having considered all the documents, there is no evidence to support a breach of Paragraph 3.5 of the Code.

(v) I do not find that Cllr Clapp used his position for personal advantage in any circumstance. Focusing on the meeting with the developers which Cllr Clapp attended with the clerk, I note that Cllr Clapp informed the Council he had met with the developers at the Council meeting on 27 November 2017. I also note that Cllr Clapp recommended that a parish meeting be held to inform residents of the developer's proposals as in his view, this might be the best way forward to get a clear steer from parishioners and avoid criticism that the Council was not being active. In my view this approach ensured the appropriate probity and openness. Whilst meeting with the developers can be seen as a misjudgement on Cllr Clapp's part, I cannot find that there was a dishonest or self-serving reason behind this.

(vi) I find that Cllr Clapp supported the Council's scrutiny functions as he self-referred himself to the Monitoring Officer and passed on notes of the meeting with the developers to all Council members. Accordingly, I do not find a breach of Paragraph 3.9 of the code.

5. With regard to the allegation that Cllr Clapp withheld relevant information, made false statements to the residents or that he made false allegations against Cllr Robinson at the meeting held on 17 April 2018 I do not find a breach for the following reasons:-

(i) The word "inappropriate" had been in the draft parish report at least since 2017. It was formally agreed by the Council.

(ii) Cllr Clapp set out the Council's position on Green belt which was openly available in the Parish Council's policy statement.

(iii) I see no evidence in any of the documents that Cllr Clapp made false comments against Cllr Robinson. I am unable to find that any statements made at the meeting was directed towards Cllr Robinson's character.

6. I do however consider it was unhelpful that the minutes of the public meeting (held on 17 April 2018) failed to record Cllr

> Robinson's speech. In my view, to make a formal complaint against Cllr Robinson and remove him from the working groups he was appointed to and in addition, to remove him from his role as signage manager, on the basis of minutes that were incomplete understandably led to criticisms of the Council and concerns about a breach of natural justice and fairness.
>
> 7. I note that Cllr Clapp resigned as the Parish Chairman on 25 June 2018 and the Clerk also resigned in 2018."

32. In her decision, the DMO concluded that, as she had found no substantive breach of the PC Code on Councillor Clapp's part, it was not in the public interest to refer the complaint for investigation, and the costs of doing so would be disproportionate.

Grounds of challenge

33. I set out below the Claimant's grounds of challenge, and the Defendant's responses.

Ground A1

34. Ground A1 alleged that the DMO mistakenly applied the Defendant's Code of Conduct instead of the PC Code when making her decision. The Defendant denied this, stating that the DMO had only referred to paragraphs of the Defendant's Code of Conduct for completeness because they had been raised by the complainants.

35. Linden J. refused permission on this ground, saying that it was clear that Ms Nawaz considered that there had been a breach of paragraph 3.1 of the PC Code, and the DMO agreed. He added that, even if the DMO based her decision on the Defendant's Code of Conduct, this did not affect the substance of what was decided. The Claimant did not seek to renew his application for permission on Ground A1, and therefore is not entitled to rely upon it.

Ground A

36. Ground A alleged that the Defendant could not reasonably have been satisfied that remarks made by the Claimant at the meeting amounted to a breach of the PC Code when those remarks were not recorded in the official minutes of the meeting, and the DMO's decision failed to make any findings as to the actual words used.

37. The Defendant submitted that the substance of the complaint was clearly communicated to the Claimant by Ms Swift at Stage One. Ms Nawaz made a clear finding as to the words that were used by the Claimant at paragraph 5.4, and considered them in sections 6 and 7. The DMO adopted Ms Nawaz's findings in paragraphs 1 to 3, and concluded in her final paragraph that Ms Nawaz had undertaken a full assessment of the facts and circumstances and referral for a further investigation was not required.

38. Linden J. rejected the proposition that there could only be a finding of breach of the PC Code on the basis of words which were recorded in the minutes. What mattered was what actually happened rather than what was recorded in the minutes. The Claimant did

not renew his application for permission in respect of this point, and so cannot rely upon it.

39. However, Linden J. considered it was reasonably arguable that there was no clear finding as to what the Claimant actually said, and that it was important that such a finding was made before deciding whether there was a breach of the PC Code, having regard to Article 10 ECHR and the political context. He therefore granted permission to that extent.

Grounds B and C

40. Both Ground B and C alleged that the DMO failed to consider Article 10 in sufficient detail, in particular, there was insufficient regard given to the wider importance of freedom of expression, rigorous debate, scrutiny of decision-making and public accountability in local government. The purpose of the meeting on 17 April 2018 was to provide a forum for members of the public and Councillors to hold a rigorous debate and to scrutinise decision-making.

41. Ground B alleged that paragraph 8 of the decision which suggested that, if the Claimant had raised the issues of concern in private, the findings against him might not have been made, was wholly inappropriate. It was entirely proper for the Claimant to raise concerns about issues affecting the Parish at a properly convened meeting in a public forum, with other councillors, and in his capacity as a councillor.

42. Ground C alleged that the DMO erred in law in paragraph 9 of the decision, when she observed that "if criticism is a personal attack or of an offensive nature, it is likely to cross the line of what is acceptable behaviour". Freedom of speech in public debate, including offensive speech is vital to the effective functioning of the democratic process. As a councillor, the Claimant was entitled to express his views robustly and a greater degree of tolerance should have been afforded to him by the PC and his fellow councillors. The DMO was wrong to find that one-off comments at a meeting could amount to bullying, particularly given the balance of power against the Claimant.

43. The Claimant submitted that failure to consider these matters, adequately or at all, amounted to errors of law.

44. In its Detailed Grounds of Resistance, the Defendant submitted that Article 10 was not engaged. However, it was conceded in the Defendant's skeleton argument that Article 10 was engaged and the Claimant's statements were entitled to the enhanced protection accorded to political expression. The Claimant's rights had to be set against the legitimate objective of protecting the integrity of, and maintaining public confidence in, democratic institutions, and the requirement for members to apply the standards of conduct in section 27(1) of the Localism Act 2011 ("LA 2011"). The Claimant's misrepresentation of the facts, for the base motive of gaining political advantage by undermining the standing of his colleagues in the eyes of the electorate, which potentially damaged their reputations, meant that it was proportionate to interfere with his Article 10 rights, particularly since no sanction was imposed.

45. Linden J. granted permission on Grounds B and C.

Ground D

46. Ground D alleged that the Defendant acted unreasonably, inconsistently and unfairly in adopting a different approach to freedom of speech in complaints against the Claimant and Councillor Clapp. Several allegations were made. The only allegation upon which Linden J. granted permission was that, in Councillor Clapp's case, the decision rightly made allowance in paragraphs 1 and 2 of the findings for the "passion and frustration" that often accompanies political debate (*Capon v Shepway District Council* [2008] APE 0399), but no such allowance was made in the Claimant's case.

47. The Defendant submitted that the two complaints were distinguishable upon the facts, and so the different approaches taken were justifiable. There was no finding of bad faith or untruthfulness against Councillor Clapp. Although Ms Nawaz considered that there was a potential breach of the PC Code by Councillor Clapp, the DMO did not make any such finding. No further action against Councillor Clapp was warranted, because he had resigned both as Chairman of the PC and as a councillor because of this episode.

48. Finally, Mr Hitchens, counsel for the Claimant, did not follow the case which was pleaded in the Statement of Facts and Grounds, in his skeleton argument or his oral submissions. That was unhelpful. It was also impermissible to make submissions which had no foundation in the pleaded case, where no application to amend had been made.

Legal framework

Localism Act 2011

49. Section 27(1) LA 2011 requires a relevant authority "to promote and maintain high standards of conduct by members and co-opted members of the authority". By subsection (2), in discharging this duty a relevant authority must adopt a code of conduct dealing with the conduct that is expected of members when they are acting in that capacity.

50. Section 28(1) LA 2011 requires that a code adopted pursuant to section 27 is consistent with the principles of selflessness, integrity, objectivity, accountability, openness, honesty and leadership.

51. These provisions replaced the previous statutory scheme, and abolished Standards for England (formerly the Standards Board) and the England-wide code of conduct, with effect from 1 April 2012.

52. The PC adopted the PC Code on 24 September 2012. The obligations of members are set out in paragraph 3, and include:

> "3.1 He/she shall behave in such a way that a reasonable person would regards as respectful and not act in any way that could bring the council into disrepute.

> 3.2 He/she shall not act in a way which a reasonable person would regard as bullying or intimidatory.
>
> 3.3 He/she shall not seek to improperly confer an advantage or disadvantage on any person (including without limitation him/herself).
>
> He/she shall use the resources of the Council in accordance with its requirements.
>
> He/she shall not disclose information which is confidential or where disclosure is prohibited by law.
>
> He/she shall exercise his/her own independent judgment, taking decisions for good and substantial reasons."

53. The Defendant also has its own Code of Conduct, which has not been adopted by the PC. Confusingly, the pro forma complaints forms completed by Mrs Holder and the Claimant required them to identify their complaints by reference to the Defendant's Code, not the PC Code, and references to the Defendant's Code were then included in the decision.

54. Pursuant to subsection 28(6) LA 2011, on 28 September 2017 the Defendant adopted "Arrangements for dealing with standards allegations under the Localism Act 2011". The Arrangements provide for complaints to be considered in three stages. At Stage One, the Member is informed of the complaint and given time to respond. At Stage Two, the complaint is to be assessed by the Monitoring Officer who will decide whether the complaint should be referred for investigation, after consultation with the Chair of the Council's Audit and Standards Committee and the Independent Person, appointed pursuant to section 28(7) LA 2011. The decision of the Monitoring Officer is final and there is no right of appeal. If the decision at Stage Two is to investigate the complaint, the Monitoring Officer will appoint an Investigating Officer. If necessary, the complaint is then determined by the Hearings Sub-Committee of the Council's Audit Committee.

HRA 1998 and Article 10 ECHR

55. Section 6(1) HRA 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a convention right. Section 3(1) HRA 1998 provides that so far as possible subordinate legislation must be read and given effect in a way which is compatible with Convention rights.

56. Article 10 provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

57. In *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, Lord Steyn said, when commenting upon Article 10 and the common law right to freedom of expression (at 126G):

> "…. freedom of expression is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country…."

58. The case law of the European Court of Human Rights (ECtHR) has repeatedly held that freedom of political debate is at the very core of the concept of a democratic society. A healthy democracy requires a government to be exposed to close scrutiny. By virtue of its dominant power, both national and local government bodies must tolerate criticism and be vigilant to avoid the chilling effect that restrictive measures may have upon political expression, especially upon their elected representatives (see *Lingens v Austria* (1986) 8 EHRR 407, at [42], and the cases cited below).

59. Article 10(1) includes the freedom to hold and express opinions, and thus protects the right to criticise, speculate and make value judgments. Whilst it is established that, in principle, it is not a breach of Article 10 to require the publisher of a statement of fact to prove to a reasonable civil standard that the statement is substantially true, a requirement to prove the truth of a value judgment is impossible to fulfil and infringes the right to freedom of opinion. However the court does require an opinion to have some foundation. The "duties and responsibilities" imposed by Article 10(2) on an author of an opinion require that there is some reasonable factual basis for the opinion. See *Lingens v Austria* (1986) 8 EHRR 407, at [46]; *Jerusalem v Austria* (2003) 37 EHRR 25, at [42], [43].

60. In *Oberschlick v Austria* App. No. 11662/85, 23 May 1991, the ECtHR reiterated the general principles established in *Lingens v Austria*, as follows:

> "57. The Court recalls that freedom of expression, as secured in paragraph 1 of Article 10 (art. 10-1), constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 (art. 5-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to

those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (see, inter alia, the Handyside judgment of 7 December 1976, Series A no. 24, p. 23, para. 49, and the Lingens judgment of 8 July 1986, Series A no. 103, p. 26, para. 41).

Article 10 (art. 10) protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed.

58. These principles are of particular importance with regard to the press. Whilst it must not overstep the bounds set, inter alia, for "the protection of the reputation of others", its task is nevertheless to impart information and ideas on political issues and on other matters of general interest (see, mutatis mutandis, the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 40, para. 65, and the above-mentioned Lingens judgment, loc. cit.).

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. This is underlined by the wording of Article 10 (art. 10) where the public's right to receive information and ideas is expressly mentioned. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention (see the above-mentioned Lingens judgment, Series A no. 103, p. 26, para. 42).

59. The limits of acceptable criticism are accordingly wider with regard to a politician acting in his public capacity than in relation to a private individual. The former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism.

A politician is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interests of open discussion of political issues (see the above-mentioned Lingens judgment, Series A no. 103, ibid.).

60. The Court's task in this case has to be seen in the light of these principles. What are at stake are the limits of acceptable criticism in the context of public debate on a political question of general interest. In such cases the Court has to satisfy itself that the national authorities did apply standards which were in conformity with these principles and, moreover, that in doing so they based themselves on an acceptable assessment of the relevant facts.

> For this purpose the Court will consider the impugned judicial decisions in the light of the case as a whole, including the applicant's publication and the context in which it was written (see, inter alia, the above-mentioned Lingens judgment, Series A no. 103, p. 25, para. 40)."

61. In *Lombardo v Malta* (2009) 48 EHRR 23, in which a local council brought defamation proceedings against some of its councillors, the ECtHR found that there had been a violation of Article 10, and held:

> "53. As regards the applicants' position, the Court observes that the first three applicants are councillors on the Fgura Local Council and also authors of the article in question which had been written in reply to a previous article published by the Mayor of the Fgura locality. In this respect the Court recalls that while freedom of expression is important for everybody, it is especially so for elected representatives of the people. They represent the electorate, draw attention to their preoccupations and defend their interests. Accordingly, interferences with their freedom of expression call for the closest scrutiny on the part of the Court. The fourth applicant is the editor of the newspaper in which the article was published. According to the Court of Magistrates, he was aware of the controversy and had believed the comment to be justified; he had also granted the Local Council a right of reply. The Court reiterates that the press fulfils an essential function in a democratic society. Although it must not overstep certain bounds, particularly as regards the reputation and rights of others, its duty is nevertheless to impart—in a manner consistent with its obligations and responsibilities—information and ideas on all matters of public interest. This implies acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism. [7]
>
> 54. The plaintiff in the defamation action was the Fgura Local Council. The Court recalls that the limits of acceptable criticism are wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lay themselves open to close scrutiny of their words and deeds by journalists and the public at large, and they must consequently display a greater degree of tolerance. Moreover, the limits of permissible criticism are wider still with regard to the Government than in relation to a private citizen or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. It follows that a local council, being an elected political body made up of persons mandated by their constituents, it should be expected to display a high degree of tolerance to criticism.
>
> 55. The subject matter of the publication was the applicants' assessment of the situation regarding the HRP which was part of

a political debate which had been discussed in the local media. The Court recalls that there is little scope under art.10(2) of the Convention for restrictions on political speech or on debate on questions of public interest. Therefore the Court is of the view that since the matter of the HRP was of general interest to the local community, the applicants were entitled to bring it to the public's attention through the press.

56. In view of the above factors the State's margin of appreciation in interfering with the applicants' right to freedom of expression must be construed narrowly in this case in determining whether the reasons given by the national authorities to justify the interference were relevant and sufficient.

57. As regards the qualification of the impugned statement by the domestic courts, the Court observes that they did not accept the applicants' argument that it was a value-judgment but considered it to be a statement of fact given that the Local Council had indeed taken a number of measures to submit the project to public scrutiny.

58. The Court disagrees with the conclusion reached by the domestic courts. It reiterates that it has consistently held that, in assessing whether there was a "pressing social need" capable of justifying interference with the exercise of freedom of expression, a careful distinction needs to be made between facts and value judgments. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof.

59. The Court observes that the statement in issue consisted of two allegations: the Local Council: (i) did not consult the public; and (ii) was ignoring public opinion on the matter. The first allegation is capable of various interpretations. It is true that even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for that statement, since even a value judgment without any factual basis to support it may be excessive. However, in the present case, the factual basis may be found in the circumstance that the Local Council had rejected a motion presented by the applicants calling for the holding of a public consultation meeting about the HRP. The Court considers that the rejection of the applicants' motion provided a sufficient factual basis for the allegation that the Local Council had not consulted the public so as to allow that allegation to be construed as a value judgment. Moreover, political debate does not require unanimous agreement on the interpretation of particular words. Therefore, even assuming that it was not a value judgment, the interpretation given by the applicants is not manifestly unreasonable. The Court finds that the second allegation cannot

> but be classified as a value judgment, whose factual basis is indistinguishable from that above, notwithstanding the style used by the applicants which may have involved a certain degree of exaggeration. Furthermore, in the Court's view, nothing shows that the value judgments were not made in good faith.
>
> 60. The Court would in any event observe that the distinction between statements of fact and value judgments is of less significance in a case such as the present, where the impugned statement is made in the course of a lively political debate at local level and where elected officials and journalists should enjoy a wide freedom to criticise the actions of a local authority, even where the statements made may lack a clear basis in fact.
>
> 61. The Court further recalls the chilling effect that the fear of sanction has on the exercise of freedom of expression. This effect, which works to the detriment of society as a whole, is likewise a factor which goes to the proportionality of, and thus the justification for, the sanctions imposed on the applicants, who, as the Court has held above, were undeniably entitled to bring to the attention of the public the matter at issue. The Government in its arguments relied on the relatively lenient nature of the sanction imposed by the domestic courts. However, the Court finds that the award of damages to the defendant constituted a reprimand for the exercise by the applicants of their right to freedom of expression. Notwithstanding the relatively low amount of damages awarded, the sanction imposed could be considered to have had a chilling effect on the exercise by the applicants of their right to freedom of expression as it was capable of discouraging them from making statements critical of the Local Council's policies in the future."

62. The position of an elected representative was also considered in *Castells v Spain* (1992) 14 EHRR 445, where the ECtHR held that a Member of Parliament's right to express his views applied equally outside Parliament:

> "42. The Court recalls that the freedom of expression, enshrined in paragraph 1 of Article 10, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. While freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition

> Member of Parliament, like the applicant, call for the closest scrutiny on the part of the Court.
>
> 43. In the case under review Mr. Castells did not express his opinion from the senate floor, as he might have done without fear of sanctions, but chose to do so in a periodical. That does not mean, however, that he lost his right to criticise the Government."

63. In *Jerusalem v Austria* (2003) 37 EHRR 25, the ECtHR held that there had been a violation of Article 10 when a member of the Vienna Municipal Council was prohibited by an injunction from repeating statements she had made in debate, and said:

> "36. As regards the applicant's position, the Court observes that she was an elected politician sitting as a member of the Vienna Municipal Council. As such, the applicant enjoyed limited parliamentary immunity. However, the session of the Municipal Council during which the applicant made her speech was one of the local council and not the *Land* Parliament. In the latter instance, any statement made by the applicant would have been protected by parliamentary immunity and an action for an injunction would have been impossible. In this respect the Court recalls that while freedom of expression is important for everybody, it is especially so for an elected representative of the people. He or she represents the electorate, draws attention to its preoccupations and defends its interests. Accordingly, interferences with the freedom of expression of an opposition Member of Parliament, like the applicant, call for the closest scrutiny on the part of the Court.
>
> 37. As regards the position of the IPM and the VPM, the applicant's opponents in the injunction proceedings, the Government submitted that the associations were private bodies and could not, for the purposes of Art.10, be compared with politicians.
>
> 38. The Court recalls that the limits of acceptable criticism are wider with regard to politicians acting in their public capacity than in relation to private individuals, as the former inevitably and knowingly lay themselves open to close scrutiny of word and deed by both journalists and the public at large. Politicians must display a greater degree of tolerance, especially when they themselves make public statements that are susceptible to criticism.
>
> 39. However, private individuals or associations lay themselves open to scrutiny when they enter the arena of public debate……"

64. In Article 10(2), the legitimate aim of the protection of the reputation or rights of others has been widely construed by the ECtHR and includes the reputation of politicians who are not acting in their private capacity (*Lingens v Austria*, at [42]).

Domestic authorities on the application of Article 10 ECHR to decisions of standards bodies under the previous statutory scheme

65. *Sanders v Kingston* [2005] EWHC 1145 (Admin) was a statutory appeal to the High Court under section 79(15) of the Local Government Act 2000 against the decision of a Case Tribunal which found that the appellant, a councillor, had failed to comply with paragraphs 2(b) and 4 of the Code of Conduct by, respectively, not treating others with respect, and by conduct which could reasonably be regarded as bringing his office or authority into disrepute.

66. Wilkie J. identified three questions for consideration, at [72]:

i) Was the Tribunal entitled as a matter of fact to conclude that the Appellant's conduct was in breach of the Code of Conduct?

ii) If so, was the finding in itself or the imposition of a sanction prima facie a breach of Article 10?

iii) If so, was the restriction justified by reason of the requirements of Article 10(2)?

Wilkie J. answered each of these questions in the affirmative.

67. The Appellant challenged the Code of Conduct on the grounds that it was insufficiently precise so as to enable a person to foresee when he/she may be in breach of it. Wilkie J. rejected this submission, saying:

> "61. In my judgment the same criticism cannot properly be made of the phrases in the model code of conduct. Each of them is specific in describing the nature of the conduct or its consequence. In one case it is a failure to treat others "with respect". That is a concept, particularly where it describes the conduct of an official to others, which is perfectly capable of being applied by a reasonable person considering a course of conduct so as to enable that person to know whether what they are doing, or are about to do, would or would not comply with the code in that way. The other paragraph in the code, which prohibits conduct which could reasonably be regarded as bringing his office or authority into disrepute, adopts a concept which is well known in a number of different contexts as a method of identifying a level of conduct which is expected of persons holding certain positions or being members of certain bodies. Once again it describes clearly the consequence or potential consequence of conduct which is prohibited in such a way as to enable a reasonable person to predict whether or not his actions or proposed actions would or would not be in breach of the provision. I therefore reject the contention of Mr Béar that these paragraphs fail to be sufficiently precise so as to amount to a restriction "prescribed by law.""

68. Applying Article 10(2) to the facts of the case, he concluded that the Appellant's words were no more than expressions of personal anger and abuse and did not constitute political expression, which attracted a higher level of protection under Article 10.

69. Wilkie J. added, at [85]:

> "85. I recognise that, were this machinery to be used against a member of a local authority who did give expression to political opinions of an offensive nature or expressed political opinions in an offensive way, then there might be circumstances in which the Case Tribunal could not find a breach of the code of conduct without involving itself in an unlawful infringement of the rights protected by Article 10. However, as a matter of fact, this is not such a case."

70. Wilkie J. then went on to allow the appeal against sanction, finding that disqualification was disproportionate and substituting an order for suspension.

71. In *R (Calver) v Adjudication Panel for Wales* [2013] PTSR 378, a councillor sought judicial review of the decision of a county council's standards committee which found that comments he made about the community council and its members on the internet failed to comply with paragraphs 2(b) and 4 of the Code of Conduct by, respectively, not treating others with respect, and bringing the community council into disrepute.

72. Beatson J. adopted the three questions identified by Wilkie J. in *Sanders*, though he acknowledged that in answering the first question, a claim for judicial review had a more restricted scope than an appeal on the merits. Nonetheless he found that the committee and the panel were entitled to conclude that the councillor's comments breached the Code of Conduct.

73. In answering the second and third questions, Beatson J. concluded that the panel's decision that the councillor's comments were in breach of the Code of Conduct was a disproportionate interference with his rights under Article 10. He said:

> "71. I turn to the second and third questions identified in *Sanders v Kingston* [2005] LGR 719. The submissions by both parties focussed on the position under the Convention and the remainder of this judgment will also do so. Mr Hughes accepted that the finding was *prima facie* a breach of the claimant's right to freedom of expression and of Article 10. It is not arguable that the legislative scheme making provision for Codes of Conduct for Councillors or the Codes of Conduct made under the 2000 Act are too uncertain to qualify as being prescribed by law: see *Sanders v Kingston*, paras 61 and 84 and *Mullaney's* case [2010] LGR 354, para 70. Accordingly, the real issue concerns the third question, whether the restriction was one which was justified by reason of the requirements of (and the application of the factors in) article 10.2. and I turn to that.
>
> 72. In these proceedings it has not been necessary to consider the distinction in the Strasbourg jurisprudence between facts and

value judgments (on which, see *Clayton and Tomlinson, The Law of Human Rights*, paras 15.314-315) because the panel's conclusions proceed on the basis that what was said in the claimant's comments was true. It stated in para 4.16 that "whether or not what was said is true does not detract from the rudeness, lack of respect and consideration" the claimant's comments showed to individual members of the Council and the Council as a body. It suffices to say that restrictions on publication of both matters which are factual in nature and are demonstrated to be true, and of value judgments are generally difficult to justify under article 10.2.

73. It is common ground that the court, in considering whether the panel failed to accord sufficient weight to the claimant's rights to freedom of expression, has to decide for itself whether those rights were accorded sufficient weight, having due regard to the decision of the Panel. The court must "have due regard" to the judgment of the primary decision-maker, in this case the panel. This is because the Panel, the statutory regulator, consists of persons identified by Parliament to apply the Code because of its knowledge and experience of local government: *Mullaney's* case, para 72; *Gaunt's* case [2011] 1 WLR 2355, para 47; *Belfast City Council v Miss-Behavin' Ltd* [2007] 1 WLR 1420, para 26, 37 and 46. But "due regard" does not mean that the process is only one of review: it is the court which has to decide whether the Panel has violated the claimant's right to freedom of expression.

74. The code seeks to maintain standards and to ensure that the conduct of public life at the local government level, including political debate, does not fall below a minimum level so as (see decision report, para 4.1.7) "to engender public confidence in local democracy". Mr Hughes submitted (skeleton argument, para 34) that it seeks to ensure that it does not descend to the level of personal abuse and ridicule "because when debate and public life is conducted at the level of personal abuse and ridicule, the public loses confidence in it and those involved in it". There is a clear public interest in maintaining confidence in local government. But in assessing what conduct should be proscribed and the extent to which sarcasm and ridicule should be, it is necessary to bear in mind the importance of freedom of political expression or speech in the political sphere in the sense I have stated (at paras 58–64) it has been used in the Strasbourg jurisprudence.

…

76. It is in the context of what constitutes "respect and consideration" and "bringing your office or authority into disrepute" in a local government context that the panel's expertise is of particular relevance. Because of this I have given

most anxious consideration to the conclusion that I was minded to reach after considering the oral and written submissions. After doing so, I have nevertheless decided that the panel fell into error in a number of respects.

…

78. The panel in para 4.1.7 of the decision report states that it did not consider that the blogs were political expression "in the true sense of that meaning". The factors referred to by the panel included that "it was all very one-sided". That does not, however, preclude something being political expression: indeed, some would say that it is a feature of much political expression.

79. The panel also stated that the comments were "not an expression of Councillor Calver's political views or allegiances, nor a response to those expressed by others, nor a critique of any other political view of party" and that the higher level of protection "does not apply here therefore". But the statements in *Filipović v Serbia* 49 EHRR 1183 (mayor guilty of embezzlement) and in *Kwiecien v Poland* 48 EHRR 150 (head of local authority carried out duties ineptly and in breach of the law) are also not expressions of or critiques of political views.

80. I have concluded that the panel took an over-narrow view of what amounts to "political expression" (see the authorities discussed at paras 57–64 above) and that, taken in the round, so have the submissions of Mr Hughes on this point. Not all of the claimant's comments were political expression even in the broad sense the term has been used in this context. It is, for example, difficult to see how comments (3) and (5) qualify, and comment (12) must at best be on the borderline. I have described the comments as sarcastic and mocking, and some as seeking to undermine Councillor Gourlay in an unattractive way. However, notwithstanding what I have said about their tone, the majority relate to the way the council meetings were run and recorded. Some of them were about the competence of Councillor Gourlay who, albeit in a voluntary capacity in the absence of a council official, was taking the minutes and no doubt trying to do her best. Others were about the provision of minutes to Councillors or the approach of councillors to declarations of interest. The comments were in no sense "high" manifestations of political expression. But, they (or many of them) were comments about the inadequate performance of councillors in their public duties. As such, in my judgment, they fall within the term "political expression" in the broader sense the term has been applied in the Strasbourg jurisprudence. For the reasons given at para 55, it is difficult to disentangle the sarcasm and mockery from the criticism of the way council meetings were run.

81. Secondly, although the essence of the framework set out by the 2000 Act and the code of conduct is to restrict the conduct of councillors not only vis-á-vis the public and staff but including that towards colleagues on the council, no account was taken in the panel's decision of what is said in the Strasbourg jurisprudence about the need for politicians to have thicker skins than others.

82. The fact that the panel took a narrower view of "political expression" and did not refer to the need for politicians to have thicker skins that others limits the weight that can be given to its findings: see para 45 above and *Belfast City Council v Miss Behavin' Ltd* [2021] 1 WLR 1420. It thus falls to the court to determine whether the restriction in this case was a disproportionate interference with the claimant's right to freedom of expression without the assistance of the panel on these questions and accordingly the panel's decision has less weight than it otherwise would have.

83. The requirement of "necessity in a democratic society" in article 10.2 sets a high threshold. It was made clear in *R v Shayler* [2003] 1 AC 247, at para 23 by Lord Bingham of Cornhill (citing language used in Strasbourg cases such as *Handyside v United Kingdom* (1976) 1 EHRR 737, para 48) that the concept is less flexible than expressions such as "reasonable" or "desirable". As to proportionality, in *Shayler's* case, para 61 Lord Hope of Craighead stated that those seeking to justify a restriction must establish that "the means used impair the right as minimally as possible". In *Sanders v Kingston* [2005] LGR 719, paras 77 and 85 Wilkie J recognised that, in the context of political debate, there may be robust and even offensive statements in respect of which a finding that the code had been breached would be an unlawful infringement of the rights protected by article 10, although he found that was not such a case.

84. Despite the unattractiveness of much of what was posted, most of it was not purely personal abuse of the kind seen in *Livingstone'*s case [2006] LGR 799. It did not involve a breach of obligation, as the conduct in *Mullaney's* case did. Nor does it come close in kind or degree of condemnation to the language which has been held to be "unparliamentary" by the Speaker of the House of Commons. I accept Mr McCracken's submission that it is necessary to bear in mind the traditions of robust debate, which may include some degree of lampooning of those who place themselves in public office, when deciding what constitutes the "respect and consideration" required by the code. I have concluded that, in the light of the strength of the right to freedom of expression, particularly in the present context, and the fact that the majority of the comments posted were directed at other members of the community council, the panel's decision

> that they broke the code is a disproportionate interference with the claimant's rights under article 10 of the Convention."

Conclusions

Ground A

74. Both Ms Nawaz and the DMO were rightly critical of the failure to record full and accurate minutes of the public meeting of 17 April 2018, and in particular, the failure to refer at all to the statements made by the Claimant. However, Ms Nawaz accepted that Mrs Holder had kept her own notes of what the Claimant said, and she set them out in paragraph 5.4 of her assessment. The Claimant gave his account of what he said at the meeting, which partly corresponded with Mrs Holder's account and partly differed from it. Neither Ms Nawaz nor the DMO made clear findings as to what the Claimant actually said at the meeting. The DMO said in paragraph 12 that the Claimant accepted that he made "those statements", which I take to mean the statements which Mrs Holder attributed to him, based on her private notes. This was not entirely accurate. Given the importance that was placed upon his statements, for the purposes of the PC Code and Article 10, I consider that this was a significant failing in the assessment and decision-making process. It is not possible to say what difference it would have made to the outcome if this exercise had been properly undertaken. Therefore Ground A succeeds.

Grounds B and C

75. It is convenient to consider these grounds together since they both rely upon the application of Article 10.

76. In my judgment, the DMO's summary of Article 10, in paragraph 11 of the decision was adequate, bearing in mind that this was a Stage 2 local government complaints procedure, not the judgment of a court or tribunal. The main issue is whether or not the DMO correctly applied the requirements of Article 10 to the complaint.

Article 10(2) - "prescribed by law"

77. In the Statement of Facts and Grounds, the Claimant did not challenge the DMO's decision on the basis that the interference was not "prescribed by law" for the purposes of Article 10(2). The matter was not referred to in the DMO's decision.

78. I am satisfied that the decision under the PC's Code, made pursuant to the LA 2011, was an interference with the right to freedom of expression, and that the legal basis for the decision was sufficiently precise to be "prescribed by law" for the purposes of Article 10(2). That point was decided in *Sanders*, in respect of a comparable code of conduct, and conceded in *Calver*.

79. Wilkie J.'s first question in *Sanders*, namely, was the DMO entitled as a matter of fact to conclude that the Claimant's conduct was in breach of paragraph 3.1 of the Code of Conduct, aside from the issue of Article 10, was not a pleaded ground of challenge in this case. Unlike *Sanders*, this is not a statutory appeal on the merits of the decision. I

note that Beatson J. did address that question, but unlike this case, it was a pleaded ground of challenge in *Calver*'s judicial review claim that the councillor's language had not amounted to a breach of the code (at 380E).

80. The Court's jurisdiction in a claim for judicial review, including a challenge based on Convention rights, is limited to consideration of the errors of law alleged to have been committed by the decision-maker, as pleaded in the Statement of Facts and Grounds. In this case, there was no pleaded ground that the DMO was not entitled, as a matter of fact, to conclude that the Claimant was in breach of paragraph 3.1 of the Code of Conduct, and therefore the decision was not "prescribed by law" for the purposes of Article 10(2). In his skeleton argument, Mr Hitchens invited the Court to determine this issue, and made outline submissions upon it. However, there was no application to amend the grounds. If an application to amend had been made and granted, an adjournment would have been required for the Claimant to plead which findings of fact he challenged, and on what legal basis, and then for the Defendant to respond. In the absence of any pleaded challenge, it is to be assumed that the DMO was entitled to find, as a matter of fact, that the Claimant had breached paragraph 3.1 of the PC Code, leaving aside any consideration of Article 10.

Article 10(2) - "necessary in a democratic society in pursuit of a legitimate aim"

81. The general principles to be applied were not in dispute between the parties. An interference with the rights protected by Article 10(1) must be (1) in pursuit of one of the legitimate aims in Article 10(2); and (2) necessary in a democratic society. For an interference to be necessary in a democratic society it must fulfil a pressing social need, and be proportionate to the legitimate aim relied upon. Proportionality requires a fair balance to be struck between the demands of the general interests of the community and the protection of an individual's fundamental rights. The decision-maker must determine whether the interference is unacceptably broad in its application or has imposed an excessive or unreasonable burden or restriction.

82. In the light of the case law of the ECtHR, I consider that the Claimant was clearly exercising his right to freedom of expression under Article 10(1) when he spoke at the meeting on 17 April 2018. In my judgment, as an elected representative attending a public meeting called by the PC to discuss the highly controversial topic of Green Belt and other development in the village, his statements attracted the enhanced protection afforded to political speech and debate under Article 10. As the ECtHR reiterated in *Lombardo*, (at [55]), "there is little scope under art.10(2) of the Convention for restrictions on political speech or on debate on questions of public interest". It is beyond argument that development in the village was a matter of public interest.

83. Initially, the Defendant in its Detailed Grounds of Resistance (paragraph 22) submitted that Article 10 was not engaged, because the Claimant deliberately misrepresented his fellow councillors for base motives. It was his conduct, rather than the words he used, which breached the PC Code, and so it fell outside the scope of Article 10(1). Mr Hitchens suggested that this misinterpretation of Article 10 infected the DMO's decision. Mr Leader explained that he was instructed to put forward this defence by the in-house solicitor, Ms Anna Dell, and it ought not to be attributed to the DMO or Ms Swift. He reformulated the defence in paragraph 32 of his skeleton argument:

> "… whilst "freedom of expression" includes the right to impart information without interference by public authority, the right cannot extend to information which is adjudged to be false, and which is promulgated for a base motive, viz. to undermine the integrity of others for political gain."

However, he then went on to explain that, upon reading the ECtHR authorities when preparing his skeleton argument, he concluded that the argument was untenable and so conceded that Article 10 was engaged. I consider he was right to do so.

84. It is apparent, from paragraph 11 of the decision, that the DMO was aware of the enhanced level of protection for the expression of political views. It is not clear to me whether or not she accepted that the enhanced level of protection applied here, but she certainly found that the Claimant's Article 10 right was outweighed by the legitimate aim of protecting the reputation and rights of others. In reaching this conclusion, I consider that she misinterpreted and/or misapplied the law in several respects. As she adopted the findings of the assessor, Ms Nawaz, it is appropriate to take those into account, alongside her decision.

85. First, the DMO failed to identify correctly the legitimate aim which could properly be relied upon under Article 10(2). Generally, the legitimate aim of "the protection of the reputation or rights of others" applies to individuals not institutions. In *Lombardo*, the ECtHR held it was "only in exceptional circumstances that a measure proscribing statements criticising the acts or omissions of an elected body such as a council can be justified with reference to "the protection of the rights or reputations of others"". Mr Leader relied upon *Castell*, where the applicant was convicted under the Spanish criminal code for criticising the Government, but there the ECtHR identified the legitimate aim as "the prevention of disorder" (at [38], [39]).

86. The DMO found that the Claimant had been disrespectful and damaged the reputation of the office of the Councillors and/or the Council, at paragraphs 6 and 7 of the decision, in breach of paragraph 3(1) of the PC Code. In his skeleton argument, at paragraph 40, Mr Leader defended the decision by reference to "the Defendant's legitimate object of protecting the integrity of, and maintaining public confidence in, the local democratic infrastructure …. which would be diminished by a loss of respect of the institution of the Parish Council and its membership …". In my view, the Claimant's measured objections to the approach of his fellow councillors to development on the Green Belt at a village meeting could not conceivably amount to "exceptional circumstances" such as to justify such a significant extension of the legitimate aim under Article 10(2). The correct approach in law was to conclude that the only legitimate aim under Article 10(2) was to protect the reputations of the other Councillors, acting in their public capacities.

87. Second, the DMO failed to consider or apply the body of law which I have summarised at paragraph 59 above, which distinguishes between statements of fact, which are capable of proof, and expressions of opinion, which are not. In my view, the Claimant's statements were, in large part, expressions of opinion, and he provided a reasonable factual basis for some of them, by reference to Councillor Clapp's meetings with developers, as well as positions adopted and statements made at PC meetings, by Councillor Clapp and other councillors (see paragraphs 6.4 – 6.7 of Ms Nawaz's assessment and the Claimant's response to the complaint dated 26 July 2018). Some of Ms Nawaz's findings lent support to his position (e.g. paragraphs 7.3, 7.4, 7.9 in her

assessment of the complaint against the Claimant; paragraphs 5.11- 5.13, 6.6, 7.3 – 7.5 of her assessment of the complaint against Councillor Clapp; paragraphs 9, 10b, 13a of her review).

88. In my judgment, the fact that other councillors disagreed with, and were offended by, the Claimant's assessment of their views and conduct, or that the Claimant's assessment was found to be inaccurate, mistaken or even untruthful, was not a sufficient basis for interfering with his right to express his opinions. In *Lombardo*, at [60], the ECtHR observed that "elected officials and journalists should enjoy a wide freedom to criticise the actions of a local authority, even where the statements made may lack a clear basis in fact".

89. As the ECtHR reiterated in *Jerusalem*, at [36]:

> "…. while freedom of expression is important for everybody, it is especially so for an elected representative of the people. He or she represents the electorate, draws attention to its preoccupations and defends its interests. Accordingly, interferences with the freedom of expression of an opposition Member of Parliament …. call for the closest scrutiny on the part of the Court."

90. Third, Ms Nawaz found, at paragraph 7.11, that the Claimant's comments were made for political gain, which he had succeeded in securing through the public support he had received since the meeting. This allegation was made by Councillor Clapp and Mrs Holder. The DMO did not expressly refer to this point, but accepted Ms Nawaz's findings. The Defendant's Detailed Grounds and skeleton argument relied upon the Claimant's "base motives". In my view, even if the Claimant did act for political gain (which he denied), this was not an aggravating feature and should not have lessened the protection afforded by Article 10. In *Lingens*, the applicant was held by the domestic courts to have engaged in "basest opportunism" and "immoral" and "undignified" criticism of the alleged victim of his libel, but nonetheless his Article 10 right had been violated. As the passage from *Jerusalem* at [36] confirms, politicians are expected to act upon the concerns and interests of their electorate, and it is an essential part of their role to gain public support and win elections.

91. Fourth, the DMO failed to apply well-established principles of law when she concluded, in paragraph 9, that "if criticism is a personal attack or of an offensive nature, it is likely to cross the line of what is acceptable behaviour" and suggested, in paragraph 10, that the Claimant's conduct amounted to bullying. In *Oberschlick*, at [57], the ECtHR confirmed the principle set out in *Lingens* that freedom of expression applies equally to statements that "offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" ….". In my judgment, the criticism which the Claimant directed at his fellow councillors enjoyed the protection of Article 10, even though it was found to be a personal attack or offensive. It was open to the other councillors to respond to the criticisms made, both at the meeting and subsequently.

92. Fifth, the DMO considered, at paragraphs 6 and 8 of the decision, that the Claimant ought to have raised these matters in private, rather than in a public forum, apparently to spare the other councillors and the PC from disrespectful remarks which were

damaging to their reputations, or at least give them an opportunity to prepare their response. In my view, this was quite inconsistent with Article 10. As an elected representative, the Claimant was entitled to express his opinions in a public meeting where the electorate could hear him, if he chose to do so. Arguably it was in the interests of transparency and accountability to do so.

93. In my judgment, the DMO's view that offensive remarks or personal attacks were unacceptable, and that the Claimant should not have criticised his colleagues in public, did not have proper regard to the protection afforded to political debate under Article 10, and the requirement that politicians must tolerate criticism and close scrutiny. As the ECtHR said in *Lombardo* at [54]:

> "54. The plaintiff in the defamation action was the Fgura Local Council. The Court recalls that the limits of acceptable criticism are wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lay themselves open to close scrutiny of their words and deeds by journalists and the public at large, and they must consequently display a greater degree of tolerance. Moreover, the limits of permissible criticism are wider still with regard to the Government than in relation to a private citizen or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. It follows that a local council, being an elected political body made up of persons mandated by their constituents, it should be expected to display a high degree of tolerance to criticism."

94. In conclusion, I find that the DMO's interpretation and/or application of Article 10 was flawed, and she failed to give effect to the Claimant's enhanced right of political expression. In re-making the decision under Article 10(2), I conclude that the interference did not fulfil a pressing social need, and nor was it proportionate to the aim of protecting the reputation of the other councillors. As an elected councillor, taking part in a public meeting called by the PC to discuss the Green Belt, the Claimant was entitled to the enhanced protection afforded to the expression of political opinions on matters of public interest, and the benefits of freedom of expression in a political context outweighed the need to protect the reputation of the other councillors against public criticism, notwithstanding that the criticism was found to be a misrepresentation, untruthful, and offensive. Although no further action was pursued against the Claimant, beyond recommending that he apologise, it was a violation of Article 10 to subject the Claimant to the complaints procedure, and to find him guilty of a breach of the PC Code. Therefore Grounds B and C succeed.

Ground D

95. The parties were in agreement that, in principle, like cases should be considered and decided in a like manner so that there is consistency in the administration and adjudication of the standards process. The principle was set out by Lord Sumption in *R (Rotherham MBC) v Secretary of State for Business, Innovation and Skills* [2015]

UKSC 6, at [26], and by Rose LJ in *Secretary of State for the Home Department v BK (Afghanistan)* [2019] EWCA Civ 1358, at [39].

96. The Claimant submitted that although the complaints against both the Claimant and Councillor Clapp were comparable and analogous, the DMO treated Councillor Clapp more favourably. The Defendant submitted that the two complaints were distinguishable because of the nature of the findings against the two councillors, and the fact that Councillor Clapp had resigned, which was a contra-indicator to any further action.

97. The DMO agreed with Ms Nawaz's assessment that Councillor Clapp appeared to be aggrieved that the Claimant challenged him at the public meeting on 17 April 2018, and in retaliation resorted to a personal attack against the Claimant on 25 June 2018. However, she did not adopt Ms Nawaz's recommendation for further investigation, and concluded that his actions did not meet the threshold for a breach of paragraph 3.1 of the PC Code, applying the approach taken by an Adjudication Panel in *Capon v Shepway District Council* [2008] APE 0399, that "the threshold for a failure to treat another with respect should be set at a level that allows for the passion and frustration that often accompanies political debate" (paragraph 2). The DMO added at paragraph 3:

> "there was a controversial issue being discussed at the meeting on 17 April 2018 and it could have been anticipated that a debate would arise possibly resulting in conflict and a tense atmosphere, with voices raised by those present at the meeting."

98. In my judgment, these passages in the DMO's decision do display an approach to paragraph 3.1 of the PC Code and the two meetings which is more consistent with the right to freedom of political expression under Article 10 than the DMO's approach in the Claimant's case. Whilst the factual differences between the cases may have resulted in a different outcome, the approach should have been the same in both. Councillor Clapp was more favourably treated. Therefore I consider that Ground D succeeds.

Final conclusion

99. For the reasons set out above, the claim succeeds on all grounds. As I have found that has been a violation of Article 10, the decision must be quashed.