Neutral Citation Number: [2023] EWHC 2785 (Admin)

Case No: CO/2033/2023

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/11/2023

Before :

MR JUSTICE CALVER

- -

Between :

DAVID OWUSU YIANOMA **Claimant**

- and -

BAR STANDARDS BOARD **Defendant**

- -
- -

Selva Ramasamy KC (instructed by **Kingsley Napley LLP**) for the **Appellant**
Joanne Kane (instructed by **Bar Standards Board**) for the **Respondent**

Hearing dates: Thursday 2 November 2023

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Tuesday 7 November 2023.

Mr Justice Calver :

1. In *R v McCook* [2014] EWCA 734, the Lord Chief Justice sounded the following warning to criminal law practitioners:

   "*This case illustrates…two matters. First, it is always desirable to consult those who have acted before in a case where fresh counsel and solicitors have been instructed. In R v Achogbuo [2014] EWCA Crim 567 we stated that it was necessary to do so where criticisms of previous advocates or solicitors were made, or grounds were to be put forward where there was no basis for doing so other than what the applicant said. Second, it is clear from this case that we must go further to prevent elementary errors of this kind. In any case where fresh solicitors or fresh counsel are instructed, it will henceforth be necessary for those solicitors or counsel to go to the solicitors and/or counsel who have previously acted to ensure that the facts are correct, unless there are in exceptional circumstances good and compelling reasons not to do so. It is not necessary for us to enumerate such exceptional circumstances, but we imagine that they will be very rare.*"

2. These highly important requirements demanded of fresh counsel and solicitors who have been instructed in relation to a potential appeal have become known as the *McCook* obligations.

3. This appeal concerns the appropriate sanction in a case of a reckless failure of counsel to comply with his *McCook* obligations.

4. It arises out of regulatory proceedings brought by the Bar Standards Board ("BSB", the Respondent) against David Owusu -Yianoma ("the Appellant"), a practising barrister.

5. A regulatory hearing took place before the Bar Tribunals & Adjudication Service (BTAS – "the Tribunal") on 8-10 February 2023 and 11-12 May 2023. The Tribunal found three of the seven charges against the Appellant proved (charges 1, 3 and 7) as follows:

   Charge 1

   Statement of Offence
   Professional misconduct, contrary to Core Duty 1 of the Code of Conduct of the Bar of England and Wales…
   Particulars of Offence
   David Owusu-Yianoma, a barrister, failed to observe his duty to the court in the administration of justice by completing and submitting a Form NG, together with an Advice on Appeal/ Grounds of Appeal on 6 June 2019, which contained information that was incorrect and was recklessly misleading in that (a) Mr Owusu-Yianoma indicated on the Form NG that he had complied with his obligations under R v McCook (b) Mr Owusu-Yianoma had not complied with his McCook obligations in that as fresh appeal counsel he had not approached the solicitors and/or counsel who had acted at trial to ensure that the factual basis upon which the Advice on Appeal/Grounds of Appeal were advanced were correct, and/or had not taken steps to obtain objective and independent evidence in support of the Grounds of Appeal (c)

Mr Owusu-Yianoma knew, or ought to have known, that he had not complied with his obligations as fresh appeal counsel.

Charge 3
Statement of Offence
Professional misconduct, contrary to Core Duty 5 of the Code of Conduct of the Bar of England and Wales…

Particulars of Offence
David Owusu-Yianoma, a barrister, behaved in a way which is likely to diminish the trust and confidence which the public places in him or in the profession by completing and submitting a Form NG, together with an Advice on Appeal/Grounds of Appeal on 6 June 2019, which contained information that was incorrect and was recklessly misleading in that: (a) Mr Owusu-Yianoma indicated on the Form NG that he had complied with his obligations under R v McCook (b) Mr Owusu-Yianoma had not complied with his McCook obligations in that as fresh appeal counsel he had not approached the solicitors and/or counsel who acted at trial to ensure that the factual basis upon which the Advice on Appeal/Grounds of Appeal were advanced were correct, and/or had not taken steps to obtain objective and independent evidence in support of the grounds of appeal (c) Mr Owusu-Yianoma ought to have known that he had not complied with his obligations as fresh appeal counsel.

Charge 7
Statement of Offence
Professional misconduct, contrary to rC3.3 of the Code of Conduct of the Bar of England and Wales…

Particulars of Offence
David Owusu-Yianoma, a barrister, failed to observe his duty to the court by failing to take reasonable steps to avoid wasting the court's time in that: (a) Mr Owusu-Yianoma submitted the Form NG and supporting Advice on Appeal/Grounds of Appeal on 6 June 2019 indicating that he had complied with his McCook obligations, which was incorrect and, in doing so, recklessly misled the court (b) Mr Owusu-Yianoma failed to comply with his obligations as fresh appeal counsel to approach the solicitors and/or counsel who had acted at trial to ensure that the factual basis upon which the Advice on Appeal/Grounds of Appeal were advanced were correct, and/or had not taken steps to obtain objective and independent evidence in support of the Advice on Appeal/Grounds of Appeal.

6. Core Duty 1 ("CD1") is that "*You must observe your duty to the court in the administration of justice*". This core duty is the most important duty which overrides any other core duty if they are inconsistent. Under the section "Rules", rc3 provides that:

> "*You owe a duty to the court to act with independence in the interests of justice. This duty overrides any inconsistent obligations which you may have (other than obligations under the criminal law). It includes the following specific obligations which apply whether you are acting as an advocate or otherwise involved in the conduct of litigation in whatever role:*
>
> *1. you must not knowingly or recklessly mislead or attempt to mislead the court.*

...

3. *You must take reasonable steps to avoid wasting the court's time*."

7. In other words, rule C3.3 is a specific aspect of the core duty which the advocate owes to the court to act with independence in the interest of justice. It can be seen that Charge 7 alleged a breach of CD1 and rule C3.3, with the specific allegation being that the Appellant failed to take reasonable steps to avoid wasting the court's time; whereas Charge 1 was a more general charge of knowingly or recklessly misleading the court.

8. In finding each of these three charges (1, 3 and 7 as to rule C3.3) to be proved, the Tribunal stated as follows:

"10. The Tribunal found on the balance of probabilities that charges 1, 3 and 7 were proved on the grounds that Mr Owusu-Yianoma had submitted a form NG and an advice on appeal/grounds for appeal on 6 June 2019 which contained information which was incorrect and recklessly misleading on the grounds set out in charges 1, 3 and 7, and that he ought to have known that he had not complied with his obligations as fresh appeal counsel.
11. The Tribunal noted that Mr Owusu-Yianoma had previously admitted charge 7 on the grounds of recklessness and, as already indicated, found this charge proved on the balance of probabilities.
12. The Tribunal did not find charges 2, 4, 5 and 6 proved, and noted that charges 5 and 6 were alternatives to charges 1 to 4.
13. On 12 May 2023 the Tribunal provided a further summary of the reasons for its decision. The Tribunal found recklessness established in this case on the balance of probabilities for the following reasons. Mr Owusu-Yianoma was aware, when he ticked the box in form NG, that there was a risk that the statement was not true in that there was a risk that he had not complied with the duties under R v McCook [2014] EWCA Crim 734, and in those circumstances, which include the fact that he had made no attempt to check the R v McCook guidance personally, it was unreasonable of him to have taken that risk. Moreover it was clear to the Tribunal that the online form NG was very easy to follow and complete and this was relevant to the finding of recklessness.
14. Secondly, Mr Owusu-Yianoma admitted that he did not in fact comply with his obligations under R v McCook. The Tribunal cited the text in charge 5, which was an admitted charge, albeit not relevant to the Tribunal's determination: "Mr Owusu-Yianoma submitted an Advice on Appeal/Grounds of Appeal having failed to comply with his obligations as fresh appeal counsel to approach the solicitors and/or counsel who had acted at the trial to ensure that the factual basis upon which the Grounds of Appeal were advanced were correct, and/or had not taken steps to obtain objective and independent evidence in support of the Advice on Appeal/Grounds of Appeal." In those respects, the Tribunal found also that, in circumstances where he was an experienced criminal specialist practitioner, he ought to have known the importance of knowing the law and specifically should have checked the law and guidance specified in form NG in preparation of a criminal appeal where he was acting as fresh counsel.
15. The Tribunal's conclusion that Mr Owusu-Yianoma was reckless in the manner set out in charges 1, 3 and 7 was supported by the following findings which the Tribunal made:

(a) He sought to engage a non-legally qualified third party to make enquiries of the previous solicitors concerning the trial process.
(b) He had not personally checked the guidance in R v McCook.
(c) His oral evidence (a) that it was preferable for an appellate judge to decide the merits or otherwise of the appeal even if (as he acknowledged) he had not checked the guidance in R v McCook and (b) that he would still have drafted and submitted grounds of appeal even if the trial solicitors had refuted the factual matrix of the appeal in advance of the submission of the appeal was, in the opinion of the Tribunal, wholly misconceived.
(d) He failed to directly contact previous trial counsel and/or solicitors to ascertain the significance of the allegations made against them in the appeal documentation.
(e) He failed to have regard to the potential impact on the proposed appellant of pursuing a non-meritorious appeal.
16. The Tribunal did not find sufficient evidence to justify a finding of dishonesty having regard to his state of mind at the time he ticked the box, despite finding significant and troubling inconsistencies in the presentation of his oral evidence at the hearing."

9. Accordingly, the Tribunal found that charges 2 and 4, which alleged a failure to act honestly and with integrity were not proved. It also found that charges 5 and 6 were not proved but noted that charges 5 and 6 were alternatives to charges 1 to 4 (see paragraph [12] of its Report on Finding and Sanction) and that the Appellant admitted charges 5 and 6, as well as charge 7 in part, being the breach of rule C3.3 (ibid, paragraph [6]).

10. The Appellant therefore admitted three of the charges (5, 6 and part of 7) of professional misconduct but did so on the basis of recklessness (denying knowingly misleading the Court) as follows:

    (1) Charge 5 – Professional misconduct contrary to core duty 7 in failing to provide a competent standard of work and service to his client by submitting an Advice on Appeal/Grounds of Appeal having failed to comply with his obligations as fresh appeal counsel to approach the solicitors and/or counsel who had acted at the trial to ensure that the factual basis upon which the Grounds of Appeal were advanced were correct, and/or had not taken steps to obtain objective and independent evidence in support of the Advice on Appeal/Grounds of Appeal.

    (2) Charge 6 – Professional misconduct contrary to core duty 5 in behaving in a way likely to diminish the trust and confidence which the public places in him or in the profession by failing to comply with his obligations as fresh appeal counsel to approach the solicitors and/or counsel who had acted at the trial to ensure that the factual basis upon which the Grounds of Appeal were advanced were correct and/or had not taken steps to obtain objective and independent evidence in support of the Advice on Appeal/Grounds of Appeal.

    (3) Charge 7 – Professional misconduct contrary to rule C3.3 of the Bar Code of Conduct in failing to observe his duty to the court by failing to take reasonable steps to avoid wasting the court's time by

(a) submitting the Form NG and supporting Advice on Appeal/Grounds of Appeal on 6 June 2019 indicating that he had complied with his McCook obligations, which was incorrect and, in doing so, knowingly and/or recklessly misled the court;
(b) failing to comply with his obligations as fresh appeal counsel to approach the solicitors and/or counsel who had acted at trial to ensure that the factual basis upon which the Advice on Appeal/Grounds of Appeal were advanced were correct, and/or had not taken steps to obtain objective and independent evidence in support of the Advice on Appeal/Grounds of Appeal.

11. It can be seen that all of the charges related to essentially the same misconduct of the Appellant which he admitted, namely the reckless misleading of the court by submitting the Form NG and supporting Advice on Appeal/Grounds of Appeal on 6 June 2019 indicating that he had complied with his McCook obligations when he had not, as well as his reckless failure to ensure that his Advice on Appeal/Grounds of Appeal were correct, and/or a failure to take steps to obtain objective and independent evidence in support thereof.

12. Because of these admissions, there only remained three central matters for the Tribunal to determine as was recorded in paragraph [10(a)-(c)] of the Appellant's written closing submissions to the Tribunal:

> *a) the Respondent's state of knowledge (at the time of the events) in relation to McCook, and the associated issue of whether he knowingly misled, or whether any misleading was reckless;*
>
> *b) whether in submitting the appeal forms the Respondent acted dishonestly or without integrity (charge 2);*
>
> *c) whether he behaved in a way which could reasonably be seen by the public to undermine his honesty and/or integrity (charge 4).*

13. The appellant succeeded on (a): he was not found to have *knowingly* misled the court. He also succeeded on (b) and (c): these two charges were not found proved. It follows that the Tribunal's decision was essentially based upon the facts as admitted by the Appellant. This is an important feature of the case when it comes to the appropriate sanction, to which I return below.

14. In the light of its findings and the Appellant's admissions, the Tribunal had to determine the appropriate sanction to impose, which determination forms the subject matter of this appeal. The Tribunal determined to suspend the Appellant from practice for 12 months concurrent on each of the 3 charges found to be proved (1, 3 and 7), with an order that he should pay costs of £5000 (including VAT). The Appellant appeals against the sanction imposed by the Tribunal, contending that it is too harsh.

Law: the correct approach to the appeal

15. Joanne Kane, counsel for the BSB, who presented the BSB's arguments in a helpful and attractive manner, set out in her skeleton argument what I consider to be the

correct approach of the court to an appeal of this nature. Mr Ramasamy KC, counsel for the Appellant also agreed with it. It is as follows.

16. The BSB was established under the Legal Services Act 2007 to act as the regulator of barristers in England and Wales. Its regulatory objectives derive from Section (1) of the Legal Services Act 2007.

17. The BSB publishes the BSB Handbook ("the Handbook") which contains inter alia the Code of Conduct. "Outcomes" and "Guidance" on the Code of Conduct are also published. The most recent Sanctions Guidance, version 6, was published on 1 January 2022 and is the relevant Guidance in respect of this appeal.

18. Section 24(2) of the Crime and Courts Act 2013 makes provision for a right of appeal to the High Court in respect of, inter alia, a matter relating to the regulation of barristers. Subsection (6) provides that the High Court may make any such order as it thinks fit on an appeal. Rights of appeal are provided for in regulations rE236-238 of the Disciplinary Tribunal Regulations.

19. CPR Part 52 applies to this appeal. Rule 52.20 confers power on the appeal court to affirm, set aside or vary the order(s) of the Tribunal. The Court has all the powers of the Tribunal. The Court may affirm, set aside or vary the Tribunal's order or order a new hearing.

20. Rule 52.21 provides:

> *(1) Every appeal will be limited to a review of the decision of the lower court unless—*
> *(a) a practice direction makes different provision for a particular category of appeal; or*
> *(b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.*
> *(2) Unless it orders otherwise, the appeal court will not receive—*
> *(a) oral evidence; or*
> *(b) evidence which was not before the lower court.*
> *(3) The appeal court will allow an appeal where the decision of the lower court was—*
> *(a)* ***wrong****;* ***or***
> *(b)* ***unjust*** *because of a serious procedural or other irregularity in the proceedings in the lower court.*
> *(4) The appeal court may draw any inference of fact which it considers justified on the evidence.*
> *(5) At the hearing of the appeal, a party may not rely on a matter not contained in that party's appeal notice unless the court gives permission."*
> (emphasis added)

21. It follows that the relevant test on appeal is that the Appellant must show that the decision of the lower court (i.e. the disciplinary tribunal) was (i) wrong or (ii) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

22. It must also be borne in mind that, as Lang J stated in *Bar Standards Board v Stephen Howd* [2017] EWHC 210 (Admin) at [16] that:

> *"an appeal against the decision of a Disciplinary Tribunal is by way of* ***review, not re-hearing****. However, the nature of an appeal by way of review under rule 52.11 is flexible and differs according to the nature of the body which is appealed against, and the grounds upon which the appeal is brought."* (*emphasis added*)

23. In *Howd*, Lang J also cited *E I Dupont de Nemours & Co v S T Dupont* [2003] EWCA Civ 1368, [2006] 1 WLR 2793, where Aldous L.J held:

> *"[94] As the terms of rule 52.11(1) (now Rule 52.21) make clear, subject to exceptions, every appeal is limited to a review of the decision of the lower court. A review here is not to be equated with judicial review. It is closely akin to, although not conceptually identical with, the scope of an appeal to the Court of Appeal under the former RSC.* ***The review will engage the merits of the appeal. It will accord appropriate respect to the decision of the lower court****. Appropriate respect will be tempered by the nature of the lower court and its decision making process. There will also be a spectrum of appropriate respect depending on the nature of the decision of the lower court which is challenged.* ***At one end of the spectrum will be decisions of primary fact reached after an evaluation of oral evidence where credibility is in issue and purely discretionary decisions. Further along the spectrum will be multi-factorial decisions often dependent on inferences and an analysis of documentary material….****"* (*emphasis added*)

24. Moreover, deference should be accorded to specialist tribunals, who have reached an decision based on all of the evidence and submissions heard at first instance. In *Hewson v Bar Standards Board* [2021] EWHC 28 (Admin) Pepperall J held at [30] that:

> *"Appeal courts should not lightly interfere with decisions of specialist disciplinary tribunals as to the appropriate sanction for professional misconduct. First, the appeal is by way of review and not re-hearing. The discretion as to sanction is therefore reposed in the tribunal and not the court. Secondly, the court should accord* ***deference to the evaluative decision of the specialist tribunal****."*

25. So far as a Tribunal's finding on sanction is concerned, an appeal court should only interfere with the Tribunal's evaluative decision – and find that it was wrong - if it made an error of principle or if it fell outside the bounds of what it could properly and reasonably decide.

26. Thus, at [31] of *Hewson*, Pepperall J cited *Bawa-Garba v The General Medical Council* [2018] EWCA Civ 1879 in declaring as follows:

> *"In a joint judgment, the appeal court described, at [61], the tribunal's decision on sanction as "****an evaluative decision based on many factors****." There was, the court observed, "limited scope" for an appellate court to overturn such decisions. They added, at [67]:*
>
> > *"That general caution applies with particular force in the case of a specialist adjudicative body, such as the Tribunal in the present case, which (depending on the matter in issue) usually has greater experience in the field in which it operates than the courts … An appeal court should*

> *only interfere with such an evaluative decision if (1)* ***there was an error of principle in carrying out the evaluation, or (2) for any other reason, the evaluation was wrong, that is to say it was an evaluative decision which fell outside the bounds of what the adjudicative body could properly and reasonably decide.****"*"

27. *In Farquharson v BSB* [2022] EWHC 1128 (Admin), Heather Williams J stated at [§63]:

> *In relation to an appeal against sanction, it is well-established that whilst* ***considerable respect should be paid to the sentencing decision of the Disciplinary Tribunal, the Court would interfere when satisfied that the sanction imposed was "clearly inappropriate****": Salsbury v Law Society [2008] EWCA Civ 1285; [2009] 1 WLR 1286 per Jackson LJ at para 30.*

28. Finally, as Popplewell J (as he then was) pointed out in *Fuglers LLP v. Solicitors Regulation Authority* [2014] EWHC 179 (Admin) at [28]:

> *"The first stage is to assess the seriousness of the misconduct. The second stage is to keep in mind the purpose for which sanctions are imposed by such a tribunal. The third stage is to choose a sanction which most appropriately fulfils that purpose for the seriousness of the conduct in question."*

The Grounds of Appeal

29. The Appellant advances three Grounds of Appeal, although they each amount to essentially the same complaint, namely that the sanction was disproportionately harsh in light of this admitted and isolated instance of misconduct. They are as follows:

    (1) **Ground 1**: The Tribunal fell into error by finding that this was an "upper range" case at "Step 3" of the sanctioning process;

    (2) **Ground 2**: The Tribunal fell into error at "step 4" of the sanctioning process by failing to give sufficient and appropriate weight to the mitigating factors of the case; and/or by giving excessive and inappropriate weight to aggravating factors;

    (3) **Ground 3**: The Tribunal fell into error by failing to give proper consideration to departing from the guidance so as to impose a sanction beneath the recommended range.

30. The Appellant invites the Court to re-determine the appropriate sanction itself, and in so doing to substitute a sanction lower than that of suspension, or (if the Court considers suspension to be necessary), to substitute a suspension of considerably shorter duration than that imposed by the Tribunal.

31. At the hearing before the Tribunal, Mr Ramasamy KC drew the Tribunal's attention to the following important features of the Appellant's evidence in particular:

    (1) Prior to his instruction in the case of RB, he had not needed to take any steps to comply with *McCook* because he had only acted as fresh counsel in cases prior to *McCook*;

(2) At the time he completed the appeal documents in RB's case, he thought he knew what *McCook* required;

(3) When he completed the appeal documents, he honestly but erroneously believed he had complied with *McCook*. He now understands and accepts that at that time, he did not in fact know precisely what *McCook* required;

(4) He was acting *pro bono* and under pressure of time, having been instructed late, and as the 28-day deadline for notice of appeal loomed. In short:

i) On 21 May 2019 the Appellant had been contacted by a Ms Brago, a non-legally qualified member of the Ghanaian community who was assisting RB, a young man who on 10 May 2019 had been convicted of rape.

ii) She had explained that RB's trial lawyers had said there were no grounds of appeal.

iii) Ms Brago had sent the Appellant an email with a list of things that were felt to have gone wrong at RB's trial – essentially, proposed grounds of appeal.

iv) The Appellant's case was that rather than simply pressing on with settling grounds of appeal, he asked Ms Brago to go back to the trial lawyers to ask for their views on those proposed grounds (i.e. an approach consistent with at least the spirit of *McCook*).

v) Subsequent communications with Ms Brago caused the Appellant to believe that Ms Brago had approached the trial lawyers and had shown them the proposed grounds, and that the trial lawyers had remained against any appeal and had said that RB would need to instruct a new legal team to pursue any appeal.

vi) The 28-day deadline for service of notice of appeal was due to expire on 7 June 2019. It is not possible to apply to the Court of Appeal for an extension of time in advance– any application for an extension must be made at the same time the grounds of appeal are submitted.

vii) At 1643 hrs on 5 June 2019 the Appellant was invited on to the Crown Court Digital System by the trial lawyers (giving him reassurance that Ms Brago had been in contact with the trial lawyers). That left the Appellant with only two days to consider the case.

viii) The Appellant had made a return trip to court in Exeter on 6 June 2019, and was working on the form NG after that long day. In particular, the Form NG and appeal documents were submitted by the Appellant at 0120 hrs on 7 June 2019, and at that point the Appellant described himself as "exhausted".

(5) The Appellant was also acting at a time of great personal stress. In short, his mother had died in Ghana in 2016 and his father had died in Ghana in 2018. There is a Ghanaian tradition of ceremonial "unveiling" of family tombs. This ceremony (for both the Appellant's parents) had been delayed until October 2019 and had involved the Appellant travelling to Ghana in April-May 2019 i.e. shortly before the events in this case. At the same time the Appellant and his (now late) wife had

been facing serious matrimonial difficulties. She had petitioned for divorce in 2017, and efforts were made to save the marriage including the trip to Ghana in April-May 2019 (i.e. shortly before the events in this case).

(6) The Appellant accepted that he had acted without competence and recklessly, in that he did not check the *McCook* guidance before completing the appeal documents and submitting them.

(7) The Appellant accepted that it was inappropriate for him to have relied on Ms Brago as an intermediary to liaise with the trial lawyers and RB, but at the time he thought it was sufficient given the circumstances and the shortness of time - if he did not use her, he would have been unable to help RB at all. RB was incarcerated and had no voice other than Ms Brago. Obviously the Appellant could not simply telephone the prison and insist on speaking to RB, or go to the prison and insist on being let in. Time was short and Ms Brago plainly had a means of contacting RB – that was the best the Appellant had, and given her obvious commitment to helping RB, there was no reason for him to think that she would not have done what he asked her to do.

(8) The Appellant maintained that he did not act dishonestly or without integrity.

32. The Appellant's case contained in paragraphs 31 (4) (iv) and 31 (4) (v) above was, however, highly contentious as can be seen from the transcript of the cross-examination of the Appellant by Ms Kane. Indeed, the evidence of the Appellant on these matters may well be, at least in part, the reason for the Tribunal stating in paragraph 16 of its findings that there were "*significant and troubling inconsistencies in the presentation of his oral evidence at the hearing."* Nonetheless, the Tribunal did not ultimately make a finding of knowingly misleading the court.

The Tribunal's approach to sanction

33. The parties are agreed that the Tribunal adopted the correct methodology in principle in determining the sanction. It carefully applied the six stage methodology set out in the Bar Tribunals and Adjudication Service ("BTAS") Sanctions Guidance, Version 6 of 1 January 2022. The parties are also agreed that the Tribunal correctly applied, as step 1, the relevant section of the Guidance, namely *Group F: Misleading the court and others*: see paragraph [20] of the Tribunal's Finding and Sanction.

34. Step 2 required the Tribunal to assess the seriousness of the misconduct within that group. This obliged the Tribunal to consider (i) the level of the Appellant's culpability and (ii) the degree of harm caused by his misconduct.

(i) Culpability

35. The Tribunal dealt first with **culpability** in paragraph [21] of its Finding and Sanction. It found that the nature of the reckless misleading was (i) in itself serious and (ii) made within a professional context. These are the first two factors of culpability referred to in the guidance as going towards determining the seriousness of the misconduct. Indeed, the fact that the Appellant's misconduct was reckless (in particular by submitting form NG and ticking the box without (i) checking the

McCook guidance and (ii) relying upon a non-lawyer to liaise with the trial lawyers) was rightly a prominent factor in the Tribunal's assessment of the seriousness of the misconduct. The first factor listed under the heading "culpability" in Annex 2 is "*Whether the conduct was intentional or reckless*", both being serious forms of misconduct (as opposed, for example, to negligent conduct, which may involve a lesser degree of seriousness).

36. The Tribunal further found that the Appellant had control over and complete responsibility for the circumstances which gave rise to the misconduct and that the harm consequent upon misleading the court could reasonably have been foreseen. This is a reference to two of the general culpability factors in Annex 2 to the Guidance. I consider that the Tribunal were right so to find and I reject Mr Ramasamy KC's submission that the Appellant did not have control over and complete responsibility for the circumstances which gave rise to the misconduct by reason of the fact that he came to the case very late in the day such that he had to submit the relevant appeal documents at 1.20am on the morning of 7 June. He had a choice: to take the case or not. Having taken it, he had control over it and responsibility for the circumstances which gave rise to the misconduct.

37. However, as Mr Ramasamy KC pointed out, the Tribunal did not refer in its assessment of culpability to the fact that other factors referred to in the guidance were in the Appellant's favour, in that the misleading was not done for gain (indeed, the Appellant was acting *pro bono*); it was not planned but rather was a one-off incident; and his motivation for the misconduct whilst misguided (and indeed admittedly reckless), was honourable in that he was seeking to assist the convicted person, despite the fact that he was only instructed very late in the day, with time for appealing about to expire (as he told the Tribunal, "*maybe my heart did get the better of my head*"). Mr Ramasamy also fairly pointed out that the vast majority of the (adverse) culpability factors referred to in Section F, step 2, as well as in Annex 2 were not present in this case.

(ii) Harm

38. The Tribunal then dealt with **harm** in paragraphs [22] and [23] of its Finding and Sanction. In paragraph [22] the Tribunal relied upon an Annex 2 general harm factor, namely "*the number of people/organisations adversely affected or potentially affected*". It stated as follows:

> *"22. When considering the harm, the Tribunal considered that [the Appellant's] misconduct impacted on a number of agencies, individuals and organisations which were adversely affected, and that the harm was significant. The appellate judge had to consider an unmeritorious appeal and the Court of Appeal had to investigate whether the factual basis of the appeal was accurate. The appeal notice and the grounds of appeal included serious and misconceived allegations against other legal professionals which required them to set out their response to the points raised in the appeal documents".*

39. In paragraph [23] the Tribunal referred to two further general harm factors, namely (i) the impact on the public confidence in the legal profession and (ii) whether the

misconduct involved, or resulted in or could have resulted in, an adverse impact on the administration of justice. It stated as follows:

> "*23. Self-evidently, [the Appellant's] conduct as set out above impacted on the public confidence in the legal profession. Furthermore, the misconduct had the potential to have an adverse impact on the administration of justice and led to an extensive enquiry into the accuracy of the allegations made in the grounds of appeal and allegations which were wholly unmeritorious and led to a misdirection of judicial resources."*

40. Mr Ramasamy sensibly did not challenge the Tribunal's finding on harm which was that it was serious; instead, he focused his fire upon the Tribunal's approach to culpability. On any view, the potential for harm and the actual harm caused was indeed in the upper range of seriousness as the Tribunal pointed out in paragraphs [22]-[23]. The appeal concerned serious and unmeritorious allegations against other legal professionals which were wholly unjustified and it was left to the court to uncover for itself the lack of justification in the allegations, leading to a waste of precious judicial resources. Indeed, the Court itself contacted trial counsel and solicitors and having discovered the true position, dismissed the application for permission to appeal, certifying it as totally without merit.

(iii) Sanction imposed by the Tribunal

41. The Tribunal's evaluation of the culpability and harm factors combined led it to conclude at [24] that "*the culpability and harm factors were such that this was significant misconduct and significant harm, and that the conduct fell within the upper range of seriousness*". This meant that the Indicative sanctions range (step 3), before taking account of aggravating and mitigating factors (stage 4) and totality (stage 6), was somewhere between suspension over 12 months and disbarment.

42. Mr Ramasamy KC points out that this finding – that the conduct fell within the upper range of seriousness – was more severe than the BSB had itself suggested in its written and oral submissions on sanction. Whilst it emphasised that it was entirely a matter for the Tribunal, in paragraph 10b of the BSB's submission to the Tribunal it stated:

> "*The Panel will be minded to consider the middle range of seriousness in terms of sanction to reflect the culpability and harm. As stated above, the harm in this case is not just the harm to the Applicant's case and the duty to the Court, but it is also the harm to the public confidence arising from the conduct of [the Appellant].*" (emphasis added)

43. Whilst sanction is indeed a matter for the Tribunal, the fact that the experienced BSB considered the case to fall (only) within the middle range of seriousness should cause the court to scrutinise with great care whether there was an error in principle of the Tribunal in carrying out its evaluation, or whether its evaluative decision fell outside the bounds of what the Tribunal could properly and reasonably decide.

44. Mr Ramasamy KC also referred the court to the BTAS case of *BSB v Turner* (BTAS case reference PC 2019/1076/D5 + PC 2020/1233/D5), which also concerned a reckless misleading of the court and others, where the conduct was repeated and was for financial gain (in contrast to the present case), and yet the Tribunal found that the case fell into the

middle range in terms of seriousness, and accordingly suspended Turner for 6 months concurrent on each of the 9 proven charges in that case. Mr Ramasamy submits that "*the clear inconsistency between sanction in the Appellant's case when contrasted with Turner should give the Court (and indeed the public and the profession) cause for concern, and should be seen as lending further support to the grounds of appeal in the Appellant's case*."

45. I consider that little or no assistance is derived from *Turner*. The facts of that case are different and each case has to be determined on its own facts. In particular in *Turner* the harm was deemed to be limited, unlike in the present case. Moreover, it may simply be the case that Mr Turner was fortunate in the degree of severity of the sanction that was imposed upon him.

Merits of the appeal

46. The central issue therefore is whether by assessing culpability as significant rather than moderate, the Tribunal committed an error of principle or that its decision fell outside the bounds of what it could properly and reasonably decide on the facts. As I have stated, whilst there are three grounds of appeal they essentially amount to the same complaint, namely that the sanction was disproportionately harsh in light of what was an isolated and admitted instance of misconduct.

47. **Ground 1** of the appeal is the essential complaint of the Appellant – that the Tribunal fell into error by finding that this was an upper range case at step 3 of the sanctioning process – and accordingly focuses on issues of culpability. The Appellant's submissions are contained in paragraphs [34]-[44] of his skeleton argument and were developed skilfully in oral submissions by Mr Ramasamy KC.

48. In essence he submitted that the Tribunal failed to take into account important culpability factors. The misconduct in this case was limited in nature, scope and extent and with no view to gain. Turning to the Annex 2 factors, he contends that the Appellant was motivated by a desire to help a convicted man and there was no motivation for personal gain. There was no planned misconduct. The Appellant misunderstood *McCook*. It was a one-off incident. The event took place over a short period of time and the circumstances were pressurised.

49. Whilst Ms Kane was right to point out that the misconduct concerned two separate matters, namely the submission of form NG as well as the advancing of grounds of appeal despite the Appellant not knowing whether they were correct, I consider that it was nonetheless an isolated instance of misconduct.

50. By **Ground 2** of the appeal, the Appellant contends that the Tribunal fell into error at step 4 of the sanctioning process by failing to give sufficient and appropriate weight to the mitigating factors and/or by giving excessive and inappropriate weight to aggravating factors. The Appellant's submissions are contained in paragraphs [45]-[56] of his skeleton argument and were developed orally by Mr Ramasamy KC.

51. I do not accept Mr Ramasamy KC's submission that none of the aggravating factors listed in Annex 2 were present in the Appellant's case. The Tribunal was entitled to rely upon (i) lack of insight into his culpability (without having to spell out its reasons for that

finding[1]) and the consequences of his actions, particularly having regard to (ii) his level of professional experience. Indeed, as Ms Kane submitted, it is significant that in its decision on recklessness the Tribunal specifically referred to the fact that the Appellant stated in evidence that it was preferable for an appellate judge to decide the merits or otherwise of the appeal even if (as he acknowledged) he had not checked the guidance in *R v McCook* and (b) that he would still have drafted and submitted grounds of appeal even if the trial solicitors had refuted the factual matrix of the appeal. The Tribunal rightly referred to this as being wholly misconceived [15(c)] and this does indeed suggest a lack of insight as to the seriousness of the misconduct. This was an important aggravating factor on culpability.

52. Mr Ramasamy KC challenged this finding and argued that it was not open to the Tribunal to find a lack of insight on the part of the Appellant on the evidence. He also submitted that it is unclear why the Tribunal found that there was a lack of insight in paragraph [25] of its Report of Finding and Sanction. However, I consider that it was indeed open to the Tribunal to find this and the reason for their so finding is reasonably apparent. The transcript of the hearing clearly demonstrates that the Appellant's evidence to the Tribunal was that even *after* he had received the written response of trial counsel and the solicitors refuting point by point the serious allegations concerning their trial conduct which were contained in the Grounds of Appeal which he settled[2], he said that he was still prepared to argue the Grounds of Appeal before the single judge and the Court of Appeal and it would be for the court to discover the falsity of his client's case, rather than the Appellant himself writing to the Registrar of the Court of Appeal, identifying his failure to comply with McCook. This did indeed demonstrate a lack of insight into his misconduct. This is demonstrated by the following answers which he gave to the Tribunal's questions on this topic:

> *1 Q. I go back to the point that you alluded to yesterday, that even if you have this*
> *2 material from the solicitors and barrister, I know it is speculative, but if you had got*
> *3 that at the time of preparing the grounds of appeal -- I think you alluded to this*
> *4 yesterday, but I may have got it wrong -- you indicated that you would still have*
> *5 drafted the grounds of appeal because you felt overall there was a reason for this*
> *6 young man's case to have a hearing by a High Court judge. Do you think you were*
> *7 right in that? Do you think that was professionally appropriate, given the rules in*
> *8 McCook but also the general nature of the process of the appellate process?*
> *9 A. Judge, yes. Again, it is one of those difficult judgments to call, because even if at*
> *10 the end of the day the sole ground of appeal was going to be the fact that he did not*
> *11 give evidence, that failure to give evidence could potentially be the basis of a*
> *12 miscarriage of justice. It may well be that if he had given evidence and the jury had*
> *13 seen his demeanor they may well have taken a very different view. <u>It was still</u>*
> *<u>14 something that I was prepared to argue before the single judge and potentially</u>*
> *<u>15 before the Court of Appeal.</u>*
>
> And:

[1] There is no requirement that the Tribunal should set out every factor and reason relied on in coming to its decision (*English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409).

[2] Namely, an alleged failure to advance the client's case in the best possible light; an alleged failure to adduce relevant defence evidence/trace and secure the attendance of witnesses; an alleged failure to make a submission of no case to answer; and denying the client the opportunity of giving evidence.

23 Q. Can I ask you, finally, have you at any time had second thoughts -- I did you the
24 question before but now we are on to this area -- about your decision not to
25 withdraw the appeal and/or to the write to the registrar once trial counsel and
26 solicitors' documentation had been provided to you? I got the impression that you
27 did not feel it was appropriate. You see, that was an opportunity, that why I am
28 asking the question. That was an opportunity for you to say, "Right, I have seen
29 now what they have said. I should not have filled the Form NG in the way I did. I
30 am going to pull out this appeal on behalf of [RB]". That was not at all your
31 response earlier on this morning?
32 A. Judge, I was trying to give an honest response. I did not want to say that, well, as
33 much as I realised that there is pressures of time on the court and all of that, one
1 finds oneself in this rather difficult position, and I think I mentioned this yesterday,
2 in between a young man finds himself incarcerated, is going to be incarcerated for a
3 very long time and has put forward what he believes went wrong in his trial and
4 trial representatives who are coming up with a different version of events, I could
5 have pulled the plug. I suspect it would have made life much easier for me. I do
6 not think I would have been facing these criticisms if I had but where a young man
7 has raised what he believes went wrong, and forgive me if I was wrong to have
8 done this, I believe that it was better for the judge to say it was wrong rather than
9 me pulling the plug at that stage and then being accused by the applicants of letting
10 him down.
11 Once the decision is coming from the judge the applicant then knows that
12 his grounds have no merit. I could have turned around and said, "Well, in light of
13 what your trial representatives are saying, clearly there does not seem to be any
14 merit here". I understand. It would have saved time, it probably would have saved
15 my position. It is one of the difficult positions that a lawyer sometimes finds
16 himself in, and I have learned a lesson from it. (emphasis added)

53. So far as mitigating factors are concerned, all of the factors referred to in paragraph [46[b]] of the Appellant's skeleton argument were indeed taken into account by the Tribunal and it cannot be said that they failed to give them sufficient weight. They were nonetheless important mitigating factors in his case, namely the Appellant's full admissions; his genuine remorse; the fact that the misconduct is unlikely to be repeated; the Appellant's personal circumstances (bereavement and relationship breakdown) and previous good character, as well as the positive professional character references[3].

54. However, I consider that Mr Ramasamy KC is right in his submission that the Tribunal failed to give sufficient weight to the importance of the Appellant's admissions (set out above). In paragraph [26] of its Report of Finding and Sanction the Tribunal referred to them as amounting only to "*partial admissions*". They were partial admissions in the sense of their being admissions of recklessness but not admissions of knowingly misleading the court; but the Tribunal went on to find that the Appellant did not knowingly mislead the court but rather did so recklessly, which he had admitted.

55. I consider that there is force in Mr Ramasamy KC's submission that the Tribunal failed to give sufficient *weight* in mitigation to these admissions:

[3] I accept Ms Kane's submission that these personal areas of mitigation should be treated with caution in the regulatory context: see the asterisked footnote to Annex 2.

"*this meant that that the Appellant had admitted the essential underlying facts (save for the elements of dishonesty and lack of integrity, which the Tribunal found not proved). This can be demonstrated by considering the wording of charge 7. This charge was admitted by the Appellant on the basis of recklessness. Albeit with different wording, charge 7 as admitted covers the same essential elements as the wording of charges 1-4, namely: a) submitting a Form NG and supporting advice indicating he had complied with McCook, which was incorrect, and in so doing recklessly misleading the Court, and b) failing to comply with the McCook obligations. The reality was that besides the disputed elements of knowingly misleading, dishonesty and lack of integrity (all of which were found not proven), the only matter that remained in dispute was the precise label/s to be attached to the admitted conduct*."[4]

56. By **Ground 3** the Appellant contends that the Tribunal failed to give proper consideration to departing from the guidance so as to impose a sanction beneath the recommended range by reason of the *"significant mitigation … and because the simple fact of these proceedings and the finding of professional misconduct was in itself a strong public message of disapproval."* I consider that there is nothing in this submission. The Tribunal took into account the relevant mitigation in arriving at its sanction (subject to the point in paragraphs 54-55 above) and as Ms Kane points out, the fact of proceedings taking place and a finding of professional misconduct being a strong public message of disapproval cannot be said to be a "*good reason*" for sanctioning outside of the range, as this could be said in every case.

57. It follows that the issue in the case boils down to this. Did the Tribunal commit an error in principle in carrying out its evaluative decision on sanction or did its evaluative decision fall outside the bounds of what it could properly and reasonably decide, such that the sanction that it imposed was clearly inappropriate, by reason of its failure to take sufficiently into account the facts, in particular that: (i) the Appellant admitted the key factual elements of the charges that were brought against him; (ii) this was an isolated incident; and (iii) this was not done for gain but rather was motivated by a desire to help the accused.

58. As against this, the Appellant's behaviour was admittedly reckless; he showed a lack of insight into the seriousness of his misconduct; and the harm caused was serious.

59. I consider that the Tribunal was entirely correct to mark the gravity of the Appellant's reckless conduct, and the serious harm that it caused, with a suspension from practice. However, despite the factors referred to in paragraph 58 above, I consider that the Tribunal failed to give sufficient weight to the factors in paragraph 57 above and as a result its evaluative decision on sanction fell outside the bounds of what it could properly and reasonably decide. This is a case of moderate culpability and the Tribunal ought to have held that the misconduct in this case fell within the middle range of seriousness rather than the upper range.

60. The Tribunal rightly identified the purpose for which sanctions are imposed by a Tribunal in a case such as the present as being the protection of the public and consumers of legal services and the maintenance of public confidence and trust in the profession, as well as

[4] Appellant's Skeleton argument at [50].

the promotion of high standards of behaviour in the profession. In my judgment, for a case falling within the middle range of seriousness and taking account of the mitigating features in this case, the Tribunal ought to have held that a period of suspension of less than 12 months was appropriate to fulfil that purpose.

61. Accordingly, I consider that imposing a period of suspension of as much as 12 months was clearly inappropriate in all the circumstances and the sanction which most appropriately fulfils the relevant purpose in the present case is to impose a period of suspension of 6 months.

62. I therefore vary the Tribunal's order by substituting a suspension of 6 months concurrent on each of the 3 charges found to be proved (1, 3 and 7), instead of the 12 months suspension imposed by the Tribunal. To that extent and that extent only, I quash the Tribunal's decision.