Neutral Citation Number: [2014] EWHC 1504 (Admin)

Case No: CO/10947/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT IN WALES
ON APPEAL FROM THE ADJUDICATION PANEL FOR WALES

The Law Courts
The Civic Centre
Mold
Flintshire

Date: 15/05/14

Before :
MR JUSTICE HICKINBOTTOM

- -

Between :

PATRICK HEESOM

Appellant

- and -

THE PUBLIC SERVICES OMBUDSMAN FOR WALES

Respondent

- and -

THE WELSH MINISTERS

Interveners

- -

Mark Henderson and David Lemer (instructed by **Howe & Co**) for the **Appellant**
James Maurici QC and Gwydion Hughes (instructed by **Katrin Shaw, Legal Adviser, The Public Service Ombudsman for Wales**) for the **Respondent**
Gwion Lewis (instructed by **the Treasury Solicitor**)
for the **Interveners** (written submissions only)

Hearing dates: 1-4 April 2014

- -

Approved Judgment

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

.....
MR JUSTICE HICKINBOTTOM

Mr Justice Hickinbottom :

Introduction

1. The Appellant is 76 years of age, and is a long-standing local councillor.

2. He was first elected as a member of Clwyd County Council in 1990, and, on the introduction of unitary authorities in Wales, he was elected to Flintshire County Council as Independent member for the Mostyn ward in 1996, being re-elected in 2000, 2004, 2008 and 2012. After the 2004 elections, he became leader of the Independents, the main opposition group on the Council. In the 2008 elections, the Independents became the largest group on the Council, and the Appellant became the leader of the Council in waiting. However, he was put under investigation for election irregularities – during which he was in due course cleared of any impropriety – and it was decided that another Independent member (Councillor Arnold Woolley) should take on the leadership of the Council, which he did. The Appellant remained leader of the Independents, and was appointed Executive Member for Housing Strategy. The Independent group lost control of the Council in the 2012 elections.

3. On 12 March 2009, a complaint about the Appellant's conduct was submitted to the Public Services Ombudsman for Wales ("the Ombudsman") by all of the Council's Corporate Management Team, which was made up of the Council's Senior Officers. As a result of the complaint, he stood down from the Executive, but continued serving as a councillor.

4. The Ombudsman published his final report on the complaint on 22 July 2010. The report ran to 232 pages and appendices. In it, the Ombudsman found that there was evidence of breach of the Council's Codes of Conduct serious enough to warrant reference to the President of the Adjudication Panel for Wales for adjudication by a case tribunal, and the matter was referred.

5. The proceedings before the case tribunal were lengthy, partly as a result of the Appellant's ill health – he was diagnosed by a psychitratist appointed by the tribunal to be suffering from clinical depression, and thus unfit to give evidence – which caused a 12 month adjournment from September 2011. The tribunal published their decision in 2013, after hearing 48 witnesses over 58 days of hearings and consideration of 7000 pages of evidence. Their decision was made in three parts. On 25 June 2013, they published their Findings of Fact, a document of over 400 pages. On 19 July they made, and on 6 August 2013 published, their Breach Decision and Sanction Decision in separate documents. In these, the tribunal found that the Appellant had committed 14 breaches of the Council's Codes of Conduct by failing to show respect and consideration for Council officers, using bullying behaviour, attempting to compromise the impartiality of officers and conducting himself in a manner likely to bring his office or the Council into disrepute. In terms of sanction, the tribunal disqualified the Appellant from being a member of the Council or of any other local authority for 2 years 6 months.

6. In this statutory appeal, the Appellant challenges the tribunal's decision on three grounds, namely:

i) The case tribunal erred in adopting the wrong standard of proof, i.e. the civil as opposed to the criminal standard.

ii) The case tribunal erred in its findings as to breaches of the Codes of Conduct.

iii) Insofar as its findings of breach were properly made, the case tribunal erred in finding that they were such as to justify the sanction imposed.

7. The appeal thus gives rise to the following important issues:

i) The appropriate standard of proof in an adjudication by a case tribunal of the Adjudication Panel for Wales.

ii) The scope of and legitimate restrictions to a politician's right of freedom of expression under article 10 of the European Convention for on Human Rights ("the ECHR") and at common law, particularly in relation to civil servants' rights and interests which might be adversely affected by the purported exercise of those rights.

8. Supperstone J granted permission to appeal on 15 November 2013. On 19 December 2013, I ordered expedition because, as a result of the case tribunal decision and this appeal, not only can the Appellant not act as a councillor, but the Mostyn ward is currently without representation since no by-election can be held until this appeal is determined.

9. On 6 February 2014, on their application, I granted the Welsh Ministers permission to intervene in writing, because of the potential systemic impact of some of the issues on the adjudication scheme in Wales as a whole.

10. At the hearing, Mark Henderson and David Lemer appeared for the Appellant, and James Maurici QC and Gwydion Hughes for the Ombudsman. The Welsh Ministers did not appear at the hearing, but the written submissions of Gwion Lewis of Counsel on their behalf were of considerable assistance, particularly in respect of the statutory scheme in Wales (to which the section below on the legal framework owes much). At the outset, I thank them all for their industry and assistance.

The Legal Framework in Wales

11. The Third Report of the Committee on Standards in Public Life (Cm 3702) (July 1997) recommended a new system to promote and uphold proper standards in public life. The framework created by Part III of the Local Government Act 2000 ("the 2000 Act") was intended to implement this recommendation. Chapter I of Part III (sections 49-56) applied to England and Wales; Chapter II to England alone (sections 57-67) and Chapter III to Wales alone (sections 68-74).

12. These provisions supplemented section 80 of the Local Government Act 1972 ("the 1972 Act"), still in force in both Wales and England, which disqualifies a person from being elected to or from being a member of a local authority if (i) he is, subject to various exceptions, in the paid employment of the authority (section 80(1)(a)), or (ii) convicted of any offence and sentenced to imprisonment for at least three months within five years of his election or after that election (section 80(1)(d)).

13. The 2000 Act enabled the relevant national authority to specify, by Order, "general principles" which were to govern the conduct of members of relevant authorities (which include local authorities) (section 49); and to issue a "model code" in respect of the conduct expected of such members (section 50). It also required each authority to set up a standards committee in accordance with provisions to be made by the relevant national authority, to promote and maintain high standards of conduct by members and to assist members to observe the authority's code of conduct (section 53).

14. The relevant national authority for England is the Secretary of State. I will return to the current position in England in due course (see paragraphs 25-30 below). Local government and public administration were substantially devolved to Wales by the Government of Wales Act 1998, and are now more fully devolved under Schedule 7 of the Government of Wales Act 2006. For Wales, the relevant national authority was the National Assembly, until the relevant powers were transferred to the Welsh Ministers by paragraph 30 of Schedule 11 to the Government of Wales Act 2006.

15. The Conduct of Members (Principles) (Wales) Order 2001 (SI 2001 No 2276), made under section 49 of the 2000 Act, identifies ten principles which govern the conduct of local authority members in Wales, namely selflessness, honesty, integrity and propriety, duty to uphold the law, stewardship, objectivity in decision-making, equality and respect, openness, accountability, and leadership (article 3). Each principle is further defined in the Schedule to the Order. For example, in relation to "Equality and Respect", paragraph 7 of the Schedule states:

> "Members must carry out their duties and responsibilities with due regard to the need to promote equality of opportunity for all people, regardless of their gender, race, disability, sexual orientation, age or religion, and show respect and consideration for others."

16. The current model Code of Conduct, issued by the Welsh Ministers under section 50 of the 2000 Act, is found in the Schedule to the Local Authorities (Model Code of Conduct) (Wales) Order 2008 (SI 2008 No 788). It replaced the model in the Conduct of Members (Model Code of Conduct) (Wales) Order 2001 (SI 2001 No 2289).

17. Section 51 of the 2000 Act requires local authorities in Wales to adopt the model code in its entirety, only making additions that are consistent with it. Section 52 requires every member of an authority to give, within two months of the code being adopted, a written undertaking that he will observe its provisions, in default of which he would cease to be a member.

18. Under these various provisions, the Council adopted a Members Code of Conduct in 2001 ("the 2001 Code of Conduct"), which it revised on the coming into effect of the 2008 Order ("the 2008 Code of Conduct"). In each, members were required to observe the Code of Conduct when conducting any business of the Council (paragraph 1 of the 2001 Code of Conduct, and paragraph 2(1) of the 2008 Code of Conduct).

19. Paragraph 1 of the 2001 Code of Conduct required members to observe the Code whenever they conducted the business of the Council, or undertook the role of

member or acted as a representative of the Council. So far as relevant to this appeal, the Code provided:

> "Promotion of Equality and Respect for Others
>
> 4. Members of the Authority:
>
> (a) must carry out their duties and responsibilities with due regard to the need to promote equality of opportunity for all people, regardless of their gender, race, disability, sexual orientation, age or religion, and show respect and consideration for others,
>
> (b) must not do anything which compromises, or which is likely to compromise, the impartiality of the Authority's employees."
>
> "Duty to Uphold the Law
>
> 6(1) Members:
>
> …
>
> (b) must not in their official capacity or otherwise behave in a manner which could be reasonably regarded as bringing the office of Member or the Authority into disrepute; ...".

20. The 2008 Code of Conduct was brought into effect from 2 May 2008. As with the 2001 Code, it requires members to comply with the Code whenever they acted as a member of or represented the Council; but it also requires compliance at all times and in any capacity in respect of conduct identified in paragraph 6(1)(a). So far as relevant to this appeal, the Code provides as follows:

> "4. You must –
>
> (a) carry out your duties and responsibilities with due regard to the principles that there should be equality of opportunity for all people, regardless of their gender, race, disability, sexual orientation, age and religion;
>
> (b) respect and consideration for others;
>
> (c) not use bullying behaviour or harass any person; and
>
> (d) do anything which compromises, or which is likely to compromise the impartiality of those who work for, or on behalf of, your authority."
>
> "6(1) You must –
>
> (a) not conduct yourself in a manner which could reasonably be regarded as bringing your office into disrepute;...".

21. Section 69(1) of the 2000 Act enables the Ombudsman to investigate failures of a member to comply with the Code of Conduct as adopted, on the basis of a written allegation being made to him by any person or on his own motion. Section 69(3) provides that the purpose of such an investigation is to determine which of the findings set out in section 69(4) is "appropriate". In this case, the Ombudsman considered the finding in section 69(4)(d) appropriate, namely:

> "… that the matters which are subject of the investigation should be referred to the President of the Adjudication Panel for Wales for adjudication by a tribunal falling within section 76(1)."

22. Given that finding, by virtue of section 71(3) of the 2000 Act, the Ombudsman was thereafter required to produce a report, and refer the matter to the President for adjudication by a case tribunal consisting of not less than three members; which he did. The case tribunal in this case comprised (i) Mr Hywel James (a District Judge, who chaired the tribunal), Mr Peter Davies (the President of the Adjudication Panel for Wales, a solicitor and Deputy District Judge) and Ms Susan Hurds (non-legal member with a background in National Health Service management, who was also a non-legal member of the Employment Tribunal).

23. Section 79 sets out the functions of a case tribunal, including the following.

    i) It must decide whether or not the member has failed to comply with the Code of Conduct (section 79(1)).

    ii) If it finds such a failure, it must then decide whether the nature of the failure is such that the member should be suspended from that authority (wholly or partially) or disqualified from that or any other authority (section 79(3)).

    iii) Where the case tribunal decides to suspend or partially suspend a member as member, it must decide upon the period of suspension, which must not exceed one year or, if shorter, the remainder of the member's term in office (section 79(5)).

    iv) Where the case tribunal decides to disqualify a member, again it must decide upon the period of disqualification, which must not exceed five years (section 79(6)).

24. Where a case tribunal finds a member has failed to comply with the Code of Conduct, he may appeal to this court in respect of any decision under section 79 that applies to him, including the sanction imposed (section 79(15)). An appeal requires leave (section 79(16))

The Legal Framework in England

25. Until 2012, Wales and England shared the scheme as set out above, the role of the Ombudsman in Wales being performed in England by, first, the Standards Board and, later, Ethical Standards Officers of Standards for England.

26. However, for England, that regime was abolished by the Localism Act 2011 from 1 April 2012. This abolished the model Code of Conduct for local authorities in England, in favour of a new regime that requires local authorities to formulate and adopt a Code of Conduct locally which must be based on seven identified principles (sections 26 and 27(1) and (2)). The requirement for local authorities in England to have standards committees was also abolished, in favour of "independent persons" who have a consultative role as part of their local standards arrangement (section 28(7)).

27. Ethical Standards Officers in England (the equivalent of the Ombudsman in Wales) were abolished, and their functions were not retained. Instead, from 1 July 2012, section 34(1) makes it a summary criminal offence deliberately to withhold or misrepresent a disclosable pecuniary interest which, upon conviction, may attract a maximum fine of £5,000 and an order disqualifying the person from being a member of the relevant authority for up to five years. Thus, in England, a councillor cannot be disqualified unless he is (i) in the paid employment of the authority (section 80(1)(a) of the 1972 Act: see paragraph 12 above); (ii) convicted of any offence and sentenced to imprisonment for at least three months (section 80(1)(b) of the 1972 Act: again, see paragraph 12 above), or (iii) convicted of an offence under section 34(1) of the 2011 Act and thereafter made the subject of a disqualification order by the magistrates. The power of local authorities to suspend members was also revoked from 7 June 2012.

28. It was uncontentious before me that, there being no common law right for an authority to impose sanctions that interfere with local democracy, upon the abolition of these sanctions and outside the categories I have described above, a councillor in England can no longer be disqualified or suspended, sanctions being limited to (for example) a formal finding that he has breached the code, formal censure, press or other appropriate publicity, and removal by the authority from executive and committee roles (and then subject to statutory and constitutional requirements).

29. The rationale for this change was set out in a number of statements issued by the Department for Communities and Local Government. There appear to have been two themes. First, the United Kingdom Government considered that the earlier regime, consisting of a centrally prescribed model code of conduct, standards committees with the power to suspend a local authority member and regulated by a central quango, was inconsistent with the principles of localism. There was, in addition, concern that the regime was a vehicle for vexatious or politically motivated complaints which discouraged freedom of speech and which could be used to silence or discourage councillors from (e.g.) whistleblowing on misconduct.

30. The Welsh Ministers have not adopted the same approach as England; and, for Wales, have maintained the pre-Localism Act scheme. In their written submissions as Interveners in this appeal, they say (at paragraphs 21-23):

    i) The Localism Act 2011 has been largely rejected by the Welsh Ministers as being inappropriate to the social policy agenda in Wales.

    ii) The Welsh Ministers were confident that the Ombudsman, adopting a robust approach, could sift out any minor, vexatious and politically-motivated complaints made in Wales.

iii) Thus, the Welsh Ministers were not persuaded that the ethical standards system in Wales was in need of reform. That was confirmed in the Welsh Government White Paper, "Promoting Local Democracy" (May 2012).

iv) That remains their view. They refer to paragraphs 16-19 of the Committee for Standards in Public Life Annual Report 2011-12, which expressed concerns about what the Committee regarded as inadequate sanctions in the new English scheme, which were restricted in essence to "criminal law or… the ballot box".

v) The Welsh Ministers remain of the view that the scheme in Wales complies with article 10 of the European Convention.

Article 10 of the European Convention on Human Rights

31. The United Kingdom gave direct effect to the European Convention by the Human Rights Act 1998. Section 3 provides that legislation including subordinate legislation must be read as compatible with the Convention rights, so far as it is possible to do so. Section 6 provides that it is unlawful for a public authority to act in a way that is incompatible with Convention rights, including rights under article 10. Further, in Wales, the powers of Welsh Ministers are in any event confined by section 81(1) of the Government of Wales Act 2006 (and, previously, by section 107 of the Government of Wales Act 1998), which provides that the Welsh Ministers have no power to make, confirm or approve any subordinate legislation, or to do any other act, so far as it is incompatible with any of the Convention rights.

32. Article 10 of the European Convention 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…
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions and penalties as are prescribed by law and are necessary in a democratic society, … for the protection of the rights and interests of others…".

Thus, the right is not absolute: it may be restricted if (and insofar as) restriction is prescribed by law and "necessary in a democratic society for the protection of the rights and interests of others".

33. Of course, as recently emphasised by Beatson J (as he then was) in R (Calver) v Adjudication Panel for Wales [2012] EWHC 1172 (Admin) at [41] and following, the common law also recognises freedom of expression, which "has been enhanced by developments of the common law under the influence of rights in international human rights treaties ratified by the United Kingdom" (Calver at [41]). However, Mr Henderson did not suggest that the scope of the common law concept is in any way broader than that of article 10; and, therefore, this judgment will focus on the latter.

34. While freedom of expression is important to everyone, Strasbourg has recognised the importance of expression in the political sphere. It has long-recognised that what is said by elected politicians is subject to enhanced protection", i.e. a higher level of protection, under article 10.

35. One of the first cases to explore the right in this context was Castells v Spain (1992) 14 EHRR 445, which concerned the publication in a weekly magazine of an article by an opposition senator, elected on the list of a political grouping supporting independence for the Basque Country. It was highly critical of the Spanish Government, accusing it of having been responsible for the murders and attacks perpetrated in the Basque Country by extremist organisations who acted (the article said) with total impunity. The Senate withdrew the senator's parliamentary immunity; and he was prosecuted and convicted of insulting the government. He was sentenced to imprisonment for one year and one day, and disqualified from office.

36. Before the European Court of Human Rights, he complained that his prosecution and conviction contravened article 10. The court said this:

> "42. The Court recalls that the freedom of expression, enshrined in paragraph 1 of article 10, constitutes one of the most 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 everyone, 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.
>
> In this respect, the pre-eminent role of the press in a State governed by the rule of law must not be forgotten. Although it must not overstep various bounds set, inter alia, fro the prevention of disorder and the protection of the reputation of others, it is nevertheless incumbent on it to impart information and ideas on political questions and on other matters of interest.

> Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society."

I have quoted that early case at some length because it reflects a number of the propositions that are developed in later cases.

37. I was referred to a very large number of Strasbourg cases, but notably to Thorgeirson v Iceland (1992) 14 EHRR 843, De Haes and Gijsels v Belgium (1997) 1 EHRR 1, Janowski v Poland (1999) 29 EHRR 705, Wabl v Austria (2001) 31 EHRR 51, Jerusalem v Austria (2003) 37 EHRR 25, Mamère v France (2009) 49 EHRR 39, Lombardo v Malta (2009) 48 EHRR 23, Monnat v Switzerland (2010) 51 EHRR 34, and Morel v France (2013) Application No 25689/10.

38. I need not quote at length from those cases. From them, the following propositions can be derived.

i) The enhanced protection applies to all levels of politics, including local (Jerusalem, especially at [36]).

ii) Article 10 protects not only the substance of what is said, but also the form in which it is conveyed. Therefore, in the political context, a degree of the immoderate, offensive, shocking, disturbing, exaggerated, provocative, polemical, colourful, emotive, non-rational and aggressive, that would not be acceptable outside that context, is tolerated (see, e.g., de Haes at [46]-[48], and Mamère at [25]: see also Calver at [55] and the academic references referred to therein). Whilst, in a political context, article 10 protects the right to make incorrect but honestly made statements, it does not protect statements which the publisher knows to be false (R (Woolas) v Parliamentary Election Court [2012] EWHC 3169 at [105])

iii) Politicians have enhanced protection as to what they say in the political arena; but Strasbourg also recognises that, because they are public servants engaged in politics, who voluntarily enter that arena and have the right and ability to respond to commentators (any response, too, having the advantage of enhanced protection), politicians are subject to "wider limits of acceptable criticism" (see, e.g., Janowski at [33]; but it is a phrase used in many of the cases). They are expected and required to have thicker skins and have more tolerance to comment that ordinary citizens.

iv) Enhanced protection therefore applies, not only to politicians, but also to those who comment upon politics and politicians, notably the press; because the right protects, more broadly, the public interest in a democracy of open discussion of matters of public concern (see, e.g., Janowski at [33]). Thus, so far as freedom of speech is concerned, many of the cases concern the protection of, not a politician's right, but the right of those who criticise politicians (e.g. Janowski, Wabl and Jerusalem). Castells, of course, was both;

the senator criticising politicians within the Spanish Government through the press.

v) The protection goes to "political expression"; but that is a broad concept in this context. It is not limited to expressions of or critiques of political views (Calver at [79]), but rather extends to all matters of public administration and public concern including comments about the adequacy or inadequacy of performance of public duties by others (Thorgeirson at [64]: see also Calver at [64] and the academic references referred to therein). The cases are careful not unduly to restrict the concept; although gratuitous personal comments do not fall within it.

vi) The cases draw a distinction between fact on the one hand, and comment on matters of public interest involving value judgment on the other. As the latter is unsusceptible of proof, comments in the political context amounting to value judgments are tolerated even if untrue, so long as they have some – any – factual basis (e.g. Lombardo at [58], Jerusalem at [42] and following, and Morel at [36]). What amounts to a value judgment as opposed to fact will be generously construed in favour of the former (see, e.g., Morel at [41]); and, even where something expressed is not a value judgment but a statement of fact (e.g. that a council has not consulted on a project), that will be tolerated if what is expressed is said in good faith and there is some reasonable (even if incorrect) factual basis for saying it, "reasonableness" here taking account of the political context in which the thing was said (Lombardo at [59]).

vii) As article 10(2) expressly recognises, the right to freedom of speech brings with it duties and responsibilities. In most instances, where the State seeks to impose a restriction on the right under article 10(2), the determinative question is whether the restriction is "necessary in a democratic society". This requires the restriction to respond to a "pressing social need", for relevant and sufficient reasons; and to be proportionate to the legitimate aim pursued by the State.

viii) As with all Convention rights that are not absolute, the State has a margin of appreciation in how protects the right of freedom of expression and how it restricts that right. However, that margin must be construed narrowly in this context: "There is little scope under article 10(2) of the Convention for restrictions on political speech or on debate on questions of public interest" (see, e.g., Lombardo at [55]-[56], Monnat at [56]).

ix) Similarly, because of the importance of freedom of expression in the political arena, any interference with that right (either of politicians or in criticism of them) calls for the closest scrutiny by the court (Lombardo at [53]).

39. As I have said, the law requires politicians to have thick skin and be tolerant of criticism and other adverse comment. Strasbourg has also considered the position of non-elected public servants in this context. Of these cases, Janowski is perhaps the most useful.

40. The facts of Janowski were very different from those of this appeal. Mr Janowski noticed two municipal guards moving street vendors on from an area in which, he

knew, such selling was not prohibited by the relevant resolution of the municipal council. A "lively exchange" ensued, in which Mr Janowski called the guards "cwoki" (oafs) and "glupki" (dumb). He was in fact a journalist, but did not make the remarks in the course of journalistic activity: he, as a member of the public, simply saw what he considered to be the unlawfulness at the hands of the guards, and confronted them. He was prosecuted for verbally insulting a civil servant under article 236 of the Polish Criminal Code, found guilty, and sentenced to eight month's imprisonment suspended, a fine, a charitable donation and court costs. The majority of the European Court of Human Rights found that the remarks were not made in the context of open political discussion, and the actions of the guards did not warrant resort to offensive and abusive attack.

41. Although very far from this case on its facts, the Court gave helpful guidance as to the approach to the limits on acceptable criticism of non-elected public servants (at [33]):

> "The Court also notes the Commission's reasoning that civil servants acting in an official capacity are, like politicians, subject to the wider limits of acceptable criticism. Admittedly those limits may in some circumstances be wider with regard to civil servants exercising their powers than in relation to private individuals. However, it cannot be said that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to the extent to which politicians do and should therefore be treated on an equal footing with the latter when it comes to the criticism of their actions.
>
> What is more, civil servants must enjoy public confidence in conditions free from perturbation if they are to be successful in performing their tasks and it may therefore prove necessary to protect them from offensive and abusive attacks when on duty. In the present case the requirements of such protection do not have to be weighed in relation to the interests of the freedom of the press or of open discussion of matters of public concern since the applicant's remarks were not uttered in such a context."

42. Therefore:

i) Civil servants are, of course, open to criticism, including public criticism; but they are involved in assisting with and implementing policies, not (like politicians) making them. As well as in their own private interests in terms of honour, dignity and reputation (see Mamère at [27]), it is in the public interest that they are not subject to unwarranted comments that disenable them from performing their public duties and undermine public confidence in the administration. Therefore, in the public interest, it is a legitimate aim of the State to protect public servants from unwarranted comments that have, or may have, that adverse effect on good administration.

ii) Nevertheless, the acceptable limits of criticism are wider for non-elected public servants acting in an official capacity than for private individuals, because, as a result of their being in public service, it is appropriate that their

actions and behaviour are subject to more thorough scrutiny. However, the limits are not as wide as for elected politicians, who come to the arena voluntarily and have the ability to respond in kind which civil servants do not. This proposition has recently been emphasised and applied in Mamère (Director of the Central Service for Protection of Ionising Radiation criticised and called a "sinister character" by the leader of the Green Party in France, for his response to the Chernobyl disaster), Bugan v Romania (2013) Application No 13284/06 (management of public hospital criticised by a journalist) and July v France (2013) 57 EHRR 28 (judges investigating the death of another judge criticised by his widow in the press as being biased, slow and conducting a farcical investigation).

iii) Where critical comment is made of a civil servant, such that the public interest in protecting him as well as his private interests are in play, the requirement to protect that civil servant must be weighed against the interest of open discussion of matters of public concern and, if the relevant comment was made by a politician in political expression, the enhanced protection given to his right of freedom of expression (see also Mamère at [27]).

The Scope of the Appeal

43. On an appeal under section 79(15) of the 2000 Act such as this CPR Rule 52 applies. There being no submission that the case tribunal decision was unjust by virtue of a serious procedural or other irregularity, by CPR Rule 52.11(3)(a), the appeal will be allowed if, and only if, the decision of the tribunal is "wrong".

44. The role of this court therefore goes beyond a simple review of the decision on public law grounds – it is possible to challenge factual findings as well as the law – but neither is it a full re-hearing. Because of the important public interest in the finality in litigation, the starting point is that the decision below is correct unless and until the contrary is shown. Laws LJ put it thus in Subesh v Secretary of State for the Home Department [2004] EWCA Civ 56 at [44]:

> "The burden so assumed [by the appellant] is not the burden of proof normally carried by a claimant in first instance proceedings where there are factual disputes. As appellant, if he is to succeed, he must persuade the appeal court or tribunal not merely that a different view of the facts from that taken below is reasonable and possible, but that there are objective grounds upon which the court ought to conclude that a different view is the right one. The divide between these positions is not caught by the difference between a perceived error and a disagreement. In either case the appeal court *disagrees* with the court below, and, indeed, may express itself in such terms. The true distinction is between the case where an appeal court might *prefer* a different view (perhaps on marginal grounds) and one where it concludes that the process of reasoning, and the application of the relevant law, *require* it to adopt a different view. The burden which an appellant assumes is to show that the case falls within this latter category." (emphasis in the original).

To that extent, in respect of factual issues, the court must engage with the merits.

45. However, in doing so, the court is required to give due deference to the tribunal below, because:

i) The tribunal has been assigned, by the elected legislature, the task of determining the relevant issues. In my view, although it is a more forceful point in respect of issues where the legislature has not provided an appeal, this is relevant even in an open-ended appeal such as this.

ii) It is a specialist tribunal, selected for its experience, expertise and training in the task (see Sanders v Kingston (No 1) [2005] EWHC 1145 (Admin) at [56] per Wilkie J, and Livingstone v Adjudication Panel for England [2006] EWHC 2533 at [41] per Collins J).

iii) It has the advantage of having heard oral evidence (Todd v Adams & Chope (trading as Trelawney Fishing Co) [2002] EWCA Civ 509 at [129] per Mance LJ (as he then was), Assicurazioni Generali SpA v Arab Insurance Group [2002] EWCA Civ 1642 at 17 per Clarke LJ (as he then was))

46. Of course, the extent of the deference to be given will depend upon the nature of the issue involved, and the circumstances of the case (see E I Dupont De Nemours & Co v S T Dupont [2003] EWCA Civ 1368 at [94] per May LJ). The greater the advantage of the tribunal below, the more reluctant the appeal court should be to interfere (Assicurazioni Generali at [15]). Applying that general proposition, the courts have considered a wide spectrum of cases.

i) Moving outside factual issues, if the issue is essentially one of statutory interpretation, the deference due may be limited (see Livingstone at [41]).

ii) If it is one of disputed primary fact which is dependent upon the assessment of oral testimony, the deference will be great: the appeal court will be slow to impose its own view, and will only do so if the tribunal below was plainly wrong (Dupont at [94], Sanders (No 1) at [55], Subesh at [41] and Assicurazioni Generali at [12]).

iii) CPR Rule 52.11 expressly enables the appeal court to draw inferences it considers justified in the evidence. Where an appeal court is asked to draw an inference, or question any secondary finding of fact, it will give significant deference to the decision of the tribunal below, and will only find it to be wrong if there are objective grounds for that conclusion (Subesh).

iv) Where the issue is essentially one of discretion, the court will only interfere if the tribunal was plainly wrong. The sanction imposed – if the case tribunal do not err in approach – falls into this category (Sanders v Kingston (No 2) [2005] EWHC 2132 (Admin) at [42] per Sullivan J (as he then was)).

v) Similarly, where an evaluative judgment has to be made on the primary facts, involving a number of different factors that have to be weighed together. In respect of such open-textured issues, Beatson J said in Calver (at [46]):

> "The relevant legal principles in this area do not provide the panel or the court with bright lines… They lead to a process of balancing a number of interests."

R (Mullaney) v Adjudication Panel for England [2009] EWHC 72 (Admin) at [95]-[96] per Charles J is to the same effect. These are therefore matters of balance and degree, in respect of which different tribunals could legitimately come to different conclusions: and the more factors there are to weigh, and/or the vaguer the standard being applied, the more reluctant an appellate court will be to interfere (Assicurazioni Generali at [18], citing with approval Pro Sieben Media AG v Carlton UK Television Limited [1999] 1 WLR 605 at page 612).

47. As Laws LJ emphasised in Subesh (at [49]), there are no rigid categories here, but a spectrum of cases:

> "The approach is a general one, having neither need nor scope for sophisticated refinement."

48. In assessing whether the case tribunal was wrong, Mr Henderson submitted that the primary issue is whether, in accordance with the principles set out above, their decision breached the Appellant's article 10 rights, i.e. it interfered with his article 10(1) rights in a way that was not justified under article 10(2).

49. He did not suggest that either Code of Conduct in itself breached article 10. Mr Henderson was right not to pursue that argument: it did not survive Calver (see [85]). Each case is fact specific: as Mr Henderson submitted, the real issue is whether the case tribunal's decision in this case breaches article 10.

50. In considering that issue, the case tribunal adopted the three-stage process used by Wilkie J in Sanders No (1) (at [72]), and by Beatson J in Calver (at [39]), which the tribunal set out as follows (see paragraph 8 of the Breach Decision):

> "1. Can we as a panel as a matter of fact conclude that the [Appellant's] conduct amounted to a relevant breach of the Code of Conduct?
>
> 2. If so, was the finding of a breach and the imposition of a sanction prima facie a breach of article 10?
>
> 3. If so, is the restriction involved one which is justified by reason of the requirement of article 10 subparagraph 2."

Question 1 requires consideration of the Code of Conduct interpreted without reference to article 10 rights, those being taken into consideration in question 2. Those three questions go primarily to breach. The tribunal considered the actual sanction to be imposed separately, in their Sanction Decision. It is rightly common ground before me that, if article 10 is engaged and a prima facie breach of it found, then the actual sanction imposed has to be proportionate and justified under article 10(2).

51. The tribunal accepted that, as Beatson J observed in Calver, "if doubt exists in the construction or application of the Code of Conduct that the [Appellant] is entitled to such doubt" (paragraph 7 of the Breach Decision). Beatson J's point was that, as the freedom of expression has been recognised by the common law such that very clear words are required to restrict it, there is a narrower approach to the interpretation of legislation and instruments such as the Code of Conduct that restrict it. Article 10 may require a similar constraint in construction.

52. Mr Henderson and Mr Maurici accepted that the approach of the case tribunal was an appropriate one. I agree. However, whilst it may be helpful to impose some structure to the relevant analysis by considering, first, whether there is a breach of the Code of Conduct construed without reference to constraints imposed by the right of freedom of expression, and then, subsequently and discretely, the impact of article 10:

    i) Such a two-stage process to ascertain whether there has been a prima facie breach of article 10 is not mandatory, so long as the case tribunal answer the ultimate question (i.e. has there been any such prima facie breach of article 10) properly.

    ii) If this staged approach is adopted, care must be taken if a breach of the Code is found in question 1, i.e. without any consideration of the rights to freedom of speech. Leaving aside the impact of the common law and article 10 on the construction issue, it must not infect or otherwise influence consideration of question 2. Answering question 1 positively is merely a precondition to proceeding to question 2.

    iii) Although analytically sound, in my judgment it will not usually be necessary in practice to consider the construction of the Code of Conduct twice, namely without and then with the interpretative constraints of the common law or article 10. If, as a result of Wilkie J's first two questions, something said is regarded as prima facie in breach of article 10(1), then in practice it matters not whether it is said that that is so because of a construction point on question 1 or because of the scope of article 10(1) in question 2. Indeed, there is a risk of circularity; because the construction of the Code with the rights of freedom of speech in mind will be driven by the answer to the question of whether a finding of breach would be a prima facie breach of those rights.

    iv) In my view, there is no need to refer to sanction at all in question 2: if a finding of breach is made, then the tribunal will need to go on to consider what, if any, sanction over and above the finding of breach should be applied. The question will then arise as to whether a particular sanction would be disproportionate. The point here is that a finding of breach in itself may be an interference with article 10 rights, which requires justification by the State under article 10(2).

53. Therefore, on the Wilkie J approach, the questions for me to consider in this appeal with regard to breach are as follows:

    i) Leaving aside any restriction on interpretation as a result of article 10 and common law rights of freedom of expression, was the case tribunal entitled as a matter of fact to conclude that the Appellant's conduct in respect of each of

incidents of which complaint was made breached the provisions of paragraphs 4 and/or 6 of the relevant Code of Conduct?

ii) If so, was the finding in itself a prima facie breach of article 10(1)?

iii) If so, was the restriction involved by the finding justified by reason of article 10(2)?

54. Before I turn to the individual charges found against the Appellant by the case tribunal, I should deal with two other issues in respect of the appeal: the appropriate respondent (paragraphs 55-59 below), and the standard of proof (paragraphs 60-66).

The Appropriate Respondent

55. Initially, the Appellant named three respondents to this appeal: the Ombudsman, Flintshire County Council and the Adjudication Panel for Wales. When granting permission, apparently contrary to the wishes of both the Ombudsman and the Panel, Supperstone J directed that the only respondent be the Ombudsman, and the Panel be removed as a party.

56. Although not taken as a substantive point, Mr Maurici submitted that that was incorrect, and contrary to previous practice. He referred me to Livingstone, in which he appeared for the appellant, and in which (under the scheme that now in effect applies in Wales) the respondent was the Adjudication Panel.

57. I can deal with the point shortly: I consider Supperstone J was right. This is not a judicial review. It is an appeal from the Adjudication Panel, by the Appellant, to which the Ombudsman is responding. The Panel is a judicial or quasi-judicial body, which has no legal interest in the appeal. It is *functus officio*. The Ombudsman referred the allegations against the Appellant to the Panel, and pursued them there; and it is right that he responds to the appeal. That he is the correct respondent in principle is, in my view, clear.

58. The practical difficulties that would arise if, contrary to principle, the Panel were the respondent in such appeals as this, appear from Livingstone. In that case, the nominal respondent (the Adjudication Panel for England) did not appear (no doubt because it had no interest in doing so); and it was the Ethical Standards Officer (who had the relevant interest, but seems to have had no formal standing in that appeal) who presented arguments in favour of upholding the Panel's decision.

59. In my view, in an appeal by a member of a relevant authority against a decision of a case tribunal of the Adjudication Panel for Wales, the appropriate respondent is the Ombudsman.

The Standard of Proof

60. The case tribunal considered the standard of proof, and determined it to be the civil standard (paragraphs 1.37-1.39 of the Findings of Fact).

61. Mr Henderson conceded that (i) the proceedings before a case tribunal are civil, and (ii) all cases before case tribunals of the Adjudication Panel for Wales (and, before its abolition, its English equivalent) have proceeded on the basis of that the civil standard

applies. However, he submitted that there is no direct authority on the standard of proof in the context of proceedings under section 79(1) of the 2000 Act – the point never having been previously taken – and, in view of the nature of the proceedings and potential consequences, the appropriate standard is the criminal one. In particular, he relied upon the seriousness of the potential consequences, i.e. the fact that the proceedings can result in a disqualification from being a councillor for five years, which not only deprives the individual of the ability to play that part in local politics, but also the electorate of their preferred representative.

62. Whilst there are no authorities directly in point, Mr Henderson relied upon two cases, Watkins v Woolas [2010] EWHC 2702 (QB) and Matyjek v Poland (2006) Application No 38184/03).

63. Watkins v Woolas, despite its neutral citation number, was a decision of the Electoral Court not the High Court (see R (Woolas) v Parliamentary Election Court [2012] EWHC 3169 (Admin), in which the decision in Watkins v Woolas was judicially reviewed before a Divisional Court). The Electoral Court considered a petition pursuant to section 120 of the Representation of the People Act 1983, in which the petitioner alleged the respondent was guilty of an "illegal practice" contrary to section 106 of that Act, namely making false statements during an election campaign. The Election Court has a restricted brief: it merely determines whether there has been "illegal practice", and reports its conclusion to the Speaker of the House of Commons (section 144). The automatic consequence of a finding of illegal practice is that the election is void (section 159(1)). Illegal practice is also a criminal offence (section 169). The Election Court held that, although the proceedings before it were civil in nature, the appropriate standard of proof was criminal:

> "That must be so because sections 168 and 169 of the [Representation of the People Act 1983] make provision for prosecution on indictment of those allegedly guilty of corrupt practice and for the summary prosecution of those allegedly guilty of illegal practice, section 106(1) refers to people being *guilty* of an illegal practice and section 106(4)… provides that those reported by an election court to be personally guilty of a corrupt or illegal practice are subject to the penal consequence of severe electoral disqualifications. In R v Rowe ex parte Mainwaring and Others [1992] 1 WLR 1059 the Court of Appeal was satisfied that it would not be desirable to have a different standard of proof in different courts on the same issue."

No adverse comment was made on that standard of proof when the decision was challenged in the Divisional Court. Mr Henderson submitted that the same standard of proof should be applied in this case which is (he contended) materially similar.

64. Matyjek concerned proceedings under the Polish Lustration Act 1997, which required disclosure by people working in public service of work they had done for the State's security services in the period 1944 to 1990. In his declaration, Mr Matyjek had denied cooperating with the secret services in that period. Proceedings were instituted on the basis that that was a lie. In such proceedings, if it is found that a false declaration has been made, then the individual may be excluded from political posts

and working in the professions for 10 years. The European Court of Human Rights found that, although the proceedings were civil, because of the nature of the proceedings and the potential consequences, the criminal standard of proof should apply.

65. Despite his able best efforts, I am unpersuaded by Mr Henderson's submissions: I consider the appropriate standard of proof is civil.

66. In coming to that conclusion, I have in particular taken into account the following.

i) There is only one civil standard of proof, namely the balance of probabilities (In re B (Children) (Care Proceedings: Standard of Proof) [2008] UKHL 35 at [13] per Lord Hoffman, and R (LG) v Independent Appeal Panel for Tom Hood School [2010] EWCA 142 at [35] per Wilson LJ (as he then was)).

ii) As Mr Henderson concedes, proceedings before a case tribunal of the Adjudication Panel for Wales are civil in nature. On the basis of the criteria in Engel v Netherlands (No 1) (1976) 1 EHRR 647, they are clearly civil.

iii) As civil proceedings, the starting point is that the standard of proof should be civil (R (McCann) v Manchester Crown Court [2002] UKHL 39 at [37] per Lord Steyn).

iv) Allegations before a case tribunal do not have to be of conduct that is criminal: none of the conduct alleged against the Appellant was criminal.

v) The proceedings are disciplinary in nature; and the potential consequences of such proceedings for the individual subject (e.g. in terms of ability to work) is well-recognised as being insufficient to warrant introduction of the criminal standard. The additional potential consequence of depriving electors of their choice of representative is also, in my view, insufficient.

vi) I do not consider the two authorities relied upon give Mr Henderson any great support. Watkins v Woolas was a very different case. The Electoral Court was charged with determining whether the respondent was "guilty" of illegal practice, which is a necessarily a crime. Although not criminal in form, the proceedings therefore have criminal connotations. In the Divisional Court's view, it appears to have been the possibility of a fine resulting from the Electoral Court's findings that required the degree of certainty inherent in the criminal standard to apply (see [83]). Similarly, Matyjek. Although the Lustration Court is not a criminal court, the initiator of the proceedings has the same powers as a prosecutor, the person the subject of the proceedings receives the same procedural guarantees as if he had been charged with a crime, the judges are criminal judges, and it operates on a model based on the Polish Code of Criminal Practice. The potential penalty was particularly severe, not only because of its length (10 years), but because it extended to professions as well as political posts. Thus, the court remarked (at [51] that the proceedings "have a strong criminal connotation".

vii) It is in my view significant that the civil standard of proof has been applied by case tribunals in Wales and England for over 10 years, and has not been

questioned. When appeals and judicial reviews have come to the High Court, the standard has never been questioned there, either. In my judgment, the point has not been taken before, because it is a point of no substantial force: the appropriate standard is civil – and clearly so.

The Allegations

Introduction

67. I now turn to consider the breaches of the Codes of Conduct which the case tribunal found against the Appellant, which arose out of nine separate incidents.

68. Whilst Mr Henderson reserved his main fire for the sanction imposed, he submitted that the tribunal had erred in their evaluation of the facts in respect each breach, resulting in a distorted view of their seriousness and an error in concluding that a finding of breach was proportionate and justified under article 10(2). This, he said, fell short of an overt challenge to the primary facts as found by the tribunal; but nevertheless involved a critical examination of the evidence upon which each breach had been found, and how the tribunal dealt with that evidence.

69. As I have indicated, the case tribunal sat for 58 days. They had 7000 pages of evidence and heard 48 witnesses, including the Appellant over seven days. In addition, the Appellant put in six formal written responses to the allegations made against him. Their Findings of Fact comprise over 400 pages.

70. As these bare figures suggest, there were very substantial evidential disputes, in the course of which the Appellant consistently contended that various Council officers were being deliberately untruthful. He accused various witnesses of lying, and as having concocted their evidence by (e.g.) creating false attendance notes. He described a number as "fantasists". The case tribunal therefore had to deal with the issue of the credibility of the Appellant, and other witnesses, which they did in paragraphs 1.39 and following of their Findings of Fact.

71. The case tribunal were clearly unimpressed by the Appellant. They found that, throughout his evidence, he was generally evasive, and was reticent in accepting straightforward points and obvious interpretations of documents. Rather than answer questions, he had a tendency to respond by directly criticising the conduct and/or ability of the witnesses who gave evidence against him, accusing them of conspiring against him (paragraphs 1.47-1.48 of the Findings of Fact). Importantly, they found he was not "full, frank and honest" in his evidence. They considered that he was concerned that any concession of even obvious points might form the basis of a breach of the Code of Conduct (paragraph 1.51). They generally accepted the evidence of the witnesses called in support of the allegations; and found that there was no basis for the Appellant's allegation "that any, let alone the significant number of accused Officers, were untruthful in the testimony they provided" (paragraph 1.52). In particular, the tribunal found that they were satisfied, even beyond reasonable doubt, that the challenged attendance notes prepared by Council Officers were accurate in terms of what was said at the various meetings (paragraph 1.52). They specifically rejected the allegation that Colin Everett (the Council's Chief Executive) was a main conspirator against him, saying there was no evidential basis for such an allegation (paragraph 1.55); and the allegation that Councillor Woolley had a part in a

conspiracy to oust the Appellant or to stop him becoming leader of the Council (paragraph 1.53). Indeed, they made clear that, contrary to the Appellant's case, there was no conspiracy against him at all.

72. The Appellant does not now challenge those general findings in relation to the credibility of himself and others. Nor does he seek to challenge the primary findings of fact made by the case tribunal, e.g. who said and did what, where and when. Given the burden on appellants in respect of such matters to which I have referred (see paragraph 46 above), there is no sensible scope for such a challenge in this case: far from being plainly wrong, the tribunal considered the evidence they heard at great length with patent care and drew conclusions as to credibility they were clearly entitled to draw, and made factual findings they were clearly entitled to make. Certainly, I could not say that they are wrong.

73. Furthermore, the general approach of the case tribunal to breach cannot be faulted. They referred to the three-stage approach of Wilkie J in Sanders No 1 – as I have indicated, appropriately setting out the questions they needed to answer – and they rigorously and meticulously applied that approach to each alleged breach of the Codes of Conduct. In respect of several, they found that, although the Appellant was in breach of the Code on the basis of a bare interpretation of its provisions, to make a finding of breach would breach the Appellant's article 10 rights (e.g. the use of the words "a shambles" and "shambolic" to describe the management of the Adult Social Services Department at the Scrutiny Committee meeting on 14 February 2007 (see paragraph 91(i) below)). Of course, this court is required to exercise particular scrutiny because of rights of expression involved – often, here, with enhanced protection. However, the assessment of whether the facts as found amounted to (say) a failure to show respect and consideration to others in circumstances such that it was necessary to restrict the Appellant's right of freedom of speech requires an evaluative judgment involving a number of factors (including the restriction of the right to speak) that have to be weighed together. Therefore, despite the small margin of appreciation in respect for article 10 in the political arena, the matter involves a relatively open-textured standard upon which many factors operate. Consequently, this court should be cautious before interfering (see paragraph 46(v) above).

74. However, Mr Henderson does criticise the case tribunal in the evaluation of the primary facts they found, and the conclusions the case tribunal drew from them. To test that criticism, it is necessary to look at the individual allegations and the tribunal's conclusions on each.

75. Before doing so, I can usefully deal with two matters that feature in the case tribunal's consideration of more than one allegation: marginality (paragraphs 76-78), and mutual trust and confidence (paragraphs 79-84).

Marginality

76. Political expression enjoys enhanced status under article 10. In respect of some of the breaches, the case tribunal described what was said by the Appellant as "borderline" but nevertheless considered it on the political expression side of the line. Mr Henderson sought to suggest that the tribunal had, thereafter, not given the full enhancement of protection to those comments that they should. However, I do not consider there is any evidence to support that proposition.

77. Whilst it may be easier in some cases than others to say which side of the line it fell, whether what is said is political expression is a binary question – it either is, or it is not – and, if it falls on the right side of the line, the speaker is entitled to fully enhanced protection.

78. In this case, having made factual findings as to what the Appellant said – and the circumstances in which he said it – the tribunal clearly considered with great care whether it was political expression. Some cases they found to be borderline; but there is no evidence to suggest that, having found those more difficult cases to be ones of political expression, they then gave less than fully enhanced protection to them.

Mutual Trust and Confidence

79. In respect of some of the alleged incidents, the case tribunal said that they took into account that the Appellant, as a councillor, was a "quasi-employer" of the Council officers that were the subject of his comments; and therefore the comments he made had the potential of impairing the mutual trust between the Council (in the sense of Council members) and them. That was a general point made in paragraph 10 of the Breach Decision; and particularly made in respect of the allegation that the Appellant had threatened two senior officials of the Council at the Scrutiny Committee meeting on 14 February 2007 (see paragraphs 89-100 below).

80. Mr Henderson criticised that approach. He noted that, at the time of the February 2007 meeting, the Appellant was a backbench opposition councillor and not a party to the officers' employment contracts. He submitted that it could pose a serious risk to the free speech of councillors as elected representatives if, merely by virtue of their position, they are treated as "quasi-employer" of every officer of the relevant authority from the Chief Executive down. In support, he relied on the minority opinion in Moores v Bude-Stratton Town Council [2001] ICR 271, a decision of the Employment Appeals Tribunal ("the EAT").

81. However, I am unpersuaded that the case tribunal erred in this respect.

82. In Moores, a council employee resigned because of abuse and allegations of dishonesty at the hands of a backbench member of the council for whom he worked. The councillor was censured by the council at its next meeting, and the employee asked to reconsider; but he refused, and pursued a claim for unfair dismissal. It was argued on his behalf that there was a duty on every local councillor arising out of his or her position as councillor not to do anything calculated and likely to destroy or damage the relationship of confidence and trust between council and the council's employees (page 277D-E). Mr Henderson relied upon the minority of the tribunal, who found that that relationship did not apply; but the majority accepted that argument, and held that councillors *were* under a duty of trust and confidence for breach of which the council would be liable. The majority said:

> "41. … The councillors are not employees of the council. All councillors have responsibilities either as officers, chairs of committees or simply as members of a committee where they are individually and jointly responsible for its remit. No individual councillor is a free agent operating on his/her own behalf.

> 42. Councillors are an integral part of the council. They do not operate on their own behalf… To a large extent they are the council in operation at senior level and they expect a service from employees…
>
> 43. … It is not possible therefore for a council to detach itself from the actions of councillors in the workplace which impact on the ability of an employee to execute his contract of employment. They are a significant part of the working environment and must be under a duty of trust and confidence…".

Moores therefore assists Mr Maurici, not Mr Henderson. That judgment was delivered 15 years ago, and Mr Henderson, despite his diligent searches, has been unable to find any authority to contradict or question it in the field of employment law, since.

83. But it was unnecessary for Mr Maurici to rely on that case alone. Ahmed v United Kingdom (2000) 29 EHRR 1 concerned the lawfulness of the Local Government Officers (Political Restrictions) Regulations 1990, which were designed to limit the involvement of certain local government officers in political activities. In an important passage for this appeal, the European Court of Human Rights said (at [53]):

> "The Court observes that the local government system of [the United Kingdom] has long resided on a bond of trust between elected members and a permanent corps of local government officers who both advise them on policy and assume responsibility for the implementation of policies adopted. That relationship of trust stems from the right of council members to expect that they are being assisted in their functions by officers who are politically neutral and whose loyalty is to the council as a whole…. [I]t is also to be noted that members of the public are equally entitled to expect that in their dealings with local government departments they will be advised by politically neutral officers who are detached from the political fray."

There can be no doubt that the bond referred to is mutual.

84. In Sanders (No 1), reliance was placed on Ahmed in support of a restriction on the right of expression; and Wilkie J noted the emphasis placed on the proposition that the system of local government here "has long resided on a bond of trust between elected members and a permanent corps of local government officers". In any democracy, that trust and confidence is crucial to good and workable administration.

85. For those reasons, I consider the case tribunal was correct to proceed on the basis that there is a mutual bond of trust and confidence between councillors and their officers. Indeed, local government in this country could not sensibly function without it.

The Incidents upon which the Allegation are Founded

86. I now turn to deal with the nine incidents which resulted in findings that there had been a breach or breaches of the Codes of Conduct.

87. Although the first incident was in February 2007 and the last in February 2009 (throughout which period, the Appellant was leader of the Independent group on the Council), all but the first two incidents were in the period July 2008 to February 2009 when the Appellant was Executive Member for Housing Strategy. There is no evidence of any breaches during the 17 years the Appellant was a councillor prior to February 2007, or during the 4½ year period from February 2009 until July 2013 when he was disqualified by reason of the case tribunal decision.

88. In looking at the individual incidents and the alleged breaches of the Code of Conduct which the tribunal found in respect of each, I will consider whether Mr Henderson has shown that the case tribunal was wrong in finding a particular breach in the light of the Appellant's article 10 rights. Mr Henderson also makes the broader submission that the tribunal erred in considering the breaches as a whole "extremely serious", a conclusion which informed the sanction they imposed. I will deal with that broader point in the context of the sanction (see paragraph 181 and following below).

Incident 1: People and Performance Scrutiny Committee Meeting (14 February 2007)

89. The People and Performance Scrutiny Committee, as its name suggests, scrutinised areas of the Council's work that caused concern. In February 2007, Susan Lewis (the Director of Adult Social Care and Social Services) and Maureen Mullaney (the Head of Adult Social Services) were asked to attend a meeting of the Committee as it was considering sickness levels and implementation of "return to work" procedures for two Council Departments, including theirs. It was alleged that, during the meeting, the Appellant described the Adult Social Care Directorate as "a shambles" and "shambolic"; and, whilst looking at Ms Lewis and Ms Mullaney in a threatening manner, he said that a number of managers at the Council had been dispensed with and "there are more to go". Ms Lewis and Ms Mullaney considered this threatening.

90. The Appellant denied using the words alleged, saying that the complaint had been fabricated by Ms Lewis. The minutes and notes of the meeting did not record the words being said. The Acting Chief Executive of the Council, Christopher Kay, who was present at the meeting and gave evidence to the case tribunal, at first could not remember the words being said; and then remembered that something like them being said, but could not remember them being said in a threatening way. He said, had they been threatening, he thought he would have remembered it.

91. The case tribunal considered the evidence and made factual findings in paragraphs 2.1-2.23 of their Findings of Fact. They found that the words were said, and with the intention and effect of threatening Ms Lewis and/or Ms Mullaney. In their Breach Decision (at paragraphs 12-16), the tribunal found that:

    i) The description of the management of the department as a shambles and shambolic by the Appellant comprised comments of political expression, which attracted enhanced protection. Therefore, whilst it was a failure to show respect to others within the terms of the 2001 Code of Conduct, the tribunal considered that a finding of breach of the Code would have been a breach of the Appellant's article 10 rights. Consequently, no breach was found.

ii) In relation to the threat to Ms Lewis and Ms Mullaney that a number of managers had gone and there were more to go, the tribunal considered that this was borderline, but fell within the scope of political expression. They accepted that the two officers were of a senior level, and hence would have a greater degree of robustness. They also accepted that the comments "have to be viewed in the context of criticism of the directorate as a whole earlier in the meeting". However, they said:

> "… [T]he comments were a threat. The [Appellant] was an elected councillor and therefore had a quasi-employer status towards employees of the Authority and as such the comment could break the obligation of mutual trust between employer and employee. These lead us to a conclusion that restricting the [Appellant's] article 10 and common law rights is justified and proportionate…".

They found that what was said was a failure to show respect and consideration to others, and was a "serious breach" of paragraph 4(a) of the 2001 Code of Conduct.

92. Mr Henderson submitted that, upon the evidence, the case tribunal wrongly assessed the Appellant's conduct in this incident as "serious". Had they evaluated the facts properly, they would not have found an article 10-compatible breach of the Code at all. In the course of those submissions, Mr Henderson referred to the evidence at some length on the basis that it showed the tribunal's evaluation of the primary facts, as they found them, was wrong.

93. However, the attack sailed very close to a challenge to the primary facts. For example, Mr Henderson referred to the evidence of Mr Kay, who, in his oral evidence, could not remember the words allegedly said at the meeting, and, when he did remember them, he could not remember the circumstances of the threat to Ms Lewis and Ms Mullaney being made. It was suggested by Mr Henderson that the words used by the Appellant could not have been very threatening or significant, if the Chief Executive could not recall them being so. However, that was a matter for the tribunal, who dealt with the point head-on. They referred to the minutes of two later meetings (paragraph 2.13 of the Finding of Fact). The day after the Scrutiny Committee meeting (15 March 2013), there was a meeting of the Corporate Management Team, at which Ms Lewis is recorded as saying that there were issues from the Scrutiny Committee meeting as to "the behaviour of members towards Officers which needed to be addressed"; and that "Chris Kay agreed to speak to the Leader on this issue and this should be an item on the Group Leader's Meeting". The minutes of the Group Leader's meeting on 14 March 2007 indicates that the issue was, indeed, then raised by Mr Kay with the Leader of the Council. The case tribunal concluded: "We are satisfied from these minutes that Mr Kay at the time was concerned by the behaviour."

94. Similarly, Mr Henderson criticised the tribunal for giving such weight as they did give to the "look in the Appellant's eye". However, the tribunal heard the evidence; and they were entitled to conclude that, on the basis of all the evidence and in all the circumstances, the Appellant looked at Ms Lewis and Ms Mullaney in a way that was intended to threaten them, and had the effect that they felt threatened.

95. Whilst Mr Henderson denied it, these submissions in relation to the evidence was essentially a collateral attack on the primary findings of fact made by the tribunal. I find no merit in this attack.

96. Leaving out of account the references to the management of the directorate being shambolic etc, in my judgment, I cannot say that the tribunal were wrong to conclude that, despite the enhanced protection given to what the Appellant said, it was not a breach of article 10 to find him in breach of the Code. Appropriate challenges to the manner in which non-elected senior public servants do their job, even in very robust terms, are protected by article 10. However, here, the Appellant intentionally sought to undermine Ms Lewis and Ms Mullaney by publicly threatening them that their jobs would go, without reference to other councillors or the procedures that are in place to deal with such employment issues.

97. The tribunal had before them the consequences of this threat. Ms Mullaney said that the manner in which she had been treated at that meeting had had a significant effect upon her: she struggled to go into committee meetings at all after that meeting, reconsidered her career development and avoided applying for further promotion within the council. During the course of giving her evidence to the tribunal, she broke down on more than one occasion. The tribunal concluded that they had no doubt that the conduct of the Appellant towards Ms Lewis, including this incident, "contributed significantly to her decision to seek early retirement" (paragraph 20 of the Sanctions Decision).

98. The tribunal were, in my view, in all of the circumstances, right to consider that these comments were a deliberate challenge and threat to the mutual trust and confidence between councillors and officers, which suffered as a result. Consequently, they did not just adversely impact on the rights and interests of Ms Lewis and Ms Mullaney as individuals, but upon the public interest in good administration.

99. I accept that the balancing exercise in respect of this incident required care; but the tribunal clearly had the enhanced protection of article 10 well in mind – that is clear from paragraph 15 of the Breach Decision – and also the private and public interests that were on the other side of the balance. Their consideration of these matters was meticulous, and their analysis unimpeachable. In the circumstances, I cannot say that the tribunal's conclusion that this was a breach of the Code, and their finding of such breach was proportionate and justified under article 10(2), were wrong.

100. With regard to the seriousness of the incident as the tribunal found it to have occurred, Mr Henderson's submissions went primarily to sanction which I deal with below. However, whilst seriousness is a relative concept, in my view, the tribunal were fully entitled to consider this breach "serious".

Incident 2: Housing Allocation: The Mills/Dodd Exchange

101. It is necessary, briefly, to set the legal background to this episode. There are two relevant provisions.

102. First, following earlier abuse within local authorities generally in respect of allocation of council accommodation, regulation 3 of the Allocation of Housing (Procedure) Regulations 1997 (SI 1997 No 483) provides as follows:

> "(1) As regards the procedure to be followed, an authority's allocation scheme shall be framed in accordance with the principle prescribed in this regulation.
>
> (2) A member of an authority who has been elected for the electoral division or ward in which –
>
> (a) the housing accommodation in relation to which an allocation decision falls to be made is situated, or
>
> (b) the person in relation to whom that decision falls to be made has his sole or main residence,
>
> shall not, at the time the allocation decision is made, be included in the persons constituting the decision-making body."

In line with those provisions, it is the policy of the Council that the allocation of accommodation should be made by an officer, and not a member of the Council.

103. Second, section 92 of the Housing Act 1995 permits mutual exchange of secure tenancies with the written consent of the landlord, which cannot be withheld except on the grounds set out in Schedule 3. Those grounds include:

> Ground 2: Possession proceedings have been commenced in respect of the dwelling-house on specified grounds, or notice of such proceedings has been served.
>
> Ground 2A: A suspended possession order on specified grounds is in force.
>
> Ground 3: The accommodation afforded by the dwelling-house is substantially more extensive than is reasonably required by the proposed assignee.
>
> Ground 4: The extent of the accommodation afforded by the dwelling-house is not reasonably suitable to the needs of the proposed assignee and his family.

104. The Council's officers involved included Elaine Williams (Housing Officer), and her superiors within the Housing Department Peter Wynne and Carys Biddle (both Senior Housing Officers), Neil Cockerton (Acting Director of Community and Housing Strategy) and Richard Birchett (Interim Head of Housing); Barry Davies (Monitoring Officer); and Christopher Kay (Acting Chief Executive). The Executive Member for Housing, Councillor Attridge, was also involved.

105. The allegations concerned a course of conduct on the Appellant's part in relation to an application by two families within his ward who each had accommodation provided by the Council and who wished to swap homes: the Mills family (consisting of Ms Mills and three children aged between 8 and 12 years) who occupied a three bedroom house, and the Dodd family (a couple) who occupied a two bedroom parlour house. The Appellant had assisted Ms Mills at a court hearing in 2004 when a suspended possession order was made in favour of the Council against her.

106. A formal application to exchange was made to the Council by the families on 27 April 2007. It was refused on 2 May by Ms Williams on Ground 4, namely that the Dodds' house was not suitable for the larger Mills family. (One ground for refusal was of course sufficient, and the evidence was that only one ground was ever relied upon; but it is noteworthy that the exchange would also have fallen within Grounds 2A and 3.)

107. The allegations against the Appellant concerned his conduct in relation to that refusal over several months. Considerable detail is involved – the case tribunal's Findings of Fact on this matter cover 35 pages – but, essentially, the allegations were that the Appellant had improperly sought to interfere with the housing allocation decision-making process. The Appellant contended that he had merely been acting properly, as a concerned and vigorous local councillor.

108. The merits of the decision are not the focus of the allegations, although it should be said that Ms Williams' decision was reviewed and upheld by two senior officers (Mr Wynne and Mr Birchett), an external review by no less than eight officers from the adjacent Wrexham County Borough Council, and a final internal review by Ms Biddle; and the case tribunal found the decision to be lawful (paragraph 3.27 of the Findings of Fact).

109. It was alleged that the Appellant acted improperly in a number of ways. He rejected the allegations, saying that, in respect of at least some contentious issues, Mr Birchett was "acting in vitriol against him" (paragraph 3.48 of the Findings of Fact).

110. The case tribunal found the facts upon which the allegations proved, the most pertinent being the following:

i) The Appellant involved Councillor Attridge, as the Executive Member for Housing. On 25 May, the Appellant wrote to Mr Davies asking him to a meeting and suggesting that, at that meeting, Councillor Attridge would "confirm his intention to override the officer's objections and enable the exchange". No such meeting ever took place; but the case tribunal found that this was an attempt by the Appellant to involve himself in the decision-making process, and Councillor Attridge never stated that his intention was to seek to override the officer's decision (paragraph 3.18 of the Findings of Fact). The suggestion that that was Councillor Attridge's intention was false.

ii) On 11 June, the Appellant told Councillor Attridge, falsely, that the Mr Davies had agreed to the mutual exchange. That was relayed to Mr Birchett, who did not act on it, because he checked with Mr Davies who confirmed it was false.

iii) The case tribunal found (paragraph 3.1 of the Findings of Fact) that Mr Davies advised the Appellant of the serious implications for the tenants if the Appellant were to advise them to move properties without the appropriate Council authority. However, the Appellant nevertheless indicated to officers that he intended telling the applicants to proceed with the mutual exchange, despite the Council's decision to refuse it. Eventually, on 9 August 2007, he did write to the both sets of applicants advising them to do so: the case tribunal found that the letters were intended to encourage, and purportedly authorised, such exchange (paragraph 3.38). The move was prevented by Ms Williams, who attended the Mills' family home on 15 August, to find a removal van at

the door. The case tribunal found that, had she not intervened, the exchange would have gone ahead, with grave consequences for both sets of tenants including the loss of their secure tenancies and costs (paragraph 3.53). It found that this was not, as the Appellant suggested, an intended temporary arrangement; but a proposed permanent exchange which the Appellant has advised and encouraged the tenants to do (paragraph 3.36 and following).

iv) On 4 August 2007, the Appellant emailed Mr Cockerton saying that he (the Appellant) could not justify refusal of the application, his advice was that the exchange should go ahead, and "if it gets to court then I am sure the judge will rule accordingly". On 6 August, he wrote to Mr Cockerton again, saying that, if the exchange were not agreed, it could escalate into a "highly legal challenge". The case tribunal found that this envisaged an unapproved exchange taking place, with the Council taking possession proceedings thereafter (paragraph 3.35).

v) On 16 October 2007, the Appellant emailed Mr Cockerton expressing frustration and anger at the "unreasonable interference by a line manager", and saying he was going to see Mr Davies to seek the suspension of Ms Williams and would be calling a special full council meeting immediately. The next day, 17 October, the Appellant wrote to Mr Davies as the Council's Monitoring Officer seeking the immediate suspension of Ms Williams for refusing the application for mutual exchange, saying, "I have to insist on the suspension of this officer forthwith…"; although, in fact, Ms Williams had merely done her job and resisted pressure from the Appellant.

111. Mr Henderson's attack on the evidential basis for the case tribunal's findings of fact and conclusions in respect of this allegation was relatively modest. He focused on the evidence of Mr Davies who, in response to questioning, said this:

> "I don't think he [i.e. the Appellant] had done anything wrong. I think he had been attempting as best he could to make sure that the transfer took place under the appropriate policy and concerns relating to the parlour room etc were resolved. So what he was doing was asking for reviews of decision made to make absolutely certain that they complied both with the policy and custom and practice."

Mr Henderson complained that this evidence, with its assessment of the Appellant's conduct, is not even referred to in the Findings of Fact.

112. However, again, I do not consider that any criticism of the case tribunal is warranted. In the passage quoted, Mr Davies was clearly referring to the letters the Appellant sent to the two sets of applicant on 9 August: Mr Davies said that it was "a clever letter", and "quite a well-drafted letter in that it wasn't saying change properties". But Mr Maurici cogently submitted that, although on a cursory and isolated reading of those letters they might be considered to have been carefully drafted to avoid impropriety, when considered in context their meaning and intent is clear and improper.

113. In the event, the case tribunal considered the letters and other evidence with great care (particularly at paragraphs 3.38-3.46 of the Findings of Fact); and, having done so, concluded that the intention of the letters was to encourage and purportedly permit Mrs and Mrs Dodd and Ms Mills to exchange properties. The tribunal found that the letter was "deceitful and had serious consequences" (paragraph 27 of the Breach Decision). Not only were those findings to which the case tribunal was entitled to come, they were findings that I cannot find to be wrong. Indeed, in the face of all the evidence, I consider them to be plainly right.

114. In making findings on breach, the case tribunal found that the Appellant had "seriously misrepresented the position", having been advised of the serious implications for the tenants of an unapproved exchange (paragraph 24 of the Breach Decision); and he had made "serious unsustainable allegations against several officers involved in the decision-making process" (paragraph 25), including attempting to have Ms Williams suspended.

115. The tribunal found that the Appellant's interference in the housing allocation decision-making process (and the manner in which he interfered, including the making of unsustainable allegations against officers and seeking the suspension of one) was a failure to show respect and consideration to others, and actions which compromised or was likely to compromise the impartiality of officers (and thus a breach of paragraphs 4(a) and (b) of the 2001 Code of Conduct); and sending the 9 August 2007 letters, which was both deceitful and had potential serious consequences for the tenants involved, was again a failure to show respect and consideration for others, and also amounted to behaviour which could reasonably be regarded as bringing the office of member and the Council into disrepute (in breach of paragraph 4(a) and 6(1)(b) of the Code). They found that article 10 enhanced protection applied; but, in view of the serious nature of the breaches of the Code found, a finding of breach would be proportionate and justified under article 10(2).

116. I note that the case tribunal found some of the Appellant's statements false and, insofar as they were deliberately false, article 10 would have no application (see paragraph 38(ii) above). But in any event, given the case tribunal's findings of fact – which are unimpeachable – it could not be argued their finding of breach as justified by article 10(2) was wrong. The tribunal said that the Appellant's conduct "drove a coach and horses through the Council's housing policy". Certainly, it undermined the Council's policy in respect of housing allocation (based upon the 1997 Regulations), in a particularly persistent manner, and in a way designed deliberately to cross the dividing line between the functions of council members and their officers.

117. Furthermore, the tribunal were entitled to find, as they did, that, in acting as he did, the Appellant was deliberately attempting to obtain political gain at public expense by exploiting his position as a councillor: he was "seeking to curry favour with electors" (paragraph 20 of the Sanctions Findings). Mr Henderson's submission that it is part of the democratic process that every elected councillor seeks political gain in the form of re-election by representing his constituents as effectively as possible: the point here is that the Appellant attempted to do so improperly.

118. Again, I will deal with the overall seriousness of the breaches when I come to consider sanction; but, in my view, it was fully open to the tribunal to consider this

misconduct "serious" (paragraph 28 of the Breach Decision) and "reprehensible" (paragraph 24).

Incident 3: Senior Sheltered Housing Officers Meeting 4 July 2008

119. The first two incidents with which I have dealt occurred in 2007, when the Appellant was an opposition member. The remaining incidents happened in 2008-9, when the Independents (whom he led) comprised the largest party in the Council and the Appellant was the Executive Member for Housing Strategy and Planning.

120. The first arose out of a meeting on 4 July 2008, and involved Dawn Evans. Ms Evans was a Senior Sheltered Housing Officer, who managed the sheltered housing wardens. An issue arose as to whether the wardens' pay structure was lawful: it arguably fell below the national minimum wage. As I understand it, it had been agreed at meetings in June 2008 that the resolution of this was operational, and the Council officers had resolved as an interim measure to reduce the wardens' hours to ensure no breach of the minimum wage legislation.

121. The officers attended a meeting on the morning of 4 July, which the Appellant and (at his request) Councillor Yale attended. It was alleged that, at this meeting (which lasted 15-30 minutes), the Appellant was overly aggressive and confrontational towards Ms Evans, whom he accused of having her own agenda which included undermining the wardens' service. The Appellant in particular criticised how Ms Evans managed accommodation issues in his ward. He concluded the meeting by saying that he would not support the officers, and walking out.

122. Ms Evans could not attend the hearing before the case tribunal because of ill-health. In her statement, she said that, at the 4 July meeting, she was bullied, intimidated and humiliated; and, in a memo she prepared immediately after the meeting, she described the Appellant as "offensive", "bullying" and "aggressive". Several other witnesses who were at the meeting and gave evidence spoke in similar terms, without referring to the word "bullying". All thought his manner was inappropriate. Several refer to Ms Evans being upset as a result. Helen Stappleton (the Council's Head of Human Resources) was at the meeting, and gave evidence: she said she was concerned at the impact of the meeting on Ms Evans.

123. The Appellant's stance was that all of the witnesses were lying, although, when asked he could provide no possible reason for their doing so.

124. The case tribunal found that the Appellant was confrontational, rude and aggressive towards Ms Evans (whom the tribunal described as "a relatively junior officer") at this meeting; and that Ms Evans found the conduct confrontational and intimidating, and was upset (paragraph 4.14 of the Findings of Fact). They did not find this in breach of paragraph 4(d) of the 2008 Code of Conduct; but that it was conduct which failed to show respect and consideration for others (paragraph 4(b)) and was bullying (paragraph 4(c)). Although enhanced protection applied, particularly given the bullying of a relatively junior officer and with a potential breach of the relationship of mutual trust and confidence, findings of breaches of paragraph 4(b) and (c) were proportionate and justified under article 10(2).

125. Mr Henderson focused on the case tribunal's finding that this amounted to "bullying", particularly given the need to constrain or read down that term in the light of the protection given to a politician's freedom of expression at common law and under article 10 (see paragraph 51 above).

126. The case tribunal said (at paragraph 50 of the Findings of Fact):

> "Bullying always has to be viewed from the perspective of the alleged victim."

This appears to be a reference to the Ombudsman's Guidance to the Code of Conduct for members of Local Authorities in Wales (September 2012), issued after the events but prior to the issue of the tribunal's findings. That states:

> "You must not use any bullying behaviour or harass any person including… council officers….
>
> Bullying behaviour attempts to undermine an individual or a group of individuals, is detrimental to their confidence and capability, and may adversely affect their health.
>
> This can be contrasted with the legitimate challenges which a member can make in questioning policy or scrutinising performance. An example of this would be debates in the chamber about policy, or asking officers to explain the rationale for the professional opinions they have put forward. You are entitled to challenge fellow councillors and officers as to why they hold their views.
>
> I will always consider allegations of bullying and harassment from the perspective of the alleged victim. The question to be answered is whether the individual was reasonably entitled to believe they were being bullied rather than whether the person accused of bullying thought that he or she was doing so…
>
> …
>
> There can be no hard and fast rules governing every set of circumstances but the relative seniority pf the officer will be a factor in some cases…".

127. In my view, this guidance, when read as a whole, is helpful. Bullying does not require any lengthy course, but does require (i) some intention ("attempt") on the perpetrator's behalf to undermine the individual who is the object the conduct, and (ii) some effect on that individual, in terms of intimidation, upset or detriment to his or her confidence, capability or health.

128. Mr Henderson submitted that Ms Evans was a relatively senior officer; but I do not accept that. Although she had been working in local government for nearly 40 years and was titled Senior Housing Officer, she was nowhere near the level of the directors. She was responsible for the day-to-day running of the warden service, but

was not responsible for (e.g.) responding to the issue that had arisen over wardens' hours and the minimum wage.

129. However, even so, I am not persuaded that the case tribunal approached this alleged breach correctly. Both the Findings of Fact (at paragraphs 4.1-4.14) and Breach Decision (at paragraphs 29-31) focus on the effect of the Appellant's conduct on Ms Evans. There was more than sufficient evidence that she was intimidated and upset by the Appellant's conduct at that meeting. Furthermore, their finding that the Appellant was confrontational and aggressive towards Ms Evans is equally sound. Pausing there, that was sufficient to find that the Appellant failed to show Ms Evans respect and consideration. However, the tribunal made no finding that, in conducting himself as he did, the Appellant intended to intimidate or undermine Ms Evans (although that was the result). In those circumstances, I am persuaded that the case tribunal were, in respect of this breach, wrong to make the finding of breach in respect of bullying that they did.

130. That leaves me the difficult question of whether a finding of breach of paragraph 4(b) (failing to show respect and consideration) would amount to a breach of article 10. After most careful consideration, I consider that it would. In coming to that conclusion, I note that:

    i) The case tribunal particularly referred to bullying as "more significant" (paragraph 30 of the Breach Decision).

    ii) Without the intention of intimidating or undermining the junior officer, it becomes a lot more difficult to justify the interference with the Appellant's enhanced article 10 rights.

131. For those reasons, whilst I understand how unpleasant this incident must have been for Ms Evans as a result of the Appellant's behaviour towards her (which, on any view, was inappropriate), in my judgment, the case tribunal were wrong to find any breach of the Code of Conduct in respect of it. I consequently quash those findings.

Incident 4: Visioning Day

132. The Council officers primarily concerned with this episode are Ms Lewis (who, as Director of Community Services, was also involved in the allegation concerning the 14 February 2007 Scrutiny Committee meeting: see paragraphs 89-100 above) and Maureen Harkin (Head of Housing).

133. The Council had had issues with its sheltered housing policy for some years. A report had been commissioned by the previous Labour administration; but the Executive had then decided not to circulate the report to all members. After the 2008 election, when the Appellant became Executive Member for Housing Strategy, all was still not well.

134. It was decided to hold a "Visioning Day". It was the evidence of Ms Lewis, Ms Harkin and Mr Neave (and Councillor Brown née Yale, still an Executive Member) that the purpose of the day was to present all elected members and other interested parties with an account of the difficulties facing sheltered housing and the warden service, and to brain-storm with a view to identifying some consensus on the way forward for the future of the service. It was, thus, an early stage of policy

development, before policy options were developed and discussed. It was not proposed to make any decisions at the meeting – it was an "ideas" day, with any decision in the future being subject to approval by the Executive and, if necessary, the full Council.

135. The Executive Members had agreed to hold the event, and the matter had been explicitly discussed with the Appellant in September 2008 and had been considered by the Community and Housing Scrutiny Committee on 13 October 2008. The scope of the meeting had been agreed by the Executive. Invitations were sent out to all members and guests for the meeting on 22 October, with a presentation prepared by Ms Lewis. The case tribunal found that the Appellant was provided with these documents shortly after 22 October. Ms Lewis sent an email to him on 24 October, requesting a meeting to discuss the day. Officers attempted to set up that meeting, which was eventually held on 5 November. In the meantime, the Appellant sent Ms Lewis an email on 31 October asking for confirmation that the presentation would confirm that sheltered housing would remain substantially a housing function and wardens' hours would not be reduced. Ms Lewis replied on 3 November, saying that there was no mention of either of those matters, and confirming that no new policy was being proposed, but merely views sought on how the service should look in the future.

136. However, the Appellant was concerned that Ms Lewis had a clandestine agenda, which included destroying the warden service. The day before the Visioning Day, without giving Ms Lewis (or the Chief Executive) notice, he sent a letter to all members, as follows:

> "If you have an interest in the future of the council wardens service and the related issues of council sheltered accommodation for pensioners, could you have a look at the attached papers which attempt to set out the background to these issues.
>
> Officers have arranged a visioning day on Friday the 7th November but as an elected member and an executive member for this service there are aspects to this event which have not been agreed or scoped with elected members.
>
> The substance of the event is in part the advice arising from a consultant's report commissioned in January 2007 and delivered to the council in later 2007.
>
> The report was heavily critical of the service but officers have failed to bring it to committee through the normal channels and with background advice.
>
> This note seeks to advise you of some of the background and within it there is a concern expressed that the officers are taking a view distinctly separate from that of elected members."

137. The attached note set out various background matters, and concluded as follows:

> "4.1 Concern has to be expressed about this calling of this 'visioning day'. As executive members, Helen Yale and I have repeatedly sought assurances from the Director [Ms Lewis] for confirmation of the instructions as stressed last July, but we were not given an insight into this meeting until a day ago the 5th November.
>
> 4.2 At the 5th November meeting it was transparently evident from the papers prepared for the meeting on the 7th, that the intention of that meeting was to effectively torpedo the wardens service as it is valued by elected members.
>
> 4.3 It is clear that this meeting on the 7th November was designed to raise a host of issues concerning the supporting of vulnerable people across the country with equal emphasis on the needs of those in the private sector. The officers sought to force onto members the view that this was a requirement on the housing service and that the needs of many occupants of sheltered accommodation was marginal. Whilst it can be acknowledged that there are many social care pressures to provide some of these services on a county wide basis to many in the private sector, that is not at the cost of the housing services responsibilities. It is clear that officers have done nothing to abide by members view in this matter.
>
> 4.4 Central to this concern is the requirement to ensure the proper structuring of the residential wardens service as requested by members, and with it the preparation of a budget bid to rectify the damaging and poor management that has been in place for the last few years."

138. At the meeting itself, the Appellant spoke for only a short time. Ms Lewis considered his tone was aggressive, confrontational, dismissive and disrespectful of her. He referred to her as "that officer", and "that officer has no business to be bringing these issues to you". She considered that was tantamount to saying that she had no right to be there and assist with the debate.

139. The case tribunal found that the Visioning Day was a forum for discussion only (paragraph 5.15 of the Findings of Fact), and they rejected the Appellant's suggestion that "high level policy issues" were involved (paragraph 5.23). He well knew they were not. The scope of the meeting was known to the Appellant at least two months before the meeting; indeed, he had been party to the meetings where the full scope and extent of the day had been scoped and agreed (paragraph 5.19). They rejected the suggestion that there was some form of conspiracy or clandestine meetings between Ms Lewis and other housing officers (paragraphs 5.23 and 5.25). They regarded the Ms Lewis's presentation as "neutral" (paragraph 5.23).

140. With regard to the letter and note, the tribunal conclusions are succinctly set out in paragraph 37 of the Breach Decision:

> "The aim of the [Appellant] by the manner of his actions was to seek to torpedo the day and thereby undermine Susan Lewis's position. This he sought to achieve by circulation of the letter and note direct to councillors. The Visioning Day in its scope had been approved by the Executive. Had the note been reasonable and accurate no issue could have been taken as to the manner of its circulation. However, the note, in our finding, was unwarranted and without foundation and its contents made allegations without foundation. For example, firstly suggesting aspects of the event had not been agreed or scoped with elected members. That was false. Secondly, by stating that the Critical Housing Report had not been brought to committee through the normal channels as a result of the failure of officers. This was highly misleading. The [Appellant] knew it was misleading. Thirdly, by claiming that he and Councillor Yale had not been given an insight by the Director in particular to Visioning Day until 5th November 2008. This was wrong in fact and was a misleading comment. Fourthly, suggestions that officers were endeavouring to force their views upon members. This again was not accurate. False and misleading statements have to be viewed in the context that they were made by the Executive Member who had been involved in the scoping and authorisation for the day. He was fully aware of their misleading nature and the effect his letter and note would have on Susan Lewis."

As can be seen, the tribunal expressly found that the terms of the documents were not only unwarranted, but "…. intended to undermine officers, particularly Susan Lewis…" (also paragraph 37).

141. The case tribunal found that, in this conduct concerning the letter and note, the Appellant both failed to show respect and consideration to Ms Lewis (paragraph 4(b) of the 2008 Code of Conduct) and amounted to bullying behaviour to her (paragraph 4(c)). Given that the only earlier incident concerning Ms Lewis was in March 2007 (see paragraphs 89-100 above), they did not find that it amounted to harassment that might amount to a breach of paragraph 6(1) (bringing the office or Council into disrepute). However, they considered the finding of the two breaches was proportionate and justified under article 10(2).

142. In respect of the meeting itself, they concluded that what he said, whilst confrontational and failing to show respect and consideration for Ms Lewis, could not, consistent with the Appellant's article 10 rights, be found to be a breach of the Code.

143. Mr Henderson submitted that the findings in relation to the letter and note failed properly to take into account the enhanced protection from which the Appellant benefited: he was merely offering an opinion as to various matters, e.g. that the officers had their own agenda.

144. I can deal with that submission shortly: it has no merit. Given the deliberately dishonest statements in those documents (as found by the case tribunal), article 10 gave the Appellant no protection (see paragraph 38(ii) above). In any event, even if it

had applied, the documents were circulated with a view to undermining Ms Lewis, and to frustrate the proper process of the Council.

145. The tribunal's finding and conclusion – that the restriction of his article 10 rights was justified – are unimpeachable, and not arguably wrong.

Incident 5: Comments about Ms Lewis

146. This concerned two alleged comments by the Appellant about Ms Lewis. The first, which was overheard by Peter Evans (Deputy Monitoring Officer) ("She's shit at her job"), was not found to be a breach of the Code. The second was a comment to Ms Harkin, of course Head of Housing and thus within Ms Lewis's Directorate: "Sue Lewis knows nothing about housing and her days are numbered." The Appellant's case was that Ms Harkin was a fantasist, and had fabricated that evidence. The case tribunal found that that those words were said; and they were a threat that the Appellant was going to seek to oust Ms Lewis from her job, with a view to undermining Ms Lewis's position (paragraphs 6.27-6.28 of the Findings of Fact). They also found that from the date of Ms Lewis's appointment as Director of Community Services to the date of the complaint to the Ombudsman:

> "The [Appellant] engaged in a campaign of personal attack upon Susan Lewis which did amount to harassment."

They concluded that this conduct amounted to a failure to show respect and consideration for others, in breach of paragraph 4(b) of the 2008 Code of Conduct).

147. The Appellant does not now challenge the finding that the words were said, nor could he. The consideration and analysis of the evidence by the tribunal over 21 pages (paragraphs 6.1-6.28 of the Findings of Fact) are meticulous. Mr Henderson simply submits that there is no basis for the conclusion that the Appellant's right of free speech – with its enhanced protection – could be overridden in this case.

148. I disagree. The case tribunal set out why they considered a finding of breach was proportionate and justified (paragraph 42 of the Breach Decision):

> "The comments are made in the context of a course of conduct detrimental to Susan Lewis. Comments were said to an officer directly accountable and answerable to Susan Lewis. They were made early after Maureen Harkin had commenced work with the Authority. They were said with the intention of undermining Susan Lewis. The Respondent had been advised previously in writing by the Chief Executive of the appropriate route and procedure, in particular appraisal, to follow if he had issues as to Susan Lewis's performance."

149. In my view, those reasons are compelling. I cannot say that the tribunal's conclusion was wrong.

Incident 6: Meeting with Ms Harkin

150. The Appellant asked for a meeting with Ms Harkin, which took place on 18 December 2008. He took with him lists of vacant council properties in his ward and constituents who were on the housing waiting list. He said that the housing allocation policy was not working, and he wished to match properties with families, outside the policy. In short, Ms Harkin was having none of it. In cross-examination, she said:

> "… [M]y recollection is we went to the meeting at Councillor Heesom's request, it was the day I was finishing for the Christmas break, very clear in my memory, Councillor Heesom presented me with a list of empty properties and a list of people he wanted for those properties, and I'll say it as I believe it happened, I said something along the lines of, "It doesn't work like that Councillor Heesom" and he said, "I'm not asking you I'm telling you" and I said, "This is not going to happen on my watch, I don't care how it's happened in the past, allocations policy is assessed and dealt with by other members of staff", he said something along the lines of, "You won't like the man I'll become if I don't get what I want" and I said, "Are you threatening me?" and he said, "I don't need to threaten you you're an intelligent woman I know you're listening to me".

That evidence was supported by a near-contemporaneous memorandum, and the evidence of another officer from the Housing Department (David Humphries).

151. The Appellant's case was that Ms Harkin had fabricated this story out of pure malice.

152. The case tribunal found Ms Harkin to be a compelling witness, whose evidence they essentially accepted. They found the meeting occurred as she portrayed, and that, although enhanced protection applied, a finding of breach of paragraph 4(b) of the 2008 Code of Conduct was proportionate and justified.

153. I cannot say that the finding of breach was wrong. The Appellant was involving himself in operational activities in respect of housing allocation, which he well knew was outside his remit as a councillor and even as Executive Member for Housing. The words were used with the intent of threatening Ms Harkin, and they were successful.

Incident 7: Head of Planning Appointment Process

154. As an Executive Member, the Appellant was a nominated member of the Appointments Panel, and was engaged as such in the appointment of a new Director of Planning. The appointments procedure had been approved by the Executive, and members had (in the Appellant's words) "signed up to" it. The process involved the Human Resources Department and the relevant Director or Interim Director. The role of the former included providing expert advice on relevant procedure, policy and law, and maintaining the integrity and fairness of the process. The role of the latter was to conduct long-list interviews along with a representative from Human Resources, and to recommend a short-list to the Panel; and to advise the Panel on the final assessment. The role of the Panel was to receive the advice from the Human Resources representative and Director, agree a short-list and to conduct final assessment on short-listed candidates. Panels were encouraged to come to a

consensus; but, if that were not possible, a formal vote would be taken, with the Panel Chair having the casting vote.

155. In respect of the appointment of a Director of Planning, Carl Longland was the Director involved, and Sharon Carney was the Human Resources representative. They conducted long-list interviews, and identified two candidates as suitable and recommended them to go forward to the short-list. There was a Panel of seven members, of which the Appellant was one. He was elected Chair.

156. The case tribunal found that the Appellant refused to engage objectively with the procedure from the outset (paragraph 9.19 of the Findings of Fact). When given the pack including details of the short-listed candidates, and without considering them at all, he said that the exercise would not be proceeding as there were no suitable candidates to take forward (paragraph 9.14). He sought to undermine the process at meetings to consider the short-list (29 January 2009) and to conduct the interviews (6 February 2009) (paragraph 9.19).

157. The allegations were two-fold. First, it was alleged that, at the meeting on 29 January and in a deliberate attempt to undermine the appointment process, the Appellant hostilely questioned the qualification of Ms Carney (who had no planning qualification, but was considerably qualified in the field of human resources) to play any part in the long-listing or in the recommendations for the short-list. The tribunal found that the nature and tone of this questioning was intended to undermine both the process and in particular the professional role of Ms Carney in it (paragraphs 9.28-9.29). In the event, the Panel voted to proceed to short-list the two candidates by six votes to one (namely, the Appellant).

158. At the interviews on 6 February, the Appellant again did not sensibly engage. He refused to answer a legitimate question of one candidate, and gave that candidate a score on one (the lowest score) for each of the marking criteria. The tribunal found that he did so because he did not want that candidate to be appointed (paragraph 9.35). After the interviews, he refused to allow Ms Carney to make her presentation, and was aggressive and hostile to her. He asked how long it would take to re-advertise, to which the senior Human Resources representative there (Pam Webb) responded that, if the Panel could not agree, then options could be considered. When another councillor asked if Mr Longland wished to contribute, the Appellant responded, "If he dares".

159. The conduct resulted in the Chief Executive sending the Appellant a letter on 9 February 2009, referring to the conduct and saying:

> "I would ask you to reflect on this formal email and on the actions you have taken. This is regrettable behaviour which is not conducive to trusting member-officer relations and good governance…"

160. The allegations were that the Appellant failed to show respect and consideration for others in (i) his conduct to Ms Carney on 29 January, and (ii) saying of Mr Longland on 6 February, "If he dares".

161. The tribunal found that neither fell within political expression. They said (at paragraphs 51-52 of the Breach Decision):

> "51. The role of the [Appellant] in the appointment process was not of a political nature. He was there effectively to assess the merits of the candidates and to appoint the best person for the post.
>
> 52. … There is a general reference to political background. We fail to see how there can be a political context to an objective and impartial appointment procedure."

162. They found that the conduct to both Ms Carney and Mr Longland failed to show respect and consideration to others; and that the former was bullying. They considered findings in respect of those breaches proportionate and justified, on the basis that the Appellant's protection from article 10 was non-enhanced.

163. Mr Henderson made three substantive submissions.

164. First, he made some comments on the evidence. For example, he submitted that the breach was founded upon the words, "If he dares", being a threat; but the tribunal made clear that, although Mr Longland did not feel threatened, it was intended by the Appellant as a threat, and that is the basis upon which they proceeded. There is nothing in these points.

165. Second, the evidence was that Ms Carney records that the Appellant spoke to her in a "very direct way with a stern look on his face and this shocked her"; which was, Mr Henderson submitted, an inadequate basis for a finding of bullying, at least on the constrained construction of that term. I have dealt with the scope of bullying above (paragraph 127). In this case, the tribunal made an express finding that the Appellant acted with the intention of undermining Ms Carney; and there was evidence of the adverse effect that his conduct in fact had upon her. The tribunal's approach was correct; and, subject to what I say below about whether this properly fell outside "political expression", the tribunal's conclusion in respect of the conduct towards Ms Carney cannot be wrong.

166. Third, Mr Henderson submitted that the tribunal erred in finding that this was not political expression. There was here no personal abuse, and the Appellant was in essence challenging Ms Carney on the appointment process.

167. I consider there is more force in this submission. Whilst the case tribunal were correct in considering that the appointment process was not within the area of policy – the policy had been fixed – but rather implementation, the scope of "political expression" is particularly wide (see paragraph 38(v) above). In Calver, it was contended that comments were not political expression" because they had "nothing to do with political policy or political views"; in response to which Beatson J emphasised that "political expression" is not limited to expressions of or critiques of political views (at [79]).

168. Although in an entirely inappropriate and disruptive way, the Appellant was challenging the appointments policy – the procedure that had been approved by the

Executive – and, with fuller argument in respect of the width of the concept than that enjoyed by the tribunal, I am persuaded that the tribunal erred in considering what he said fell outside the very generous bounds of political expression.

169. However, that does not mean that I consider the tribunal's conclusion that findings of breach of the Code are wrong. That is a separate question, which needs to be considered in the light of the enhanced protection I consider due.

170. With regard to the conduct towards Ms Carney, the Appellant acted with the intention of undermining Ms Carney; and there was evidence of the adverse effect that his conduct in fact had upon her. I am satisfied that, even with the enhanced protection, findings of breach both in respect of paragraph 4(b) (failure to show respect and consideration) and 4(c) (bullying) are, in all the circumstances, proportionate and justified.

171. However, as to the Appellant's attempt to threaten the robust and senior Mr Longland, particularly as he did not consider himself threatened, in all the circumstances, I consider that, although the Appellant did fail to show him proper respect and consideration, a finding of breach would contravene article 10.

Incident 8: Head of Housing Appointment Process

172. The Appellant was also involved as a member of the Appointments Panel for the appointment of a new Head of Housing. The procedure was essentially the same as that for the Head of Planning, save there was an independent person with expertise in housing involved at the long-list stage. Ms Lewis was the Director involved, and Natalie Pridding was the Human Resources representative.

173. The meeting for the approval of the short-list was held on 12 February 2009. The Appellant chaired the meeting, which was chaotic and became quite heated. The allegation was that the Appellant engaged on a verbal attack on Ms Lewis and Ms Pridding, questioning their professional capacity to make a recommendation of candidates or otherwise assist the process, with a view to undermining the officers and their role in the process, which upset both.

174. The case tribunal considered that this fell outside political expression, that the Appellant's conduct failed to show respect and consideration to Ms Lewis and Ms Pridding and that a finding of breach would be proportionate and justified.

175. As with the previous allegation, I consider that the case tribunal was wrong to consider that this fell outside "political expression". However, as the Appellant's conduct was deliberately intended by him to undermine, not just the process, but the two officers, I am satisfied that, even with the enhanced protection, a finding of breach in respect of paragraph 4(b) was, in all the circumstances, proportionate and justified.

Incident 9: Meeting with Ms Littlejohn 25 February 2009

176. Carolyn Littlewood was a Homelessness Prevention Officer. On 25 February 2009, she had a meeting with a constituent of the Appellant, who had been served with a notice to quit. The Appellant joined the meeting, and gave the constituent advice

which Ms Littlewood considered incorrect and undermining of her. The constituent became agitated. Ms Littlewood made a note shortly after the meeting. It was the Appellant's case that the note was not true, and Ms Littlewood was "making it up".

177. The tribunal preferred the evidence of Ms Littlewood, and found that the Appellant had made inappropriate comments during the interview and had sought wrongly to interfere with Ms Littlewood's role as officer. He acted in a manner which intimidated and undermined the role of Ms Littlewood, and amounted to an attempt to bully her. They found a breach of paragraph 4(b) of the Code (failure to show respect and consideration), which they considered justified in terms of article 10(2).

178. In concluding that findings of breach were justified, the case tribunal said (at paragraph 46 of the Breach Decision):

> "We do so balancing his right to represent and advocate a case on behalf of his constituent with a need to have regard to the officers' roles and duties. The [Appellant] in terms of both meetings seriously failed to appreciate and have regard to the role of the officers, to the policy which had to be applied and sought to undermine their position. He wrongly interfered with their role. In terms of the 2008 meeting he made comments which were threats to Maureen Harkin. In terms of both officers he sought to intimidate them. Protection of officers in such positions require to be ensured and is the basis for finding a breach and a justifiable and proportionate imposition of a sanction, notwithstanding the [Appellant's] enhanced article 10 rights."

179. Mr Henderson did not strongly press the proposition that such a conclusion was wrong. I could not properly hold that it was.

180. The events upon which this breach was founded occurred on 25 February 2009, and were the last in time before the complaint was submitted by the senior officers two weeks later, on 12 March 2013.

Summary

181. For those reasons, I refuse the appeal insofar as it challenges the case tribunal's findings of breach, save for (i) the two breaches found in respect of Incident 3, involving Ms Evans and the Senior Sheltered Housing Officers Meeting on 4 July 2008; and (ii) the breach found in respect of Incident 7: Head of Planning Appointment Process, but only the breach involving Mr Longland. I quash those three findings. I uphold the other findings of breach.

Sanction

Introduction

182. Under section 79(3) of the 2000 Act, where a breach is found, the tribunal have to consider whether the relevant member should be suspended or disqualified (see paragraph 23 above). Suspension involves the individual being unable to participate

in the activities of the particular authority; and it can be imposed for no more than 12 months. During the relevant period, it deprives the object of the suspension of the right and ability to play any part in the particular authority's affairs; and the electorate of any effective representation. Disqualification prohibits the individual of the right and ability to participate in the affairs of *any* authority, for up to 5 years; but, although it deprives the electorate of the right to be represented by that individual, it does not deprive them of representation altogether, because it triggers a by-election. Of course, having made a finding of breach of a Code of Conduct, a case tribunal may neither suspend nor disqualify the member: it may simply find that a breach has occurred.

183. The Adjudication Panel for Wales has issued guidance for its case tribunals on sanction ("the Sanctions Guidance"), to which the case tribunal in this case specifically referred. It sets out the statutory provisions, and then the aims of sanctioning a member as follows (at paragraph 1.6):

> "The action on which the case tribunal decides will be directed toward upholding and improving the standard of conduct expected on members of various bodies to which the code of conduct applies, as part of the process of fostering public confidence in local democracy. Thus, the action will be designed both to discourage or prevent the particular respondent from any future non-compliance, but also to discourage similar action by others."

184. It stresses the need for tribunals to take into account all relevant aggravating and mitigating factors (paragraph 1.7), including potential, as well as actual, consequences of the misconduct (paragraph 1.8). It deals with suspension (paragraphs 1.18-1.23), partial suspension (paragraphs 1.24-1.26) and the decision not to impose either suspension or disqualification (paragraph 1.27).

185. It makes clear that disqualification is the most severe of the options (paragraph 1.10); and it non-exhaustively lists a number of factors that may lead to disqualification being imposed, as follows:

> "a. The respondent having deliberately sought personal gain (for either himself/herself or some other person) at the public expense, by exploiting his/her membership of the authority that is subject to the code of conduct.
>
> b. The respondent having deliberately sought to misuse his or her position in order to disadvantage some other person.
>
> c. The respondent having deliberately failed to abide by the code of conduct, for example as a protest against the legislation of which the code forms part. Members of relevant authorities are expected to uphold the law.
>
> d. Repeated breaches of the code of conduct by the respondent.

> e. Misusing power with the authority or public resources for personal gain
>
> f. Misusing the relevant authority's property.
>
> g. Bringing the authority seriously into disrepute."

186. Although Mr Henderson, with more or less enthusiasm, challenged each finding of breach, his primary challenge was to the sanction imposed. A sanction may be challenged on the basis that the case tribunals' approach to sanction was wrong in law, or that the sanction imposed is clearly wrong, manifestly excessive or disproportionate. Mr Henderson submitted that the case tribunal's approach to sanction in this case was wrong in a number of respects, and their decision to disqualify the Appellant for two and a half years was a clearly disproportionate interference with his article 10 rights.

The Proper Approach

187. It is properly common ground that the any sanction imposed on the Appellant, over and above a finding of breach of the Code of Conduct, would be a prima facie interference with the right freedom of expression; and would thus need to be proportionate and justified under article 10(2).

188. The proper approach to proportionality was recently considered by the Supreme Court in Bank Mellat v Her Majesty's Treasury (No 2) [2013] UKSC 38, which concerned restrictions imposed on those acting within the financial sector from dealing with the claimant Iranian commercial bank. Drawing upon Commonwealth authority, Lord Reed said (at [74]):

> "The approach… can be summarised by saying that it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter."

Lord Reed dissented on a number of issues, but not in respect of this; and Lord Sumption (with whom Baroness Hale, Lord Kerr and Lord Clarke agreed) put the analysis in much the same terms (see [20]).

189. In the case before me, it is uncontroversial that imposing a sanction upon a councillor who has breached the Code of Conduct has a proper objective, namely the public interest in good administration and in fostering of public confidence in local democracy. That interest may be adversely affected if a councillor conducts himself improperly, for example by undermining the relationship of mutual trust and confidence between council members and officers that is crucial to local democracy,

or otherwise failing to respect and give proper consideration to others. A sanction is necessarily related to and supportive of the public interest in good administration and in fostering of public confidence in local democracy. Of Lord Reed's questions, questions (1) and (2) are therefore straightforward in this context: the answer to each is, "Yes".

190. Lord Reed's questions (3) and (4) reflect earlier jurisprudence, notably Samaroo v Secretary of State for the Home Department [2001] EWCA Civ 1139, which concerned the impact of the deportation of Mr Samaroo on his article 8 rights. Dyson LJ (as he then was) said at [19]-[20]):

> "19. … [I]n deciding what proportionality requires in any particular case, the issue will usually have to be considered in two distinct stages. As the first stage, the question is: can the objective of the measure be achieved by means which are less interfering of an individual's rights?
>
> 20. At the second stage, it is assumed that the means are employed to achieve the legitimate aim are necessary in that they are the least intrusive of Convention rights that can be devised in order to achieve the aim. The question at this stage of the consideration is: does the measure have an excessive or disproportionate effect on the interests of affected persons?"

191. Like the analysis of Lord Reed, this envisages two discrete stages: first, consideration of whether the interference with the human rights involved is the minimum necessary, or whether less restrictive means could be employed – the measure must be no more than necessary; and then, second, consideration of whether the benefits of that least necessary measure (in terms of the legitimate aims sought to be pursued) outweigh its adverse impact on the rights of its object.

192. Mr Henderson submitted that, in all the circumstances, it could not be said that the disqualification period imposed on the Appellant was the least necessary to protect public confidence in local democracy – particularly as the Appellant was re-elected in May 2012, at a time when the allegations against him were to an extent publicly known. Mr Maurici, relying on cases such as Lough v First Secretary of State [2004] EWCA Civ 905 and R (Clays Lane Housing Co-operative Limited) v The Housing Corporation [2004] EWCA Civ 1658, submitted that the private and public interests in this case were of such variety and complexity, the two-stage approach advocated in Samaroo and Bank Mellat was inappropriate: what was required was a balancing exercise that resulted in a decision which is justified on the basis of a compelling case in the public interest and as being reasonably necessary (see Clays Lane at [25] per Maurice Kay LJ).

193. It must be remembered that each of these various analyses used by the court are tools provided to assist in making decisions involving proportionality more rigorous and transparent. None is prescriptive. None purports to be universal in its application. Cases such as Clays Lane reflect the truth learned from experience that, in many cases, the question of what measure interferes least with the human right engaged is inextricably bound up in the exercise of balancing private and public interests (of

which that right is one) and therefore it is necessary to consider the two stages in Samaroo (and Lord Reed's questions (3) and (4) in Bank Mellat) together.

194. Whilst I do not consider Lough and Clays Lane are directly in point, in my view this is a case in which the appropriateness and proportionality of sanction could and can only be considered in the context of the other rights and interests in play.

Alleged Errors in Approach

195. Mr Henderson submitted that the case tribunal erred in their approach to sanction in the following ways.

196. First, he submitted that the tribunal simply failed to assess the sanction on proportionality grounds, because they failed to appreciate the need to consider whether the proposed sanction was proportionate under article 10(2). Whilst they found that "the imposition of a sanction did not breach the [Appellant's] article 10 rights" (paragraph 1 of the Sanction Decision), they never considered whether the sanction they actually imposed might be a breach. Mr Maurici submitted that this was a case, like Lough (a planning case), where the assessment of proportionality is inherent in the balancing exercise that is an integral part of the decision-making process.

197. In my view, it would have been better if the Sanction Decision had expressly indicated that the case tribunal had taken into account the need to justify any sanction imposed under article 10(2); but, reading the Sanction Decision as a whole together with the Breach Decision (which was published on the same day), I am satisfied that the tribunal were aware of this requirement and had it well in mind in fixing the sanction that they did. That is clear, in my view, from (e.g.) paragraph 22 of the Sanction Decision, in which the tribunal restricted the period of disqualification to two and a half years, saying:

> "Any disqualification beyond May 2016 could result in reality in the [Appellant] being disqualified for an additional 5 years, *which in our view would be disproportionate*." (emphasis added).

198. That is not insignificant; because, in giving due regard to the case tribunal's decision on sanction, more deference must be given if the tribunal took into account all material matters (including any interference with any human right) and did not otherwise err in approach.

199. Second, Mr Henderson submitted that the tribunal failed to take into account properly, and in accordance with Sanders No 1, that the Appellant had been re-elected in May 2012 at a time when it can be inferred that the electorate was aware of the matters alleged against him.

200. Mr Sanders was the leader of Peterborough Council. He received a request from Carrickfergus Borough Council for support from English local authorities for its call for a public enquiry into the death of army personnel in Northern Ireland generally and of one soldier who lived in its area in particular. His response was in the form of abuse directed at, not only Carrickfergus Council for troubling him, but also at the

deceased soldier's family and, more generally, the Irish people at large. It was offensive, emotive and potentially inflammatory. The case tribunal found him in breach of the relevant Code of Conduct, and disqualified him for two years.

201. Mr Sanders was re-elected after his response to Carrickfergus Council had been made public. In considering whether the sanction was proportionate, Wilkie J said:

> "… It must, as a matter of inference, be the case that the electorate were aware of his peculiar personal position and recent history when casting their votes and re-electing him as a councillor….
>
> … It is a very serious thing indeed for a non-elected body, such as the case tribunal, to disqualify from membership of a council a person who has been elected to that body by the electorate after the events complained of. In effect the case tribunal is overriding the wishes of the electorate. Whilst it cannot be said that this would never be an appropriate course for the case tribunal to take it, in my judgment, where the matter complained of was, by inference, put before the electorate as an issue and they have delivered their verdict through the ballot box it cannot be right to override their verdict. Accordingly, in my judgment the decision to disqualify Councillor Sanders was wrong…".

202. Wilkie J quashed the disqualification, and replaced it with a one year partial suspension from holding the post of leader of the Council. Mr Henderson submitted that the same reasoning applies in this case, such that disqualification of the Appellant was wrong in principle.

203. However:

i) In my judgment, the gravamen of a non-elected case tribunal disqualifying (or, indeed, suspending) a councillor lies – not in *re*-election – but simply in the fact that the councillor is elected and the case tribunal is not. In all cases of disqualification or suspension, the tribunal is overriding the expressed wishes of the electorate.

ii) If a councillor is guilty of a breach of the Code of Conduct, his re-election does not and cannot act as an absolution for his misconduct. Popularism is not determinative. In any event, the fact that a councillor is re-elected by his own ward, does not mean that democracy has not been adversely affected by his conduct: his misconduct may, for example, have comprised of improperly favouring his own constituents. In determining an appropriate and proportionate sanction, the case tribunal must consider all relevant factors, including the extent to which the councillor's conduct has had an impact on the rights and interests of other individuals, and the public interest in terms of (e.g.) good administration.

iii) Therefore, whilst re-election may be a relevant factor in showing the will of the electorate, whether it is material (and, if so, the weight to be given to it as a

> factor) is a matter – just one of many – for the case tribunal to consider (see Chegwyn v Ethical Standards Officer of the Standards Board of England [2010] EWHC 471 at [37] per Collins J). It may attract little weight if it is unclear that the electorate was aware of the full details of the misconduct; and, in any event, it may be inappropriate to attach much if any weight as it may be unclear what impact, if any, the issue had on voters (R (Mullaney) v Adjudication Panel for England [2009] EWHC 72 (Admin) at [122], where Charles J found re-election in that case to be irrelevant).

204. In this case, the tribunal expressly considered Sanders (No 1) and Mullaney, and noted that they had not been addressed by Counsel for the Appellant (not then Mr Henderson) on the apparent divergence of views expressed (paragraphs 7-8 of the Sanctions Decision). They continued (at paragraph 9):

> "In our view the re-election of the [Appellant] is not wholly irrelevant, however each case is fact sensitive."

They proceeded to consider the circumstances of this case, including the fact that the extent to which the electorate were aware of the full ambit and nature of the complaints was unknown (paragraph 9). Therefore, the tribunal took the Appellant's re-election into account, and gave it the weight they considered appropriate.

205. The approach of the case tribunal to the Appellant's re-election was not arguably wrong.

206. Third, Mr Henderson submitted that the sanction is inconsistent with penalties imposed in other cases; and the tribunal failed to have proper regard to the importance of consistency between penalties, to avoid unfairness and retain public confidence. He relied upon Sanders v Kingston (No 2) [2005] EWHC 2132 (Admin).

207. It was the same Councillor Sanders. He accompanied a constituent to an interview with the council's benefit fraud investigation officers in connection with that constituent's claim for housing benefit, held under the provisions of the Police and Criminal Evidence Act 1984. Amongst other things, the councillor made it clear that, if the officers acted in a way to which he took objection, he would use his executive powers to overrule them. An argument ensued, as a result of which he walked out, which brought the interview to an end. He later wrote advising his constituents not to attend any rescheduled interview. The case tribunal found that this conduct failed to treat the officers with respect, and could reasonably be regarded as bringing his office or the authority into disrepute. The tribunal disqualified him for 18 months.

208. Sullivan J (as he then was), in finding the penalty manifestly excessive, said (at [40]):

> "While each case will turn upon its own facts, unless there is some degree of consistency in the penalties imposed by different case tribunals there is bound to be a perception of unfairness, and hence a loss of confidence in the operation of the statutory system."

209. I respectfully agree; although, given the very disparate nature of breaches of the Codes of Conduct and the discretion in case tribunals (which means there is inevitably

a range of sanction that would be appropriate and proportionate), a case tribunal (and, on appeal, this court) may in practice be able to do little more than assess whether a particular sanction is broadly in or out of kilter with sanctions imposed in other cases.

210. Unfortunately, in respect of appropriate sanction, Counsel for the Appellant before the case tribunal submitted – possibly disingenuously, and certainly unhelpfully – that the Appellant should simply be commended for the work he had done as a councillor over two decades. It is difficult to criticise the tribunal for not considering whether the sanction they imposed was out of line with penalties in other cases when those cases were not put forward for comparison. The issue now really goes to the merits of the disqualification imposed, i.e. the question of whether the sanction was wrong. I shall deal with it in that context (see paragraphs 217 and following below).

211. Fourth, whilst Mr Henderson accepts that Wales is entitled to retain the scheme despite is abolition in England and that the retention of the scheme in Wales is not inherently incompatible with article 10, he submits that the fact that, short of some criminal offence, disqualification or suspension of a councillor is no longer available in England, should inform the exercise of the power to disqualify or suspend in Wales. In view of the narrow margin of appreciation for States to restrict article 10 rights, it is an indicator that the exercise of disqualification of an elected representative in such a case as this is disproportionate. He relies upon S v United Kingdom (2009) 48 EHRR 50, in which the European Court of Human Rights, in concluding that the policy of DNA retention by police authorities in the rest of the United Kingdom had overstepped the permissible margin of appreciation, considered that:

> "The current position in Scotland, as part of the United Kingdom itself, is of particular significance in this regard."

212. However, I do not consider that this submission has any great force. In this devolved area, Wales is entitled to take a different stance over the misconduct of local authority members than that taken in England, based upon its own policies with regard to standards in public life and the issues with regard to such standards in Wales. The government in Wales has taken the view that the sanctions of disqualification and suspension should remain available for local government elected representatives who engage in misconduct short of crime. Whilst of course conduct that is criminal has a particular mark, there is no objection in principle to misconduct that is not criminal being visited by a sanction that disenables a councillor from acting as such. I do not consider Sullivan J in Sanders (No 2) (a case concerning the one-off incident of a member intimidating an officer referred to at paragraph 207 above), at [40], suggests otherwise: indeed, he accepted that "in principle bullying and intimidation of officers by councillors could be as serious as the kinds of conduct discussed" in the Guidance as potentially warranting disqualification (see [35]). Whilst the changes in England are a reminder that to deprive constituents of the elected member of their choice is an especially serious matter requiring particular justification (especially when the member misconducted himself in the course of exercising his right of freedom of political expression), it is neither more nor less than that.

213. Fifth and finally, Mr Henderson submitted that the tribunal failed to address the option of partial suspension, i.e. suspending him from executive functions.

214. I can deal with this shortly. The case tribunal did not arguably err in not specifically considering a partial suspension. The Appellant never suggested that a partial suspension might be appropriate. Not all of the incidents occurred when the Appellant was an Executive Member: importantly, at the time of the Mills/Dodd exchange, he was a backbencher. By July 2013, the Independents had lost control of the Council, and therefore the Appellant had no executive functions and was unlikely to have any such functions until that position changed. A partial suspension was inappropriate for that reason also. In any event, the tribunal concluded that a full suspension was inappropriate in view of the seriousness of the breaches found; and, thus, it was implicit that a partial suspension was inappropriate.

215. For those reasons, I cannot fault the approach of the case tribunal towards sanction in any of the specific respects relied upon by Mr Henderson.

216. Indeed, the approach of the case tribunal to sanction was, in general, a model of its type. They recognised the seriousness of disqualification as a sanction. In meticulous detail, they carefully set out all of the material factors, both aggravating and mitigating, as they saw them. The former included the damage that had been caused to the Council, in terms of its functioning and its standing. The latter included the deprivation of the electorate of their chosen representative, and the effect of disqualification on the Appellant himself. They weighed all factors, with patent care.

217. I agree with Mr Maurici's submission: the case tribunal did not err in principle or approach.

Was the Sanction "Wrong"?

218. However, more generally, Mr Henderson submitted that the penalty imposed was simply too great in all of the circumstances, particularly in the light of the fact that the Appellant had been a councillor for nearly 20 years before the incidents in respect of which breaches of the Codes of Conduct have been found, and (more importantly, he submitted) four years after those incidents, without any conduct issues arising. As I have found that the case tribunal did not err in approach, I should only find the sanction they imposed to be wrong if clearly so or (in the words of Sullivan J in Sanders (No 2) at [15] and [42]) if it was "manifestly excessive".

219. In my view, there is far more force in this ground.

220. In making their assessment, as I have indicated, the case tribunal identified the main aggravating and mitigating factors in this case. Briefly, they were as follows.

221. With regard to factors upon which the Appellant can rely in his favour:

i) A number of common aggravating factors were absent. The Appellant has not been convicted or even charged with any criminal offence; and there is no suggestion that any of the relevant conduct is criminal, or corrupt, or sleaze, or motivated by or resulting in any personal financial gain by the Appellant. Mr Henderson submitted that this is of particular importance, in the light of the fact that, in England, disqualification and suspension of a councillor are not available unless he has committed a crime; and there does not appear to be any

reported case in which a councillor has been disqualified (as opposed to suspended) in the absence of criminal conduct.

ii) Most of the breaches were for a failure to show respect and consideration to others, not (submitted Mr Henderson) the most serious of charges. All of the incidents took place over a period of two years – and all but two, over about eight months – in a career in local politics of over 20 years.

iii) The Appellant can of course rely upon his right to freedom of speech, and the fact that most of the utterances that form the basis of the misconduct were made as political expression. I say "most" because, although the tribunal found that all of the remaining charges resulted from circumstances of political expression (and they found that "dishonesty" was not an aggravating factor in this case: paragraph 20 of the Sanctions Decision), they also found that some (notably in connection with the Mills/Dodd exchange, and the Visioning Day letter and note: Incidents 2 and 4 above) were deliberately false or misleading; and article 10 does not protect such speech (see paragraph 38(v) above). But in any event, generally, this weighs greatly in the Appellant's favour. The minimum sanction should be imposed, consistent with the requirements of the legitimate aim of the measure.

iv) If the Appellant is suspended or disqualified, that will rob the electorate of his ward of the councillor of their choice. Here, his re-election in 2012 is of some relevance. Although the extent to which the nature and extent of the allegations against the Appellant were known to the public prior to that election is unclear, it seems that the public were aware that there were allegations and that the adjudication before the case tribunal was proceeding. If he is disqualified, in addition to preventing him from standing for any relevant authority (not just the Council), that will trigger a by-election in the Mostyn ward in which he could not stand. This court can look at the practical implications of any sanction; and, in practice, any disqualification may mean that the Appellant will not be able to be a member of the Council until the elections that are due in 2016 at the earliest. The tribunal noted the fact that the next elections would be in 2016; and appear to have used that fact to reduce the period of disqualification they might otherwise have imposed as being disproportionate (paragraph 22 of the Sanctions Decision).

v) In addition, disqualification would rob the Appellant of his living as a councillor.

vi) Mr Henderson, understandably, relied heavily upon the Appellant's record as a councillor. Prior to 2007, he had nearly 20 years good service as a councillor, without any misconduct in terms of breaches of the Code of Conduct; and similar good service since the last incident referred to above (February 2009) until his disqualification in July 2013, i.e. about 4½ years. In addition, there were testimonials from a number of councillors and officers, that marked his experience, knowledge and worth as a councillor. One described him as one of the most intelligent and experienced members of the Council (paragraph 1.42 of the Findings of Fact). The tribunal found that the Appellant worked hard for his constituents, and saw no evidence to controvert the positive view of the Appellant put forward by those witnesses who commended him (ibid).

In addition to the commendation of his character, Mr Henderson submitted that, given that he did not commit any breaches of the Code for over four years after the mast incident, there can be some confidence in him not misconducting himself as a councillor in the future.

222. However, in terms of aggravating factors:

i) Although none of the conduct was criminal, all of the breaches of the Code were intentional; and some of the misconduct was undoubtedly serious. Some involved deliberately dishonest and misleading conduct towards officers, other Members and members of the public. In respect of officers, much of the conduct was intended to undermine – not their views – but the officers personally. Most of this conduct towards officers was performed when those officers were merely trying to do their job, which the Appellant was intent on frustrating. On occasions, officers were personally undermined as part of a campaign by the Appellant to undermine Council policies which the Executive had approved and were therefore not in play: the officers were only trying to do their job, and implement those policies. In respect of housing allocation, the Appellant well knew that his involvement in operations was both against the relevant regulations and Council policy, which were (again as he well knew) to prevent members being involved in such allocation when members of their constituency were involved. He encouraged officers to act contrary to Council policy. As the tribunal put it, he attempted "to drive a coach and horses through the housing allocation policy" (paragraph 10 of the Sanctions Decision). Vis a vis the officers, he misused his power as a councillor. The case tribunal concluded that, in the circumstances, the breaches were "extremely serious, and "the [Appellant's] conduct has seriously undermined [the standards in public life that the Code of Conduct was designed to protect (paragraph 21 of the Sanctions Decision). I agree.

ii) In respect of the Mills/Dodd exchange, he was found to have brought the Council into disrepute; and his misconduct damaged the relationship between councillors and officers within the authority, and undermined good government. Further, the tribunal found (paragraph 21 of the Sanctions Decision), and I accept, that, looking at the misconduct cumulatively, it could be said to have brought the office of member or the authority into disrepute.

iii) There were repeat breaches (involving a significant number of officers, from a wide range of grades; but several relatively junior), a factor specifically identified in the Sanctions Guidance as being a potential marker for disqualification. Mr Henderson emphasised that most of the incidents took place over a few months when the Appellant was an Executive Member: but, even taking out of account the three breach findings I have quashed, there were repeated incidents, during both the time he was a backbencher and when he was an Executive Member. The misconduct continued despite warnings (although no formal complaint) that he had been guilty of misconduct. In the words of the tribunal (paragraph 20 of the Sanctions Decision), there was a "failing to heed appropriate advice and warnings".

iv) Although it is important not to punish the Appellant for his conduct during the hearing, it is relevant that he showed no remorse or insight into his misconduct

(including insight into the effect of his conduct on officers), rather making extreme allegations against officers including allegations that they had manufactured allegations against him and supported them with manufactured documentary evidence. Although Mr Henderson suggested that the four years that the Appellant acted as a councillor after these events without any report of misconduct strongly suggests that there is little risk of a repetition in the future, given his lack of understanding and insight, that risk must be real.

v) Although there was no intent on the Appellant's part to obtain personal financial gain, the tribunal found (and I accept) that the Appellant was attempting to obtain political gain by, improperly, seeking to favour his constituents. The Mills/Dodd exchange incident was a notable example.

223. The tribunal found that the Appellant's conduct had "seriously undermined [the standards in political life] and public confidence", such that "the high threshold required for disqualification… has been crossed (paragraph 21 of the Sanction Decision). I note the "chilling effect" that the fear of sanction potentially has on the freedom of expression (Lombardo at [61]). However, even when the three breaches I have quashed are taken out of account, after anxious consideration, I agree: no sanction short of disqualification would have been appropriate and, in view of the seriousness of the misconduct, disqualification is a proportionate response.

224. However, mindful of the requirement of article 10 to impose the minimum sanction consistent with the aims of maintaining standards in public life, I have come to the view that a period of disqualification of 2 years and 6 months was excessive, and manifestly so. The tribunal considered that this is a case in which a period of disqualification near the upper end of the range (i.e. 5 years) would be appropriate, which they then reduced to reflect the realities of a period of disqualification that went beyond mid-2016, when the next Council elections are due to be held. With respect to the tribunal, and taking into account the automatic disqualification provisions applying to those who are convicted of serious criminal offences (see paragraph 12 above), I do not consider that that gives "adequate head room for the much graver breaches of the Code which could be envisaged" (see Sanders (No 2) at [38] per Sullivan J). In all the circumstances (and on the basis of the breaches limited to those that I have upheld), I consider the appropriate period of disqualification to be one of 18 months.

225. I consider that to be in line with sanctions imposed in other cases, notably Sanders (No 2), the facts of which are related above (paragraph 207). Sullivan J considered that a suspension of six months would have been appropriate. Although each case is different, that incident bears some resemblance to the Mills/Dodd exchange incident. However, Sullivan J stressed (i) that, in Councillor Sanders' case, this was a "one-off", and "there was no suggestion that there was a wider problem of councillors bullying and intimidating officers within the council" (at [41]; and (ii) in principle, bullying and intimidation of officers by a councillor might warrant disqualification (at [35]). In the case of the Appellant, although there is no suggestion of other members of the Council misconducting themselves towards officers, the Appellant himself did so on a number of occasions.

226. Sullivan J notes (at [39]) two cases in which disqualification had been imposed and an appeal against it dismissed, namely Hathaway v Ethical Standards Officer [2004]

EWHC 1200 (Admin) and Sloam v Standards Board for England [2005] EWHC 124 (Admin). In Hathaway, a member barged past a traffic warden, thereby assaulting him, to get to a market trader to whom he used violent language. He pleaded guilty to assault, and was fined. Disqualification for one year was upheld on appeal. In Sloam, the member pleaded guilty to attempting dishonestly to evade four penalty charge notice issued by the council. He was fined £225. His appeal against a one year disqualification was also refused. Whilst the facts of these cases are very different from those of the Appellant – and, of course, I appreciate that in those two cases criminal conduct was involved, albeit at the low end – I do not consider that a period of disqualification of 18 months in his case is out of kilter with the sanctions upheld in those cases.

Sanction Conclusion

227. For those reasons, I quash the sanction imposed by the tribunal; and impose in its place disqualification for a period of 18 months to run from 19 July 2013.