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Case No: CO/4073/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 April 2018

Before :

MR JUSTICE WARBY

- -

Between :

JONATHAN COULTER **Claimant**

- and –

INDEPENDENT PRESS STANDARDS ORGANISATION CIC **Defendant**

- -
- -

Nikolaus Grubeck (instructed by **Irvine Thanvi Natas**) for the **Claimant**
Tom Richards (instructed by **Sheridans**) for the **Defendant**

Hearing date: 17 April 2018

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Judgment Approved

The Honourable Mr Justice Warby :

Introduction

1. This is a claim for judicial review of decisions made by the Independent Press Standards Organisation ("IPSO"). The claimant's case is that IPSO mishandled his complaints that reports in *The Times* and *The Sunday Times* about a campaign meeting held at the House of Lords were inaccurate or misleading, or both.

2. Where a court carries out judicial review, it is not determining the merits of the decision under challenge, or conducting an appeal. It does not reach a decision of its own on the issue that was before the decision-maker, and substitute that for the original decision. It only assesses whether the decision-maker has acted lawfully. If not, the remedies available include declaratory orders, orders quashing the decision, and orders requiring the person or body concerned to re-make the decision.

3. In this case, the decisions under challenge are said to involve a failure to determine complaints that should have been adjudicated upon, if IPSO's rules had been properly applied; it is said that relevant evidence was wrongly left out of account; and that some complaints were brushed aside by IPSO as a result of a misinterpretation or misapplication of its own rules about the borderline between fact and opinion. The remedy sought is an order quashing the decisions.

4. Judicial review is a public law jurisdiction. Today, its exercise is governed by Part 54 of the Civil Procedure Rules which provides, so far as relevant, that judicial review is available in respect of "a decision, action or failure to act in the exercise of a public function": r 54.1(2)(a)(ii).

IPSO

5. IPSO describes itself as "one of the independent regulators of the press in the United Kingdom". It is a non-profit Community Interest Company which regulates those publishers who have agreed to be subject to its regulation. These include the publisher of *The Times* and *The Sunday Times*. The publisher has submitted to the jurisdiction of IPSO pursuant to a set of contractual arrangements.

6. The constitution, remit, functions, and procedures of IPSO are governed by its Articles of Association (and in particular Articles 5, 7, and 8.1), and by Regulations ("the Regulations"). One function which the Articles and the Regulations confer on IPSO is the provision of a "complaints handling" service. This involves ruling on complaints against regulated publishers that they have infringed the Editors' Code of Practice ("the Code"), which IPSO has adopted.

7. By Regulation 8, IPSO is given power to consider complaints in three categories: complaints from those "personally and directly affected" by the alleged breach; or, in specified circumstances, from a representative group; or from "a third party seeking to correct a significant inaccuracy of published information." Regulations 14 to 31 and 37 provide for the investigation, mediation, and determination of complaints that the Code has been infringed, to be carried out by IPSO's Complaints Committee. This consists of 12 members, chaired by the Chair of IPSO's Board. Six of the 12 members (in addition to the chair) must be "independent as defined in the Regulator's Articles".

8. This claim relates to decisions of the Complaints Committee about compliance with clause 1 of the Code. This provides, so far as relevant, as follows:

> "1**. Accuracy**
>
> i) The Press must take care not to publish inaccurate, misleading or distorted information or images, including headlines not supported by the text.
>
> ii) A significant inaccuracy, misleading statement or distortion must be corrected, promptly and with due prominence, and — where appropriate — an apology published. In cases involving IPSO, due prominence should be as required by the regulator.
>
> iii) A fair opportunity to reply to significant inaccuracies should be given, when reasonably called for.
>
> iv) The Press, while free to editorialise and campaign, must distinguish clearly between comment, conjecture and fact. …"

9. Regulations 32 to 37 provide for decisions of IPSO's Complaints Committee to be subject to review by an Independent Complaints Reviewer. But the review is a procedural one, not a merits review. The criterion is laid down by Regulation 32:

> "Requests for a review may be made only on the ground that the process by which the Complaints Committee decision was made was substantially flawed."

Factual background

10. During the First World War, on 2 November 1917, the British Government issued a public statement announcing that it "view[ed] "with favour the establishment in Palestine of a national home for the Jewish people", and would use its best endeavours to facilitate the achievement of this objective. The declaration was made in an open letter written to Lord Rothschild, one of the leaders of the British Jewish community, by the then Foreign Secretary, Arthur Balfour. It has become known as the Balfour Declaration.

11. On Monday 25 October 2016, there was a meeting at the House of Lords to launch the second phase of the "Balfour Apology Campaign". This is a public campaign which seeks to secure from the British government an apology relating to the Balfour Declaration. The meeting was organised by the Palestinian Return Centre ("PRC"). It was chaired by Baroness Jenny Tonge. It was attended by the claimant, among others. This claim arises from reporting of and about the meeting.

12. On Wednesday 27 October 2016, *The Times* published in the hard copy paper and on its website an article by Dominic Kennedy, headed "Jews blamed for Holocaust at 'shameful' House of Lords event" ("the First Article"). The next day, Thursday 28 October 2016, *The Times* published - again in hard copy and online - an article by David Aaronovitch, headed "Tonge's obnoxious ideas on Jews set a terrible example" ("the Second Article"). On Sunday, 30 October 2016, the *Sunday Times* published in hard copy and online an article by Rod Liddle, entitled "Peace be upon Israel – the Lib Dems have cut off their Tonge" ("the Third Article").

13. On 3 December 2016, the claimant and another 29 named signatories filed with IPSO a complaint in relation to each of the two *Times* articles. In summary, the complaint was that the articles represented "gross misreporting", and presented a misleading picture; that they contained factual inaccuracies; and that they made unjustified and unfair accusations against Baroness Tonge.

14. On 6 December 2016, the claimant filed an addendum to the original complaint, and also raised issues about the Third Article, which he described as "an offensive rant" in which Mr Liddle inaccurately assumed the truth of "his colleague's fabrications". Prompted by IPSO, the claimant expanded on his criticisms of the Third Article in a letter dated 8 January 2017, which was rather more analytical.

15. Correspondence followed during February and March 2017, concerning the role and status of Baroness Tonge in respect of the complaints. The Baroness was involved in this correspondence. I shall return to this, and to later correspondence with the Baroness.

16. On 15 March 2017, the House of Lords Committee for Privileges and Conduct published its 7th report of the Session 2016-17, headed "The conduct of Barnoness Tonge" ("the Report"). The Report contained an assessment of Baroness Tonge's conduct at the Meeting, and its compliance with House of Lords standards.

17. On 24 March 2017, the claimant wrote to IPSO asking it to consider the Report as part of the process of assessing his complaints. On 5 April 2017, IPSO replied, declining to refer the Report to the Committee.

The Committee decisions

18. By letter of 19 April 2017, IPSO notified the claimant of the Complaints Committee's decisions on his complaints in respect of the First and Second Articles. These were as follows:

(1) The Committee upheld the complaint in relation to the First Article, finding that this had inaccurately reported that an audience member had been applauded after making remarks that "Hitler only decided to kill all the Jews after he was provoked by anti-German protests led by a Rabbi in Manhattan." The Committee recorded that the video of the event showed an audience member claiming that a boycott on Germany in the 1930s had "antagonised" Hitler, with the result that he wanted to systematically kill Jews. The audience member was then interrupted by Baroness Tonge, who said words to the effect that the campaign to boycott Israeli goods and services (or BDS) was very important indeed. The audience then applauded. The Committee noted that the journalist had watched the video but, having done so itself, concluded that it was

> "clear that the audience was applauding Baroness Tonge's further comments about the BDS campaign, which did not reflect the remarks of the audience member in question."

The Committee considered this to be a significant inaccuracy that required correction. It concluded, however, that the newspaper's offer to publish a correction and amendment was sufficiently prompt, and that it had offered to publish it with due prominence. The newspaper should carry out what it had proposed, which was an appropriate remedy. No further action was deemed to be merited. *The Times* published the correction.

(2) The Committee did not uphold the claimant's complaint about the Second Article, concluding that this was "clearly presented as an opinion piece". The author's claim that the PRC was "an organisation that wants there to be no Israel at all" was a "significant claim about the PRC", but was "clearly presented as the columnist's opinion" such that "this aspect of the article was not significantly misleading".

(3) The Committee determined that the claimant was "a third party in relation to claims about Baroness Tonge's conduct at the meeting". It went on:

> "Having considered the position of the party most closely involved, Baroness Tonge, it declined to consider these aspects of the complaint further. However, having watched the video of

> the event, the Committee considered it was not misleading to report that the audience member who had commented on the Rabbi antagonising Hitler was not challenged."

19. IPSO dealt separately with the complaint about the Third Article. The Committee's decision was notified to the claimant on 21 April 2017. The Committee did not uphold the complaint, concluding that the article was a comment piece, and clearly presented as such. Its account of the claims made at the meeting was not misleading, and "did not raise a breach of clause 1." The Committee adopted the same approach to the complaints about reporting of Baroness Tonge's behaviour as it had taken when dealing with the complaints about the *Times* reporting; it determined that the claimant was a third party, and having considered the position of Baroness Tonge, it declined to give further consideration to these aspects of the matter.

20. IPSO's procedures give complainants an opportunity to check draft determinations for factual errors, before they are finalised and made public. The claimant complained that the decisions did contain factual errors. The Committee's response, conveyed by letter of 25 May 2017, was that there were no inaccuracies. But it expressed its willingness to make amendments to the decisions to record aspects of the claimant's complaints.

The Independent Reviewer's decisions

21. By letters of 6 June 2017, the claimant sought review of each of the Committee's determinations. He complained that IPSO was wrong (1) to refuse to determine his complaints about accuracy matters relating to Baroness Tonge; (2) to refuse to consider the Report; and (3) to reject complaints of inaccuracy in relation to the Second and Third Articles, on the basis that these were opinion pieces. There were other criticisms, but these do not matter for present purposes.

22. On 19 June 2017, the Independent Reviewer, Trish Haines, made written determinations against the claimant. Applying the standard laid down by IPSO's Regulation 32, she ruled that the process in each case "was not substantially flawed." That conclusion extended to the complaint pursued in respect of the portrayal of Baroness Tonge's conduct. As to that, the Independent Reviewer stated that

> "Baroness Tonge was offered and refused to accept the opportunity to make a complaint in her own name. … the refusal to accept [the claimant's] request to make a 3rd party complaint without the 3rd party actually making a complaint themselves, does not seem to me to be a significant process flaw."

23. On 22 June, the correction which the Committee had decided should be published was published in *The Times*, and the online correction referred to was made.

24. On 29 June 2017, IPSO wrote to Baroness Tonge, notifying her that the Committee's decisions had been published. The email drew attention to the paragraphs in the decisions which explained the Committee's decisions in respect of the alleged inaccuracies "which related directly to you, and to which the complainant was determined to be a third party". This was said to be in accordance with IPSO's

regulations, requiring the position of the party most closely involved to be taken into account. The email said, "You are of course free to make your own complaint against these newspapers and can discuss this further, if you wish." The Baroness made no reply.

The judicial review claim

25. A letter before claim was sent on 9 August 2017. A further letter of claim was sent by fresh legal representatives, on 21 August 2017. The claim was issued on 25 August 2017. It complained of the decisions of 25 May 2017 and the decisions of the Independent Reviewer dated 9 June 2017. The Acknowledgment of Service and Summary Grounds of Resistance were filed on 4 October 2017. IPSO did not dispute the Court's jurisdiction to grant judicial review of its decisions, but resisted the application for permission on its merits. It might perhaps have argued that strictly speaking the proper defendants to the claim were the Committee and the Independent Reviewer, but no such point was or has been taken. Permission was granted by Goose J, on 12 October 2017, in respect of all three grounds of challenge.

Issues

26. The issues to which the grounds give rise can be summarised in this way:

(1) Whether it was unlawful for IPSO, when dealing with the *Times* and *Sunday Times* complaints, to refuse to assess the third-party complaints about the reporting of Baroness Tonge's behaviour ("the Third Party Issue").

(2) Whether IPSO was in breach of a duty of sufficient inquiry, by failing to take into account the Report when determining the complaints ("the Report Issue").

(3) Whether IPSO acted unlawfully by applying, in two respects, an incorrect and therefore irrational standard of review to the complaints ("the Irrationality Issues).

Evidence

27. The claim is supported by a witness statement of the claimant, with extensive exhibits, which include a transcript of the meeting, the articles complained of, all the material correspondence, and the House of Lords Report. For IPSO, there is a witness statement from Charlotte Dewar, its Director of Operations. She explains IPSO's process of decision-making, investigation and review in respect of the claimant's complaints, and exhibits a volume of internal and external correspondence. More recently, a short witness statement from Baroness Tonge has been submitted, by permission of Lang J.

Jurisdiction and approach

28. As already noted, IPSO did not dispute, at the permission stage of this claim, that it is amenable to judicial review. Nor does it now dispute that proposition. It accepts that the Complaints Committee's decisions involve the exercise of a public function, for the purposes of Part 54. Understandably, Mr Grubeck would have been content to leave the matter there and proceed with the merits of his case. But as both Counsel

acknowledge, this is a question of law, not one of discretion, and it is a jurisdictional issue. The parties cannot determine the law or confer jurisdiction, by agreement.

29. There is no binding precedent. Before IPSO, there was the Press Complaints Commission ("PCC"). Two claims for judicial review of PCC decisions were made (*R v Press Complaints Commission, ex p. Stewart-Brady* [1997] EMLR 185, and *R (Ford) v Press Complaints Commission* [2001] EWHC 68 (Admin) [2002] EMLR 5). In each case, the Court decided that it was arguable that the PCC was amenable to judicial review, but dismissed the claim at the permission stage as having no real prospect of success. The cases are of relatively little value on the jurisdiction issue in this case, for those reasons, and because time has moved on and, with it, the legal and factual context have changed. IPSO's set-up is different from that of the PCC, in ways that could be material.

30. Doubtless recognising this, Mr Grubeck's skeleton argument relied principally on a statement made by the Chairman of IPSO, and a passage about IPSO in *Judicial Remedies in Public Law*, 5th Ed,§§-2-088-2-089. In evidence to a Parliamentary Committee, Sir Alan Moses was asked if he believed that decisions of IPSO's Complaints Committee would be amenable to judicial review. He said yes. The textbook relied on discusses the issue of amenability, and concludes that "the better view" is that IPSO is subject to this jurisdiction. Mr Richards' skeleton argument pointed to the objects of IPSO ("to carry on activities which benefit the community and in particular to promote and uphold the highest professional standards of journalism …."), and asserted that the function of handling complaints about the output of regulated publishers is a public function.

31. As Mr Richards recognises, however, IPSO is "a private body operating a voluntary self-regulatory scheme, without any statutory underpinning." In the wake of the Leveson Inquiry (Report into the culture, practices and ethics of the press, Sir Brian Leveson) a scheme did come into existence, pursuant to a Royal Charter, by which a Press Recognition Panel ("PRP") has the function of approving regulators. There is related legislation, in the form of s 40 of the Crime and Courts Act 2013. These arrangements have been denounced by some as "state regulation" of the press. IPSO has chosen not to apply for recognition by the PRP.

32. Against this background, it seemed to me that there might be something to be learned from a comparison with the legal position of private law bodies that regulate sports, such as the horseracing regulator, the Football Association, or the FA Premier League. I therefore invited the parties to address me on whether anything might be gained from study of the decision of Stanley Burnton J (as he then was) in *R (Mullins) v Appeal Board of the Jockey Club* [2005] EWHC 2197 (Admin) [2006] ACD 2. The Jockey Club, established pursuant to a Royal Charter, operated a monopoly in the regulation of horseracing. It was however a private body with no statutory underpinning. The Judge, applying the decision of the Court of Appeal in *R v Disciplinary Committee of the Jockey Club, Ex p. Aga Khan* [1993]*1 WLR 909* held that the regulator was not amenable to judicial review as it was not exercising a "public function" within the meaning of Part 54. He held, among other things, that a body which would otherwise exercise only private functions could not assume public functions by its own action alone. Some governmental intervention was required, and there had been none.

33. It might be said that the argument against IPSO decisions being amenable to judicial review is stronger than it was in the case of the Jockey Club. IPSO's powers derive neither from statute nor the Royal prerogative, but entirely from corporate and/or contractual arrangements entered into by IPSO and elements of the press. IPSO does not claim, nor does it operate, any monopoly in the matter of press regulation. For many complaints, and many complainants, there remains the option of legal proceedings. IPSO's arrangements have no point of contact with the scheme established by the Royal Charter. The view of IPSO's chair, though entitled to respect, does not amount to authority. But Mr Grubeck is entitled to point to the eminence of the author of *Judicial Remedies.* And when considering amenability to judicial review the focus nowadays is on a body's function, not the source of its powers, and there is no doubt that the operation of the Complaints Committee impinges on fundamental rights and freedoms. But nobody suggests this is an easy issue.

34. In further written submissions which I allowed the parties to make after the hearing, Mr Grubeck has identified a number of features of IPSO's role which he says are indications that its function, in determining complaints, is a public function. One of his arguments is that if IPSO did not exist, government would step in. At the same time, he argues that IPSO's role is comparable to that of the Office of Communications ("Ofcom"). He submits that a decision in favour of amenability would be consistent with the situation regarding other industry regulators, in the private sector, such as the Advertising Standards Authority. In the alternative, he submits that I should recognise and exercise an equivalent common law supervisory jurisdiction, such as that which exists in respect of sports regulators: see, eg , *Bradley v Jockey Club* [2004] EWHC 2164 (QB) [37]ff (approved, [2005] EWCA Civ 1056, [17-18] and [28]), *Cronin v Greyhound Board* [2013] EWCA Civ 668 [1].

35. This last point is an alternative basis of claim, which was not advanced until after the hearing had concluded. It is, moreover, legally distinct. Mr Richards objects to its pursuit at this late stage. Further, as Mr Richards points out, what Mr Grubeck is seeking to rely on is a private law principle stemming from the unavoidable impact of the decisions of monopoly sports regulators on the "right to work", and rooted in private law rights. I add that IPSO's complaints jurisdiction is of a separate and distinct kind from that of a sports regulator, exercising power to ban or exclude an individual from earning his or her living. IPSO's Complaints Committee does not regulate the rights to work of journalists. It cannot stop anybody working. And in this case there is no question of any contractual relationship between the complainant and the regulator, or anything akin to a contract. IPSO's complaints jurisdiction is conferred by its rules, regardless of the identity of the complainant(s). It affects fundamental rights of a different kind, including those under Articles 8 and 10 of the Convention. So far as judicial review in public law is concerned, Mr Grubeck's submissions raise difficulties of their own. The Leveson Report did not recommend any form of state regulation. IPSO remains outside the post-Leveson scheme, and Ofcom regulates aspects of the media but not the press. All this could be viewed as undermining Mr Grubeck's suggestion that if IPSO did not exist, the state would have to invent it or something to fill its place.

36. The jurisdiction issue can be seen as one of some constitutional importance, as well as having resource implications for the judicial system, which must devote its scarce

resources to those issues the law requires to be dealt with by a Court. In the light of my conclusions on the grounds of challenge, I do not need to decide the issue. Although I am grateful for the submissions of Counsel it seems to me, in all the circumstances, that it is better not to do so. The parties' agreement on the issue has meant it has not been explored as fully as it might have been. If another judicial review claim is brought against IPSO, and the jurisdiction issue remains uncontested, the Court should give active consideration to the appointment of an *amicus,* to ensure a full adversarial examination of the question. In this case I shall assume, without deciding, that the court has jurisdiction to exercise its public law jurisdiction to review the lawfulness of the decisions of IPSO's Complaints Committee and the Independent Reviewer that are challenged by this claimant.

37. In *Stewart-Brady* Lord Woolf MR observed that

> "it is very important where you have a body, such as the Press Complaints Commission, that if the court has any jurisdiction over them, it is reserved for cases where it would be clearly desirable for this court to intervene. The Court will not get into a position where it adopts a technical interpretation of the Code of Practice and then relies on that technical interpretation as a justification for intervening."

Millett and Potter LJJ agreed. This, of course, is a point about the right approach to the exercise of the public law judicial review jurisdiction, if it exists. It is not binding, but it is highly persuasive.

The Committee's disposal of the complaints

38. It is helpful to have in mind just what the claimant was complaining about, when he placed the matter before IPSO. The initial letter of complaint provided a broad introduction, in these terms: "We are writing to complain about Dominic Kennedy's gross misreporting … our immediate complaint centres on the article and the defamation of Baroness Tonge ..." The complaint about the Second Article said that Mr Aaronovitch had "built on" the First Article by attributing to Baroness Tonge "obnoxious ideas about Jews." This was said to have led to a "flood of publicity" that "unjustly defamed Baroness Tonge." The initial complaint about the third article likewise related to conduct and attitudes which that article was said to have attributed to Baroness Tonge.

39. The claimant went on to be more specific about each of the three articles. He did so at some length, over what ended up as seven pages in all. The complaints related to three separate articles, were numerous, overlapped to some extent, and some of them were stated, and then re-stated in slightly different terms. The claimant is not a lawyer. It is therefore understandable that his correspondence was rather discursive and, in parts, lacking in focus. This is a commonplace, and I do not criticise him for it.

40. It would however have been helpful if at some stage someone had distilled and numbered the complaints, to make it easier (a) to be precise about the nature and basis of each complaint, and avoid uncertainty on that score; (b) to track whether and if so how each was dealt with by the Committee; and (c) to assess the merits of the present claims. It would also have been helpful for the Court to be provided with copies of

the articles with their paragraphs numbered for ease of cross-reference, as is customary. Although this is not an appeal, the grounds do allege that the majority of the complaints were not dealt with at all and/or wrongly dismissed. It is not easy to evaluate such criticisms properly, or to decide how to exercise the discretion to grant relief, without analysis of this kind.

41. Aided by submissions made by Mr Grubeck during the hearing, however, I can list the complaints which are said to have been mishandled by IPSO, and the way that they were dealt with by the Committee:-

The First Article

(1) The claimant said the article was inaccurate or misleading "above all" by failing to report on the invited speakers, whilst giving prominence to comments of the Israeli embassy. The IPSO decision said (at paragraph 12) that the article did not suggest that the comments reported were the only comments made at the meeting; "the newspaper was not required to report a balanced account of the comments made"; and the report was "not significantly misleading". This determination is not the subject of complaint in these proceedings.

(2) Paragraph 4 of the article said that "An audience member was applauded after suggesting that Hitler only decided to kill all the Jews after he was provoked by anti-German protests led by a Rabbi in Manhattan". The claimant said this was wrong. IPSO upheld this complaint, finding that the applause had followed Baroness Tonge's response to the speaker, and that "in the circumstances, to report that the audience member had been applauded after his remarks represented a failure to take care not to publish inaccurate information, in breach of clause 1(i)". IPSO determined that a correction was required. No complaint is now made of this determination.

(3) Paragraph 13 of the article, referring to this and other comments by audience members, said "Baroness Tonge made no attempt to challenge the provocative comments". The claimant complained that she was "in no position" to do so, as the comments were delivered from the other side of the room and at such a speed as to be "virtually unintelligible". IPSO identified this as a third-party complaint which it declined to determine.

(4) The claimant also objected to paragraph 13 on the basis that the Baroness "lacked a base of evidence" to challenge the other comments which she "made no attempt to challenge", adding that "there is a mass of evidence to support the comment about Zionist power over Parliament." This was also dealt with as a third-party complaint which IPSO declined to determine.

(5) IPSO dealt similarly with the claimant's complaint that the article quoted selectively from the views of a blogger called David Collier, failing to report his "positive assessment of Baroness Tonge's conduct".

The Second Article

(6) The claimant objected to the headline about Baroness Tonge's "obnoxious views on Jews". IPSO treated this as a third-party complaint, which it declined to determine.

(7) Paragraph 3 of the article referred to Baroness Tonge "chairing an event for an organisation that wants there to be no Israel at all." The claimant objected on the basis that "this is not an aim of the Balfour Apology campaign." IPSO found this to be "a significant claim about the PRC, denied by the claimant", but noted that it was made in the context of a column that was "concerned with" Baroness Tonge, rather than being "a detailed examination of the aims and objectives of the PRC." The newspaper's position was recorded: Israel was founded as a homeland for the Jews, and if the "right to return" was granted to Palestinians, it would no longer be a Jewish majority state and "no longer recognisably Israel." On that basis, IPSO determined that the claim was clearly presented as the columnists' opinion and "not significantly misleading."

The Third Article

(8) Paragraph 2 of the article reported that Baroness Tonge had hosted the meeting and "cheerfully clapped and cheered along as [attendees] spouted the sort of stuff you might have heard in Berlin in 1936, or Tehran in 2012." The claimant said this was inaccurate. In its findings (at paragraph 11) IPSO disagreed. It found that the journalist's characterisation of what audience members had said was comment, not fact, and not misleading. Otherwise, IPSO dealt with this as a third-party complaint about the conduct of Baroness Tonge, which it declined to determine.

(9) Paragraph 4 of the article contained a list of propositions attributed by the author to those present at the meeting, including (but not limited to) "if any country in the world is anti-semitic, it's Israel". Elaborating his complaints about the Third Article on 8 January 2017, the complainant said that the article's account of what had been said was inaccurate and misleading in several respects. IPSO dealt with these complaints in some detail in paragraph 10 of its findings, concluding that the article was not misleading.

The Third Party Issue

42. Regulation 8 provides as follows (emphasis added):-

> "The Regulator *may, but is not obliged to, consider complaints:* (a) from any person who has been personally and directly affected by the alleged breach of the Editors' Code; or (b) where an alleged breach of the Editors' Code is significant and there is substantial public interest in the Regulator considering the complaint, from a representative group affected by the alleged breach; or (c) *from a third party seeking to correct a significant inaccuracy of published information. In the case of third party complaints the position of the party most closely involved should be taken into account* …"

43. Bearing in mind Lord Woolf's warnings against technicality, three straightforward and uncontroversial points can be made about this provision. First it creates a

discretionary power to consider complaints; there is no obligation to do so. Secondly, when it comes to complaints from representative groups and third parties the discretion exists where the complaint concerns an inaccuracy that is (or is alleged to be) "significant". Finally, when deciding whether to consider a third-party complaint, IPSO is required to take into account the position of "the party most closely involved". As Mr Richards says, this is a mandatory consideration.

44. IPSO's website contains a section headed "Who can complain?" which includes the following ("the Website Wording") (again, the emphasis is mine):-

> "Accuracy (Clause 1 of the Editors' Code)":
>
> Anyone can complain about a *significant* inaccuracy which has been published on a general point of fact under Clause 1 of the Editors' Code. *Where an inaccuracy relates to a specific individual or organisation, IPSO may be able to take forward a complaint from a third party but will need to consider the individual or group directly affected*:
>
> - Can IPSO properly investigate the factual position?
> - Is the material in dispute in the public domain?
> - Has the person/people directly affected complained and are they likely to complain on their own behalf? If not, what is the likelihood that they would cooperate with IPSO?
> - What is the likely impact of a complaint on the person/people directly affected?
> - Would there be a legal difficulty in publishing any findings?"

45. It is common ground that the Website Wording sets out a policy, which Mr Grubeck dubs "the Complaints Policy". In my judgment, the Complaints Policy is consistent with Regulation 8. It expands on that Regulation by setting out factors that may be relevant when IPSO is exercising its discretion under Regulation 8(c), to consider or not to consider a third-party complaint. The list of factors is not exhaustive.

46. I have already set out the nature of the complaints, and some of the wording. It is fair to say that the main focus was on alleged inaccuracies that were said to amount to libel of Baroness Tonge. She was not one of the numerous complainants. It is therefore entirely understandable that IPSO sought further information about her stance in relation to the complaints. It wrote to one of the claimant's co-claimants, querying whether he was acting on behalf of Baroness Tonge and the PRC, with their knowledge and consent. It was the claimant who responded, and he asked Baroness Tonge to write to IPSO and clarify the position. On 24 February 2017, she wrote that she gave her "full consent to [the Claimant], to represent my interests in complaining about the articles". This was ambiguous, and IPSO asked if it meant she was authorizing the Claimant to act as her "agent and representative in bringing [her] complaint" against the newspapers. She replied in the negative, saying the complaint

was that of the claimant and the other complainants. She did say that she "shared and support[ed] their concerns", and urged IPSO to "get on with" the matter. IPSO took this for what it clearly was: support for the complaint of others. The Baroness, told that this was IPSO's understanding, did not seek to correct it.

47. Baroness Tonge's witness statement says that she misunderstood the position, and contains some evidence as to what she would or might have done if she had understood better. Mr Grubeck accepts that this is of no real relevance, as the claim must be resolved on the basis of the facts as they stood at the time of the decisions complained of. I merely note that the Baroness does not say for sure that she would have made a complaint of her own, and that she did not do so when offered the chance.

48. The claimant's case, as presented by Mr Grubeck, is that the third party in this case could hardly have made her position clearer: she supported the claimant's complaints and consented to their resolution by IPSO. IPSO's decision not to do so, submits Mr Grubeck, involved a misunderstanding or misapplication of its own Complaints Policy. The argument starts with the decision of the Independent Reviewer that there was no error of process in this regard. The Independent Reviewer, having referred to IPSO's offer in correspondence, said this (emphasis added):

> "… This would have allowed her to complain directly, or to have Mr Coulter act as her representative (as was the case with the PRC). *IPSO has no process to investigate beyond the direct complainant or their representative*, or to enable the publication complained about to do the same in response …"

49. Mr Grubeck focuses on the words I have emphasised, submitting that they amount in substance to a determination that IPSO cannot consider or determine third-party complaints at all. This submission has no support in the wording used in the Complaints Committee's determination, but Mr Grubeck seeks to buttress this argument by reliance on internal correspondence in which two members of IPSO's executive discussed the reasoning behind the Committee decision. The submission, based on this material, is that IPSO imposed what was in effect an additional requirement or threshold for the investigation of third-party complaints: that the third party should expressly agree to appoint the complainant as their agent and representative in bringing the complaint. This is said to amount to a "significant and unlawful fetter on [IPSO's] discretion to investigate complaints under its Regulations and policy". Thus, it is said, IPSO was in breach of the well-established principle that "a decision-maker must follow his published policy (and not some different unpublished policy) unless there are good reasons for not doing so": *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] AC 245 [26] (Lord Dyson).

50. This is an ingenious argument, but in my judgment it is fallacious. Clearly, the Committee and the Independent Reviewer would have been wrong in law to approach the issue on the basis identified by Mr Grubeck. It is equally clear that they did not do so. The wording used by the Independent Reviewer does not mean that IPSO has no power to entertain complaints by third parties. That would have been a startling misapprehension, given the clear terms of the Regulations and the Complaints Policy. In my view, the Independent Reviewer's words are unambiguous and mean what they

say: that IPSO has no *investigation process*, to determine the truth of statements about those who are not complainants. The internal correspondence does not support the view that IPSO executives took the mistaken view attributed to them. The reality is that a discretionary decision was made in the first instance, and upheld by the Independent Reviewer. The exercise of discretion was not invalidated by an error of law. Nor is there any other basis on which the decision could be said to be unlawful.

51. There is no doubt that the position adopted by Baroness Tonge was taken into account by IPSO. So was her situation. The concerns harboured by IPSO are clear enough from the correspondence with Baroness Tonge, and the internal correspondence between the committee members which has been disclosed. In its final letter to Baroness Tonge, IPSO pointed out that the result of making a complaint to IPSO may be a published decision on the website, identifying the complainant and giving details of the complaint. Once she had declined to make her own complaint, a draft determination was prepared for the Committee's consideration. This included a draft decision not to determine the third-party complaints. The Committee discussed whether it was right or wrong to decline to deal with the complaints about how her conduct had been depicted. Differing views were expressed. Plainly, the Committee treated this an issue over which it had a choice. The consensus arrived at was that the claimant's complaints should not be determined, but the Baroness should have an opportunity to complain herself. That was a legitimate conclusion, which was put into effect. It cannot be said that in this case the only proper exercise of discretion was to deal with the third-party complaints.

52. IPSO adjudications on third party complaints have the potential to create significant problems for the complainant, the newspaper(s) concerned, and – in some instances – may affect the wider public interest. IPSO has no powers to obtain evidence, nor any means of compelling third parties to engage in its complaints process. It would be unsatisfactory to reach a definitive conclusion on a matter of significance, in the absence of adequate evidence. Here, as Mr Richards submits, the article complained of included serious criticisms of the Baroness. There was the potential for conclusions on those criticisms to have a severe impact on her reputation. I would add that the context was one of highly-charged political controversy, which makes it all the more important for any determination to be soundly based. A number of issues arose from the complaints, in relation to which it could be said that input from the Baroness herself was highly desirable, and potentially crucial. IPSO's decision and that of the Reviewer were lawful.

The Report Issue

53. IPSO's role is expressly stated to be one of complaints handling. It is not an inquisitorial function. There is therefore nothing in the submission that Mr Grubeck sought at one stage to develop – going beyond the grounds for which permission was granted – that IPSO had a duty to inform itself and take account of the Report, whether or not the claimant invited it to do so. The starting point for consideration of this ground of challenge is the date when the claimant asked IPSO to consider the Report. That was on 24 March 2017, several months after the complaints were first lodged. The process of investigation had by then concluded, and the process of adjudication was well-advanced. It would not have been impossible to pause it, or to delay, in order to take account of fresh and additional evidence. IPSO has power, as Mr Grubeck points out, to extend its own time limits. But IPSO did not reach its

decision on the basis that the evidence was introduced too late, outside a time limit. It dealt with the matter as one requiring what, in Court proceedings, would be described as a case management decision. It had to weigh up whether the Report was of sufficient significance to justify the inevitable disruption and delay that would be caused by its introduction at that late stage. With hindsight, it can be clearly seen that the Report did not satisfy that criterion. Its relevance, if any, was to the conduct of Baroness Tonge, and the Committee decided – lawfully, in my judgment – not to determine those aspects of the complaint. But that decision remained in the future when IPSO decided not to consider the Report. Still, I am not persuaded that this aspect of IPSO's decision-making was wrong in law.

54. When he referred the Report to IPSO, the claimant said that the "key information" was to be found in Annex 1 to the Report. This was a report from the Sub-Committee on Lords' Conduct. It was just over a page in length. It was itself a report, summarising the conclusions reached by the Commissioner for Standards in respect of three allegations against the Baroness. The only relevant paragraph was number 3. This dealt with an allegation that the Meeting "was antisemitic and that, by allowing this to happen, Baroness Tonge had failed to act on her personal honour and so breached paragraph 8(b) of the Code of Conduct." The Sub-Committee reported that the Commissioner had found that the meeting was "not held with the intention of promoting antisemitism nor was taken over by those promoting antisemitism", and that the Baroness had not, therefore, acted in breach of paragraph 8(b).

55. In its email of 5 April 2017, IPSO pointed out that the Report concerned an allegation of breach of the House of Lords Code of Conduct; and that in order to consider the matter, the investigation would have to be re-opened "in order to provide this material to the newspapers, before passing this matter back to the Complaints Committee ..." IPSO observed that the claimant's complaints were about the accuracy of the newspaper reporting, and the Committee had a video of the Meeting. It was said that the Committee did not "require" the Report and that it "would [not] be proportionate" to delay its consideration of the matter, in order to provide it with this further material. That, on its face, represents a rational assessment of competing considerations. Mr Grubeck has sought valiantly but without success to persuade me that it is an irrational one.

56. The argument is that the conclusions in the Report were "relevant considerations", which IPSO was duty bound to take into account. In my judgment, they barely qualified as relevant. The connection between the conclusions of the Commissioner and the issues with which IPSO had to deal is tangential at best. It is not clear to me quite how the IPSO Complaints Committee could have been assisted by the Sub-Committee's summary of the conclusions reached by the Commissioner. In any event, the question for the Court is not just whether the conclusions of the Commissioner were in some way relevant to the issues before IPSO. As the Divisional Court emphasised in *R (Plantaganet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin) [2015] 3 All ER 261 [100], a challenge of this kind will only succeed if the information in question was such that no reasonable authority could have been satisfied that, without it, it had the information necessary for its decision. The question is whether the Report contained "matters which are so obviously material ... that they cannot be ignored", so that it was an error of law to

leave them out of account: see *R (DSD) v Parole Board* [2018] EWHC 694 (Admin) [141].

57. The contents of Annex 1 to the Report cannot, in my judgment, be so categorised. They included a third party's conclusions, after reviewing evidence. As such, they would be of questionable admissibility in a civil court. Moreover, they were findings on issues arising under a specific Code of Conduct. The issues differed from the ones that IPSO had to decide. In the end, it was for IPSO to decide the questions that were placed before it, on the evidence available to it. On analysis, the conclusion that bringing the Report into the evidential picture would not be "proportionate" is unassailable.

58. Mr Grubeck has sought in argument to suggest that there was additional material of relevance to be found within the Report, including a transcript of the Meeting. In this respect, again, he trespasses beyond the issues that were placed before the decision-maker at the time. But in any event he has not persuaded me that there was anything else that it was impermissible for IPSO to put to one side, for the reasons it gave. IPSO had not only a recording of the meeting but also a transcript. IPSO was perfectly entitled to take the view that this was enough for its purposes.

59. The reasoning behind this decision of IPSO's has been explored in more detail in the course of the hearing. Again, reference has been made to internal correspondence leading up to the Independent Reviewer's decision. I did not find that this assisted the claimant. I bear in mind that there is evidence that the Committee had adopted a policy stance that it would not sacrifice justice in the interests of speedy complaints resolution, but that does not really bear on the issue now before me, which must depend on the facts of the individual case. It cannot be argued, on the facts of this case, that IPSO's decision was one that allowed the demands of speed or efficiency to prevail over the desirability of a proper investigation or resolution.

60. Assessing the claimant's complaint about this aspect of IPSO's decision-making, the Independent Reviewer noted that further delay would have been undesirable. She observed that the Complaints Committee had access to the video of the meeting, so could see the original material without having to rely on the views of others; and that the Report had a different focus. Her understanding of the relevant facts was correct. She was right to reject the claimant's complaint about this aspect of IPSO's decision-making process.

61. IPSO relies on an additional ground of defence: that a decision-making process that involved its Committee in evaluating the Report would have infringed Parliamentary Privilege, in contravention of Article 9 of the Bill of Rights 1688 ("Proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament"). This was not a ground of decision. It is an afterthought. But it is relied on as a reason why relief should be refused in any event. IPSO may well be right about this. The Report is plainly a "proceeding in Parliament", and the authorities make clear that the process of evaluating a claim or complaint, or a defence, by reference to what has been said in Parliament does involve "questioning", and could involve "impeaching" what was said: see, for instance, *Office of Government Commerce v Information Commissioner* [2008] EWHC 774 (Admin) [2010] QB 98 [58-59] (Stanley Burnton J). The more difficult issue is whether IPSO's Complaints Committee, which is clearly not a "Court", counts as a "place outside Parliament"

within the meaning of Article 9. Mr Grubeck says not, referring to a Joint Select Committee Report which proposed a criterion which IPSO would not satisfy (Parliamentary Privilege – First Report, 9 April 1999, esp at para 91). IPSO submits that its Committee is a "place" within Article 9, on the basis that it is a regulator exercising an adjudicatory jurisdiction in the public interest, performing which is *ex hypothesi* a public function. I can see the force of that. Happily, perhaps, my other conclusions mean that I do not need to decide this issue.

The Irrationality Issues

62. The claimant makes two complaints. The first is that IPSO rejected complaints of inaccuracy "out of hand", because the alleged inaccuracies appeared in what the Committee judged to be opinion pieces. The claim documents do not clearly identify the findings at which this aspect of the claim is directed. My own analysis, having now teased out the specifics of the original complaint, suggests that it relates to the Second and Third Articles only, and to the complaints that I have numbered 7, 8 and 9.

63. I can readily accept the argument that a factual proposition does not cease to be so just because it appears in an article that, taken overall, can be labelled an opinion piece. That would be an irrational approach. But I do not agree that this is how the Committee dealt with the matter. Its position was a good deal more nuanced and subtle. It concluded that the offending passages in the articles needed to be assessed in their context. That was an entirely legitimate approach, consistent with principle. Complaint 7 was disposed of on the basis that the words used, in their context, were an expression of opinion. That, in my judgment, was a legitimate conclusion that cannot be described as irrational. The same is true of complaint 8 ("the sort of stuff you might have heard in Berlin in 1936 ..."). The Committee was plainly entitled to characterise that as comment, clearly identifiable as such. When it came to complaint 9, the Committee's assessment was not that the statements in question were not factual but rather that, in their context, they were not significantly inaccurate. The Committee said (in its paragraph 10) that the article was a comment piece which "contained a brief summary of the claims made at the meeting in question". It then went on to assess the reporting of those claims, in the light of the evidence it had received. It concluded that the reporting was "not misleading". I see no flaw in its approach.

64. The claimant's second argument under this ground of challenge is that IPSO misdirected itself as to the difference between Clause 1(i) and (ii) of the Editors' Code of Practice. The argument fastens on the Committee's findings that passages in the First and Second Articles were "not significantly misleading". The word "significant" is to be found in clause 1(ii), but not in clause 1(i). The Committee's use of this language is said to betray some confusion, involving the mistaken introduction of a higher threshold than the one provided for in clause 1(i). Mr Grubeck submits that the Committee misdirected itself as to the standard it was bound to apply. A complainant, he says, is entitled to an adjudication on whether a published item is inaccurate, whether or not the inaccuracy counts as "significant".

65. I can see real force in Mr Richards' argument, that this is just the kind of "technical" point of construction that the Court in *Stewart-Brady* considered an unsuitable basis for interference with decisions of the Press Complaints Commission. But I do not

think the point is sound in any event. True it is that the term "significant" appears in some parts of the Code but not in clause 1(i). The provisions for corrections in clause 1(ii) relate to inaccuracies, misleading statements or distortions that are "significant". The provisions for rights of reply in clause 1(iii) of the Code are similarly qualified. I note that the same is true of the discretion to entertain complaints from groups and third parties that is provided for in Regulation 8(b) and (c). And the same word appears in the Complaints Policy. But in the context of this case the claimant's argument is artificial. When they wrote to IPSO the complainants were not seeking a mere finding that the articles were inaccurate or misleading in some way that was not "significant". They were complaining of "gross misreporting". Their demands were for an "unambiguous and prominent apology", and IPSO's condemnation of the reporting, "unambiguously and in the strongest possible terms". The adjudications have to be read and assessed against that background.

66. I do not accept in any event that the Code imposes a duty on IPSO to make a finding of accuracy or inaccuracy in respect of every complaint under clause 1(i), however insignificant the Committee may deem the point to be. The obligation imposed by clause 1(i) is not an absolute duty of accuracy. It is a duty to take care to avoid the publication of information which is inaccurate, misleading or distorted. Such a duty is compatible with the publication of information that is in fact inaccurate or misleading to some degree. If a story is inaccurate or misleading to a significant degree, it may be harder to find that due care has been taken. Put another way, the extent to which a story is inaccurate, misleading, or distorted is closely connected with the question of whether due care has been taken to avoid that outcome.

67. The Committee was clearly aware that it was concerned with a duty of care. It so directed itself in terms at paragraph 13 of its decision on the complaints against *The Times*, where it expressly found a breach of that duty. The Committee went on in the very next paragraph to address separately the question that arises under clause 1(ii), namely whether this careless inaccuracy was "significant ... such as to require correction". This approach is unimpeachable. In my judgment, the Committee's findings that other parts of the articles were "not significantly misleading" are to be understood as findings that the newspaper was not in breach of the duty imposed by clause 1(i); there was nothing substantively misleading about the passages complained of, and sufficient care had been taken. The Independent Reviewer's conclusions on these points are likewise beyond challenge.

Conclusions

68. Assuming without deciding that decisions of IPSO's Complaints Committee and its Independent Reviewer are amenable to judicial review in public law, I would dismiss the claim. The Committee's decision not to adjudicate on the claimant's third-party complaints about the newspapers' reporting of Baroness Tonge's attitudes and behaviour was a rational decision, within the scope of the discretion given to IPSO by the Regulations. IPSO's decision not to take the Report into consideration was not a breach of any duty of inquiry, nor was it irrational. The Committee's approach to the inaccuracy complaints did not involve the errors of principle alleged by the claimant. Its decisions do not betray confusion over what can and cannot count as opinion, and were legitimate. Its approach to inaccuracy was not wrong in principle. The decisions of the Independent Reviewer, by which she rejected the claimant's challenges to IPSO's original decisions, were rational and lawful.

69. I refuse permission to amend the grounds to embrace a private law claim, and to transfer the claim out of the Administrative Court. The application came very late; I am doubtful of its merit; and in view of my conclusions on the merits it could not save the claim in any event.