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Case No: CO/1789/2006

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 October 2006

Before:

Mr Justice Collins

Between:

Ken Livingstone

Appellant

v

The Adjudication Panel for England

Respondent

Mr James Maurici (instructed by Mayer, Brown, Rowe and Maw LLP) for the Appellant
Mr Timothy Morshead (instructed by the Solicitor to the Standards Board for England) for Mr Steven Kingston, Ethical Standards Officer

Hearing dates: 4 & 5 October 2006

Judgment

Mr Justice COLLINS :

1. This is an appeal pursuant to s.79(15) of the Local Government Act 2000 (the 2000 Act) by Mr Ken Livingstone, the Mayor of London, against the decision of a Case Tribunal of the Respondent which decided that the appellant had failed to comply with the Code of Conduct of the Greater London Authority. On 24 February 2006 the Tribunal directed that the appellant should be suspended for a period of four weeks from 1 March 2006. That suspension was itself suspended by Ouseley J pending the determination of this appeal.

2. The Respondent itself has not appeared but the Ethical Standards Officer (ESO) whose report led to the hearing before the Tribunal and who presented the case against the appellant, has presented arguments in favour of upholding the decision that there has been a failure to comply with the Code of Conduct. He did not present any argument in support of the sanction. This was consistent with his approach to the hearing before the Tribunal, where counsel on his behalf had said:-

> "... we can indicate to you now that for our part we will certainly not be pressing you to exercise your powers of, for example, suspension or disqualification in relation to the Mayor, as is plain from the fact that Mr Kingston would otherwise have referred the matter to the Monitoring Officer under paragraph (c)."

3. The absence of an appearance by the Respondent is consistent with its usual practice, which is to leave to the ESO the task of making representations and adducing arguments to the court on its behalf. But in a letter of 15 March 2006 to the court, the President referred to the fact that 'a large part of the first two days of the Case Tribunal's hearing was taken up with considering the appellant's arguments that the Case Tribunal did not have jurisdiction to deal with the matter because of alleged procedural defects on the part of the ESO who had investigated the matter'. He went on to indicate that there was some dispute whether the Case Tribunal should have considered those arguments and he asked the court, if possible, to give some guidance on the point. Neither counsel had raised the issue in their very helpful and full skeleton arguments and at the outset of the hearing I asked each if he would be good enough to give some thought to it. They helpfully did so, but I am conscious that I have not been asked to nor have I gone into the issue in any depth.

4. The President of the Tribunal and those who act as chairmen of the Case Tribunal, are, as I understand, legally qualified. Whether or not that is so, it seems to me, that the Tribunal must have the power to ensure that it does have jurisdiction to consider a case and so can decide, if the question is raised, whether there have been any defects of procedure such as to render it unfair or outside the Tribunal's jurisdiction to proceed. It can and should decide, for example, whether to proceed would be so unfair to the individual whose conduct was under investigation as to render it an abuse of the process to proceed. But it must, I think, apply the law as set out in the statutory provisions, which of course include the relevant Regulations and the relevant Code of Conduct, unless the Code in question does not comply with the Regulations. It cannot entertain arguments that go to the vires of any of the statutory provisions: these must be addressed to this court through a claim for judicial review. While I must emphasise that these observations are not based on full argument, I did not understand counsel to dissent from them. Mr Morshead did raise a caveat, with which I agree, that in a given case the Tribunal might properly consider that it was more appropriate for a particular issue to be put to this court by way of judicial review rather than decided by it and so adjourn the hearing for that to be done.

5. This case arose as a result of a brief interchange between the appellant and a reporter of the Evening Standard, Mr Oliver Finegold, in the evening of 8 February 2005. The appellant had been hosting a reception at City Hall for Chris Smith, M.P., to mark the twentieth anniversary of his making public that he was gay. The news editor of the Evening Standard had decided that a reporter and a photographer should go to City Hall and wait outside to photograph and try to have words with those leaving the reception. It seems that no other representatives of the media attended and it was, to the appellant's knowledge, rare if not unique for the Evening Standard to have decided that such action should be taken. According to Mr Finegold, when interviewed by the ESO, he had been sent there 'to try and chat to some of the guests that were leaving the City Hall, and to write a nice piece about Chris Smith's party for celebrating twenty years of coming out as being gay'. It is to be noted that no piece, whether nice or otherwise, appeared in the Evening Standard about the reception. It was only because

the relevant interchange, which was recorded on tape by Mr Finegold, was leaked to and so reported by another paper that the complaint which led to the Tribunal decision was made.

6. As he left City Hall when the reception was ended, the appellant was confronted by Mr Finegold and the photographer. The tape commences with the appellant saying:-

> "You've got one of me already".

which makes it obvious that he was photographed. The tape, which lasts for 35 seconds overall, continues as follows:-

> "OF. Mr Liv(?) … Evening Standard. How did –
>
> [?]. [?someone in the background]
>
> KL. Oh how awful for you.
>
> OF. How did tonight go?
>
> KL. Have you thought of having treatment?
>
> OF. How did tonight go?
>
> KL. Have you thought of having treatment?
>
> OF. Was it a good party? What did it mean to you?
>
> KL. What did you do before? Were you a German war criminal?
>
> OF. No, I'm Jewish. I wasn't a German war criminal-
>
> KL. Ah right.
>
> OF. … I'm actually quite offended by that. So how did tonight go?
>
> KL. Well you might be, but actually you are just like a concentration camp guard. You're just doing it 'cause you're paid to aren't you?
>
> OF. Great, I've got you on record for that. So how did tonight go?
>
> KL. It's nothing to do with you because your paper is a load of scumbags –
>
> OF. How did tonight go?
>
> KL. … It's reactionary bigots …
>
> OF. I'm a journalist. I'm doing my job …
>
> KL. … and who supported fascism.
>
> OF. … I'm only asking for a simple comment. I'm only asking for a comment.
>
> KL. Well work for a paper that isn't …
>
> OF. I'm only asking for a comment.
>
> KL. … that hadn't a record of supporting fascism.
>
> OF. You've accused me …

There is a five second silence on the tape, following which an unidentified person can be heard to make a sound which might be 'right' or humph."

It is clear that Mr Finegold pursued the appellant as he was walking away and should have appreciated that he was not willing to answer any questions. The ESO described what the appellant did as a 'non-verbal indication that he did not want to be interviewed', but went on to say that politicians in high profile roles "must expect to be approached by journalists at inopportune or tiresome moments." In his statement to the Assembly on 14 February 2005, following the passing of a resolution calling on him to apologise for his remarks, the appellant said:-

> "The idea that you can pursue someone along the street, when they clearly do not wish to be interviewed by you, barking the same question in your face again and again, that too disfigures journalism."

The ESO quarrelled with the word 'barking', but that is entirely immaterial. The comment made by the appellant was in my view entirely appropriate.

7. It is important to understand the appellant's frame of mind when confronted by Mr Finegold. He had been the target of the Daily Mail in particular, which was owned by Associated Newspapers who also owned the Evening Standard. In the statement to which I have already referred, he described how he had been persecuted by the Mail Group in particular. Journalists had been despatched to try to obtain comments or information adverse to him from his family and his partner and from neighbours. The conduct he described was disgraceful and has not been disputed by the Mail Group. In addition, he loathed and despised Associated Newspapers because of its past record of pre-war support for anti-Semitism and Nazism and what he regarded as its continuing racist bigotry, hatred and prejudice. Whether or not all would regard that as a reasonable view of the approach of the newspapers owned by Associated Newspapers, it was a view which he honestly held. Part of the bigotry which he believed to exist was an anti-gay attitude. Thus he was suspicious of the motives of the Evening Standard news editor in sending a reporter and a photographer to wait outside the reception, having regard to what it was celebrating, with a view to seeing who had attended it.

8. While he did not give evidence in person to the Tribunal or speak directly to the ESO, his statements made to the Assembly were in evidence. There was in reality no issue of fact which needed to be decided. There was one matter in dispute, but that was not directly material to the issue to be decided. At the end of the recording, there is a 5 second gap where whatever was said appears to have been erased. The appellant asserted that at the end of the incident Mr Finegold swore at him, saying 'Fuck you'. This was denied and led the ESO to decide to consider whether it was a further breach of the Code inasmuch as the appellant had been responsible for making a false allegation. This was a somewhat extraordinary decision, but he concluded that on the balance of probabilities the appellant 'did not knowingly fabricate the allegation'. I am bound to say that the gap in the recording is strange and I would have thought was consistent with Mr Finegold wanting to ensure that something was concealed. Thus it helps to support the appellant's assertion. But, as is I think obvious, it could not affect the decision which had to be made whether what the appellant said amounted to a failure to comply with the Code.

9. I have mentioned the resolution of the Assembly calling upon the appellant to apologise and to withdraw his remarks. The full resolution was in the following terms:-

> "This Assembly deeply regrets the Mayor's comments made to Evening Standard Journalist Oliver Finegold and the offence those remarks have caused and calls upon the Mayor to apologise and withdraw his remarks immediately.
>
> The Assembly urges the Mayor, through his programme of engagement with the Jewish community, to ensure that he communicates continuing commitment to fighting anti-Semitism, and the ongoing commitment of his administration to marking the unique horror of the Holocaust, the greatest racial crime in history.
>
> The Assembly notes the commitment of the Mayor's administration to opposing anti-Semitism and celebrating the contribution of Jewish Londoners, such as the hosting of the Anne Frank Exhibition in City Hall, the annual marking of the

> Holocaust Memorial, and decisions by the Mayor to ensure that the Eruv in North London could be established.
>
> Given the Mayor's opposition to racism and fascism it would be unfortunate if an incident with a journalist overshadowed the work his administration is doing to oppose anti-Semitism and to engage with the Jewish Community."

Later that day the appellant made his first statement to the Assembly. Having spelt out the campaign waged against him by the Mail Group and his loathing for it and its policies, he concluded by saying:-

> "You know that I wrote to every editor and electronic media editor when my son Thomas was born saying I would not be using my family in the media and I asked them to respect that privacy. Of course, that was not enough for the Daily Mail. They got a photographer, with a telephoto lens lurking around, wanting to see me out with him and I expect that it will carry on indefinitely. Finally I say, if I could in anything I say relieve any pain anyone feels, I would not hesitate to do it but it would require me to be a liar. I could apologise, but why should I say words I do not believe in my heart? Therefore, I cannot. If that is something that people find that they cannot accept, I am sorry genuinely that they feel that way but this is how I feel on the receiving end of nearly a quarter of a century of them and their policies and their behaviour and their tactics. Therefore I cannot say to you words I would not believe in my own heart."

10. On that day, 14 February 2005, the Board of Deputies of British Jews made a formal complaint to the Standards Board for England. It stated:-

> "The complaint relates to the widely reported and broadcast statements of Mayor Livingstone in the course of an exchange with Evening Standard reporter Oliver Finegold. In particular the Mayor commented as follows:-
>
> – On hearing the name of the paper for which Mr Finegold was reporting, Mayor Livingstone asked Mr Finegold if [he] was or had been a 'German War Criminal'.
>
> – In response to Finegold's reply "No, I'm Jewish, I wasn't a German war criminal. I'm quite offended by that", Mayor Livingstone says: "Ah right, well you might be, but actually you are just like a concentration camp guard, you are just doing it because you are paid to, aren't you?"
>
> It is the complainant's contention that:-
>
> – Mayor Livingstone's references to 'German War Criminal' and 'concentration camp guard' were entirely unwarranted and unjustified in the circumstances and had no bearing on or relevance to the exchange with Mr Finegold;
>
> – Such comments were particularly offensive given that Mr Finegold stated that he was Jewish and that they were made at an event for predominantly Gay Men and Lesbians, given that Jews and homosexuals were victims of the Nazi concentration and extermination camps;
>
> – In making such comments Mayor Livingstone demonstrated a gross insensitivity to and a wilful disregard for the feelings of, appreciable numbers of those he is supposed to represent as holder of the office of Mayor of London, including but not limited to Jews and gays and lesbians in London.
>
> In light of the above it is the complainant's further contention that Mayor Livingstone, by reference to the Seven Principles of Public Life set out by the Committee on Standards in Public Life:-
>
> – Failed to 'promote and support these principles by leadership and example'.

> – Failed to act objectively, with integrity and in the public interest by allowing his personal antipathy to the Evening Standard newspaper to influence his actions and statements.
>
> – Should be 'accountable for [his] … actions to the public and must submit [himself] to whatever scrutiny is appropriate to [his] office'."

11. On 22 February 2006, the appellant made a further statement. In it, he repeated his views of the Mail Group. He said:-

> "What was the motive of the Mail Group in whipping up this media fire storm? If insulted why did the Daily Mail Group journalist or the editor of the Evening Standard not get in touch and say they thought I had gone too far? If the Daily Mail Group journalist had expressed regret for his behaviour on the street I would have been happy to withdraw my comments and assure him I bore him no hard feelings."

Later in the statement, he said:-

> "Over the last two weeks my main concern has been that many Jewish Londoners have been disturbed by this whipped up row. I do not equate the actions of one reporter with the total abdication of responsibility shown by those who were complicit to whatever degree in the horrors of the holocaust. But I do believe that abdicating responsibility for one's actions by the excuse that 'I am only doing my job' is the thin end of the immoral wedge that at its other extreme leads to the crimes and horrors of Auschwitz, Rwanda and Bosnia.
>
> I have been deeply affected by the concern of Jewish people in particular that my comments downplayed the horror and magnitude of the holocaust. I wish to say to those Londoners that my words were not intended to cause such offence and that my view remains that the holocaust against the Jews is the greatest racial crime of the 20th century."

12. The Assembly resolution recognised the role played by the appellant in opposing racism and anti-Semitism. It could not sensibly be suggested that he is or ever has been anti-Semitic. He has not approved of some of the activities of the State of Israel and has made his views about that clear. But that has nothing to do with anti-Semitism. However, the Board of Deputies in a letter of 26 April 2005 to the ESO expressed concern at the effect on holocaust survivors in particular of his remarks and referred to 'a spate of anti-Semitic incidents that followed the events of 8 February and the objections raised to Mr Livingstone's comments' including abusive e-mails. Sadly, those irrational and unpleasant characters who indulge in anti-Semitic activities will use any or no excuse to display their views.

13. Before considering how the Tribunal dealt with the complaint, I should set out the statutory procedure. The Respondent came into existence under Part III of the 2000 Act, which was conceived to regulate the conduct of local government members and employees. The model Code of Conduct which has been established pursuant to the Act is based on a 1986 report of a Committee chaired by David Widdicombe, Q.C. (Cmnd 9797) and a 1997 report by the Committee on Standards in Public Life chaired by Lord Nolan (Cm.3702-1). The Code came into existence following an extensive consultation exercise. It followed Regulations which set out the general principles to govern the conduct of members which were made under s.49(1) of the 2000 Act, which enabled the Secretary of State 'by order [to] specify the principles which are to govern the conduct of members and co-opted members of relevant authorities in England …' S.50(1) went on to enable him 'by order [to] issue a model code as regards the conduct which is expected of members and co-opted members of relevant authorities in England …' S.50(4) provides:-

> "A model code of conduct –
>
> (a) must be consistent with the principles for the time being specified in an order under section 49(1) …
>
> (b) may include provisions which are mandatory; and

(c) may include provisions which are optional".

S.51 imposes a duty on relevant authorities to adopt a code which must include all mandatory provisions of the model code and may include any optional provisions and any other provisions which are consistent with the model code (s.51(4)). S.52 is important, having regard to an argument put forward by Mr Maurici which, he submits, means that this appeal must be allowed. It reads:-

> "52(1) A person who is a member or co-opted member of a relevant authority at a time when the authority adopt a code of conduct under section 51 for the first time –
>
> (a) must, before the end of the period of two months beginning with the date on which the code of conduct is adopted, give to the authority a written undertaking that in performing his functions he will observe the authority's code of conduct for the time being under section 51, and
>
> (b) if he fails to do so, is to cease to be a member or co-opted member at the end of that period.
>
> (2). The form of declaration of acceptance of office which may be prescribed by an order under section 83 of the Local Government Act 1972 may include an undertaking by the declarant that in performing his functions he will observe the authority's code of conduct for the time being under section 51.
>
> (3). A person who becomes a member of a relevant authority to which section 83 of that Act does not apply at any time after the authority have adopted a code of conduct under section 51 for the first time may not act in that office unless he has given the authority a written undertaking that in performing his functions he will observe the authority's code of conduct for the time being under section 51.
>
> (4). A person who becomes a co-opted member of a relevant authority at any time after the authority have adopted a code of conduct under section 51 for the first time may not act as such unless he has given the authority a written undertaking that in performing his functions he will observe the authority's code of conduct for the time being under section 51."

14. Each authority must set up a standards committee which must consist of at least 2 members of the authority and at least one independent member (s.53(4)). The GLA has resolved that members must be in the majority in its standards committee. The committee must promote and maintain high standards of conduct by the members and assist them to observe the authority's code of conduct (s.54(1)).

15. S.57 of the Act creates the Standards Board for England which, in exercising its functions, 'must have regard to the need to promote and maintain high standards of conduct by members of relevant authorities in England' (s.57(4)). It has appointed, as it has power to do (s.57(5)(a)), ethical standards officers, to whom it must refer written allegations which it considers should be investigated, that a member of a relevant authority has failed, or may have failed, to comply with the authority's code of conduct (s.58(1) and (2)). S.59(1) enables an ESO to investigate not only a case referred to him under s.58(2) but also other cases in which he considers that a member has failed or may have failed to comply with the authority's code of conduct and which have come to his attention as a result of the investigation of the allegation referred to him. The purpose of the investigation is to decide whether any of the findings mentioned in s.59(4) is appropriate. These are:-

> "(a) that there is no evidence of any failure to comply with the code of conduct of the relevant authority concerned;
>
> (b) that no action needs to be taken in respect of the matters which are the subject of the investigation,

> (c) that the matters which are the subject of the investigation should be referred to the monitoring officer of the relevant authority concerned, or
>
> (d) that the matters which are the subject of the investigation should be referred to the Adjudication Panel for England for adjudication by a Tribunal falling within s.76(1)."

A monitoring officer is appointed under the Local Government and Housing Act 1989 and one of his responsibilities is to bring a reference from an ESO following a finding under section 59(4)(c) before the authority's standards committee for consideration.

16. Ss.60 to 67 of the 2000 Act contain detailed provisions setting out the procedures that should be adopted by ESO's in carrying out their functions. Although there were lengthy submissions made to the Tribunal that the ESO had failed to comply with those provisions in a number of respects, they have not been repeated before me and I do not need to refer to those provisions.

17. S.75(1) establishes the Adjudication Panel for England whose members are to be appointed by the Lord Chancellor (now in accordance with the Constitutional Reform Act 2005) and must possess 'such qualifications as may be determined by the Lord Chancellor'. S.79 deals with Tribunal decisions and requires them, by s.79(1), to decide whether or not any person to which (sic) the matter upon which it is adjudicating relates has failed to comply with the Code of Conduct of the relevant authority concerned. Its powers, if it does so decide, include suspension or partial suspension for a maximum of 12 months (s.79(5)), disqualification for a maximum of 5 years (s.79(6) or notice to the relevant authority that the member has failed to comply with its code of conduct, specifying the details of that failure (s.79(7)).

18. The order made under s.49 of the Act is The Relevant Authorities (General Principles) Order 2001 (2001 No.1401). Paragraph 3 provides:-

> "3(1). The Secretary of State hereby specifies in the Schedule to this Order, the principles which are to govern the conduct of members of relevant authorities in England …
>
> (2). Only paragraphs 2 and 8 of the Schedule to this Order shall have effect in relation to the activities of a member that are undertaken other than in an official capacity."

Paragraphs 2 and 8 of the Schedule provide:-

> "2. Honesty and Integrity.
>
> Members should not place themselves in situations where their honesty and integrity may be questioned, should not behave improperly and should on all occasions avoid the appearance of such behaviour.
>
> 8. Duty to Uphold the Law
>
> Members should uphold the law and, on all occasions, act in accordance with the trust that the public is entitled to place in them."

19. This Order was followed some six months later by the Local Authorities (Model Code of Conduct)(England) Order 2001 (2001 No.3575). This Order applies to the Greater London Authority (GLA) (Paragraph 1(21)(d)) and provides that all the provisions of the Model Code set out in Schedule 1 to the Order are mandatory (Paragraph 2(2)). Schedule 1 applies to authorities operating executive arrangements and so to the GLA. Paragraph 1(2) provides:-

> "An authority's code of conduct shall not, apart from paragraphs 4 and 5(a) below, have effect in relation to the activities of a member undertaken other than in an official capacity."

The Tribunal decided that when he made the remarks the appellant was not acting in his official capacity. However, the ESO thought that he had been so acting. Accordingly, he faced allegations that he had contravened paragraphs 2(b) and 4 of the Code. These provided:-

> "2. A member must …
>
> (b) treat others with respect.
>
> 4. A member must not in his official capacity, or any other circumstance, conduct himself in a manner which could reasonably be regarded as bringing his office or authority into disrespect."

I should also set out paragraph 5(a), which provides:-

> "A member must not in his official capacity or any other circumstance, use his position as a member improperly to confer on or secure for himself or any other person, an advantage or disadvantage."

20. The ESO's opinion was that 'when responding to the questions of Mr Finegold' the appellant was, albeit he was leaving the building after the reception, acting in his official capacity. The Tribunal did not agree since in its view official capacity meant that a member was conducting the business of the authority or the office to which he had been elected or acting as a representative of the authority. It is highly doubtful that the observations made by the appellant could properly be regarded as responses to the questions of Mr Finegold, but, even if they could, they did not and could not reasonably have been regarded as being uttered in his official capacity. This was what is popularly known as doorstepping and any observations made in such circumstances are made outside official capacity. It would have been different if, for example, the appellant had been holding a press conference. I have no doubt that the Tribunal was correct and Mr Morshead has not sought to argue the contrary. Thus the failure to comply with Paragraph 2(b), which was alleged by the ESO, could not be made out.

21. Mr Maurici submitted that the effect of s.52 of the Act was to prevent a Code of Conduct from covering activities which were carried out in a member's private life. This submission was not in his notice of appeal and so he needed leave to amend. Mr Morshead did not object to the point being taken since it depended upon the correct construction of s.52 and so amounted to a pure point of law. However, he did raise a slight reservation in that he suggested that, if I was persuaded by Mr Maurici's argument, I should consider remitting the case to the Tribunal to decide whether the activities, while not in the appellant's official capacity, could nonetheless be regarded as falling within the words 'in performing his functions', which are the important words in s.52. He did not pursue this reservation with any enthusiasm and, as will become apparent, I do not regard it as necessary or desirable to take that course.

22. Mr Maurici's submission depends on the words 'in performing his functions'. Their inclusion in s.52 shows, he submits, that Parliament recognised the need to limit the scope of Codes of Conduct and that it was not intended that they should affect what a member of a council did in his private life. There is, following the Tenth report of the Committee on Standards in Public Life (Cm.6407, January 2005), consideration of amending the model code by removing the phrase 'in any other circumstance' from Paragraphs 4 and 5(a). The Tenth report contained a recommendation to that effect. In Paragraph 3.88 of the Report, this is said:-

> "The relationship between standards of conduct by public office-holders acting in their official capacity, and conduct in their private lives has been a difficult and contentious issue over the years. The Committee in its First Report drew a significant difference between, for example, sexual misconduct and financial misbehaviour. We indicated that while rules could be usefully drawn up for the latter, they could not for the former. This has remained the case in all of its subsequent reports and recommendations. The Committee has concentrated on standards of conduct in respect of public, rather than private life except where private interests, financial or otherwise could give rise to a potential conflict of interest with an office-holders' public role. The public attitudes research published by the Committee indicated that the public place a lower priority on public office-holders setting a good standard in their private lives than they do in respect of public conduct."

In Scotland, the rules of conduct apply to members only when they are acting as councillors including representing the council on official business. The reasons for this are explained by the Chief Investigating Officer of the Standards Commission for Scotland:-

> "In Scotland the view has been taken that the misconduct must relate in some way to the activity of the person as a councillor. If there is a link, then you can apply the terms of the Code. If the misconduct relates purely to the personal life of the councillor, then on the face of it there is a presumption that there is not necessarily a breach of the code."

In Paragraph 3.92 the Report noted that the Adjudication Panel for England made it clear that it operated a higher threshold in relation to 'any other circumstance' than might be implied by the Code. It believed that the circumstances should be sufficiently proximate to, or reasonably capable of being linked to or have a bearing on, the official capacity.

23. The government has responded by indicating that councillors should 'set an example of leadership to their communities' and that misconduct in private lives should only be within the code if it was unlawful. The Standards Board itself has broadly agreed with this response, but has suggested that, in addition to an unlawful act which has been dealt with by a conviction or the imposition of criminal sanctions (for example, I suppose, an anti-social behaviour order), it should include 'an activity which may be seen as unlawful although no case has been brought'. It is not necessary to go into details any further for the purposes of this judgment.

24. Mr Maurici also draws attention to the undertaking entered into by the appellant on accepting office. This included the following:-

> "I undertake that in performing the functions of that office I will observe the Greater London Authority's Code of Conduct for the time being under Section 51 of the Local Government Act 2000."

This follows the wording of s.52 of the Act. The precise wording of any undertaking is immaterial since the Code can go no further in what it regulates than the Act permits.

25. Mr Morshead submits that Mr Maurici's argument means that Paragraphs 4 and 5(a) of the Model Code are ultra vires in so far as they cover conduct beyond official capacity. While this does not mean that he is necessarily wrong, it is a point of considerable importance and some cases, including at least two which have gone on appeal to this court, may have been wrongly decided. The point has not hitherto been taken and did not seem to occur to Mr Maurici or those advising the appellant until a very late stage in the proceedings.

26. While it is true that there are no words of limitation in ss.49 to 51, the words in s.52 must have been intended to have some effect. I do not accept Mr Morshead's submission that it means only that the member's undertaking to abide by the Code is to last for so long as he has relevant functions to perform. If that is what Parliament had intended, it could easily have made it clear by using some such wording as 'so long as he remains a member'. The expression 'in performing his functions' cannot in my view sensibly bear the construction suggested by Mr Morshead. There has always been concern about the extent to which a councillor should be subject to a code of conduct in his private life and it is not in the least surprising that some limitation should have been included in the Act. The approach in Scotland applies a limitation which is not the case in England. Although the Standards Board may apply a higher threshold, it is important that councillors should know what they can and cannot do and where the line is to be drawn.

27. Conduct which is regarded as improper and meriting some possible sanction will often be constituted by misuse of a councillor's position. He may be purporting to perform his functions if, for example, he seeks to obtain an advantage by misusing his position as a councillor. Such misuse may not amount to corruption; it may nonetheless be seen not only to be improper but to reflect badly on the office itself. If the words 'in performing his functions' are applied literally, it may be said that such misuse, and other misconduct which is closely linked to his position as such may not be covered.

28. It seems to me that what I will describe as the words of limitation must be construed so as to promote the purpose of the statutory provisions, namely the setting of standards for and the

regulation of conduct of those who choose to enter local government. Thus I think the words do not necessarily cover the same conduct as 'in his official capacity' but may extend further. They must cover activities which are apparently within the performance of a member's functions. Thus misuse of the position for personal advantage will appear to whoever is affected by it to have been in the performance of functions. It seems to me that the expression should be construed so as to apply to a member who is using his position in doing or saying whatever is said to amount to misconduct. It is obviously impossible for a member who was acting in his official capacity to argue that by acting improperly he was not performing his functions. Such a construction would emasculate the system set up by Parliament.

29. It follows that conduct which is outside his official capacity can be covered by the words in s.52 and so can properly be within the Code of Conduct. Accordingly, I do not think that the words 'or any other circumstance' mean that the Model code is to that extent ultra vires. That phrase must receive a narrow construction so that any other circumstance will not extend to conduct beyond that which is properly to be regarded as falling within the phrase 'in performing his functions'. Thus, where a member is not acting in his official capacity (and official capacity will include anything done in dealing with staff, when representing the council, in dealing with constituents' problems and so on), he will still be covered by the Code if he misuses his position as a member. That link with his membership of the authority in question is in my view needed. This approach is very similar to that adopted in Scotland and in my judgment accords with the purpose of the Act and the limitations that are appropriate. It is important to bear in mind that the electorate will exercise its judgment in considering whether what might be regarded as reprehensible conduct in a member's private life should bring his membership to an end in due course. Equally, it is important that the flamboyant, the eccentric, the positively committed – one who is labelled in the somewhat old fashioned terminology, a character – should not be subjected to a Code of Conduct which covers his behaviour when not performing his functions as a member of a relevant authority.

30. It seems to me that unlawful conduct is not necessarily covered. Thus a councillor who shoplifts or is guilty of drunken driving will not if my construction is followed be caught by the Code if the offending had nothing to do with his position as a councillor. Section 80 of the Local Government Act 1972 provides for disqualification for election to a local authority of those who have within 5 years before the date of election been convicted of any offence which has resulted in a sentence of 3 months imprisonment (whether or not suspended) or more. Parliament could for example have provided that conviction of any offence carrying imprisonment whatever the sentence should lead to consideration of some punitive action by the Standards Board. It seems to me that if it is thought appropriate to subject a member of a local authority to a code which extends to conduct in his private life, Parliament should spell out what is to be covered.

31. The Tribunal correctly decided that the appellant was not in his official capacity when he made the remarks in question. It is not in my view even arguable that when making them he was performing his functions as Mayor. Thus there is no reason to remit the case for any reconsideration of this issue. On its true construction, Paragraph 4 of the Code of Conduct did not apply to what the appellant said and so the finding by the Tribunal that there had been a failure to follow the provisions of the Code cannot stand.

32. I must however deal with the appeal on the basis that Paragraph 4 of the Code of Conduct did apply to the circumstances. This involves considering the reasons given by the Tribunal for finding a failure to comply and the arguments put forward by Mr Maurici. In short, he submits that, while the appellant may properly have been considered to have brought himself into disrepute by what he said, he did not bring his office or authority into disrepute. He further submits that it was wrong to decide that the Code extended beyond his official capacity to cover what was said by him since that extension infringed his right of freedom of speech.

33. I shall deal with this latter submission first. The right of freedom of speech has always been recognised by the common law. In *Derbyshire CC v Times Newspapers* [1993] A.C. 534 at p. 551F, Lord Keith observed:-

> "My noble and learned friend, Lord Goff of Chieveley, in *A-G v Guardian Newspapers Ltd* [1990] 1 A.C. 109, 283-284, expressed the opinion that in the field of freedom of speech there was no difference in principle between English law

> or the subject and Article 10 of the Convention. I agree, and can only add that I find it satisfactory to be able to conclude that the common law of England is consistent with the obligations assumed by the Crown under the Treaty in this particular field."

Article 10 is now incorporated into our law by the Human Rights Act, and so whether a particular restraint on freedom of speech was proportionate has expressly to be considered. It is Mr Maurici's submission that in this case it was not and he relies in particular upon the government's response to the reconsideration to which I have already referred that conduct not in an official capacity should only be within the Code if unlawful. That he submits demonstrates that the restraint in this area was disproportionate in that it cannot be said to be necessary in a democratic society.

34. There can be no doubt that restraints imposed by a code of conduct designed to uphold proper standards in public life are in principle likely to be within Article 10(2). But it is important that the restraints should not extend beyond what is necessary to maintain those standards. There has always been a debate over the extent to which conduct in private as opposed to public life should be regulated and that debate continues. The government has, it seems, recognised that Paragraph 4 of the Code may go too far, but that does not of itself mean that it is not necessary in the circumstances. It must, however, raise some doubts. Added to that is the recognition that it is not considered necessary to go that far in Scotland.

35. Mr Maurici has suggested that the appellant was making a political comment so that there is a higher threshold to be surmounted in establishing that the restraint was proportionate. Interference with the right of free speech which impedes political debate must be subjected to particularly close scrutiny: see *Sanders v Kingston* [2005] LGR 719 in which at p.745h Wilkie J refers to the high level of protection given to expressions of political views.

36. I have no doubt that the appellant was not to be regarded as expressing a political opinion which attracts the high level of protection. He was indulging in offensive abuse of a journalist whom he regarded as carrying out on his newspaper's behalf activities which the appellant regarded as abhorrent. Nevertheless, as Mr Morshead accepted, Article 10 applied. Anyone is entitled to say what he likes of another provided he does not act unlawfully and so commits an offence under, for example, the Public Order Act. Surprising as it may perhaps appear to some, the right of freedom of speech does extend to abuse. Observations, however offensive, are covered. Indeed, as Hoffman, LJ observed in *R v Central Television Plc* [1994] 3 All ER 641 at 652:-

> "Freedom means … the right to say things which 'right-thinking people' regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute … It cannot be too strongly emphasised that outside the established exceptions … there is no question of balancing freedom of speech against other interests. It is a trump card which always wins."

37. The Tribunal decided in Paragraph 65 of its decision that 'by restricting the application of the Code to those other circumstances which are closely allied to a member's official duties, the interference with Convention rights can be restricted to that which is proportionate to what is necessary in the interests of a democratic society'. It went on in Paragraphs 68 and 69 to explain why it regarded the interference with the right as proportionate and so permitted by Article 10(2). It said:-

"68. The exchange between the Mayor of London and a journalist which gave rise to this reference took place immediately after the Mayor left a reception at City Hall and began with the journalist asking how the evening had gone. The Mayor chose to make some comment. Although finding that the Mayor was not at that time fulfilling his official duties (they having ceased for the day), the Case Tribunal has no difficulty in saying that the events were sufficiently proximate in time, in place and, so far as the journalist's question was concerned in content, to mean, that it is proper to regard Paragraph 4 of the Code of Conduct as being applicable to the situation.

69. Bearing in mind that the exchange took place in a public place and that the Respondent knew that his remarks were being recorded the Case Tribunal is doubtful whether any

interference with the Respondent's private life can as a matter of fact be made out. Insofar as the fact that Code of Conduct can result in a member of a local authority having to account for what is said in such circumstances (when as the Case Tribunal found he was not "on duty") can be seen as an intrusion into his private as opposed to his public life than in the Case Tribunal's view such interference can be seen as necessary and permitted by law (in the form of the promulgation of the Code), for the protection of the public order and morals or for the protection of the rights and freedoms of others."

38. I do not accept the reasoning set out in Paragraph 68. The appellant had ceased to act in his official capacity as host of the reception and was leaving the building to go home. He was accosted outside the building, but it does not seem to me to matter when he was approached. It might have been when he reached his front door. Would that have been regarded as sufficiently proximate in time or place? If not, where does he have to be and how long after he has ceased his official duties for such proximity to exist so as to justify the application of the code? The answer in my view is that since he was off duty, there was no basis for finding that what he said was, to use the Tribunal's words, so closely allied to his official duties as to justify the restraint on his freedom to express himself within the law as forcibly as he thought fit. And the fact that the journalist's question related to something he had done as mayor cannot produce the alliance that the Tribunal regarded as necessary. As the appellant pointed out, it was not as if it was necessary to approach him when off duty. He held regular press conferences when any matter could be raised and when his responses would be subject to the constraints of the code of conduct.

39. The burden is on the defendant to justify the interference with freedom of speech. However offensive and undeserving of protection the appellant's outburst may have appeared to some, it is important that any individual knows that he can say what he likes, provided it is not unlawful, unless there are clear and satisfactory reasons within the terms of Article 10(2) to render him liable to sanctions. In my view, the Tribunal misdirected itself in deciding that it was proportionate for the Code to extend as far as it did on the Tribunal's construction. The restraint was not in my judgment shown to be necessary in a democratic society even though the higher level of protection appropriate for the expression of political opinion was not engaged.

40. I turn to the submission that there was no breach of Paragraph 4 because by what he said the appellant did not bring his office or authority into disrepute. The Tribunal dealt with this in Paragraph 74 of its decision, saying:-

> "The Case Tribunal can see a theoretical possibility that damage can be caused to the reputation of an individual holding an office without damage being caused to the reputation of the office itself. In practice, however, there is a very real risk that damage to the reputation of the former seeps across to cause damage to the latter. The higher the profile of the post and the more the postholder seeks to stamp his individuality on the office the harder it is to envisage circumstances where damage to his own reputation does not also cause damage to the reputation of the office. In the view of the Case Tribunal the reasonable onlooker would regard Mr Livingstone's own reputation as being diminished as a result of the exchange and having reached that view, bearing in mind Mr Livingstone's profile and the difficulty of separating him as an individual from the role of the office he holds, have also concluded that the remarks have had the effect of damaging the reputation of his office as Mayor."

41. In my view, the distinction is more than theoretical. There is a danger in regarding any misconduct as particularly affecting the reputation of the office rather than the man. If a councillor commits sexual misconduct or is convicted of theft, I do not think the reputation of the office is thereby necessarily brought into disrepute. His certainly will be. If the high profile test is correct, anything done by the appellant which can be regarded as improper may fall within Paragraph 4, however remote from his official position. Having said that, I recognise the force of the Tribunal's view of the difficulty in separating the man from the office. I have no doubt that the Tribunal was entitled to conclude that what he said did bring him into disrepute. I am less clear that in reality it was right to say that the office of Mayor was brought into disrepute. While the appellant has a high profile as Mayor, I doubt that many people would regard what he did as bringing disrepute on the office rather than on him personally. Misuse of the office can obviously bring disrepute on the office, but personal

misconduct will be unlikely to do so. I think the Tribunal applied a test which failed to recognise the real distinction between the man and the office and I am not persuaded that his conduct did fall within Paragraph 4. I appreciate Mr Morshead's point that the appellant occupies an office in which he exercises real power over the lives of millions of people and so has an unique position with unique powers. This means that he has responsibilities and people, including those who did not vote for him, are entitled to expect that he will conduct himself to a high standard suitable to his office. That may well be so, but it does not mean that, if he falls below that high standard, the office as well as he are brought into disrepute.

42. In the skeleton arguments, considerable space was occupied in arguing what should be the court's approach in considering appeals under s.79(15). CPR 52.11 applies. It provides that every appeal will be limited to a review of the decision of the lower court [or Tribunal] unless a practice direction provides otherwise or the court considers that in the circumstances of an individual appeal, it would be in the interests of justice to hold a rehearing (CPR 52.11(1)). The Practice Direction provides for a rehearing in the case of a number of appeals against disciplinary Tribunals. Appeals under s.79(15) are not included. The Practice Direction is, in my view, somewhat unsatisfactory and the distinction between what is required for a rehearing rather than a review is in any event somewhat indistinct. In *Du Pont Trade Mark* [2004] FSR 293, the Court of Appeal considered the distinction: see per May LJ at pp.324 to 326. He pointed out that the old RSC O.55, which dealt with appeals, referred to a rehearing, but it was always regarded as not being a rehearing in the fullest sense of the word. Rather, it "reviewed the decision under appeal giving it the respect appropriate to the nature of the court or Tribunal, the subject matter and, importantly, the nature of those parts of the decision making process which was challenged." (Paragraph 90 on p.324). The same approach is applicable to rehearings under CPR 52.11. Thus at the lesser end, the meaning of rehearing merges with that of review. Perhaps the most important distinction is that in a rehearing, fresh evidence is likely to be admitted, if relevant and material, even though it does not pass the *Ladd v Marshall* [1954] 1 W.L.R. 1489 test. However, in the end Mr Maurici accepted that the review approach was correct. Either approach involves giving weight to the fact that the Tribunal in question has expertise. This Tribunal sets the standards and has a member who has experience in local government. Thus I should and do give considerable weight to its judgment, but in this case that is not so important since the appeal turns more on the construction of the statutory provisions and of Paragraph 4 of the Code. Furthermore, in relation to Article 10, I do not think that the Tribunal has particular expertise.

43. Mr Maurici argued that the Tribunal had not made sufficient findings of fact. It did not need to make explicit findings of matters which were not in issue and what it said enabled the appellant to know why it had decided against him. I have referred to the matters relied on by the appellant to indicate his state of mind. There was no need for the Tribunal to spell them out in reaching its decision. It was open to Mr Maurici to rely on them in submitting that the decision was wrong and he did so.

44. I indicated in the course of argument that, whatever my decision on whether there had been a failure to comply with the Code, I would not uphold the sanction of suspension. It was in my view clearly wrong.

45. I must make it clear that this decision must not be taken as an indication that the appellant's actions were appropriate. They clearly were not. His initial question: "Were you a German war criminal?" was obviously intemperate. However strongly he felt about the impropriety of the journalist's conduct, the remark was unnecessarily offensive. In itself, it would not have led to the proceedings against the appellant. But, when he knew that Mr Finegold was particularly offended because he was Jewish, to go on to compare him to a concentration camp guard was indefensible. He should have realised it would not only give great offence to him but was likely to be regarded as an entirely inappropriate observation by Jews in general and those who had survived the holocaust in particular.

46. The appellant could have put the criticism to rest by apologising. He chose not to do so. However, he could have done so without compromising his feelings about the actions of the Mail Group and Mr Finegold as its employee. There was no reason why he should not have, as he did, explained why he had been so incensed by Mr Finegold's actions, but made clear that he had not intended any slur on him because he was Jewish. He could and in my view should have apologised for any particular hurt occasioned, not only to him but to others, including, but not limited, to Jews for whom the actions of the Nazis in the establishment and use of

concentration camps were especially loathsome. Had he done so, it is likely that no action would have been taken against him.

47. This is another reason why the sanction was unnecessarily severe. I recognise that the fact that the ESO did not seek suspension is not determinative; the Tribunal must make its own mind up. Its comments suggest that it regarded the failure to apologise as an aggravation of the misconduct which justified a more severe sanction. The appellant explained why he did not believe it was possible to apologise, but he did express regret that offence had been caused to Jewish Londoners by his remarks and make it clear that he had not intended that they should. His point was that he believed that Mr Finegold was doing something which was improper and that his reason, namely that he was doing his job, was the sort of reason used to justify any unacceptable behaviour. That his example was excessive and unnecessarily offensive is clear, but I do not believe that it justified suspension.

48. It follows that this appeal will be allowed and the finding that the appellant failed to comply with the Code of Conduct set aside. In any event, the suspension is quashed and, if I had upheld the finding, I would have directed that a notice be given to the Standards Committee of the GLA pursuant to s.79(7) of the Act.