

Report into the Fitness for Office of Part-Time Sheriff John Halley, Advocate Constituted under Section 21 of the Courts Reform (Scotland) Act 2014

[1] John Halley, who is a part-time Sheriff, is a judicial office holder (JOH) in terms of the Courts Reform (Scotland) Act 2014. The JOH in his role as junior counsel was appointed as counsel to the Scottish Child Abuse Inquiry chaired by Lady Smith and established under the Inquiries Act 2005 on 1 October 2015. His appointment was terminated in about April 2019. Following this, the JOH issued a number of tweets, statements or other communications which form the subject matter of these proceedings.

[2] Under the Fitness for Judicial Office Tribunal Rules 2015, the Tribunal appointed an Investigating Officer (IO) (Lord Bracadale) to investigate the question whether the judicial office holder is unfit to hold his judicial office. On 1 October 2020, the IO reported that there were grounds to allege unfitness for office by reason of misbehaviour because of the content of a public statement issued by him, along with a series of tweets posted by him between May 2019 and December 2019. The reasons for the lapse of time are explained at paras 9 and 10 of that report. The IO reported that:

“The Statement of Principles of Judicial Ethics for the Scottish Judiciary advises that judicial office holders should not sign up to social media sites such as Twitter and should exercise extreme caution in discussing both judicial and personal matters (section 5.2). Regardless of whether or not there was any substance in the complaint of Mr Halley, it is inappropriate for a judicial office holder to conduct a campaign against another member of the judiciary in such a confrontational and public way. Such conduct is improper and not consistent with the dignity of judicial office (section 7.1 of the Statement of Principles of Judicial Ethics for the Scottish Judiciary). (Doc 26).”

Lord Bracadale did not therefore inquire into the veracity or otherwise of any of the assertions made in the statement or tweets.

[3] On 2 October 2020, the JOH was notified that the Investigating Officer had submitted his report. The JOH did not exercise his right under the Rules either to request further

information or to submit a written response. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[4] Thereafter, in April 2021, having considered the investigating Officer's report, and [REDACTED], the tribunal made a decision under Rule 7 of the Fitness for Judicial Office Tribunal Rules 2015 that the investigation should proceed to a hearing, authorising that the JOH could be represented by a senior counsel of his choice. It advised that if no representative was appointed, the Tribunal would approach the Dean of Faculty and ask that he nominate someone to represent the JOH. Under Rule 10, a preliminary hearing required to be fixed. On 9 September 2021, the JOH's agents were asked to supply submissions for a preliminary hearing within 28 days. Their request for an extension to 9 November was granted, as was a further request for extension, which required the preliminary hearing to be rescheduled from 7 December 2021 to 18 January 2022. The arguments advanced at that hearing and the Tribunal's decision are recorded in the determination of 8 February 2022. The JOH sought a judicial review of that decision. A determination by the Scottish Government that it would not fund such proceedings itself resulted in a further judicial review, which proceeding concluded in February 2023.

[5] Thereafter, the Tribunal resumed consideration of the substantive matter, in respect of which the JOH advanced further preliminary arguments, and sought to reserve further preliminary points to be advanced at a future stage. The Tribunal asked for detailed written submissions, and issued its determination thereon in March 2024. It rejected the JOH's arguments, and ordered a full hearing on all outstanding issues.

[6] On 13 October 2023, the PO intimated to the IO that given the passage of time, and consequent on his duty to keep matters under review, he required the IO to carry out further investigations. The IO being unavailable to do so the tribunal appointed a further IO (Lord Mulholland) who duly reported a further series of tweets which on the face of it continued the campaign referred to by Lord Bracadale and which were said to constitute further grounds upon which unfitness might be determined. Lord Mulholland agreed with Lord Bracadale that the issue of the veracity of the assertions did not arise, and he too did not inquire into that issue.

[7] The Tribunal in its determination of 8 February 2022 adopted a similar approach to the tweets, recording that

“It is important to note that the scope of the grounds alleging unfitness is a very narrow one. The grounds relate to the specific statements allegedly made or issued by the judicial office holder that are specified in paragraph 5 of the Statement of Reasons. They [the statements] all relate to the chair of the Scottish Child Abuse Inquiry. In brief they allege harassment, discrimination and bullying by her towards him, and accused her of being “a danger to cancer sufferers at work”. The statements do not relate to ... a note apparently submitted by the judicial office holder to the inquiry in April 2019. Significantly, and in any event, the tenor of the complaint does not hinge on whether or not there was any merit in the complaints made by the judicial officer holder against the chair: the nub of the basis upon which misbehaviour is asserted is as follows: [there followed the observation taken from the first IO's report, quoted at para 2 above.]”

It was submitted for the JOH that this Tribunal could not reach a determination of the case against the JOH without inquiry into the facts underlying the statements made by him. The

PO submitted that the grounds in these proceedings are not concerned with whether any of the public statements made by the JOH are false, whether they lack substance, whether the JOH had or has a legitimate grievance of any kind, or whether any of the public statements are defamatory. The nub of the complaint is that the JOH conducted a campaign against another, the judicial chair of the SCAI, in a confrontational and public way which was inappropriate, both as to content, language and forum, and inconsistent with the dignity of judicial office. Having considered in detail the submissions advanced for the JOH we remain of the view expressed in our determination of 8 February 2022 that this is at the heart of the complaint and that the veracity or otherwise of any of his remarks is not a relevant matter for inquiry (see further paras 22 and 23 below).

[8] The communications, which formed the grounds contained in Lord Bracadale's report, may be summarised as follows:

1. On 3 May 2019 he issued a "Public Statement" in which he referred to himself as "Advocate and Part Time Sheriff in Scotland". He alleged that since 1 September 2016 he had had to suffer disability discrimination, harassment and victimisation by Lady Smith, Chair of the Scottish Child Abuse Inquiry (SCAI) (doc 1);
2. On 8 June 2019 he tweeted 'In case I wasn't clear enough, I have made a criminal complaint, which is in the hands of Crown Office, to effect that Lady Smith, Chair of the SCAI, presents a danger to cancer sufferers at work.' (Doc 2);
3. On the same date he tweeted 'I was treated viciously by Lady Smith, Chair of the SCAI, after cancer diagnosis, DURING surgery, after discharge from intensive care, during chemo and thereafter. Serious danger to cancer sufferers. Chair of SCAI' (Doc 2);
4. On 9 June 2019 he tweeted 'Lady Smith should admit her deplorable conduct and resign.' (Doc 2);
5. On 18 July 2019 he tweeted 'Lady Smith is a danger to vulnerable people in the workplace.' (Doc 2);
6. On 12 December 2019, replying to a tweet by another stating that John Halley had withdrawn his employment tribunal discrimination claim against Lady Smith,

he tweeted 'Bullying in all its forms and manifestations is unacceptable. Especially in high public office and in relation to the horror of cancer.' (Doc 3);

7. On 13 December 2019 it was reported in the Scottish Legal News that Mr Halley had told STV News, 'Lady Smith discriminated against me, harassed and victimised me when I was diagnosed with cancer, undergoing surgery, during chemotherapy and thereafter to date ... Her lack of compassion calls into question her ability to exercise balanced and compassionate judgement in relation to cancer sufferers in the workplace, in my experience.' (Doc 4)"

[9] The various communications are appended to the reports of the IOs, which are in turn reproduced as appendices to this report, and from which the detail may be seen. We will refer to these as necessary in due course. However, particular importance was placed by senior counsel for the JOH on the public statement referred to in para 1 of those listed in the first report so we replicate it here in full:

"Public Statement by John Halley, Advocate and Part Time Sheriff in Scotland

The Scottish Child Abuse Inquiry ('SCAI') Selkirk, May 2019.

I have been absent from work since 28 October 2016. On 10 October 2016, I was diagnosed with █████ cancer. On 31 October 2016, I underwent a █████ █████ in surgery lasting some 4 hours at Borders General Hospital, Scotland. Between 6 December 2016 and June 2017, I underwent 8 cycles of chemotherapy. I have been unable to return to work since then. Prior to and after my diagnosis of cancer, I have held appointment as Lead Junior Counsel to the SCAI.

On 1 April 2019, I submitted a detailed "Note", running to in excess of 17,500 words, on Child Trafficking Through Prostitution of Children in Care in Scotland to Lady Smith, Chair of the SCAI. By letter dated 25 April 2019, █████ █████, SCAI Secretary, informed me that Lady Smith has decided that the Note is comprised of material that I ought not to have been working on. I refute that entirely. I was instructed and I did investigate and report. The Note sets out a summary of my remit important facts, allegations, inferences and sources for investigation by the SCAI. It is clear to me that Lady Smith has decided that the SCAI will not investigate the material detailed in the Note.

Since 1 September 2016, I have had to suffer disability discrimination, harassment and victimisation by Lady Smith. I will deal with that in an application to the Employment Tribunal when I am well enough.

However, I will not be complicit in, nor tolerate, cover up and failure to report or

to Investigate systemic failures, including prosecution policy failures, which appear to have perpetrated injustice on vulnerable young people in care in Scotland. I will not permit the serious allegations, detailed in my Note, of past child exploitation, and failures to report suspicions of child exploitation, by lawyers, judges, public figures and others, to be ignored.

I have today reported my Note to [REDACTED], Procurator Fiscal for the Scottish Borders Area. I understand that the Procurator Fiscal will report the Note and its content directly to the Lord Advocate if, having considered its content, he is satisfied of the duty to do so. I have felt compelled to immediately report the Note to the Procurator Fiscal in the public interest.

However this is spun the facts remain. In order to ensure necessary safeguarding of our children going forward, Scotland and our survivors of child abuse require the truth. This statement constitutes a protected act within the meaning of section 27(2)(c) and (d) of the Equality Act 2010.”

[10] The JOH did raise proceedings against Lady Smith in ET on 25 July 2019. He withdrew his claim to the Tribunal on 11 December 2019, and the proceedings were dismissed on 16 December 2019.

[11] The communications forming the grounds identified by Lord Mulholland may be summarised as follows:

“1. On 12 January 2023 he issued a tweet calling Lady Smith a bully (page 5 of the PDF bundle). This was repeated (twice) on 23 September 2023 (pages 57 and 59 of the PDF bundle).

2. On 22 September 2023 he retweeted an excerpt from his book (A Judicial Monsterring – Child Sexual Abuse Cover Up and Corruption in Scotland) in which he called Lady Smith a monster (page 55 of the PDF bundle). On 7 October 2023 he issued a further tweet calling Lady Smith a monster (page 75 of the PDF bundle).

3. On 21 September 2023 he issued a tweet calling Lady Smith evil (page 50 of the PDF bundle).

4. On 16 September 2023 he issued a tweet calling Lady Smith an abuser (page 29 of the PDF bundle). This was repeated on 19 September 2023 (page 45 of the PDF bundle).

5. On 23 September 2023 he issued a tweet calling Lady Smith deranged (page 57 of the PDF bundle). This was repeated on 26 October 2023 (page 86 of the PDF bundle).

6. On 19 September 2023 he issued a tweet calling Lady Smith corrupt (page 43 of the PDF bundle). This was repeated on 30 September 2023 (page 69 of the PDF bundle).
7. On 23 September 2023 he issued a tweet calling Lady Smith a criminal (page 57 of the PDF bundle).
8. On 12 November 2023 he issued a tweet calling Lady Smith irrational and abnormal (page 92 of the PDF bundle).
9. On 24 September 2023 he issued a tweet accusing Lady Smith of misusing public funds for the investigation of child abuse to defend her personal reputation (page 64 of the PDF bundle).
10. On 8 September 2023 he issued a tweet calling Lady Smith a liar (page 20 of the PDF bundle).
11. On 10 September 2023 he issued a tweet accusing Lady Smith of shaping false, manufactured accusations and his unlawful arrest and the false reporting in the media (page 22 of the PDF bundle).
12. On 19 September 2023 he issued a tweet accusing Lady Smith of fabricating charges to make him look like a paedophile and have him arrested (page 46 of the PDF bundle).
13. On 21 September 2023 he issued a tweet accusing Lady Smith of maligning him as a child sex abuser (page 52 of the PDF bundle).
14. On 10 October 2023 he issued a tweet accusing Lady Smith of the brutal, inhumane and unlawful abuse of him (page 77 of the PDF bundle of him).
15. On 22 October 2023 he re tweeted an extract from his book accusing Lady Smith of purposely covering up by determination not to investigate serious allegations of organised child trafficking and sexual abuse involving judges and members of the legal profession, among others (page 84 of the PDF bundle). The averment that she was covering up abuse was repeated on 1 November 2023 in a re tweeting of a post by 'Hamish' (page 90 of the PDF bundle)."

[12] That the JOH issued the tweets and statements referred to in the reports of the Investigating Officer is a matter of admission and agreement.

[13] We pause to note certain submissions made by senior counsel for the JOH about the way in which the present proceedings were initiated, referring to the "complaint of the Lord President". For the avoidance of doubt, we consider that senior counsel was mistaken

in offering such a categorisation of matters before the Tribunal. The complaint, which this tribunal is considering, is not “the complaint of the Lord President”, nor is it defined by the terms of any letter, which the Lord President wrote to the JOH suspending him or indicating that he was asking the First Minister to establish a Tribunal. Once a tribunal is established, any such correspondence from the Lord President is of no real significance. Under the relevant Rules, an IO must be appointed by the tribunal to consider the question whether the judicial office holder is unfit to hold his or her judicial office. In doing so, the IO under Rule 4(3)) (a) must consider the existing information relating to the tribunal case and make such further enquiries as he considers appropriate; (b) may obtain and consider any documents and productions which appear to be relevant; and (c) may interview any person he considers appropriate to interview, including the judicial office holder if the judicial office holder agrees to be interviewed. If the IO recommends further proceedings, he must produce a statement of reasons. Such a statement of reasons then constitutes “a statement of the grounds on which it is alleged that the judicial office holder is unfit to hold office by reason of inability, neglect of duty or misbehaviour”. It is thus the statement of reasons which provide the basis for the continuation of the proceedings.

[14] The JOH contends that the communications issued by him cannot constitute misbehaviour because:

- (a) they qualify for the statutory protection afforded to protected acts by section 27 of the Equality Act 2010;
- (b) they come within the statutory protection provided to whistle-blowers under the Employment Rights Act 1996; and
- (c) they were published by him in legitimate exercise of his right to freedom of expression under Article 10 of the ECHR.

The Equality Act 2010

[15] The critical provision is as follows:

“27 Victimization

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

- (a) B does a protected act, or
- (b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

- (a) bringing proceedings under this Act;
- (b) giving evidence or information in connection with proceedings under this Act;
- (c) doing any other thing for the purposes of or in connection with this Act;
- (d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.”

[16] The PO submitted that section 27 of the EA merely describes the concept of victimisation, and that the actual protection arises elsewhere in the Act, and that the JOH had failed to identify how this fitness for office proceedings are caught by any of the provisions in Parts 3 to 8 of the EA. Further, proceedings relating to a contravention of the EA must be brought in accordance with Part 9 (see section 113) and there had been no attempt to explain how a claim for victimisation towards the JOH under the EA can be made under section 113 in these proceedings under the 2014 Act.

[17] It is not correct that section 27 EA has no relevance to these proceedings. The JOH, as a part time sheriff, is the holder of a public office made by a member of the executive (section 50(2)(a)) and, as such, cannot be victimised by his appointment being terminated (section 50(9)(c)) or by being subjected to any other detriment (section 50(9)(d)). Moreover,

section 113(3)(a) preserves the right to bring proceedings for judicial review, so the specific remedies afforded by Part 9 are not exhaustive.

[18] Section 50(9) follows a similar format to section 27 by using the descriptors of person (A) and person (B):

“A person (A) who is a relevant person in relation to a public office ... must not victimise a person (B) appointed to the office ...”.

The identity of the “relevant person” depends on the nature of the act that is said to be victimisation (section 52(6)). For termination of appointment, it is the person who has the power of termination, in this case the First Minister. For any other detriment, it includes the person who has the power to which the conduct in question relates.

[19] The JOH submits that this Tribunal is victimising him by subjecting him to the detriment of prosecuting these proceedings. Whether there is victimisation contrary to the EA depends on the question whether this Tribunal is subjecting the JOH to any detriment “because” he has done a protected act (section 27(1)). This turns on the reason why this Tribunal is conducting these proceedings: *Chief Constable of Greater Manchester Police v Bailey* [2017] EWCA Civ 425 at [12], Underhill LJ. The reason this Tribunal is conducting these proceedings is because it has been constituted under section 21 of the 2014 Act. Rule 4 of the Act of Sederunt (Fitness for Judicial Office Tribunal Rules) 2015 interposes the IO to investigate and make a recommendation whether further procedure is required. Lord Bracadale recommended further procedure and, under Rule 7, this Tribunal determined to proceed to a hearing. The ultimate responsibility of the Tribunal is to submit a report under section 24 of the 2014 Act. Even if we were satisfied that a protected act had taken place in the present case (as to which, see below) the reason these proceedings are taking place is not “because” the JOH has done a protected act; it is because the Tribunal has

to discharge its statutory duty to consider and report on the “tribunal case”, namely, the issue whether the JOH is unfit to hold his judicial office by reason of misbehaviour: Rule 2 of the 2015 Rules. The same applies insofar as it is said that some of the communications are “protected disclosures” for the purposes of the ERA. This Tribunal is not subjecting the JOH to any detriment “on the ground that” he has made protected disclosures (ERA, section 47B (1) and (2)). In order to discharge its statutory duty this Tribunal must necessarily determine whether or not any of the communications is a “protected act” and/or a “protected disclosure” and report accordingly. In so doing, this Tribunal is not victimising the JOH.

[20] The existence of any protected act is, however, relevant to the consideration of fitness for office because, in our view, the commission of a protected act could not form part of the grounds for finding the “tribunal case” proven. Again, the same applies to any protected disclosure and we shall address that separately in our discussion of the ERA.

[21] There are four categories of protected act in section 27(2). Category (a) is the bringing of proceedings under the EA. The JOH did bring proceedings under the Act in the ET. The bringing of those proceedings was a protected act but there is no allegation that there was anything inappropriate in him so doing, so paragraph (a) has been respected. The issue in dispute is whether the communications in question fall within at least paragraphs (b) – (d) of section 27(2). For the reasons already explained, we are satisfied that if this Tribunal were to conclude that the disciplinary proceedings were brought or maintained because the JOH had done a protected act it would not be appropriate for us to suggest to the First Minister on that basis that the JOH was unfit to hold office.

[22] At this stage, we should note the submission for the JOH that he would only lose the protection afforded under section 27 were the tribunal to reach a conclusion that his claim was false and made in bad faith, under reference to section 27(3). It was submitted that this

tribunal is not in any position to reach such a conclusion since (a) the IOs did not inquire into the veracity of the communications; and (b) no evidence on this issue has been laid before the tribunal. Under reference to the Grand Chamber decision in *Ramos Nunes de Carvalho e Sá v Portugal*, [2018] ECtHR 55391/13, 57728/13 and 74041/13, para 203, it was submitted that the establishment of the facts in disciplinary proceedings is especially important. In the present case it was submitted that the Tribunal could not reach a conclusion unfavourable to the JOH without inquiry *inter alia* into the truth or otherwise of whether the subject matter of the JOH's Note of April 2019 was within the scope of his instructions; whether the content was within the scope of the inquiry; whether the chair had wrongly determined not to investigate the contents; whether there was truth in the contents of the Note; and numerous other issues of fact.

[23] We are unable to accept that submission. *Carvalho* related to a situation where the basic facts were in dispute, and obviously required to be determined, for example whether the individual had called another judge a "liar". That is not the case here. The basic facts are not in dispute, rather they are a matter of agreement. We acknowledge that giving false information or making a false allegation could not be considered a protected act if made in bad faith. However, before that question may be said to arise there is a logically anterior question, namely whether the conduct in question is capable of coming within any of the definitions of a protected act within the legislation. Only if it can be said that the communications in question could be so categorised would the issue arise whether they should nevertheless be denied protection as being false and made in bad faith. We do accept that, should that question eventually arise, this Tribunal might not be in a position to determine it.

[24] The JOH refers to the ET proceedings brought by him, which constituted a protected act. It is maintained that the communications in question are also protected acts because they constitute (i) evidence or information in connection with the ET proceedings brought by him against Lady Smith (section 27(2)(b)); (ii) doing any other thing for the purposes of or in connection with the Act (section 27(2)(c)); and (iii) making an allegation (whether or not express) that Lady Smith has contravened this Act (section 27(2)(d)) .

[25] At least two questions arise here: (a) has the JOH done a protected act; and (b) has he been or is he being subjected to a detriment because of that/those protected acts?

27(2)(a)

[26] We accept that the bringing of the ET proceedings constituted a protected act. It is however untenable to say that the current proceedings arose because the JOH raised proceedings in the ET. At the heart of the complaint is the running of an intemperate and vituperative campaign against a fellow JOH in a confrontational and public way, instead of pursuing appropriate and proper channels. There is no hint in the material before us that would allow us to reach a conclusion that these proceedings arise because the JOH had raised proceedings in the ET.

27(2)(b)

[27] We do not consider that it can on any reasonable basis be said that the communications in question constitute the giving of evidence or information in connection with proceedings under the Act. The proceedings of this Tribunal are not proceedings under the Act. The only proceedings under the Act were those in the ET between July and December 2019. None of the communications can reasonably be considered to constitute the giving of evidence in connection with those proceedings. Indeed, many of them were issued long after the proceedings had been dismissed. Making public assertions, on social media or

elsewhere, does not amount to the provision of evidence or information “in connection with proceedings”. That being so, no question of victimisation on this basis could arise.

27(2)(c)

[28] It is maintained, entirely without specification, that the communications were actions undertaken for the purposes of or in connection with the Act. It is impossible to identify any content for this assertion. The public statement refers to section 27(2)(c) but does not provide content or context for doing so. The statement in any event makes it clear that ET proceedings will be pursued separately. The affidavit from the JOH provides no further information which would illuminate the point, nor do any of the tweets. The mere existence of ET proceedings relating to the JOH’s engagement with SCAI does not mean that any comment he makes in relation to SCAI must be protected under section 27(2)(c).

27(2)(d)

[29] The final basis upon which the protection of the EA is advanced is the submission that the communications amounted to an allegation that another person, here Lady Smith, has contravened the Act, and so are protected acts. The submission of the PO is that although items 1 and 7 of the First Investigation Report may contain an allegation that Lady Smith has contravened the EA, the remainder of the statements cannot be regarded as protected under section 27(2)(d), since their content does not involve allegations of contraventions of the EA.

[30] We recognise that it is not necessary for an allegation under section 27(2)(d) to make express reference to the EA. The key issue is whether the statement may contain enough information that it might reasonably and in context be read as suggesting that an individual has contravened the Act. In these proceedings there are only two statements which may be

capable of constituting such allegations. These are (a) the comment in the original public statement that:

“I have had to suffer disability discrimination, harassment and victimisation by Lady Smith. I will deal with that in an application to the Employment Tribunal when I am well enough”,

and (b) the statement to Scottish Legal News of 13 December 2019 that

“Lady Smith discriminated against me, harassed and victimised me when I was diagnosed with cancer, undergoing surgery, during chemotherapy, and thereafter to date.”

In their context, including the reference to discrimination, and the ET, we consider that despite the baldness of the assertions these two statements may be considered allegations that Lady Smith contravened the EA in identifiable ways, namely discrimination, harassment and victimisation, and so would be capable of attracting protection under that Act.

[31] So far as the remaining communications are concerned none of these amounts to an allegation under section 27(2)(d). As we have noted, allegations which do not state in terms an assertion that an individual contravened the EA may nevertheless constitute an allegation for the purposes of section 27(2)(d). However, it must be possible to discern from the nature of the communication that a breach of the Act is being alleged and that the alleged breach, or at least its general nature, is identified. To be capable of being considered an allegation that a specified individual has contravened the Act a statement must include a basic level of detail to raise this as a possibility. Apart from the items we have identified there is no such material in the communications with which we are concerned. Whilst they contain complaints by the JOH against Lady Smith, the tenor of these is that she displayed an unsympathetic attitude towards someone undergoing cancer treatment as opposed to specific behaviour, which might constitute a breach of the Act. Neither the content nor the

context of these might reasonably allow the inference to be drawn that there was indeed the possibility of such a contravention having occurred.

Section 27(1)

[32] The PO submitted that there is clearly a distinction between a detriment caused by the carrying out of a protected act and one which followed from the manner in which it was made. We recognise that this may be so. However, great care must be taken not to attribute too readily to the manner in which that act was executed action taken against an individual in reality based on the carrying out of a protected act. In the present case it is the inability to identify that the many communications, save for the two brief statements we have identified, might constitute a protected act, which creates the first stumbling block for the JOH. The second problem is that it is clear that the facts do not allow the inference that the disciplinary proceedings have been instituted or maintained because of any protected act. They have not been raised because the two statements identified made allegations against Lady Smith. They have not been raised or maintained because of his raising ET proceedings, or anything in connection with such proceedings, or indeed in respect of the EA, as opposed to the conduct by him of a sustained and vituperative campaign of abuse against Lady Smith, conducted via social media, without regard for due process, and using confrontational and unprofessional language, in a manner which persisted over a number of years. Should he be found unfit to hold office it will be because of these acts, not any protected act under the EA.

The Employment Rights Act 1996

[33] The JOH maintains that he is entitled to the protection afforded to whistle-blowers in terms of the ERA 1996. We would not dispute that whether as counsel to the Inquiry or in

his capacity as a JOH (*Gilham v MOJ* [2019] 1 WLR 5905) any protected disclosures which he made would be entitled to the protection offered by the Act. We will address separately the question whether the communications can amount to disclosures in terms of the Act. The JOH does not seek to discriminate between his role as JOH or as counsel to the Inquiry, merely asserting that he was at all times acting in both capacities. This issue has some significance since the Act sets out a scheme for making protected disclosures in particular circumstances, to particular individuals, and under certain conditions, all of which may vary according to the nature of the alleged disclosure and the capacity in which it is made. It is also a factor relevant to the nature of the protection given under the Act to those making protected disclosures, which is specified in section 47B.

[34] The provisions of the ERA which set out the structure thereof, and which arise for consideration include the following:

“43A.— Meaning of “protected disclosure”.

In this Act a “protected disclosure” means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

43B.— Disclosures qualifying for protection.

(1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

- (a) that a criminal offence has been committed, is being committed or is likely to be committed,
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
- (d) that the health or safety of any individual has been, is being or is likely to be endangered, ...

43C.— Disclosure to employer or other responsible person.

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure—

- (a) to his employer, or
- (b) where the worker reasonably believes that the relevant failure relates solely or mainly to—
 - (i) the conduct of a person other than his employer, or
 - (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

43E.— Disclosure to Minister of the Crown

A qualifying disclosure is made in accordance with this section if—

- (a) the worker's employer is—
 - (i) an individual appointed under any enactment (including any enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament) by a Minister of the Crown or a member of the Scottish Executive, or
 - (ii) a body any of whose members are so appointed, and
- (b) the disclosure is made to a Minister of the Crown or a member of the Scottish Executive.

43F.— Disclosure to prescribed person.

(1) A qualifying disclosure is made in accordance with this section if the worker—

- (a) makes the disclosure to a person prescribed by an order made by the Secretary of State for the purposes of this section, and reasonably believes –
 - (ii) that the information disclosed, and any allegation contained within it, are substantially true.

43G.— Disclosure in other cases.

(1) A qualifying disclosure is made in accordance with this section if—

- (b) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
 - (c) he does not make the disclosure for purposes of personal gain,
 - (d) any of the conditions in subsection (2) is met, and
 - (e) in all the circumstances of the case, it is reasonable for him to make the disclosure.
- (2) The conditions referred to in subsection (1)(d) are—
- (a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,
 - (b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or
 - (c) that the worker has previously made a disclosure of substantially the same information—
 - (i) to his employer, or
 - (ii) in accordance with section 43F.
- (3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard **shall** be had, in particular, to—
- (a) the identity of the person to whom the disclosure is made,
 - (b) the seriousness of the relevant failure,
 - (c) whether the relevant failure is continuing or is likely to occur in the future,
 - (d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,....

43H.— Disclosure of exceptionally serious failure.

- (1) A qualifying disclosure is made in accordance with this section if—
 - (b) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

- (c) he does not make the disclosure for purposes of personal gain,
- (d) the relevant failure is of an exceptionally serious nature, and
- (e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to the identity of the person to whom the disclosure is made.

47B.— Protected disclosures.

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.”

[35] Two points at this stage might be made regarding the statutory scheme. The first is that the structure of the Act is designed to enable issues of concern to be raised and pursued by employees or workers without prejudice, when following a reasonable and appropriate procedure in the circumstances. Hence, the expectation is that the disclosure be made to an employer or other responsible person; or to a minister of the crown if appropriate; or a prescribed person if one has been specified. Hence, there is also the provision in section 43G that whilst a qualifying disclosure may be made in other circumstances, this is subject to the additional requirements (a) that the individual believes that disclosure to the employer would result in his being subjected to a detriment, or that evidence would be destroyed; and (b) that it is reasonable for the disclosure to be made in the circumstances, in respect of which particular regard has to be had to the identity of the person to whom the disclosure is made. The second of those requirements is also to be found in section 43H(1)(e) and (2).

[36] That the structure of the Act is designed to achieve effectively a hierarchy of disclosure was recognised in *Gilham v MOJ*. At para 36 Lady Hale, noting that there was no legitimate aim in excluding the judiciary from the statutory protection, observed:

“Of course, members of the judiciary must take care, in making any public pronouncements, to guard against being seen to descend into the political arena. But responsible public interest disclosures of the sort which are protected under Part IVA do not run that risk. Indeed, the object of the protection was to give workers the confidence to raise malpractice within their organisation rather than placing them in a position where they feel driven to raise concerns externally. It is just as important that members of the judiciary have that confidence. They are just as vulnerable to certain types of detriment as are others in the workplace. To give the judiciary such protection might be thought to enhance their independence by reducing the risk that they might be tempted to “go public” with their concerns, because of the fear that there was no other avenue available to them, and thus unwillingly be drawn into what might be seen as a political debate.”

This was followed at para 43 by:

“The legislation contemplates disclosure to an employer or others responsible for the conduct in question, which in this case would be the leadership judges or HM Courts and Tribunals Service (“HMCTS”) or the Ministry of Justice, depending upon the nature of the conduct. It also prohibits both the employer and fellow employees from subjecting the whistle-blower to any detriment, which again would have to embrace fellow judges and those in a position to inflict such detriments. None of this would go against the grain of the legislation. When considering whether the disclosures had been made in the public interest, it would of course be relevant to consider whether there were other more appropriate ways of trying to resolve the situation.”

[37] The second point is to address what is meant by “information” for the purposes of section 43B, and whether a mere allegation is sufficient to constitute “information”. In terms of section 43B, the requisite information must “tend to show” the existence of one of the circumstances listed (a) to (d). That implies that it must meet a certain minimum standard of detail. In *Kilraine v Wansworth LBC* ([2018]ICR 1850) the Court of Appeal (Sales, LJ) noted (para 28):

“The appeal tribunal in the Cavendish Munro case correctly noted, at para 20, that in section 43F, set out at para 2 above, the 1996 Act recognises that there can be a distinction between information (the word used in section 43B(1)) and an “allegation”.”

This is recognised on the face of the Act itself. Section 43B identifies a qualifying disclosure as one which discloses “information”. Elsewhere in the Act (sections 43F (1)(a)(ii); 43G (1)(b)

and 43H (1)(b)) the repeated use of the phrase “the information disclosed, *and any allegation contained in it*” recognises that the two may not be synonymous and that a disclosure may both provide information and include certain allegations. The question whether a fairly bald allegation could amount to the provision of information was considered in *Kilraine*. In the EAT ([2016] IRLR 422) it was noted (Langstaff J, para 32), in relation to one alleged disclosure, that:

“If one takes away the word inappropriate from the highlighted section, it says nothing that is at all specific. It does not sensibly convey any information at all.... it is difficult to see how what is said alleges a criminal offence, a failure to comply with legal obligations or any of the other matters to which section 43B(1) makes reference. It is simply far too vague. “Inappropriate” may cover a multitude of sins. It has to show or tend to show something that comes within the section.”

The Court of Appeal endorsed this approach:

“30 ... the concept of “information” ... is capable of covering statements which might also be characterised as allegations. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between “information” on the one hand and “allegations” on the other.

31 On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute “information” ...not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision.

32 ... all that the appeal tribunal was seeking to say was that a statement which merely took the form, “You are not complying with health and safety requirements”, would be so general and devoid of specific factual content that it could not be said to fall within the language of section 43B(1) so as to constitute a qualifying disclosure. It emphasised this by contrasting that with a statement which contained more specific factual content.

35 The question in each case ... is whether a particular statement or disclosure is a ‘disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in paragraphs (a) to (f)]’. Grammatically, the word “information” has to be read with the qualifying phrase, ‘which tends to show [etc]’ (as, for example, in the present case, information which tends to show ‘that a person has failed or is likely to fail to comply with any legal obligation to which he is subject’). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual

content and specificity such as is capable of tending to show one of the matters listed in subsection (1).”

[38] We recognise that the issue of whether a communication presents information or not is a fact sensitive one, and that the two may be intimately entwined. A communication which clearly conveys factual content is not to be dismissed as such merely because it is couched in terms of allegation or is accompanied by allegations. However, it is necessary to be able to identify the factual content which justifies the description “information”. The requirement that the communication “tends to show” one of the qualifying conditions (a) to (d) of section 43B makes it clear a level of detail, relating to the qualifying condition, is required. In the present case the communications are no more than bare allegations. They are so general and devoid of specific factual content as to be incapable of constituting information tending to show anything. In this respect, we note that what might satisfy the terms of section 27(2)(d) of the EA as an “allegation” may not be sufficient for the purposes of the provisions of the ERA. In particular, the content of the public statement and the statement to Scottish Legal News, which we considered, were probably sufficient for the purposes of the former are insufficient for the purposes of the ERA. An allegation that the JOH was the subject to disability discrimination, harassment and victimisation without any further particularisation is no different from a bald assertion of the kind discussed in *Kilraine* “You are not complying with health and safety requirements”. The affidavit of the JOH states that the statements were designed to show that Lady Smith had failed to comply with “a legal obligation to which she was subject (i.e. under the Equality Act 2010) which amounted to a miscarriage of justice” but again no detail is provided. We have examined each of the individual communications and we are satisfied that none of them amounts to a disclosure of “information”. For that reason alone the arguments under the ERA must fail.

[39] Associated with the question whether something amounts to information or merely a bald allegation is the issue raised by the PO who submitted that there is clearly a distinction between a detriment caused by the making of a complaint and manner in which it was made. We recognise that this is an issue which cannot be approached on a simplistic binary basis. As with information and allegation it will often be the case that the two matters are intertwined. Intemperate language used in the making of a disclosure would not deprive the communication of the character of a disclosure if it otherwise justified that characterisation, making it clear what was the substance of the complaint, with adequate specification to recognise what the issue was, for example specifying what was the nature and circumstances of any alleged breach of legal obligation. The fundamental problem for the JOH is that it is not possible to identify anything which might reasonably and properly be categorised as a protected disclosure of information as opposed to mere vulgar abuse and vituperation, repeatedly made in the most unprofessional of terms. There is therefore in the present case no risk of confusing any protected disclosure with the terms in which it is advanced.

[40] In addition, even if it had been possible to categorise the communications as disclosures, in the present case it is not suggested that any disclosure was made to an employer or responsible person. It is rather maintained that the communications complained of constituted disclosures in terms of sections 43G and 43H. Thus, even if the communications could be construed as providing information, there are additional requirements to be satisfied before the communications could be considered to be qualifying disclosures. In relation to section 43G the first of these is that the individual reasonably believed that if he made the disclosure to his employer he would be subjected to a detriment. In his affidavit, the JOH asserts:

“I reasonably believed that if I had instead disclosed the nature of the allegations and grievances to the Lord President, or the Scottish Courts Administration (*sic*), or any other party in an equivalent position to my employer as a Sheriff, I would have been subjected to a detriment as a result.”

This is the only basis upon which section 43G(2)(a) is said to be involved. In our view, it is impossible to identify a reasonable basis for this assertion. The justifications offered for this all rely on the alleged behaviour towards him by Lady Smith. There is nothing contained within the affidavit capable of constituting a reasonable basis to conclude that any report to the Lord President, the Scottish Courts and Tribunals Service, or other party in an equivalent position would not have been taken seriously, investigated and considered without prejudice to the JOH’s position. He cites the fact that Lady Smith made restriction orders under section 19 of the Inquiries Act 2005 preventing the publication of information about the JOH’s claim. However, when these orders were challenged, a court chaired by the Lord President overturned the decision, which would not seem to be consistent with the JOH’s alleged concerns. The JOH does not otherwise set out any basis for believing that he would be subjected to a detriment for following appropriate channels, nor does he identify the detriment he feared.

[41] The question of reasonable belief was addressed in *Kilraine* in connection with the requirement for the individual to have a reasonable belief that the information he discloses does tend to show one of the listed matters. However, the observations are equally applicable *mutatis mutandis* to the issue of reasonable belief under section 43G(2)(a). In this connection, the Court of Appeal commented that the issue had

“both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief.”

In the context of section 43G(2)(a) the presence of objective material which might inform a reasonable belief may be a relevant factor in considering whether the belief may properly be so categorised. There is no such material, nor is there any reasonable explanation by the JOH for allegedly holding this belief.

[42] A further requirement before a disclosure may be treated as a qualifying one under section 43G is that in all the circumstances of the case it was reasonable for him to make the disclosure, in respect of which particular regard must be had to the identity of the person(s) to whom the disclosure was made. It is in that connection that it is relevant to note that the communications in question were not made to an individual in any position of authority – as the PO put it, they were not directed to any person or body properly charged with adjudicating upon whether the JOH may have had a legitimate grievance; nor to any person with a specific interest in the administration of justice; they were not made to a journalist with a responsible newspaper, or other similar person; rather they were made indiscriminately in the echo chamber of social media. Twitter, or “X” is a medium which is essentially unfiltered and without editorial control. The observations we make below with regard to social media in the contest of the article 10 argument have equal relevance here. The use of X, the language used, and the overall content of the communications make it impossible in the circumstances to consider that it would be reasonable for the JOH to seek to make a disclosure by this means. The same arguments would apply with even more force if one were dealing with an exceptionally serious failure in terms of section 43H.

ECHR

[43] It is not a matter of dispute that a JOH retains the right to freedom of expression in terms of Article 10. Nor is it disputed that in certain circumstances it may be appropriate, or

even necessary, for judges to comment publicly on issues concerning the functioning of the judicial system. This was recognised in *Baka v Hungary* ((2017) 64 EHRR 6), para 165, and *Zurek v Poland* ((2022) EHRR 28), para 222 of which noted:

“... the general right to freedom of expression of judges to address matters concerning the functioning of the justice system may be transformed into a corresponding duty to speak out in defence of the rule of law and judicial independence when those fundamental values come under threat...”

These issues are also recognised in the Guidance to Judicial Office Holders on Judicial Ethics in Scotland 2015, and 2024:

“In general, judges are entitled to exercise the rights and freedoms available to everyone else. There is a clear public interest in judges participating in the life and affairs of the community (para 6.1)”

“Many aspects of the administration of justice and the functioning of the judiciary are the subject of public consideration and debate. Judicial contribution may be desirable. (para 4.6 (2015) 4.16(2024)).”

Nevertheless, judges are expected to exercise restraint in the making of public pronouncements. In *Baka* the court said (para 164):

“The Court has recognised that it can be expected of public officials serving in the judiciary that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called in question. The dissemination of even accurate information must be carried out with moderation and propriety. The Court has on many occasions emphasised the special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a law-governed state, must enjoy public confidence if it is to be successful in carrying out its duties. It is for this reason that judicial authorities, in so far as concerns the exercise of their adjudicatory function, are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges.”

[44] This expectation of restraint is consistent with both the Bangalore Principles and the Statement of Ethics for the Scottish Judiciary. The following is to be found in the Bangalore Principles:

“4.2. As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should

do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.

4.6. A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but, in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.”

Para 4.2 is reproduced verbatim in para 7.1 of the Statement of Judicial Ethics (both versions). The issue of restraint is further emphasised in both versions. Paras 4.6 and 4.16, quoted above, both add:

“However, care should be exercised to ensure that such contribution remains within proper bounds.”

Para 6.1 adds:

“Judges however require to accept that the nature of their office exposes them to considerable scrutiny and puts constraints on their behaviour, which other people may not experience. Thus judges should avoid situations which might reasonably be expected to lower respect for their judicial office. (2015)”

“Appointment to judicial office brings with it limitations on the private and public conduct of a judge. Judges require to accept that the nature of their office exposes them to public scrutiny. It puts constraints on their behaviour, which other people may not experience. Judges should avoid situations which might reasonably be expected to lower respect for their judicial office.” (2024)

Para 5.2 (2015) states:

“A judge should be aware that extra-judicial activities referred to above extend to their online presence. A judge should be wary of publishing online more personal information than is necessary. Judges are advised not to sign up to social media sites such as Facebook or twitter and should exercise extreme caution in discussing both judicial and personal matters. Should a judge engage in online communication the judge should be aware that online discussions are not private, comments can be copied and have an unintended longevity.”

This is reflected in para 6.3 (2024)

“A judge should be aware that the extra-judicial activities, in which restraint may be necessary, include online behaviour. Judges are strongly advised not to sign up to social media sites such as Facebook or Twitter. If a judge chooses to engage in online communication, extreme caution should be exercised. Online discussions are not

private. They may have unintended longevity. Social media is a public forum. Under no circumstances should discussion of judicial matters take place online.”

Finally, para 7.1:

“A judge should avoid impropriety and the appearance of impropriety in all of that judge’s activities. As a subject of constant public scrutiny, a judge should accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. As already stated, a judge should conduct himself or herself in a way that is consistent with the dignity of judicial office.” (2015)
 “A judge should avoid impropriety and the appearance of impropriety. A judge must accept personal restrictions that might be viewed as burdensome by others and should do so freely and willingly. A judge should behave in a way that is consistent with the dignity of judicial office.” (2024)

[45] The jurisprudence is clear as to the importance to be attached to freedom of expression by judges, and as already noted, it was this importance which led to a particular interpretation of the ERA in *Gilham*. In *Baka*, para 165, the court noted:

“The Court has also stressed that having regard in particular to the growing importance attached to the separation of powers and the importance of safeguarding the independence of the judiciary, any interference with the freedom of expression of a judge in a position such as the applicant’s calls for close scrutiny on the part of the Court. Furthermore, questions concerning the functioning of the justice system fall within the public interest, the debate of which generally enjoys a high degree of protection under art.10. Even if an issue under debate has political implications, this is not in itself sufficient to prevent a judge from making a statement on the matter. Issues relating to the separation of powers can involve very important matters in a democratic society which the public has a legitimate interest in being informed about and which fall within the scope of political debate.”

In *Zurek*, it was observed that public statements by a judge which clearly fell within the context of a debate on a matter of great public interest, (para 224)

“called for a high degree of protection for his freedom of expression and strict scrutiny of any interference, with a correspondingly narrow margin of appreciation being afforded to the authorities of the respondent State.”

Each judge is responsible for promoting and protecting judicial independence, although heightened protection will be afforded when a judge makes a public statement not only in his or her own personal capacity, but also on behalf of a judicial council, judicial association

or other representative judicial body (see *Zurek*, para 222). The office held by a particular judge may bring with it particular duty to express his views on legislative reforms likely to have an impact on the judiciary and its independence (*Baka*, para 168).

[46] In considering whether in any given case the expectation of restraint, and the consequences of failing to exercise due restraint, may place an undue check on a JOH's right of freedom of expression under Article 10 regard must be had to all the circumstances of the making of the statements in question. As was noted in *Baka*,

“166. In the context of art.10 of the Convention, the Court must take account of the circumstances and overall background against which the statements in question were made. It must look at the impugned interference in the light of the case as a whole, attaching particular importance to the office held by the applicant, his statements and the context in which they were made.

167. Finally, the Court reiterates the “chilling effect” that the fear of sanction has on the exercise of freedom of expression, in particular on other judges wishing to participate in the public debate on issues related to the administration of justice and the judiciary. This effect, which works to the detriment of society as a whole, is also a factor that concerns the proportionality of the sanction or punitive measure imposed.”

[47] The nature or method of the communication remain relevant to the overall assessment. For example, in *Baka*, it was noted that the JOH had used recognised and appropriate channels to air his concerns. He had used a power available to him to challenge some of the legislative reforms in the Constitutional Court; and the opportunity to express his opinion directly to Parliament on two occasions, in accordance with Parliamentary Rules.

[48] As noted in *Baka* consideration must also be given to the content of the statements made. In both *Baka* (171) and *Zurek* (224), it was significant that the views and statements publicly expressed by the applicants did not go beyond mere criticism from a professional perspective; they did not contain attacks against other members of the judiciary; and did not

concern criticisms with regard to the conduct of the judiciary dealing with pending proceedings (*Baka* 170, *Zurek* 223).

[49] Senior Counsel for the JOH placed considerable reliance on the case of *Danilet* in which the applicant, a Romanian judge, had been the subject of disciplinary proceedings for posts made on his Facebook page. However, there is nothing within that case which detracts in any way from the observations made in *Baka* or *Zurek*. The case concerned two Facebook posts, the first expressing concerns about the risk of political control of state institutions in the light of legislative changes, and the second including a link to a press article by an anonymous public prosecutor about the problems faced by prosecutors within the Romanian system. Both issues had been the subject of public debate in Romania, the latter article having been the subject of a discussion at a judicial forum. The EU Commission subsequently published a report noting that the changes in question had serious repercussions for the independence, quality and efficiency of the judicial system in Romania.

[50] The JOH in question was well known nationally as a former member of the Superior Council of the judiciary, former vice-president of a court, former advisor to the Minister of Justice, founding member of two non-governmental organisations operating in the field of democracy and justice and author of several legal articles. Although the national authorities had reached a different view, the ECtHR concluded that in their context - which was that there was no dispute that there existed an important debate within civil society on the issue, which had even been the subject of litigation - the applicant's first comments were expressions of opinion that constitutional democracy would be threatened in the event of a resumption of political control of public institutions. It was of particular relevance that the comments in question were not defamatory, hateful or calling for violence.

[51] The comments amounted to general opinions placed within an appropriate historical context. The second post was also a comment on a topic of public debate at the time, confirmed by the intervention in the proceedings by the Romanian judicial Forum. Significant weight was attached to this overall context.

[52] The court concluded that the national courts had not conducted the necessary balancing exercise relating to the importance of the judge's right to freedom of expression, the significance of the topic involved as an issue of important public debate, the means and content of the communication, and the potential effect on future exercise of their rights by other judges.

[53] Nevertheless, the court emphasised the duty of restraint. It highlighted certain of the Bangalore Principles, including paras 4.2 and 4.6 quoted at para 44 above. It noted (para 55) that even accurate statements required to be accomplished with restraint and decency, and that the word of the magistrate, unlike that of the lawyer, is received as the expression of an objective assessment which is attributed not only to the individual concerned, but also, through him, the entire institution of Justice.

[54] In recognising that judges of course retain rights of freedom of expression the court also recognised that the use of social media may be an aspect of that. The court noted (para 60) that:

“The Internet has today become one of the main means of exercising freedom of expression, by providing tools for participation in activities and discussions regarding political questions and debates of general interest. Websites contribute greatly to improving public access to news and, generally, to facilitate the dissemination of information, and even bloggers or users of social media may contribute by performing a watchdog function. However, the advantages of this resource, an electronic network serving billions of users all over the world, are accompanied by a certain number of risks: in particular compared with the written press online communications content present an increased risk of harm to the exercise and enjoyment fundamental rights and freedoms, in particular the right to respect for private life.”

Equally, there were concerns over the use of such media by a judge. There was a distinction to be drawn between messages sent in an environment reserved for professionals as opposed to one accessible to all Internet users (para 62). In commenting in his role as judge the JOH was expected to show restraint (para 64). Moreover (para 76):

“the Court reaffirmed the principle according to which judges are expected to exercise their freedom of expression with restraint; and noted that by using his Facebook account accessible to the public he was accepting a certain number of risks. Remarks thus published can be disseminated as never before in the world, in seconds, and sometimes stay online for a long time for a long time.”

Perhaps most significantly, the court noted (para 82 that

“the use of a Facebook account accessible to the public may give rise to legitimate questions with regard to respect for the duty of restraint imposed on judges.”

[55] The reasons given above for concluding that the communications in question did not, save in two cases, constitute protected acts; and that none of them constituted qualifying and protected disclosures - for example, their vagueness, the lack of illustrative detail, the decision to communicate thought X or by public statement rather than seek to pursue his alleged grievances through more appropriate and formal channels, (and in the instance where he did, namely raising ET proceedings, the decision to conduct a parallel and public campaign whilst those proceedings were pending), the tone of the communications, the language used - are all relevant to the balancing exercise which the tribunal must consider in respect of the article 10 issue.

[56] These matters must be weighted in the balance against the fact that the exercise by a JOH of the right to free expression attracts a high degree of protection, with interference thereof requiring intense scrutiny, conscious of the potential benefits of judicial involvement in matters of important public debate, as well as the potentially dissuasive effect of

disciplinary proceedings arising out of the communications in question. We remind ourselves of para 165 of *Baka*:

“In the context of art.10 of the Convention, the Court must take account of the circumstances and overall background against which the statements in question were made. It must look at the impugned interference in the light of the case as a whole, attaching particular importance to the office held by the applicant, his statements and the context in which they were made.

[57] We note from the case law that while each judge may have an individual duty to uphold and protect the rule of law, whether it may be appropriate for the judge to do so in an unrestrained and public way may vary according to the judge’s position. Certain positions carry demands well beyond those placed upon ordinary sitting judges. For a judge who holds a representative or managerial role, and who has pursued his concerns through official channels to no avail (as in *Baka*, see para 47 above), it may be easier to justify a decision to air his concerns in a forthright public way, than there would be for a junior judge who has not pursued the various channels open to him. Here the office held was that of part time sheriff. The JOH had open to him numerous avenues to pursue any grievance he had. He did in fact raise ET proceedings but instead of allowing those proceedings to take their course, he engaged in public communications on X during their currency. After he had withdrawn the proceedings, he continued in this vein, the communications progressively intensifying. Any individual in the position of the JOH would require to be conscious of the fact that when someone speaks as a judge his observations may be attributed to “the entire institution of Justice” (*Baka*, para 55).

[58] In this regard, it is of significance to note as part of the context in which the statements are made, the medium in which they were made, the tone and content of the communications, the nature of the language used, the extent to which they contained detail to advance debate or enable the reader to be reasonably informed on a matter of public

interest, and whether or not they were pursued in an appropriate method of drawing attention to an issue. As we have observed at para 42 using X in the manner used by the JOH is not a useful way to advance or inform rational public debate. The communications cannot reasonably be considered as an objective attempt to draw attention to a matter of serious public interest, or properly to provoke a reasoned debate thereon.

[59] Unlike the cases to which we have referred, where it was significant that the communications had not gone beyond mere criticism from a professional perspective; did not contain attacks against other members of the judiciary; and did not concern criticisms with regard to the conduct of the judiciary dealing with pending proceedings (*Baka* 170, *Zurek* 223), all three elements are present in the communications issued by the present JOH. The communications were not framed in the way one might expect from a professional judge, conscious of the dignity of the office, exercising appropriate restraint, and aware of the need to preserve public confidence, and seeking merely to raise awareness of an issue of public importance; rather the tone was offensive, vulgar and confrontational. The communications certainly amounted to a public attack on the character and integrity of a fellow judge. As the PO submitted, the statements used extremely derogatory language, in terms which were redolent of vulgar abuse rather than reasoned debate, in highly confrontational terms, over such a period of time as might legitimately be described a public – and seemingly personal - campaign against that individual in circumstances far removed from those which might sensibly draw attention to a matter of public interest. They also related to ongoing proceedings.

[60] There is no doubt that social media generally has its place as a means of communication. Social media platforms reach very large audiences, and may be a useful means of circulating information. Websites, blogs and the like may be able to contribute in

some way to public debate. However, there are significant drawbacks. Serious public debate on matters of public interest should be conducted in conditions of accuracy, reason, restraint, discipline, rational analysis and courtesy. Should a judge engage in any way in public debate these are the qualities which should be the hallmark of participation. Using X as the primary means of communication is not obviously designed to attract those qualities, even without consideration of the language used in the communications. In the twenty-first century, it is no doubt artificial to expect judges to refrain from use of social media; although the advice to do so with extreme caution and circumspection seems appropriate. In particular, there is a requirement that judges should express themselves with restraint, express themselves professionally, and with courtesy, and keep their comments within fitting bounds, commensurate to the dignity of their office and be respectful of others. It is clear that the court in *Danilet* had concerns over the use of such media by a judge, and noted a distinction to be drawn between messages sent in an environment reserved for professionals as opposed to one accessible to all Internet users. It stated in terms that the use of a Facebook account accessible to the public may give rise to “legitimate questions with regard to respect for the duty of restraint imposed on judges”. In *Danilet* the communications were found to be within the bounds of courtesy, decency and professionalism. The same cannot be said in the present case.

[61] As to the potentially chilling effect of sanctions following the exercise of the right to freedom of expression, we recognise that this is an important and relevant consideration. The valid contribution which judges may have to make on issues of significant public interest is recognised. It may be unwise for a judge to offer public comment, even in a civil and measured manner, on a topic of important public debate, but it does not necessarily follow that doing so is not within the bounds of a JOH’s article 10 rights, should the content,

context and tone of the communications be such as unlikely to be considered to go beyond the bounds of reasonable and professional behaviour or to bring the office into disrepute. *Danilet* is an example. The present case, for the reasons we have given is far removed from that context. The communications referred to the judicial chair of the inquiry as evil, corrupt, a monster, who had manufactured false criminal charges against him to get him arrested, and who was a bully who had treated him viciously, an abuser, a danger to cancer sufferers, evil and deranged, questioning whether she was a normal, compassionate, rational human being, and saying that she was a person who was guilty of the abuse of public funds. The tenor of the communications, and the language used, becomes progressively worse over time and it is not unreasonable to categorise it as a campaign of personal abuse addressed to the Inquiry Chair. In our view to expect that judges do not descend to such conduct, particularly in a public forum of the kind in question, and to consider it a fit subject for disciplinary proceedings does not invoke the potentially chilling effect of imposing a restriction on the JOH's article 10 rights. The fact that a JOH continues to have article 10 rights does not give him *carte blanche* to say what he likes, how he likes, however unprofessionally or to conduct himself in this way.

Fitness for Office

[62] The test for determining that a JOH is not fit to hold office if a high one. It was addressed by the Judicial Committee of the Privy Council in the case of the *Hearing On The Report Of The Chief Justice Of Gibraltar* [2009] UKPC 43 in the advice of the majority, given by Lord Phillips:

“[31] While the highest standards are expected of a judge, failure to meet those standards will not of itself be enough to justify removal of a judge. So important is judicial independence that removal of a judge can only be justified where the

shortcomings of the judge are so serious as to destroy confidence in the judge's ability properly to perform the judicial function. As Gonthier J put it at paragraph 147 of [*Therrien v Minister of Justice*]:

'... before making a recommendation that a judge be removed, the question to be asked is whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office.'

[63] The test relating to "behaviour" was also addressed. It was noted that "misbehaviour" was a word which drew its meaning from the context in which it was used.

Reference was made (para 202) to para 85 of the decision of Gray J in *Clark v Vanstone* [2004] FCA 1105, (2004) 211 ALR 412 at [85], that:

"It is clear from these expressions of opinion that, in order to constitute misbehaviour by the holder of an office, the conduct concerned need not be criminal conduct and need not occur in the course of the performance of the duties of the office. For present purposes, the important proposition to be drawn from these expressions of opinion is that, in a case in which the term 'misbehaviour' is used with reference to the holder of an office, the content of its meaning is to be determined by reference to the effect of the conduct on the capacity of the person to continue to hold the office. In turn, the capacity to continue to hold an office has two aspects. The conduct of the person concerned might be such that it affects directly the person's ability to carry out the office. Alternatively, or in addition, it may affect the perceptions of others in relation to the office, so that any purported performance of the duties of the office will be perceived widely as corrupt, improper or inimical to the interests of the persons, or the organisation, for whose benefit the functions of the office are performed. In either case, the danger is that the office itself will be brought into disrepute as a result of the conduct of its holder. If that is likely to be the case, then the conduct is properly characterised as misbehaviour for the purposes of the relevant legislation."

[64] That passage had been relied upon by Lord Scott of Foscote in the advice of the Judicial Committee of the Privy Council in *Lawrence v A-G* [2007] UKPC 18, which in turn informed the advice given in the *Gibraltar* case:

“[203] Lord Scott derived ... four ingredients that will normally need to be present before conduct can be characterised as ‘misbehaviour’ for the purposes of removal from office. ... (i) Has the Chief Justice’s conduct affected directly his ability to carry out the duties and discharge the functions of his office? (ii) Has that conduct adversely affected the perception of others as to his ability to carry out those duties and discharge those functions? (iii) Would it be perceived to be inimical to the due administration of justice in Gibraltar if the Chief Justice remains in office? (iv) Has the office of Chief Justice been brought into disrepute by the Chief Justice’s conduct?”

[65] The test that removal from office “can only be justified where the shortcomings ... are so serious as to destroy confidence in the judge’s ability properly to perform the judicial function” is clearly a very high one. A determination that all faith in the JOH’s ability to discharge the judicial function has been lost is not to be made lightly. Before expressing the test in para 31 of the *Gibraltar* case, Lord Phillips had made observations as to the standard of behaviour expected from a judge:

“[30] A summary of the standard of behaviour to be expected from a judge was given by Gonthier J when delivering the judgement of the Supreme Court of Canada in *Therrien v Canada (Ministry of Justice)* and another [2001] 2 SCR 3:

‘The public will therefore demand virtual irreproachable conduct from anyone performing a judicial function. It will at least demand that they give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens.’”

[66] It is worth recalling what the role of sheriff involves. The role is one which is central to the community. The sheriff deals with a very wide range of cases, such criminal cases including various types of warrant, family and adoption proceedings or permanence orders, civil business of almost all kinds. The sheriff may be called upon to determine children’s referral proceedings; summary applications of various kinds; child welfare hearings; and fatal accident inquiries. The sheriff is primarily a judge of first instance, but may have to exercise an essentially appellate capacity in respect of certain administrative and *quasi-*

judicial decisions. The range of work carried out by a sheriff is very broad, of significant importance to the local community and more widely, under regular press scrutiny, and may involve considerable public interest. It is a role which calls for good judgment, self-discipline, courtesy, circumspection in the use of language, and sensitivity. The sheriff must treat everyone with respect and dignity. The sheriff must be able to communicate effectively and with authority, applying logic and reason, and remaining calm in the face of provocative behaviour, keep his own reactions in check, and generally bringing a professional detachment to the discharge of his functions. Loss of self-control or civility, and emotional involvement, are inimical to the discharge of the judicial function. The sheriff must both follow and promote high standards of behaviour, both in private and in public. In this regard, they must be conscious that as a symbol of the justice system, the expectations on judges may be greater than those imposed on other members of the community.

[67] Having regard to the role of sheriff, the qualities required, and the functions performed we are of the view that we require to answer each of the four questions posed in Gibraltar case in the affirmative. The nature and tone of the communications and the method of communication, all indicate a serious lack of judgment. They are offensive and abusive in tone, and lacking of respect for another JOH to an extent constituting a personal attack on that individual, in vituperative terms. They are seriously lacking in dignity. The communications are not simply rash or intemperate comments showing a one-off lack of judgement. They evidence a sustained lack of judgement over an extended period of time, and after there had been the opportunity to reflect on the course of action adopted. Rather than cease the conduct, or temper his means of expression, he intensified the conduct, using language which even deteriorated further over time. The original communications referred to by Lord Bracadale, were followed by extremely intemperate communications which were

then persisted in over a considerable period of time. For the reasons we have already given, they cannot reasonably be placed within the context of a JOH's right to freedom of expression, entitlement to engage with restraint in issues of public debate, whistleblowing or (save in two instances) other protected acts. The communications become progressively more abusive, less restrained, and entirely lacking in balance and reason. The messages as a whole were properly described as a campaign. The lack of judgement, the lack of self-discipline, and the loss of self-control directly call into question his professionalism, and his ability to carry out the duties and discharge the functions of sheriff. The conduct as a whole is likely adversely to affect the perception of others as to that ability, given the intemperate and abusive nature of the communications, the use of X, and the persistent nature of the communications, as well as their increasingly unrestrained content.

[68] We have already noted that loss of self-control or civility, and emotional involvement, are inimical to the discharge of the judicial function. So too are lack of dignity and unprofessionalism. We are satisfied that it would be perceived to be inimical to the due administration of justice if the JOH remained in office. Finally, for all the reasons we have given it is clear that the communications, as in the *Gibraltar* case, constitute repeated and serious shortcomings and misjudgements and have brought the office of sheriff into disrepute.

[69] We are satisfied that that the JOH is unfit to hold office by reason of misbehaviour.



25 July 2024

Appendix

1. Report by the Investigating Officer (Lord Bracadale) with all the docs appended thereto;
2. Report by the Investigating Officer (Lord Mulholland) with all the docs appended thereto;
3. The determination of 8 February 2022; and
4. The determination and directions of 22 March 2024.