The Applicant appealed the Tribunal's decision dated 5 February 2020. The appeal was heard by Mr Justice Murray on 8 October 2020 and Judgment handed down on 20 April 2021. The appeal was dismissed. Shrimpton v Solicitors Regulation Authority [2021] EWHC 945 (Admin)

SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 (as amended) Case No. 12014-2019

BETWEEN:

MICHAEL SHRIMPTON Applicant

and

SOLICITORS REGULATION AUTHORITY Respondent

Before:

Mr E. Nally (in the chair)
Mr P. Booth
Mrs C. Valentine

Date of Hearing: 4 – 5 February 2020

Appearances

The Applicant appeared and represented himself.

Charlotte Watts, barrister employed by Capsticks Solicitors LLP, 1 St George's for the Respondent.

JUDGMENT ON AN APPLICATION TO REVIEW/REVOKE A SECTION 43 ORDER

Introduction

1. By a Notice for Review/Revocation brought by the Applicant pursuant to section 43(3)(a) of the Solicitors Act 1974 (as amended) ("the Act") dated 17 October 2019, the Applicant applied for the decision of a Chief Adjudicator of the Respondent dated 16 September 2019 to be reviewed/revoked.

2. The Chief Adjudicator directed that the Applicant be made subject to a section 43 Order, such that:

   2.1 no solicitor shall employ or remunerate him in connection with his/her practice as a solicitor;

   2.2 no employee of a solicitor shall employ or remunerate him in connection with the solicitor's practice;

   2.3 no recognised body shall employ or remunerate him;

   2.4 no manager or employee of a recognised body shall employ or remunerate him in connection with the business of that body;

   2.5 no recognised body or manager or employee of such a body shall permit him to be a manager of the body; and

   2.6 no recognised body or manager or employee of such a body shall permit him to have an interest in the body;

   except in accordance with a Society permission.

3. The Chief Adjudicator also directed that the decision be published. The Applicant was ordered to pay the sum of £1,350 towards the SRA's costs of investigating the matter.

4. The grounds for review were detailed by the Applicant in his Grounds for Review document dated 17 October 2019.

The Legal Framework

5. The procedure for the review of the section 43 order was governed by section 43(3)(a) of the Act. On the review of an order under subsection (3) the Tribunal might order:

   (a) the quashing of the order; or
   (b) the variation of the order; or
   (c) the confirmation of the order;

   and where in the opinion of the Tribunal no prima facie case for quashing or varying the order was shown, the Tribunal might order its confirmation without hearing the applicant. Section 43(4) provided that the Tribunal, on the hearing of any application under this section, might make an order as to the payment of costs by any party to the application.

6. In light of the Divisional Court's Judgment in SRA v SDT and Arslan and the Law Society (Intervening Party) [2016] EWHC 2862, the following framework principles applied to the review:

- The role of the Tribunal was to review the Chief Adjudicator's decision, rather than to conduct a rehearing.

- That review function was analogous to that of a court dealing with an appeal from another court or tribunal pursuant to Rule 52.11 of the Civil Procedure Rules. The case law that had developed under Rule 52.11 in relation to (i) the difference between a review and rehearing and (ii) the nature of a review would inform the correct approach that the Tribunal should adopt when conducting a review.

- The Tribunal should interfere with the Respondent's decision under review only if satisfied that the decision was wrong or that the decision was unjust because of a serious procedural or other irregularity in the proceedings.

- The Tribunal should not embark on an exercise of finding the relevant facts afresh. On matters of fact, the proper starting point for the Tribunal was the findings made by the Chief Adjudicator and the evidence before the Chief Adjudicator. Whilst the Tribunal could reach a different conclusion, the consideration was whether, on that evidence, the Chief Adjudicator was justified in making the factual findings that he did.

- Where a challenge was made to conclusions of primary fact, the weight to be attached to the findings of the original decision-maker would depend upon the extent to which that decision-maker had an advantage over the reviewing body; the greater that advantage, the more reluctant the reviewing body should be to interfere.

- Where the original decision involved an evaluation of the facts on which there was room for reasonable disagreement, the reviewing body ought not generally to interfere unless it was satisfied that the conclusion reached lay outside the bounds within which reasonable disagreement was possible.

The Standard of Proof

7. The standard of proof to be applied was the civil standard.

Background

8. On 20 February 2014, the Applicant was convicted at East Berkshire Magistrates' Court of an offence contrary to section 1 of the Protection of Children Act 1978 ("the Images conviction"). Section 1 of that Act provided that:

> "It is an offence for a person –
>
> (a) to take, or permit to be taken, or to make, any indecent photograph or pseudo-photograph of a child; or

(b) to distribute or show such indecent photographs or pseudo-photographs; or

(c) to have in his possession such indecent photographs or pseudo-photographs, with a view to their being distributed or shown by himself or others; or

(d) to publish or cause to be published any advertisement likely to be understood as conveying that the advertiser distributes or shows such indecent photographs or pseudo-photographs, or intends to do so."

9. The date of the offence was 1 July 2011 to 20 April 2012. Forty indecent images of children had been downloaded from the internet and stored on an encrypted memory stick. The memory stick was found during a search of the Applicant's house in relation to an investigation into communicating false information with intent. Following his conviction, the Applicant was sentenced to a 3 year Supervision Order and a 5 year Sexual Offences Prevention Order.

10. The Applicant appealed to the Crown Court against his conviction and sentence. His appeal was dismissed at Aylesbury Crown Court on 28 October 2014. The Applicant's application to state a case was refused, as was his application for judicial review of that decision made to the Divisional Court.

11. On 25 November 2014 the Applicant was tried and convicted at Southwark Crown Court on indictment of two counts of communicating false information with intent contrary to section 51 of the Criminal Law Act 1977 ("the Bomb Hoax conviction"). Section 51(2) of that Act provided that:

> "A person who communicates any information which he knows or believes to be false to another person with the intention of inducing in him or any other person a false belief that a bomb or other thing liable to explode or ignite is present in any place or location whatever is guilty of an offence."

12. The Applicant made telephone calls on 19 and 20 April 2012 to the Private Secretary to the Secretary of State for Defence and a political agent of the Foreign Office Minister warning that he had knowledge of a nuclear warhead which had been planted in the London area for detonation during the Olympic Games.

13. The Applicant was sentenced on 6 February 2015 to 12 months' imprisonment. The Applicant applied for permission to appeal his conviction. Permission was refused by the single Judge on 15 June 2015. His renewed application to the full Court was refused on 19 January 2016

14. On 29 September 2015 the Criminal Cases Review Commission ("CCRC") received an application from the Applicant in relation to the indecent photographs conviction. On 21 March 2016, the CCRC received a further application in relation to the bomb hoax conviction. The CCRC considered the applications on 18 September 2017 and concluded that there was no real possibility that the Crown Court would not now uphold the conviction for making indecent images or quash the bomb hoax conviction. Further submissions were sent by the Applicant to the CCRC on 18 October 2017. Having

reviewed those submissions, the CCRC remained of the view that there was no real possibility that the Applicant's convictions would be overturned.

15. In 2016, the Applicant made an application to the European Court of Human Rights as regards the Images conviction. That application was determined to be inadmissible.

16. Following a hearing at the Bar Tribunals & Adjudication Service ("BTAS") that took place on 19 and 20 September 2018, the Applicant was disbarred. The Applicant appealed that decision to the High Court. On 8 April 2019, Mrs Justice Jefford delivered her Judgment in which the Applicant's appeal was dismissed.

17. On 16 September 2019, the Respondent imposed the Section 43 Order which is the subject of this application.

Jurisdiction

The Applicant's Case

18. The law of England was correctly reflected in Rule 30(i)(a) of the Solicitors (Disciplinary Proceedings) Rules 1994 - in proceedings where the strict rules of evidence did not apply a conviction was no more than prima facie evidence of guilt. That accorded with the Rule in Hollington v. F. Hewthorn & Co. Ltd [1943] KB 587, where a strongly constituted Court of Appeal held that a conviction was no more than a statement of opinion by the tribunal of fact in a criminal case, based upon the evidence before them. Evidence of a conviction was still inadmissible at common law in proceedings where the strict rules of evidence applied.

19. Absent statutory intervention a professional disciplinary tribunal does not sit as a court of appeal from a criminal court and was bound to consider the evidence tendered before it - General Medical Council v. Spackman (1943] AC 627. The fresh evidence in Spackman was available at the Probate Divorce and Admiralty Division hearing but as the House of Lords held the reason why it was not led was immaterial. Both Jefford J. and the Chief Adjudicator misunderstood the Applicant's arguments in relation to Spackman - a regulator was entitled to treat a criminal conviction as a starting point and was not obliged to conduct a "wholly fresh inquiry", which would be a nonsense. The duty on a regulator was to consider fresh evidence which was not before the criminal court. The onus of proof rested on the party seeking to overturn the conviction, which was the answer to Lord Taylor CJ's objection in Shepherd v. Law Society LTA/96/5914/D that the standard of proof was different. So it was, but the onus of proof was also different. Lord Taylor's rare error, which was an error of logic as well as law, was repeated by the Chief Adjudicator. The Applicant's case did not require a "re-hearing of the criminal convictions on the civil standard of proof".

20. The Court of Appeal decision in Shepherd was not binding upon the Tribunal as it was a summary permission to appeal decision only and in accordance with the Law of Precedent such decisions were not binding. Both the Court of Appeal 'decision' and that of the Divisional Court were in any event *per incuriam*[1] by reason of the failure of

[1] A finding of *per incuriam* means that a previous court judgment has failed to pay attention to relevant statutory provision or precedents.

counsel for the Law Society to cite the binding decision of the Court of Appeal in In re Weare, A Solicitor (1893) 2 Q1 419. In Weare a very strong constitution decided that when hearing an appeal against a professional disciplinary based upon a criminal conviction the court will review the sufficiency of evidence against the solicitor. The Applicant submitted that by extension the rule in Weare required a court to consider any fresh evidence since the criminal trial, since fresh evidence might have a bearing on the issue of sufficiency of evidence.

21. The Chief Adjudicator was wrong in law in applying the exceptional circumstances test that was based on the *per incuriam* decision in Shepherd. Further, it was submitted that Rule 15(2) of the Solicitors (Disciplinary Proceedings) Rules 2007 ("the Rules") was in conflict with the Law of England, had "no statutory authority, [was] *ultra vires*[2] the Tribunal, null and void and of no legal effect whatsoever." The binding nature of a legal precedent could not be altered by a decision to suppress it from a later court, let alone where that decision was taken in bad faith in order to increase the chances of success of a regulator wishing to adopt a policy position which it was not prepared to put before Parliament. The Solicitors Act 1974, together with the 1932, 1957 and 1965 Acts were enacted on the basis of Weare, namely on the basis that a solicitor convicted of a criminal offence had the important and fundamental safeguard of the right to have the evidence on which the conviction was based reviewed by a court before being damned professionally.

22. For the avoidance of doubt the accusation against the Law Society was that it deliberately suppressed Weare, which had been applied by a strong Divisional Court, presided over by the Lord Chief Justice, as recently as 1992 in Re A Solicitor [1993] QB 69, from the Court of Appeal. Weare was probably applied in every case of a contested conviction on indictment of a solicitor from 1893 until at least. 1993, when it was last applied in a reported decision. Even if counsel was unfamiliar with the law relating to solicitors, the Law Society must have known about Weare. The authority probably appeared in every edition of Cordery on Solicitors published in the 20th century until the 8th.

The Respondent's Case

23. The Applicant argued that Spackman established that the Chief Adjudicator had a duty to consider fresh evidence that was not before the criminal court. In fact, the judges in Spackman held that in a case where the practitioner had been convicted, the practitioner could not go behind the conviction and endeavour to show that he was innocent of the charge and should have been acquitted.

24. In Shepherd the Appellant sought leave to appeal against the findings of the Tribunal who had struck him off. Before the Tribunal, a certificate of conviction evidencing the Appellant's convictions had been admitted without objection. The ground of appeal advanced related to the Tribunal's refusal to allow the Appellant to adduce evidence in support of his assertion that he was not, in fact, guilty of the offences of which he had been convicted. The Divisional Court dismissed the appeal and refused leave to appeal. The Divisional Court accepted that the effect of the Solicitors Disciplinary Proceedings Rules 1994, which incorporated section 11 of the Civil Evidence Act 1968, was that a

[2] A matter is *ultra vires* when it is beyond or outside of one's legal power or authority.

certificate of conviction was admissible to prove the fact of the convictions as prima facie evidence that the Appellant was guilty of the offence. It was prima facie evidence only because it was subject to the qualification in section 11(2)(a) "unless the contrary is proved'. The practice of the Tribunal not to go behind a conviction unless there were exceptional circumstances was lawful and justified. Shepherd, it was submitted, was a persuasive authority and contained the correct interpretation of the rules.

25. The Applicant argued that Rule 15(2) of the Rules was incompatible with Weare, and was thus null, void and *ultra vires*. He suggested that Weare was authority for the proposition that a solicitor convicted of a criminal offence "had the important and fundamental safeguard of the right to have the evidence on which the conviction was based reviewed by a court before being damned professionally". It is no such authority. Weare held that where a solicitor had been convicted of an offence, the Court would inquire into the nature of the crime, and would not, as a matter of course, strike him off because he has been convicted.

26. Under Rule 15(2) of the Rules, a conviction for a criminal offence may be proved by the production of a certified copy of the certificate of conviction relating to the offence and proof of a conviction shall constitute evidence that the person in question was guilty of the offence. The findings of fact upon which that conviction was based shall be admissible as conclusive proof of those facts, save in exceptional circumstances. In any event, the Applicant's position was that the Chief Adjudicator had a duty to consider fresh evidence that was not before the criminal court. Whilst that proposition was not accepted, it was clear that the Chief Adjudicator did consider the evidence provided by the Applicant but dismissed it as 'nothing more than opinions and views' and found that there was no fresh evidence supporting the Applicant's assertions.

The Tribunal's Findings

27. The Tribunal did not accept the Applicant's interpretation of the decision in Weare. In that case, the Court considered (amongst other things) whether the fact of a criminal conviction itself justified striking a solicitor from the Roll, and whether the power to strike a solicitor from the Roll related only to misconduct by a solicitor when acting as a solicitor or extended to personal misconduct. The Court held that a criminal conviction did not automatically lead to a solicitor being struck off. There should be consideration of the nature of the criminal conviction. It also held that the Court's jurisdiction to strike a solicitor off the Roll included misconduct that was not connected to a solicitor's professional dealings. The Tribunal found that there was nothing in the decision in Weare that supported the Applicant's contention that the Tribunal was bound to consider to any fresh evidence since the criminal trial.

28. The Tribunal did not accept that Spackman was authority for the Applicant's proposition that the Chief Adjudicator (or the Tribunal) was under a duty to consider fresh evidence that was not before the criminal courts. That case related to a medical practitioner and section 29 of the Medical Act, 1858, which stated:

> "If any registered medical practitioner shall be convicted … of any felony or misdemeanour, or … of any crime or offence, or shall after due inquiry be judged by the General Council to have been guilty of infamous conduct in any

> professional respect, the General Council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register."

29. Viscount Simon L.C. considered that Section 29 drew "a significant distinction between a case in which the impeached practitioner has been convicted of felony or misdemeanour and a case in which the allegation of infamous conduct is not connected with a criminal conviction. In the former case, the decision of the council is properly based on the fact of the conviction, and the practitioner cannot go behind it and endeavour to show that he was innocent of the charge and should have been acquitted. In the latter case, the decision of the council, if adverse to the practitioner, must be arrived at "after due inquiry," and this of course means after due inquiry by the council. The question, therefore, is whether the council in this case can be regarded as having reached its adverse decision "after due inquiry" when it has refused to hear evidence tendered by the practitioner with a view to showing that he has not been guilty of the infamous conduct alleged and that the finding of the Divorce Court against him as co-respondent is wrong."

30. The Tribunal determined that the decision in Spackman was clear. Where there was a criminal conviction, "the practitioner cannot go behind it and endeavour to show that he was innocent of the charge and should have been acquitted". The duty to make "due inquiry" was limited to those matters of infamous conduct where there had been no criminal conviction. Accordingly, the Tribunal found that there was no obligation on the Chief Adjudicator (or the Tribunal) to make any further inquiry following a criminal conviction; it was entitled to rely on the conviction as proof of the facts.

31. The Tribunal found that the decision in Shepherd was not *per incuriam*. The sole ground of appeal advanced in that case related to the Tribunal's refusal to allow Mr Shepherd to adduce evidence in support of his assertion that he was not guilty of the offences of which he had been convicted. The failure to cite Weare in that matter was not detrimental to the findings. Weare, as detailed above, related to whether a criminal conviction in and of itself justified striking a solicitor from the Roll and whether a solicitor could be struck from the Roll for misconduct that was not connected to his professional practice. The matters considered in Weare were of an entirely different nature to those considered in Shepherd, and thus the failure to cite Weare did not render the decision in Shepherd *per incuriam*.

32. The Applicant submitted that the Court of Appeal decision in Shepherd was not binding upon the Tribunal as it was a summary permission to appeal decision. He did not seek to argue that the Tribunal was not bound by the Divisional Court's decision. In the Divisional Court Lord Taylor stated:

> "Public policy requires that, save in exceptional circumstances, a challenge to a criminal conviction should not be entertained by a Disciplinary Tribunal for the reasons quoted above from the Master of the Rolls' judgment. If this appellant's argument were right, he should have been allowed to challenge his conviction before the Tribunal even if he had appealed unsuccessfully to the Court of Appeal Criminal Division. That could, in theory, have led after a conviction by a jury on the criminal burden of proof, upheld by three Appeal Court Judges, to exoneration by a Disciplinary Tribunal on the civil burden of proof … There were no exceptional circumstances. What he wished to do was to have a

> rehearing of the criminal trial ... We are in no doubt that the Tribunal were right to refuse an adjournment and to refuse the appellant an opportunity to mount such an operation."

33. Given the Tribunal's finding that Shepherd was not *per incuriam*, it followed that the Tribunal's Rules were also binding and were not, as had been submitted, "in conflict with the Law of England". Nor were the Rules *ultra vires*, null and void and of no legal effect whatsoever. The Tribunal was satisfied that the Tribunal's Rules were on the contrary fully effective with the statutory force of secondary legislation

34. The Applicant had argued that in order for a conviction to be binding, there had to be express legislation, as was the case in Spackman. The terms of Rule 15(2) were clear:

> "A conviction for a criminal offence may be proved by the production of a certified copy of the certificate of conviction relating to the offence and proof of a conviction shall constitute evidence that the person in question was guilty of the offence. The findings of fact upon which that conviction was based shall be admissible as conclusive proof of those facts save in exceptional circumstances."

35. The Tribunal found that pursuant to Rule 15(2), there was express statutory authority by which the Tribunal was bound.

36. Having considered the submissions of the parties and reviewed the authorities to which it was referred, the Tribunal determined that it had proper jurisdiction to hear the matter, and that it was entitled to rely on Rule 15(2) when considering the Applicant's criminal convictions.

37. Accordingly, and for the reasons detailed above, the Tribunal did not accept the Applicant's submissions as regards jurisdiction.

The Status of the Applicant's Convictions

The Chief Adjudicators Decision

38. The Chief Adjudicator determined that as a regulator, the SRA was entitled to consider the convictions in the context of exercising its regulatory powers. She noted that this was accepted by the Applicant, however he considered that it was material that one conviction was spent and described the other as not very serious and nearly spent. Section 43 enabled an order to be imposed if a person had previously been subject to a conviction.

The Applicant's Case

39. The Applicant submitted that the Images conviction became spent on 13 March 2019, and that the Bomb Hoax conviction would become spent on 5 February 2020. Section 4 of the Rehabilitation of Offenders Act provided that, subject to exceptions:

> "(1) Subject to sections 7 and 8 below, a person who has become a rehabilitated person for the purposes of this Act in respect of a

> conviction shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction; and, notwithstanding the provisions of any other enactment or rule of law to the contrary, but subject as aforesaid—
>
> (a) no evidence shall be admissible in any proceedings before a judicial authority exercising its jurisdiction or functions in … England and Wales to prove that any such person has committed or been charged with or prosecuted for or convicted of or sentenced for any offence which was the subject of a spent conviction; and
>
> (b) a person shall not, in any such proceedings, be asked, and, if asked, shall not be required to answer, any question relating to his past which cannot be answered without acknowledging or referring to a spent conviction or spent convictions or any circumstances ancillary thereto.

40. Accordingly, not only was the Respondent prohibited from leading evidence of the convictions, the Applicant could not even be asked about the convictions. It was clear from Schedule 1 to the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975, that solicitors and barristers (amongst others) were exempted from Section 4 of the Rehabilitation of Offenders Act. This, it was submitted, did not extend to solicitors' clerks. In those circumstances, it was submitted, the Respondent had no case.

The Respondent's Case

41. The Respondent submitted that the Rehabilitation of Offenders Act (Exceptions) Order 1975 listed exceptions to the 1974 Act in recognition that there were certain activities for which fuller disclosure of a person's criminal record history was relevant. Barrister and solicitor were listed in Schedule 1. Section 43 enabled an order to be imposed if a person had previously been convicted. Whether a conviction was spent or not was irrelevant to the question of whether the underlying criminal offences were such that, in the opinion of the decision maker, it would be undesirable for an individual to be involved in legal practice.

The Tribunal's Decision

42. The Tribunal considered the statutory provisions contained in the relevant legislation. Section 4(6) of the Rehabilitation of Offenders Act provided that:

> "For the purposes of this section and section 7 below "proceedings before a judicial authority" includes, in addition to proceedings before any of the ordinary courts of law, proceedings before any tribunal, body or person having power—
>
> (a) by virtue of any enactment, law, custom or practice;

(b) under the rules governing any association, institution, profession, occupation or employment; or

(c) under any provision of an agreement providing for arbitration with respect to questions arising thereunder;

to determine any question affecting the rights, privileges, obligations or liabilities of any person, or to receive evidence affecting the determination of any such question."

43. Section 7(3) of the Rehabilitation of Offenders Act provided that:

> "If at any stage in any proceedings before a judicial authority in … England and Wales (not being proceedings to which, by virtue of any of paragraphs (a) to (e) of subsection (2) above or of any order for the time being in force under subsection (4) below, section 4(1) above has no application, or proceedings to which section 8 below applies) the authority is satisfied, in the light of any considerations which appear to it to be relevant (including any evidence which has been or may thereafter be put before it), that justice cannot be done in the case except by admitting or requiring evidence relating to a person's spent convictions or to circumstances ancillary thereto, that authority may admit or, as the case may be, require the evidence in question notwithstanding the provisions of subsection (1) of section 4 above, and may determine any issue to which the evidence relates in disregard, so far as necessary, of those provisions.

44. The provisions of the Act were clear. The Respondent, was deemed a judicial authority by virtue of Section 4(6) and thus, under the provisions of Section 7(3) was entitled to admit evidence of the Applicant's spent convictions if satisfied that justice could not otherwise be done. Accordingly, the Tribunal found that contrary to the submissions made by the Applicant, the Respondent had not erred in law by considering the Respondent's convictions whether or not those convictions were spent. Thus the Tribunal rejected the Applicant's submissions in that regard. Further, the Respondent's submissions as to the law, insofar as they were capable of being correct, were only applicable to the Images conviction as the Bomb Hoax conviction was not spent at the time of the Respondent's determination of the necessity to impose a Section 43 Order.

45. Accordingly, the Tribunal did not find that the Chief Adjudicator's decision to consider the Applicant's previous convictions was wrong or unjust because of a serious procedural or other irregularity.

Exceptional Circumstances

<u>The Chief Adjudicator's Decision</u>

46. The Chief Adjudicator did not find that there were any exceptional circumstances that justified going behind the Applicant's convictions as no new evidence had been provided. The Applicant had relied on arguments previously made in the criminal and civil courts and to the CCRC. All of those arguments had been rejected. The Chief Adjudicator considered that she was entitled to take into account the decisions made by the Courts and the CCRC when reaching her decision. The Chief Adjudicator also

considered the authorities to which she had been referred. In her decision the Chief Adjudicator stated:

> "In conclusion, I am entitled to rely on the evidence already adduced and I have considered [the Applicant's] representations and Mr Cufley's reports. They are nothing more than opinions and views. There is no fresh evidence supporting [the Applicant's] assertions. It is not in the public interest for me to go behind the convictions which have been upheld on the criminal burden of proof and by three Court of Appeal judges (in relation to the bomb hoax conviction). [The Applicant] was convicted for the bomb hoax following a two week trial by jury. He has produced nothing significant or new. His representations are not sufficient for me to conclude there are exceptional circumstances requiring a re-hearing of the criminal convictions on the civil standard of proof.
>
> The conviction for the criminal offences are proved by the production of a copy of the certificates of conviction and constitute evidence that [the Applicant] was guilty of the offences. The findings of fact on which the convictions are based are conclusive proof of those facts."

The Applicant's Case

47. The Applicant submitted that the availability of fresh evidence was, of itself, an exceptional circumstance. Even if Shepherd was correctly decided and bound the Tribunal, treating the availability of fresh evidence as an exceptional circumstance was consistent with that decision.

48. The Chief Adjudicator's decision that the Applicant has no fresh evidence to lead was incorrect. The Applicant referred the Tribunal to Mr Cufley's reports. Mr Cufley had not given evidence to any court or tribunal in respect of the Applicant. Nor had any of the other experts on which the Applicant wished to rely.

49. As regards the Images conviction, none of the evidence in relation to the hard drive and the memory stick was provided to cither the trial or appeal court in the images matter, although it could and should have been provided by the IT companies in question. No evidence was led from the maker of the second hard drive.

50. The Applicant submitted that both IT companies, prior to being taken over, "were corrupt companies, that is to say they were willing, no doubt after political pressure was applied to them by a with respect corrupt American administration, to mislead a court of law … and or in the alternative conceal material information … in order to secure the conviction of an innocent defendant".

51. The Chief Adjudicator had wrongly equated the CCRC with a court of law. The CCRC was in no way the equivalent of a court of law. Its procedures were opaque and lacking in transparency. It conducted its affairs in secret and it operated unfairly. It had failed to put points to the expert instructed by the Applicant's solicitors, failed to engage with their arguments and reached its "facile conclusion" as regards separate warranties without consulting the manufacturer of the second hard drive.

52. The Applicant submitted that "assuming in its favour that the CCRC is not corrupt and prepared to take orders from the Cabinet Office in political cases" its conclusion as regards the issuing of a separate warranty for original equipment hard drives to that issued by the laptop manufacturer, "maintained in the face of an expert's report relying on WDC's own website, is so facile with respect that it calls the CCRC's competence into question". The Tribunal, it was submitted, was entitled to rely on its own experience when purchasing computers in judging whether the CCRC was right on this point.

53. The Chief Adjudicator was wrong to dismiss the evidence of Mr Cufley as nothing more than "opinions and views". This was a grotesque misrepresentation of the fresh evidence in relation to both convictions. As a matter of law expert evidence was admissible as an exception to the general rule whereby opinion evidence was not admitted. Any expert, including Mr Cufley, was under a primary duty to the court or tribunal before whom he or she appeared to give objective evidence and disclose any evidence tending to undermine the position they are adopting, a duty which the Thames Valley Police computer technician conspicuously failed to observe, for example as regards the frailties of the software she was using to exclude tampering with the computer exhibits.

54. The Applicant detailed a number of reasons why the Chief Adjudicator's decision as regards the Images conviction was wrong, namely (but not limited to):

- She wrongly assumed that downloading from the internet onto a memory stick amounted to an offence in law;
- She wrongly assumed that the original search and seizure was lawful;
- The prosecution could not prove that the males in the images were minors as at the date of the alleged offence. The Chief Adjudicator has wrongly assumed that the material date for the assessment of the males depicted in the images was the date of uploading and not the date of downloading;
- She wrongly assumed that the Magistrates' Court had jurisdiction to try an offence said to have been committed in its entirety in New Zealand.

55. The Applicant detailed a number of matters which, in his submission, showed beyond reasonable doubt that he was innocent of the Images matter.

56. As regards the Bomb Hoax conviction, the Applicant submitted that its safety was adversely affected by the wrongful Images conviction. The Applicant detailed a number of reasons why the Chief Adjudicator's decision was wrong as regards the Bomb Hoax conviction, namely (but not limited to):

- She was wrong to reject his case as regards the presence of two nuclear warheads in London in 1945;
- She was wrong to consider herself bound by the permission to appeal ruling of the Court of Appeal which had incorrectly held that a bomb hoax offence could be

committed when a bomb is actually present and that the qualified warning that there might be a bomb could amount to an offence;

- She wrongly applied the law as regards the admissibility of the published scientific works of a Canadian nuclear physicist.

The Respondent's Case

57. The Applicant asserted that the Chief Adjudicator wrongly equated the CCRC with a court of law however he provided no clarity as to how she did so, or how doing so impacted her decision. In her decision the Chief Adjudicator stated that she was entitled to take into account the decisions made by the courts and the CCRC in reaching her decision. The Respondent submitted that the Chief Adjudicator was entitled to take into account the views of a statutory body charged with considering the references of cases to the Court of Appeal. The Applicant considered that the CCRC was incompetent and that that the Tribunal should disregard the fact that the CCRC did not refer his case for appeal. The CCRC, it was submitted, had considered the same material as the Crown Court, the Court of Appeal, BTAS and the High Court and reached the same conclusion i.e. that the evidence provided by the Applicant did not undermine his convictions.

58. As to the complaints of the dismissal of the Applicant's expert evidence as being 'nothing more than opinions and views', the Chief Adjudicator was entitled to conclude, having considered the evidence already adduced, the Applicant's representations and Mr Cufley's reports, that there was no fresh evidence to support the Applicant's assertions and that there were no exceptional circumstances requiring a re-hearing on the civil standard of proof.

59. The Applicant recited his arguments as to why, in his opinion, he was not guilty of the offences and why his convictions were unsafe. The Applicant had been convicted following trial and, as the Chief Adjudicator took into account, the cases had been the subject of unsuccessful appeals and an unsuccessful application for judicial review. The Chief Adjudicator properly took into account that in these circumstances, something more than a re-run of the arguments and evidence presented at trial would be required to amount to exceptional circumstances. Any attempt to rely on evidence that was not part of the original trial would not be sufficient since that evidence, and arguments as to why that should have been admitted, ought to have been the subject matter of his appeals.

60. The Tribunal was referred to the observations of Mrs Justice Jefford in her Judgment following the Applicant's appeal against the decision of the BTAS: "[the Applicant] appears to believe that he can endlessly adduce further evidence and that the mere production of such evidence is sufficient to mean that the Tribunal ought to have gone behind his convictions and considered all matters afresh. That is unsustainable."

The Tribunal's Findings

61. The Applicant had, in the instant proceedings, made an application for Mr Cufley to give evidence on his behalf. In his oral submissions, the Applicant explained that Mr Cufley's evidence went solely to the safety of the Images conviction. However,

given that the Bomb Hoax conviction was predicated on the Images conviction, if the Images conviction was unsafe, it followed that the Bomb Hoax conviction was also unsafe. (It was also the case, as detailed above, that the Bomb Hoax conviction was unsafe in any event). The application was based on the Applicant's interpretation of the law (as detailed above).

62. The Respondent objected to Mr Cufley giving oral evidence. The Tribunal was referred to the decision in SRA v Liaqat Ali [2013] EWHC 2584 (Admin) which stated at paragraph 14:

> ""it is essential to recognise that the Tribunal carries out a review of the imposition of the Section 43 Order. It does not rehear the original case."

63. The reports had already been considered and did not amount to fresh evidence. The sole purpose in calling Mr Cufley was to undermine the basis of the Applicant's convictions. The purpose of this hearing was to review the Chief Adjudicator's decision, and not to hear and determine an appeal against the Applicant's convictions.

64. The Tribunal found that Mr Cufley's reports had been considered by BTAS and by Mrs Justice Jefford on appeal. BTAS found that the only fresh evidence produced by the Applicant for that hearing was the fourth report of Mr Cufley (the other three having at that time been considered by the CCRC). BTAS did not find that the fourth report amounted to significant fresh evidence. Nor did it find that there were any exceptional circumstances justifying Mr Cufley giving oral evidence at the hearing.

65. For the reasons detailed above, the Tribunal did not accept the Applicant's interpretation of the statute and case law cited. Nor did it find that the cases relied upon by the Applicant supported his contention as to his ability to call evidence to cast doubt on his convictions. The Tribunal paid due regard to the decisions and reasons provided by the CCRC and BTAS. Whilst it did not consider itself bound by those decisions, it did find that the reasons espoused were in accordance with its own findings. The Tribunal did not find that the Mr Cufley's four reports amounted to significant fresh evidence. The Tribunal considered Mr Cufley's addendum to his fourth report. The Tribunal found that this did not amount to significant fresh evidence, such that the Applicant satisfied the exceptional circumstances test. Nor did it find that there were any exceptional reasons such that it could go behind the Applicant's convictions. Accordingly, the application for Mr Cufley to give oral evidence was refused.

66. Having considered all the evidence provided by the Applicant, the Tribunal was not persuaded that the circumstances in which the Applicant came to be convicted of both the Images and the Bomb Hoax convictions were exceptional such that it could go behind those convictions. The Tribunal considered the relevant authorities. The onus was on the Applicant to provide the Tribunal with sufficient compelling information such as would cause it to determine that the conviction could not be relied upon. The Applicant had failed to do so. The reports of Mr Cufley (save for the addendum to his fourth report) had been considered in detail by the CCRC. Whilst the Applicant doubted the validity of the scrutiny the CCRC gave to his matters, the Tribunal was satisfied that the CCRC had competently and comprehensively examined the evidence submitted and had reached the conclusion that the evidence upon which the Applicant sought to rely was insufficient as to render his convictions unsafe. The Tribunal did

not find that in considering and placing reliance on the decisions of the CCRC, BTAS or the Courts, the Chief Adjudicator's decision was wrong or unjust because of a serious procedural or other irregularity.

Dishonesty

The Chief Adjudicator's Findings

67. The Applicant denied dishonesty. Further, dishonesty was not a required element for the bomb hoax offence. He also said the statement he made was true and he believed it to be true.

68. Section 51(2) Criminal Law Act 1977 stated: "A person who communicates any information which he knows or believes to be false to another person with the intention of inducing in him or any other person a false belief that a bomb or other thing liable to explode or ignite is present in any place or location whatever is guilty of an offence".

69. The Applicant was found guilty of that offence following a jury trial in the Crown Court. He appealed the conviction and the Court of Appeal confirmed the issue for the jury to decide was whether they were sure that either the Applicant knew that his report of a nuclear device was false or that he did not believe it to be true. The prosecution case was that he must have known that the extraordinary information he was communicating was false. The jury agreed and found him guilty.

70. The Chief Adjudicator found that "the offence is one that falls to be considered as an offence of dishonesty because it required the communication of false information that the person knew or believed to be false and induced a false belief. The findings and conviction prove beyond reasonable doubt that he was dishonest in communicating the information. For these reasons I find [the Applicant] was dishonest.

The Applicant's Case

71. The Applicant submitted that dishonesty was not and had never been an element of the offence under Section 51(2). Dishonesty was not alleged by the Prosecution. The Judge did not direct the jury that they had to find dishonesty. Any such direction, it was submitted, would have been wrong and grounds for an appeal.

72. The legal test for dishonesty was that in Brunei Airlines v. Tan [1995] 2 AC 378 and Ivey v. Genting Casinos (UK) Ltd [2017] UKSC 67. The test was an objective one. In Ivey the Court considered that avoiding a loss or making a gain was an element of dishonesty. If there was no conceivable gain to a person making a false statement, then such a statement was not dishonest. The Chief Adjudicator, it was submitted, had allowed herself to be wrongly influenced by the BTAS finding of dishonesty.

73. The Applicant submitted that he had not communicated a false statement in any event as:

- There was a device present that had been recovered by the Americans
- There had been no attempt to deceive – he believed the intelligence to be credible

- The information he provided was qualified in that he said he thought that there was a device and recommended verification by an RAF overflight.

The Respondent's Case

74. The Chief Adjudicator found that the bomb hoax offence was one that fell to be considered as an offence of dishonesty because it required the communication of false information that the person knew or believed to be false and induced a false belief.

75. Having determined that there were no exceptional circumstances to go behind the facts of the conviction, the Chief Adjudicator was entitled to rely on the facts of the offence to ascertain the Appellant's state of mind i.e. that he knew or believed the information he was communicating in relation to the bomb hoax was false. Having determined his state of mind, she was entitled to go on to consider whether his conduct was honest or dishonest, by applying what she considered to be the objective standards of ordinary decent people (as per the test for dishonesty confirmed in Ivey). It was open to the Chief Adjudicator to find that the Applicant acted dishonestly, regardless of the fact that dishonesty did not form part of the offence under s51(2) Criminal Law Act 1977.

The Tribunal's Findings

76. The Tribunal found that for the jury to have convicted the Applicant, it must have found that he knew or believed the information he communicated to have been false. Having determined that there were no exceptional circumstances such as to go behind the conviction, the Tribunal did not then need to assess the Applicant's state of mind – that decision had already been made by the jury.

77. The test for dishonesty was as set out in Ivey was as follows:

> "When dishonesty is in question the fact-finding Tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledgeable belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the factfinder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

78. The Tribunal found that the first part of the test had been determined by the jury's finding that the Applicant had communicated information that he knew or believed to be false. The Tribunal considered that ordinary decent people would consider it was dishonest to communicate information that was known or believed to be false.

79. The Tribunal found that the Adjudicator was entitled to consider whether the Applicant's conduct was dishonest. She had not applied the incorrect test, and she had not sought to import an element of dishonesty into the offence. She had considered whether in committing the offence, the Applicant's conduct had been dishonest. It was

clear from the decision that the Chief Adjudicator had not simply adopted the BTAS findings; she had considered the position and reached a reasoned and reasonable conclusion.

80. The Tribunal did not find that in concluding that the Applicant's conduct was dishonest, the Chief Adjudicator's decision was wrong or unjust because of a serious procedural or other irregularity.

81. In addition, the Tribunal did not accept that there could be no dishonesty without personal loss or gain. Knowingly false statements could be made for any number of reasons, and were not limited to loss or gain. Ivey was not authority for that proposition.

The Section 43 Order

The Chief Adjudicator's Decision

82. The Chief Adjudicator found that the Applicant's conduct was serious and involved dishonesty. He had two criminal convictions and was sent to prison for 12 months for the Bomb Hoax offence.

83. The Images offence was of a sexual nature. He had shown no insight or remorse. His convictions undermined the trust the public placed in him and in the provision of legal services. He failed to uphold the law.

84. The Chief Adjudicator considered that there was a risk to the public because the Applicant denied he committed both offences. He was convinced that two nuclear warheads were found in London and his intelligence was therefore based on a true belief. He had criticised the individuals and organisations that had not found in his favour or supported his requests. In some cases, he had suggested they had been silenced or removed from their position because of their response. He said that the only criminal activity involved was on the part of those who fabricated or suppressed material evidence with the intent of undermining the course of public justice. His view was that his intelligence experience was central to the cases against him and there was never any realistic possibility of either Thames Valley Police or the CPS forming a rational view of himself or the case.

85. The Chief Adjudicator noted that the nature of the Applicant's work meant that he represented vulnerable adults at immigration tribunals and could represent unaccompanied asylum-seeking children. She considered that his conduct fundamentally undermined the trust and confidence that the public placed in, and were entitled to expect from, those involved in the provision of legal services. In all the circumstances, the Chief Adjudicator considered that it was appropriate to impose a Section 43 Order so as to ensure the public were protected by prohibiting solicitors and firms regulated by the SRA from employing or remunerating the Applicant without prior approval.

86. The Section 43 Order also enabled the SRA to consider the Applicant's proposed working environment and whether it provided sufficient support and supervision to ensure that clients and the public were adequately protected. The restriction imposed on his ability to work and to be involved in a legal practice would also maintain public

confidence in the legal profession. The order did not prevent the Applicant from working. It required any SRA regulated firm to seek permission to employ him.

87. The Chief Adjudicator was satisfied that the decision to make a Section 43 Order was an effective regulatory outcome which was sufficient to benefit and protect clients and the public.

The Applicant's Case

88. An order depriving a legally trained employee of a solicitor's firm of his or her livelihood has penal effect, regardless of intent. Almost all criminal sanctions are imposed for the benefit of the public, but that does not mean that a sentence of imprisonment does not have penal effect. The issue is whether the public are in fact protected in any meaningful way by the deprivation of livelihood sought by the SRA. As at the time of the hearing no firm had been granted approval to employ or engage the Applicant by the SRA. The 1933 Reichstag Fire Decree (Decree of Reich President von Hindenburg for the Protection of People and State) was passed "for the protection of the public".

89. The Chief Adjudicator's decision to the effect that nothing that the Applicant might say at an oral hearing could make a difference was indicative of actual and or in the alternative apparent bias. In the further alternative it showed rigidity of thinking and pre-determination, namely a determination to make a Section 43 Order regardless of the law, the evidence or the submissions made to her.

90. The SRA knew that the Applicant was acting for solicitors from February 2016. If it was the Respondent's position that he was not fit and proper on the basis of his convictions, that must have been the case in 2016, however no action was taken. It was difficult to see how the Section 43 Order could now be justified when there were no new facts and there had been no judicial criticism of his conduct in any matter since his convictions. By virtue of the Respondent's failure to make an order in 2016, the Applicant had, for the past 3½ years proved himself to be a fit and proper person to be a solicitor's clerk.

91. The Chief Adjudicator pointed to concerns in the Applicant representing minors. Whilst he had done so, this had always been with adult supervision.

92. As a matter of discretion, it was wrong in principle to deprive him of his ability to earn a living on the basis of convictions that were spent and stale.

The Respondent's Case

93. The Applicant argues that the Section 43 Order had a penal effect. It was well established that an order made under Section 43 was not penal in nature, but has to do with the regulation of the profession. As was observed in Ali at paragraph 9:

> "The prohibition in section 43 is not an absolute prohibition upon employment by a solicitor, but is one which applies where a person is engaged otherwise than in accordance with a Society permission. Thus the structure of the section reflects the fact that this is a structure which is intended to be protective of the

> public interest and the reputation of the Society and, accordingly, it is informed by the fact that the conduct which has given rise to the order is such that it calls into question the fitness of the person to be employed by a solicitor without the necessary level of supervision which the Society will seek to see established before it will give its permission for such employment."

94. The Applicant further asserted that the Chief Adjudicator's comment that nothing that the Applicant might say at an oral hearing could make a difference was indicative of actual or apparent bias. The Respondent rejected that assertion. The Chief Adjudicator carefully considered whether or not to hold an oral hearing and concluded that she could make a decision without the need to hear from the applicant. She set her reasons out in detail in her decision. There was nothing to suggest she was actually or apparently biased against the Applicant.

The Tribunal's Findings

95. The Tribunal noted that the imposition of a Section 43 Order was a regulatory control. It did not prevent the Applicant from working or remove his ability to earn a livelihood. It required that any prospective employer had appropriate systems in place to militate against any risks posed, and that the Applicant would be properly supervised.

96. In a letter dated 18 September 2018, Mr Justice Lane questioned whether it was appropriate for a Section 43 Order to be made. He noted the matters of which the Applicant had been convicted and explained that the work before the Upper Tribunal Immigration and Asylum chamber involved families with minor children and the representation of unaccompanied minors.

97. The Applicant submitted that the Respondent had been aware of his convictions since February 2016. It had not imposed a Section 43 Order then, and no new facts has arisen from that date. The Tribunal noted that there was communication between the Applicant and the Respondent's investigating officer in 2017 referring to the disciplinary proceedings before BTAS. The Respondent's investigation was suspended due to the CCRC review. That review concluded in March 2018. In May 2018, the investigating officer wrote to the Applicant seeking the Applicant's views on whether his convictions made it undesirable for him to be involved in a legal practice. The Tribunal found that there had been no decision made in February 2016 that a Section 43 Order was not appropriate. It was clear that no decision was taken as to his fitness until his routes of appeal and review had been concluded. It was not, the Tribunal found, a sufficient ground to say that a Section 43 Order was not appropriate because it had not been imposed in February 2016.

98. The Tribunal did not consider that the Chief Adjudicator had demonstrated actual or apparent bias in refusing to allow the Applicant to have an oral hearing. Nor was there any evidence of "rigidity of thinking and pre-determination". The report clearly set out the matters that the Chief Adjudicator had considered in reaching her decision. The Applicant accepted that he had been convicted, although he considered that the convictions were wrong. The Tribunal considered that the sole purpose for an oral hearing was for the Applicant to attempt to demonstrate why his convictions were wrong. For the reasons detailed in the report, the Chief Adjudicator did not find that there were any exceptional circumstances that necessitated going behind the

convictions. The Applicant had provided comprehensive written submissions. The Tribunal found that the Chief Adjudicator was properly able to (and did) consider the matter on the papers. The Tribunal determined that in refusing the Applicant an oral hearing, the Chief Adjudicator was not wrong, nor was that decision unjust because of a serious procedural or other irregularity.

99. As detailed, the Tribunal considered each of the decisions made by the Chief Adjudicator. It had found that none of the decisions made were wring or unjust because of a serious procedural or other irregularity. Accordingly, it found no reason to interfere with the Chief Adjudicator's decision.

Costs

100. The Respondent applied for costs in the sum of £10,200.00. This was based on a fixed fee of £8,500 + VAT and included both the preparation of the case and the advocacy.

101. The Applicant did not dispute the reasonableness of the quantum. The Tribunal was referred to the Applicant's Statement of Means. The Section 43 Order deprived him of his major source of income. As such, the appropriate order would be no order for costs, as any costs order would cause him financial hardship.

102. The Applicant referred to his joint ownership of land. The estimated value of his share of that land was £2,250,000.00. After payment of his liabilities, he anticipated a profit of approximately £750,000.00. If the Tribunal were not minded to order that there be no costs, it should make a costs order that was not to be enforced without leave of the Tribunal. The Applicant stated that he was prepared to give an undertaking to the Respondent that he inform the Respondent in the event of the sale of the land.

103. The Tribunal considered that the Applicant's estimate of his share of the proceeds of the sale of the land was far in excess of the costs claimed. Whilst he may not be in a position to satisfy any costs order immediately, he was in possession of a valuable asset. In those circumstances, it was not appropriate to make a costs order that was not to be enforced without leave. The Tribunal noted that the enforcement department of the Respondent would consider the Applicant's means and could come to an arrangement with the Respondent as to payment terms.

104. The Tribunal considered the quantum claimed. The matter had been listed for a three day hearing, but had taken half that time. The Tribunal considered that it was appropriate to reduce the quantum based on the reduced hearing time. The Tribunal reflected this in their determination of the time spent during the entire matter and determined that the sum of £8,160.00 (inclusive of the VAT element) was appropriate and proportionate considering the complexity of the issues and the length of the hearing.

Statement of Full Order

105. The Tribunal Ordered that the application of MICHAEL SHRIMPTON, for review of a S.43 Order with a view to that Order being revoked, quashed or varied be **REFUSED** and it further Ordered that he do pay the costs of the response of the Law Society to this application fixed in the sum of £8,160.00.

DATED this 20th day of March 2020
On behalf of the Tribunal

E. Nally
Chair