SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 12259-2021

BETWEEN:

JENNIFER MORDI Applicant

and

SOLICITORS REGULATION AUTHORITY LTD Respondent

Before:

Mr P Jones (in the chair)
Ms B Patel
Mrs C Valentine

Date of Hearing: 17 December 2021

Appearances

The Applicant represented herself

Inderjit Johal, barrister, of the Solicitors Regulation Authority Ltd, for the Respondent

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APPLICATION FOR REVIEW/REVOCATION OF SECTION 43 ORDER

Background

1. By an application dated 7 October 2021, the Applicant applied to review (and remove) a "section 43 order" made by an adjudicator of the Respondent on 12 July 2019 ("the Order").

2. The Order, made pursuant to section 43(2) of the Solicitors Act 1974 ("the Act") stated:

   - No solicitor shall employ or remunerate the Applicant in connection with her practice as a solicitor;
   - No employee of a solicitor shall employ or remunerate her in connection with the solicitor's practice;
   - No recognised body shall employ or remunerate her;
   - No manager or employee of a recognised body shall employ or remunerate her in connection with the business of that body;
   - No recognised body or manager or employee of such a body shall permit her to be a manager of the body; and
   - No recognised body or manager or employee of such a body shall permit her to have an interest in the body

   except in accordance with a Society permission.

3. At a Case Management Hearing ("CMH") on 8 December 2021, the Applicant confirmed that she was applying for the restrictions in the Order to be removed on the basis they were no longer required; she did not submit that the Order was improperly imposed and was not asking the Tribunal to review the original decision on the basis that it was somehow wrongly made. She accepted that the Order, on the date that it was made, and on the basis of the evidence then available, was properly made.

4. During the CMH, the Tribunal Chair invited the views of the parties on the Tribunal's powers under section 43(2) and (3) of the Act, and queried whether section 43(3)(b) gave the Tribunal the power to revoke the original order when the Tribunal was not the body that originally made it? The Chair had noted that the case of SRA v SDT (Arslan) [2016] EWHC 2862 (Admin) set out the nature of a review under section 43(3), which was a review of the original order, principally on the information and evidence that was available at the date that such order was made. The parties' submissions and the observations made by the Chair are set out in the relevant memorandum. Paragraph [20] of the memorandum stated:

   > *"The Tribunal expressed no settled view on the question which was raised to avoid it being considered for the first time during the substantive hearing. The Tribunal did however invite the parties to consider whether indeed, under the statutory regime, it has the power to revoke the original order, when it was not the Tribunal that had made it. The parties were specifically invited to consider the wording of section 43(3)(b). Absent any application from the parties, the Chair indicated that this issue would be considered as a preliminary issue at the start of the substantive hearing of the Applicant's application."*

The Parties' written representations

The Applicant

5. The Applicant submitted, by email dated 9 December 2021, that the Tribunal had the discretion to make the order she sought. The Applicant referred the Tribunal to the Tribunal's "Guidance Note on Other Powers of the Tribunal 4th Edition – December 2020" ("the Guidance"). Under the section setting out how the Tribunal approaches applications for the review and revocation of section 43 orders, paragraph [14] stated:

> *"It is essential to recognise that the Tribunal carries out a review of the Section 43 Order. It does not re-hear the original case. The question that the Tribunal must consider (per Wilkie J, in [SRA v Ali [2013] EWHC 284 (Admin))] is* "whether it was, in the circumstances, any longer necessary for the level of regulatory control to be imposed upon the person subject to the Section 43 Order"*, taking into account the purpose of the order in safeguarding the public and the reputation of the legal profession"*

6. The Applicant submitted that this conferred a power on the Tribunal to look at all of the circumstances and consider, in light of those circumstances, whether it remained necessary to have the Order in place.

7. The Applicant also referred to a recent Tribunal decision (Case Number 12134-2020). In that case, the SRA had made a section 43(2) order on 10 September 2020. On 5 October 2020 an application was made to the Tribunal for review and revocation of the order. In its judgment, whilst the Tribunal had stated that the correct approach to be taken to a review was that set out in the Arslan case, it also had regard to the Guidance. The Applicant submitted that this illustrated the Tribunal did have power, reflected in the Guidance, to use the Arslan case in addition to its own guidance, to consider cases such as hers.

The Respondent

8. By email dated 13 December 2021, Mr Johal, for the Respondent, submitted that as the Order was made by the SRA, only the SRA could revoke it (by reference to section 43(3)(b) of the Act). The Tribunal had the power to review the Order, and, on such a review, the Tribunal could quash, vary or confirm it (pursuant to section 43(3A)).

9. He submitted that Arslan suggested any review of a section 43 order was a narrow one and should be limited to the correctness of the Adjudicator's decision and that new evidence should not be received as the Tribunal was conducting a review and not a re-hearing. He submitted that paragraphs [38 – 40] of Arslan set out the correct approach of the Tribunal when reviewing a section 43 order and he summarised the approach as follows:

> *"1 The proper approach is to proceed by way of a review of the Section 43 order and not to rehear the case.*
>
> *2 The review is analogous to a court dealing with an appeal from another court or Tribunal and accordingly it should not generally (pursuant to*

rule 52.11 of the CPR) receive new evidence that wasn't before the Adjudicator although it may do so if justice requires it.

3 The Tribunal shouldn't interfere with the Section 43 Order unless it is satisfied that it was wrong or that the decision was unjust because of a serious procedural or other irregularity.

4 Where there is room for reasonable disagreement as to the facts found by the Adjudicator, the Tribunal shouldn't interfere with the findings of fact unless they conclude that it is a fact that no reasonable decision maker could come to."

10. It was submitted that the Guidance reflected and reinforced the principles derived from Arslan and did not widen the powers of the Tribunal.

11. Mr Johal further submitted that the test referred to in Ali (set out above) was not inconsistent with Arslan and did not alter the Tribunal's approach to a review, which should focus on correctness of the Adjudicator's decision. He accepted that the test implied that the Tribunal had a discretion to consider evidence not before the original decision maker when the interests of justice required this, and if that new evidence was relevant to the basis upon which the original decision was made by the Adjudicator

The CMH

12. Ms Mordi and Mr Johal expanded on their written submissions when the issue of the Tribunal's powers was considered as a preliminary point at the start of the hearing.

The Applicant

13. Ms Mordi confirmed she sought a review and for the Tribunal to exercise its power under section 43(3A)(a) of the Act to quash the Order. She stated that she had perhaps used the words 'review' and 'revocation' interchangeably. She submitted that Arslan allowed for the Tribunal to consider new evidence if justice required it. She submitted that the interests of justice did so require in her case as there were exceptional circumstances which led to the imposition of the Order in the first place (exceptional circumstances which meant that she was not then of sound mind and since when she was able to demonstrate substantial and sustained progress such that the position was now completely different).

14. Ms Mordi again referred the Tribunal to the Guidance and the question posed in Ali (set out in paragraph [5] above) which focused on whether the Order was still necessary taking into account the purpose of the Order. She submitted that the recent Tribunal decision (Case Number 12134-2020) illustrated that the Tribunal had regard to the Guidance in addition to Arslan. Taken together, Ms Mordi submitted that the Tribunal had the power to consider her evidence from the last three years in assessing whether the Order was still necessary for the purpose for which it was imposed, though she accepted that this evidence did not cast any light on the basis upon which the original decision was made.

15. Ms Mordi stated that it was circular to suggest that she should be required to ask the Respondent to revoke the Order when it was clear from their opposition to her application to the Tribunal that it would be refused. She stated this was not a meaningful remedy.

The Respondent

16. Mr Johal submitted that it was clear from section 43(3)(b) that only the Respondent could revoke the order: "*whichever of the Society and the Tribunal made it may at any time revoke it".*

17. He submitted that it was clear from the substance of the Applicant's application that it was, in its substance, an application for revocation; the Adjudicator's decision to impose the Order was not challenged. The Applicant sought revocation based on wholly new evidence that did not exist at the time of the original adjudication, but might cast light on the position of the Applicant now. Mr Johal noted that the Applicant had mentioned using the terms revocation and review interchangeably and suggested this may have happened in the previous Tribunal case to which she had referred. He noted that in that case the applicant had challenged the imposition of the order on several grounds.

18. Mr Johal repeated his submission that the Tribunal's remit was narrow and was limited to whether the Order was wrongly imposed, as set out in Arslan. In the absence of a challenge to the imposition of the Order, and given the narrow remit of a review, he submitted that, even in the event that new evidence was admitted, the application was bound to fail.

19. Mr Johal submitted that the test in Ali, a case which predated Arslan, did not alter the Tribunal's approach to a review. It illustrated that the Tribunal had some discretion to admit new evidence whilst undertaking an Arslan type review, but not that the focus of the review should shift from the imposition of the Order to any continuing need for it.

20. Mr Johal stated that the Applicant had a remedy which was to make a revocation application to the SRA. In the event this was refused, she could apply for that decision to be reviewed by the Tribunal.

The Tribunal's Decision

21. The Applicant had clearly and repeatedly stated that she accepted the Order was properly made. She sought the removal of the Order on the basis that it was regulatory and not penal and the reasons for its imposition no longer applied. She sought to adduce evidence from the intervening three years to seek to make good her submission.

22. The Tribunal considered that this application unambiguously amounted to an application for revocation of the Order on the basis of evidence that she wished to adduce showing what had happened over the last three years. Whilst the terms may be used interchangeably in everyday English, in the statutory scheme for the regulation of solicitors (and non-solicitors involved in a legal practice) they were treated differently.

23. Section 43(2) of the Act states that either the Society (now the SRA) or the Tribunal may impose an order restricting the employment and payment of a non-solicitor in a legal practice. Section 43(3) states:

> *"Where an order has been made under subsection (2) with respect to a person by the Society or the Tribunal—*
>
> *(a) that person or the Society may make an application to the Tribunal for it to be reviewed, and*
>
> *(b) whichever of the Society and the Tribunal made it may at any time revoke it."*

24. As it did not make the Order, the Tribunal's power was purely to review it. The terms of the Act made this clear.

25. The case of Arslan, to which the Tribunal had been referred by both parties set out the approach to be followed by the Tribunal to a review of a section 43 order. Paragraph [38] states:

> *"I turn to the nature of the Tribunal's task in conducting a review under section 43(3) and an appeal under section 44E. It is not in dispute that the Tribunal was correct to hold that, in both cases, the proper approach was to proceed by way of a review and not a re-hearing. As for what such a review involves, the Tribunal accepted submissions made to it by Ms Emmerson that its function was analogous to that of a court dealing with an appeal from another court or from a tribunal and that it should apply by analogy the standard of review applicable to such appeals which is set out in rule 52.11 of the Civil Procedure Rules. Rule 52.11 makes it clear that a court or tribunal conducting a review should not generally receive new evidence that was not before the original decision-maker, although it may do so if justice requires it;* ***and it should interfere with a 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****." (emphasis added)*

26. The Tribunal was required to adopt the approach set out in Arslan.

27. Paragraph [38] of Arslan made clear that new evidence could be considered by the Tribunal if justice required it. Any new evidence so admitted could form part of the Tribunal's assessment of whether the decision under review was "*wrong*" or "*unjust because of a serious procedural or other irregularity in the proceedings*". Such was the extent of the Tribunal's remit when carrying out a review.

28. The Tribunal recognised that it had the power under Rule 6(1) of the Solicitors (Disciplinary Proceedings) Rules 2019 to regulate its own procedure, subject to the Act and other enactments. The Tribunal did not have the power to circumvent the statutory framework established in the Act which distinguished between the review and revocation of section 43 orders according to which body had imposed them.

29. The Tribunal had been referred to the test in Ali which had been confirmed in paragraph [41] as:

> *"whether it was, in all the circumstances, any longer necessary for the level of regulatory control to be imposed upon the Applicant".*

The Tribunal accepted that this formulation of the test to be applied by the Tribunal plainly encompassed events which had taken place after the imposition of the relevant order and was focused on whether there was a continuing need for the restrictions. The Tribunal noted that the Arslan case post-dated the Ali case. The case of Ali also involved a section 43 order which had originally been imposed by the Tribunal itself (and so, as set out above, under section 43(3)(b) it retained a power to revoke the order at any time). That was not the position in the Arslan case, and it was not the Applicant's position.

30. On the basis of the above, the Tribunal considered that it was obliged to conduct any review of the Order as set out in Arslan. Whilst it had the discretion to admit new evidence if the interests of justice required it, the Tribunal should interfere with the Order under any review (whether by quashing or varying pursuant to section 43(3A)) 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*." [18] of Arslan.

31. In circumstances where the Applicant accepted that on the date that it was made, and on the basis of the evidence then available, the Order was properly made, the Tribunal considered that a review conducted in accordance with the approach set out in Arslan was bound to fail. Any new evidence of developments since the imposition of the Order could not show that the imposition itself was flawed or wrong.

32. The Applicant also submitted that it would be contrary to the interests of justice for her to be required to go back to the Respondent and go through the formality of asking for the Order to be revoked when it was, in her view, clear what their response would be (based on their opposition to her application to the Tribunal).

33. The Tribunal understood the frustration of the Applicant at the suggestion that she may be required to make her application for revocation directly to the Respondent in the first instance. However, the Tribunal did not consider that it was open to it to assume what the outcome of such an application would be, or to assume a power to revoke an order imposed by the Respondent when this power was expressly reserved to the Respondent in the Act. The Applicant was not denied a remedy; in the event she was dissatisfied with a decision made by the Respondent, she would be fully entitled to refer that decision to the Tribunal for review. Such a review of a contested fresh decision could properly take into account any new evidence of remediation and achievement which had been submitted to the Respondent.

34. The Tribunal determined that it did not have the statutory authority to determine the Applicant's revocation application in the circumstances in which it was made. In any event, given the approach it was required to take by Arslan, and the fact that the imposition of the Order was not challenged by the Applicant, the Tribunal also concluded that any challenge to the Order by way of review must inevitably fail for the reasons set out above. The Tribunal refused the Applicant's application.

Costs

35. Mr Johal applied for the Respondent's costs in the sum of £2,565. He stated that as only around half of the anticipated 3 hours had been needed for the hearing around £190 should be deducted from the total as set out in the schedule of costs.

36. The Applicant did not make any specific comments on the schedule of costs beyond indicating that she would prefer not to pay the Respondent's costs.

37. The Tribunal assessed the costs for the hearing. No application for costs had been made in respect of the previous CMH, held on 7 December 2021, and no order was made for costs. That CMH had been convened in order for a special measures application to be determined. As no application or order had been made, the Tribunal considered that no award should be made for preparation and attendance at that CMH. The Tribunal also accepted that half of the sum claimed for the hearing on 17 December 2021 should be deducted to reflect the fact that the hearing had taken only half of the time anticipated.

38. The Tribunal reviewed the remaining costs claimed in the undated "final costs" schedule. The Tribunal considered that the costs claimed for reviewing the Applicant's reply and her witness statements (£325), preparation for the hearing (£260) and half of the figure for attendance at the hearing (£195) were reasonable, necessarily incurred, and proportionate. The Tribunal also noted that the issue of the Tribunal's jurisdiction had not been raised at an early stage by the Respondent, when the matter could then have been addressed early by the parties and costs avoided; it had not been raised by the Respondent until the CMH last week had raised the point for the first time. The Tribunal accordingly ordered the Applicant to pay the Respondent's costs in the sum of £780.

Statement of Full Order

39. The Tribunal ORDERED that the application of Jennifer Mordi, for the removal of conditions imposed by the Solicitors Regulation Authority on 12 July 2019, be **REFUSED** on the basis the Tribunal does not have the power to revoke the conditions.

40. The Tribunal further Ordered that the Applicant do pay the costs of the response of the Solicitors Regulation Authority Ltd to this application fixed in the sum of £780.

Dated this 13th day of January 2022
On behalf of the Tribunal

P Jones
Chair