SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 12260-2021

BETWEEN:

HUSEYIN ARSLAN Applicant

and

SOLICITORS REGULATION AUTHORITY LTD Respondent

Before:

Miss H Dobson (in the chair)
Ms A Horne
Dr A Richards

Dates of Hearing:
18-19 January 2022 and 21 February 2022

Appearances

The Applicant appeared in person.

Victoria Sheppard-Jones, barrister of Capsticks LLP, for the Respondent.

JUDGMENT ON AN APPLICATION FOR A REVIEW OF AN ORDER MADE UNDER S43 OF THE SOLICITORS ACT 1974

Background

Chronology

1. On 16 January 2015 the SRA Adjudicator had made an Order under s43 in the following terms:

> "(i) no solicitor shall employ or remunerate him in connection with his/her practice as a solicitor;
> (ii) no employee of a solicitor shall employ or remunerate him in connection with the solicitor's practice;
> (iii) no recognised body shall employ or remunerate him;
> (iv) no manager or employee of a recognised body shall employ or remunerate him in connection with the business of that body;
> (v) no recognised body or manager or employee of such a body shall permit him to be a manager of the body; and
> (vi) 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 Law Society permission."

2. The Adjudicator further ordered that the s43 Order should be published.

3. On 13 February 2015 the Applicant applied to the Tribunal for a review of the s43 Order. That review was heard from 9-11 February 2016 and resulted in the Tribunal quashing the s43 Order on 16 March 2016.

4. The SRA lodged a judicial review of the Tribunal's decision to quash the s43 Order. On 10 November 2016 the Administrative Court quashed the Tribunal's decision in respect of the review and reinstated the s43 Order - The Solicitors Regulation Authority v Solicitors Disciplinary Tribunal, and Arslan, and The Law Society [2016] EWHC 2862 (Admin). The Applicant was an interested party in those proceedings. For ease of reference, that case is referred to as Arslan in this Judgment.

5. On 11 October 2021 the Applicant lodged an application for revocation of the s43 Order. The distinction between an application for revocation and an application for a review is discussed below as a preliminary matter.

Documents

6. The Tribunal considered all of the documents in the case, which were contained in an agreed electronic bundle on CaseLines.

Preliminary Matters

Jurisdiction to hear an application for revocation

7. The Applicant had approached the SRA on 25 August 2021 seeking its views on a possible application for revocation of the s43 Order. The SRA replied on 3 September 2021, advising the Applicant that, as his s43 Order had been reinstated on

10 November 2016 he would need to make his application for revocation to the Tribunal. For reasons set out below, that advice was wrong.

8. The Applicant duly made an application to the Tribunal for revocation of the Order on 11 October 2021.

9. On 6 January 2022 the SRA wrote to the Tribunal to explain that, following another case heard by the Tribunal on 17 December 2021, concerning an application for revocation of a s43 Order, the SRA was now uncertain as to whether the Tribunal had jurisdiction to hear such an application in circumstances where the initial Order had been made by the SRA. The letter explained that the reason the Applicant had been advised to make his application for revocation to the Tribunal arose from the following section of the Judgment in Arslan at [72] (emphasis added):

> "As from today, then, no solicitor, employee of a solicitor, recognised body or manager or employee of a recognised body will be entitled to employ or remunerate Mr Arslan in connection with any solicitor's practice or the business of any recognised body, except with the SRA's permission. That is subject to Mr Arslan's right to make another application to the Tribunal for the order to be revoked, if he chooses to do so."

10. The Respondent applied for the matter to be dealt with as a preliminary issue at the commencement of the hearing. The Tribunal granted this application. The Applicant emailed to object to any stay of the proceedings.

Respondent's Submissions

11. The Tribunal permitted Ms Sheppard-Jones to make submissions first on the basis that it was the Respondent's Application which raised the preliminary issue as to jurisdiction.

12. Ms Sheppard-Jones submitted that the Tribunal did not have jurisdiction to revoke the s43 Order as it had not made the Order. Ms Sheppard-Jones referred the Tribunal to the wording of s43(3) of Act, which is set out in full for ease of reference:

> "(3) 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.
>
> (3A) On the review of an order under subsection (3) the Tribunal may order—
>
> (a) the quashing of the order;
> (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 is shown, the Tribunal may order its confirmation without hearing the applicant."

13. Ms Sheppard-Jones submitted that a review was a review of the original Order and whether the making of it was wrong or procedurally incorrect. That s43 Order had already been reviewed by Tribunal in 2016 and quashed, and it had then been reinstated on Judicial Review. Ms Sheppard-Jones submitted that the Tribunal did have the power to review the s43 Order, though the scope of that review was the subject of further submissions which are set out below for ease of reference. In contrast, an application to revoke was akin to asking whether the Order was still necessary. This was where the evidence put forward by the Applicant, of qualifications and experience gained in the years since the order was imposed, was relevant. Ms Sheppard-Jones noted that the Applicant relied on such material, as well as continuing to challenge the making of the s43 Order.

14. Ms Sheppard-Jones acknowledged that the Applicant had been mistakenly advised to apply to the Tribunal for revocation of the s43 Order, on the basis of the remark in Arslan referred to above. However, on a proper reading of the Act, the Tribunal did not have jurisdiction to revoke an Order initially made by the SRA, and so in this case the only body that could consider an application to revoke was the SRA itself. Ms Sheppard-Jones told the Tribunal that the SRA's position was that, if such an application was made to the SRA, it would be considered in the usual way and, if refused, the Applicant could then apply to the Tribunal to appeal against the refusal. If the Tribunal did not, in fact, have the power to hear such an appeal then there remained the remedy of an application for Judicial Review.

15. Ms Sheppard-Jones submitted that this position was consistent with the recent Tribunal decision in Mordi v SRA, Case No: 12259-2021, heard on 17 December 2021, in which the Tribunal had refused an application for revocation of a s43 Order imposed by the SRA on the basis that it lacked jurisdiction.

Applicant's Submissions

16. The Applicant submitted that the Tribunal had jurisdiction to hear an application for revocation as well as an application for review. The Applicant described the Respondent's approach as "dishonest and unfair" and a "litigation tactic". The Applicant pointed out that this issue could have been raised when he first approached the SRA. The Applicant confirmed, in response to a question from the Tribunal, that he was not seeking more time to argue the point, and he did not wish to apply for an adjournment.

17. The Applicant submitted that a refusal to entertain a revocation application would be incompatible with his rights under Articles 6 and 8 of the ECHR. These rights took precedence over the provisions of the 1974 Act.

18. The Applicant further submitted that his case was distinct from Mordi in that he maintained a challenge to the original s43 Order, which the Applicant in Mordi did not. He further submitted that the SRA's position on any application to revoke which was made to them, was already known, as the SRA had set out its position in relation to this application. It opposed a revocation of the s43 Order. The Applicant therefore submitted that any application to the SRA to revoke the s43 Order was doomed to fail.

19. The Applicant maintained that the Tribunal had full jurisdiction to determine his application. The interests of justice and proportionality required that it do so.

20. The Tribunal asked the Applicant whether he was inviting the Tribunal to review the s43 Order on the basis that it should never have been made, or to revoke it on the basis that it was no longer necessary. The Applicant stated that he did not differentiate, as both were linked.

21. The Applicant submitted that his avenues with regards to the SRA had been exhausted, and that the Tribunal should now deal with the application in its entirety, having regard to the comments of the learned Judge in Arslan.

The Tribunal's Decision

22. The Tribunal listened carefully to all the submissions and had close regard to the wording of s43 and the learned Judge's remarks in Arslan.

23. There was clearly a distinction between an application for revocation and an application for review. It was equally clear that at various times the terms had been used interchangeably, when they ought not to have been. The Tribunal considered that the comments in Arslan, to the effect that the Applicant could apply to the Tribunal for revocation were *obiter*, as the issue of future remedy was not something on which the Court had been asked to make a ruling. The Tribunal concluded, respectfully, that the learned Judge had used incorrect terminology when making reference to revocation.

24. The nature of a review was different to a consideration of whether revocation was appropriate. A review considered whether the s43 Order should have been made, or whether the decision to do so was wrong, or that the decision was unjust "because of a serious procedural or other irregularity in the proceedings". An application for revocation, in contrast, considered whether the s43 Order remained necessary, having regard to factors arising since the date it was made, including rehabilitation.

25. S43 made clear that a s43 Order could only be revoked by the body that made it. This meant that only the SRA could revoke its own s43 Order. The Tribunal could only revoke an Order made by the Tribunal, not one made by the SRA. The Applicant had argued that the distinction between his case and Mordi was that in Mordi the applicant did not challenge the making of the original order. This was not a relevant factor, however, to the question of jurisdiction, which did not turn on whether the making of the original s43 Order remained in dispute.

26. The Tribunal clearly did have the power to review a s43 Order made by the SRA, but it did not have the power to revoke a s43 Order made by the SRA.

27. In this case, the application to revoke related to a s43 Order made by the SRA, and the Tribunal concluded that it did not have jurisdiction to hear such an application. The Tribunal therefore notified the parties of its ruling and asked the Applicant whether he wished to apply to convert his application into one for review of the s43 Order. or whether he wished to withdraw his application for revocation and to pursue it with the SRA. The Tribunal adjourned overnight to give the Applicant sufficient time to digest the Tribunal's ruling and decide how he wished to proceed.

Submissions on the scope of review of the s43 Order

28. When the hearing resumed, the Applicant made clear that he was dissatisfied with the Tribunal's ruling, and stated that there had been procedural impropriety on the part of the Tribunal as well as on the part of the SRA, in that the application had been made to the Tribunal, as advised by the SRA, and had been accepted by the Tribunal. However, the Applicant confirmed that he wished the Tribunal to proceed with a review of the s43 Order. Ms Sheppard-Jones did not object to that aspect of the Applicant's application. The Tribunal was prepared to allow the Applicant to convert his application to one for a review of the s43 Order.

29. The parties made submissions as to the scope of the review that the Tribunal could undertake.

Applicant's Submissions

30. The Applicant submitted that the Tribunal should review all the circumstances in which the s43 Order had been made, as well as his character references and submissions as to why it had not been necessary to make the Order. The Applicant submitted that the principle of "full jurisdiction" applied, and anything other than a full review of all matters would be a breach of his Article 6 and Article 8 rights.

31. The Applicant submitted that the only appropriate way to proceed was for the Tribunal to review all aspects of the s43 Order, including those that had been reviewed previously by the Tribunal and considered as part of the judicial review. The Applicant referred to and summarised the matters set out in his skeleton argument.

Respondent's Submissions

32. Ms Sheppard-Jones submitted that the Tribunal could only review limited aspects of the making of the s43 Order in this case, given the nature of a review and the fact that a previous Tribunal and the Administrative Court had already considered many of the matters raised by the Applicant in his previous review application. Ms Sheppard-Jones submitted that the Tribunal could only approach the review by considering new arguments put forward by the Applicant, not argument that had previously been determined.

33. Ms Sheppard-Jones reminded the Tribunal of the description of the nature of a review as set out in Arslan:

> "38. 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."

34. Ms Sheppard-Jones told the Tribunal that the equivalent relevant section of the CPR was now Rule 52.21, which stated as follows:

> "52.21
>
> (1) Every appeal will be limited to a review of the decision of the lower court unless—
>
> (a) a practice direction makes different provision for a particular category of appeal; or
>
> (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.
>
> (2) Unless it orders otherwise, the appeal court will not receive—
>
> (a) oral evidence; or
>
> (b) evidence which was not before the lower court.
>
> (3) The appeal court will allow an appeal where the decision of the lower court was—
>
> (a) wrong; or
>
> (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.
>
> (4) The appeal court may draw any inference of fact which it considers justified on the evidence.
>
> (5) At the hearing of the appeal, a party may not rely on a matter not contained in that party's appeal notice unless the court gives permission."

35. Ms Sheppard-Jones submitted that the Tribunal could not, therefore, hear evidence that was not before the Adjudicator, and that such evidence was inadmissible unless justice required it. The review could not consider matters of rehabilitation as this could not be

relevant to the question of whether there had been a serious procedural irregularity in the making of the original Order.

The Tribunal's Decision

36. The Tribunal took careful note of the parties' submissions.

37. The nature of a review was clearly set out in Arslan, and this was entirely consistent with CPR Rule 52.21. The purpose of the review was to look at what the Adjudicator had decided on the basis of the material before him, and consider whether there had been a "serious procedural error or other irregularity" in the process by which the decision to impose the s43 Order had been reached. This meant that material which related to rehabilitation or remediation was not relevant or admissible. Those were matters that would be relevant to an application to revoke.

38. There was an additional factor in this case which was that the s43 Order had already been reviewed by a previous Division of the Tribunal. A significant number of complaints made by the Applicant had been considered at that hearing in 2016. The Tribunal's decision on those matters had subsequently been the subject of a judicial review, the outcome of which had been that the Tribunal's decision had been quashed and the s43 Order had been reinstated. The result of this was that the Tribunal could not reconsider matters which had been the subject of the previous review and judicial review, as that would effectively amount to an appeal hearing against the Administrative Court's decision, which was plainly not the Tribunal's role. Any appeal against the judicial review decision would have had to have been made to the Court of Appeal. The Tribunal could not put itself in a position where it was required to go behind a ruling of the Administrative Court. Therefore, those matters raised by the Applicant which were substantially the same points as he had previously argued in the earlier proceedings would not be considered by this Tribunal. The Tribunal would also not entertain the Applicant's criticisms of the way in which the judicial review had been conducted, as it had no jurisdiction to do so.

39. The Tribunal concluded that the only matters it could take into account when considering the review were matters which had not been argued previously and which related to the making of the s43 Order.

Factual Background

40. The Applicant was an unadmitted person and at the relevant time, October 2012 to June 2013, was employed by Duncan Lewis (solicitors) Limited ("the Firm"). From 2 September 2013 he became a consultant to the Firm. The Firm suspended the Applicant's employment with them as consultant, on 9 January 2014.

41. The Applicant had been instructed to act for Person A, in an immigration case. On 21 May 2013, the Respondent had received a report on behalf of Person A, making an allegation of sexual harassment against the Applicant. That matter was subsequently closed due to lack of evidence, but the Applicant's response to the investigation raised issues of professional conduct.

42. On 24 December 2013 the Respondent emailed the Applicant, attaching a letter with enclosures. The letter raised the allegations of sexual harassment against the Respondent. On 26 December 2013 the Applicant had asked the Respondent to send the attachments to a new email address, saying that he could not open them as they had been sent to a now redundant email address. The Respondent re-sent the letter and enclosures to the new email address on 30 December 2013.

43. On 10 January 2014 the Applicant provided a response to the allegations. On 10 February 2014 the Respondent obtained access to the records of the Firm, which included a copy of Person A's hard copy file and access to the Firm's electronic case management system. On 14 February 2014 the Firm provided the Respondent with an interim report, including screen shots from the electronic file. There were found to be four discrepancies between documents held on the hard and soft versions of the file.

44. The Respondent raised allegations around those discrepancies with the Applicant in a letter dated 3 March 2014. The concerns were that the Applicant had provided false and misleading information and/or documents during the course of the Respondent's investigation. The Applicant responded on 20 March 2014, denying those allegations. A Report was prepared by the Respondent and sent to the Applicant for his comments. The Applicant provided detailed submissions on the Report. The matter was initially referred to an Adjudicator on 25 July 2014. The matter was then delayed to allow further consideration by the Respondent. A supplemental Report was prepared and disclosed to the Applicant, who provided further submissions in relation the same on 30 September 2014.

45. The matter was again referred to the Adjudicator, who concluded that the Applicant:

> "Had, on the balance of probabilities, read and received the Respondent's email of 24 December 2013, including its attachments, within two days of it being sent and had then created an additional page for Document A and the whole of Documents B and C in an attempt to mislead the SRA.
>
> That he was a person involved in legal practice (as defined by Section 43 (1A) of the Solicitors Act 1974) but not as a solicitor and had occasioned or been a party to, an act or default which involved such conduct on his part that in the opinion of the Society it would be undesirable for him to be involved in legal practice in any of the ways that is set out in the Decision."

46. The Adjudicator had then made the s43 Order.

Applicant's Submissions

47. The Applicant had provided a detailed Skeleton Argument, running to 39 pages and 212 paragraphs. The Applicant relied on this document in support of his application and invited the Tribunal to read it in full, which it did. The Applicant elaborated somewhat on this Skeleton Argument in oral submissions, but the oral submissions did not go materially beyond what he had set out in writing. The basis of his submissions are set out in detail under the heading 'Tribunal's Decision' below.

Respondent's Submissions

48. Ms Sheppard-Jones confirmed that she confined her submissions to the scope of the review that the Tribunal had indicated it would limit itself to during the consideration of the preliminary matters.

49. Ms Sheppard-Jones referred the Tribunal to [69] and [70] of Arslan which stated as follows:

> "69. Mr Arslan, who chose to represent himself at the hearing after removing his instructions to solicitors and leading counsel, made a number of allegations in his skeleton argument and oral submissions that he has been treated unfairly and oppressively by the SRA. These include allegations that the SRA's adjudication panel is not an independent and impartial body; that he was prevented from collecting evidence to rebut the allegations raised against him; that the SRA and its adjudicator acted improperly and in a procedurally unfair way; that the SRA has invaded his right to privacy; that the SRA has defamed him; and that the SRA has changed his exam results because of his dispute with them so as to fail him in exams which he should have passed.
>
> 70. It is sufficient to say that no evidence has been placed before the court which provides any foundation for these allegations, none of which was accepted by the Tribunal or played any part in its decision which is the subject of these proceedings."

50. Ms Sheppard-Jones submitted that there remained no evidence of the matters the Applicant had complained of previously, and that the complaint he had made about privacy had clearly been addressed in the judicial review.

51. In relation to the submission by the Respondent that the s43 Order was in and of itself a breach of the Human Rights Act, Ms Sheppard-Jones reminded the Tribunal that it could not make declaration of incompatibility and that only the High Court or above could do so. There was also no 'leapfrog' procedure which permitted the Tribunal to refer the question of incompatibility directly to the Supreme Court, as suggested by the Applicant. In the event that a Court did make a declaration of incompatibility, that did not automatically invalidate the relevant statute, and so could not assist the Applicant.

52. Ms Sheppard-Jones denied that the Applicant's Article 6 rights had been breached, noting that he had been able to make representations and submissions throughout the process, including before the Administrative Court.

53. Ms Sheppard-Jones denied that the Applicant's Article 8 rights had been breached. The s43 Order did not prevent him working, it merely required him to obtain permission to work in the legal profession. The s43 Order was not punitive but was a regulatory tool put in place to protect the public.

54. Ms Sheppard-Jones denied that the Applicant's Article 14 rights had been breached, and submitted that s43 Orders were imposed on all applicable persons irrespective of the characteristics set out in Article 14.

55. Ms Sheppard-Jones submitted that the Applicant's references to the Rehabilitation of Offenders Act were irrelevant as this was regulatory matter, not a criminal one.

56. The applicant relied on a large number of decisions from international jurisdictions. Ms Sheppard-Jones submitted they did not assist on the question before the Tribunal.

57. Ms Sheppard-Jones submitted that the s43 Order had been imposed following very serious conduct engaging principles 2, 6 and 7 of the Code of Conduct 2011, which included a lack of integrity. Ms Sheppard-Jones submitted that nothing advanced by the Applicant demonstrated that the making of the s43 Order was wrong or that anything procedurally incorrect had taken place in the process culminating in the making of the Order.

The Tribunal's Decision

General

58. The Tribunal had due regard to its statutory duty, under section 6 of the Human Rights Act 1998, to act in a manner which was compatible with the Respondent's rights to a fair trial and to respect for his private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

59. The Tribunal had set out the nature of a review generally, and the nature of the review in this case when considering the preliminary issues, and so that is not repeated here.

60. The Tribunal began by considering the overarching points raised by the Applicant.

61. The Applicant had invited the Tribunal to utilise a 'leapfrog' process in order to refer the matter to the Supreme Court for consideration of a declaration of incompatibility with the ECHR. The Tribunal had no power to undertake such a procedure and, even if it did, would not have done so. The Tribunal therefore refused to attempt such a course of action.

62. The Applicant had consistently submitted that the s43 Order, and the process by which it had been imposed, was unlawful and a breach of Articles 6 and 8 of the ECHR. The Tribunal considered the Applicant's right to due process and noted that the Applicant had been given ample opportunity to make representations throughout the investigation and had done so on several occasions. The Applicant's representations were before the Adjudicator when the decision to impose a s43 Order was taken. Thereafter the Applicant had exercised his statutory right to seek a review of the Order before the Tribunal. The Applicant had been given every opportunity to make his submissions before the Tribunal and had done so. In the judicial review that followed, the Applicant had again been given every opportunity to make submissions, which he had done. The Respondent's investigation had not amounted to an ambush of the Applicant, and there had been no obligation on the Respondent to warn the Applicant that, if he created and relied upon false documents in defence of the original allegation, this might give rise to a separate investigation and disciplinary action. The Applicant had not been deprived of his rights to a fair process, and there was no evidence that the s43 procedures in general, or the application of them in this case, were a breach of Article 6. The Tribunal rejected this ground of challenge.

63. The Applicant had submitted that s43 Orders were, by their very nature, incompatible with Article 8 by reason of their indefinite nature, and the restriction they placed on employment. The Tribunal noted that the nature of a s43 Order was not punitive and did not prohibit employment. It was a statutory provision as part of the regulatory structure put in place to protect the public. The Applicant was not barred from employment generally, and was not prohibited from employment in the legal profession, providing he had the permission of the SRA. This was necessary to ensure that necessary safeguards were in place. In any event, it was not the Tribunal's function to review legislation. The only question for the Tribunal was whether the procedures provided for in the legislation had been properly followed.

64. The s43 Order was indefinite, but was not necessarily permanent as an application to revoke it could be made at any time. Any refusal of such an application could also be challenged. In this particular case the Tribunal recognised and accepted that there had been confusion about the appropriate process for making an application to revoke, through no fault of the Applicant. However, the Tribunal had made allowances for this by giving the Applicant time to consider his options, and by allowing him to convert his application into one for a review. The Tribunal noted that the Applicant had declined the option to apply to the SRA for revocation, but still retained that option, irrespective of the outcome of this application for a review. The Tribunal rejected the submission that the s43 Order, generally or in this case, breached the Applicant's rights under Article 8.

65. The Applicant had mistakenly conflated the issues of rehabilitation in the context of a criminal conviction with remedial matters which may mean that a s43 Order was no longer necessary. Those were not matters for consideration on a review, but in the context of the submission that the s43 Order was, by definition, a breach of the Human Rights Act, it was right to note that remedial matters could be taken into account in any application to revoke.

66. The Tribunal then proceeded to take each of the Applicant's submissions as set out in sub-headings his Skeleton Argument and developed in subsequent paragraphs. The sub-headings are quoted for ease of reference.

"Fairness, a prominent place, legal certainty and the rule of law"

67. The Applicant's submissions here related to Article 6. The Tribunal had determined that point as discussed above.

"a judicial body that has full jurisdiction"

68. The Tribunal had addressed this submission when considering the preliminary arguments as discussed above.

"The principle of the separation of powers is the cornerstone of an independent and impartial justice system."

69. This point had already been considered in Arslan at [69] and therefore did not form part of the Tribunal's review for the reasons set out previously.

"Art.8 of the Convention:(1) " ... private and family life .... home and ... correspondence ... ".

70. The Applicant's submissions here related to Article 8. The Tribunal had largely determined that point as discussed above. In relation to the personal data breach point, the previous Tribunal decision had dealt with the Applicant's difficulties accessing his redundant email account, and the matter of where and to whom emails had been sent had also been considered in Arslan at [55] – [59]. The Applicant had not identified any new argument that linked any data breach, if indeed there was one, to a procedural irregularity by the Adjudicator.

"The Recommendations and Principles Guaranteed Under International Declarations"

71. The submissions under this heading cited various principles and recommendations from the Council of Ministers. This effectively reiterated the Applicant's submission in relation to Article 8, which the Tribunal had already determined above. Any qualifications the Applicant may have obtained in other jurisdictions were of no relevance to the question of whether the s43 Order should have been imposed.

"The Basic Principles on the Role of Lawyers -the Havana Principles- (Havana, Cuba, 1990)"

72. The Applicant's submissions under this heading included allegations of discrimination on the part of the SRA. This point had already been considered in Arslan at [69]-[70] and therefore did not form part of the Tribunal's review for the reasons set out previously. The Tribunal also noted that s.43 applied equally to anyone who met the criteria. The Applicant's submission relating to the Rehabilitation of Offenders Act was not relevant, as these were not criminal proceedings.

"A long and Arbitrary Investigation"

73. The Tribunal considered the chronology, which is set out above. The initial investigation into the report of sexual harassment did not directly result in further action, and the further investigation occurred as a result of the Applicant's response to the initial investigation. The timescale was not inordinately long as it lasted approximately 12 months.

74. The investigation could not be described as "arbitrary" as the SRA was under a duty to investigate both the initial complaint and the Applicant's conduct in the course of his responding to it.

"The Adjudicator did not apply the proportionality test, violated the s.6 of the HRA and art.6 of the Convention. The SRA violated the DPA 98 and art.8. The high court violated the English constitution."

75. The matters raised under this heading are dealt with above, and the submissions rejected for the reasons stated.

"The Respondent is a public authority under the HRA 98"

76. The points made under this heading did not add substantively to the Human Rights issues already considered, and disclosed no evidence of procedural irregularity.

"The Respondent did not give a reason in their response to my application, therefore acted unreasonably and disproportionately as a public authority."

77. This related to the confusion arising from the Applicant's enquiry about applying for revocation in August 2021. The circumstances relating to that issue are rehearsed above and did not go to the question before the Tribunal on a review of the s43 Order.

"The Issue of Conflict of Interest"

78. The points raised here post-dated the imposition of the s43 Order and did not disclose any evidence of procedural irregularity.

"The Law Firms' views on the S.43 Order's time and necessity"

79. The view of individual law firms on the continuing merits or otherwise of a s43 Order were completely irrelevant to the question before the Tribunal.

"The Case of Liaqat Ali: Liaqat Ali was not a lawyer, not authorised to work in immigration matters and also did not have any qualifications to carry out such a duty. He also committed a criminal offence"

80. The Applicant referred to this case in response to the Respondent's reference to it. The Tribunal confined itself to the facts of the Applicant's case and to the relevant test for review in relation to it.

"I was in fact under a supervision which was prevented and then suspended by the SRA. They did not even lift the suspension."

81. These were matters that may be relevant to an application for revocation but were not relevant to a review.

"Legal profession, Attorney and legal work experience in Turkey must be considered and taken into account"

82. These were matters that may be relevant to an application for revocation but were not relevant to a review.

"Comments on the Respondent's Answer: the Respondent in this case reacts like a defendant, immediately gets defensive rather than behaving like a reasonable public authority; therefore fails to meet the S.6 of the HRA 98. Essentially, it is better the Respondent be the Law Society and the Defendant is the SRA in order to have a fair, reasonable and proportionate hearing and outcome."

83. The majority of submissions under this heading repeated those already made and determined by the Tribunal for the reasons set out above. The remaining submissions were matters already determined by the Administrative Court and were therefore outside the scope of the review in this case.

"Give me a man and I will find the crime."

84. The submissions set out under this heading required no finding, other than to note that they disclosed no evidence of procedural irregularity.

"The correct standard is a criminal standard and the test is the proportionality test"

85. This point had already been considered in Arslan at [43]-[49]and therefore did not form part of the Tribunal's review for the reasons set out previously.

"The Ali Test ([2013] EWHC 2584 (Admin) is not compatible with the Proportionality test in my case. As such, it is for those who committed a criminal offence, had no supervision in place, no qualifications obtained and no authorisation to work in such a field. Every case has its own unique background to consider. Ali was not accredited to work in immigration as well. Furthermore, the application of criminal law by analogy is prohibited within the principle of legal certainty and Art.7 of the Convention: Lex Stricta and the prohibition of Application by Analogy."

86. The Tribunal's response to the Ali submissions is set out above.

"S.43 and its arbitrary interference fails the rule of law test"

87. The Tribunal's discussion of the legality of s43 is set out above.

"The legal provision is not sufficiently precise to enable the person reasonably to foresee the consequences which a given action may entail."

88. This was a repeat of earlier points and the Tribunal's decision is set out above.

"The law does not provide effective safeguards against arbitrary interference with the respective substantive rights. The law must be compatible with the aim of the Convention."

89. The role of the Tribunal was not to review whether the law was compatible with the ECHR, for the reasons set out above. The Applicant relied on Basfar v Wong UKEAT/0223/19/BA, an Employment Appeal Tribunal authority. That case related to diplomatic immunity and was therefore of no assistance on the question before the Tribunal in its review of the s43 Order.

"s.43 is an arbitrary penal interference indirectly, therefore violates Article 8 and Article 14 of the Convention"

90. The Tribunal's discussion of the legality of s43 is set out above.

"The law does not offer a clear and accessible resolution mechanism."

91. The Tribunal noted that the Applicant had a right to seek revocation of the s43 Order, which it accepted was an indefinite Order until such time as it was revoked or quashed. The Applicant, having been advised of the correct procedure by the Tribunal, had not so far chosen to apply to the SRA for revocation. Nevertheless, this was not a matter

which addressed the issue as to whether the Adjudicator had made a serious procedural error.

92. The Applicant again referred to discrimination in this section. The Tribunal noted that s43 applied equally to anyone who met the criteria, namely that it was undesirable for them to be employed in the profession without SRA permission. The fact that the Applicant's qualification was in a foreign jurisdiction was not a basis for the decision made by the Adjudicator when imposing the s43 Order.

"The S.43 is unclear, ambiguous, meaningless, open to abuse and facilitates discrimination."

93. The Tribunal's discussion of the legality of s43 is set out above. The Applicant had provided no evidence of a "grudge" or "malice" on the part of the SRA. The points about discrimination are addressed above.

94. The Applicant's complaint under this heading that the SRA would not apply to revoke the Order appeared to rely on a misunderstanding of the process, which is set out above. In any event it was not a matter relevant to a review of the s43 Order.

"The Procedure and Cost issues prevents a person to prepare an application for revocation"

95. This was not a matter relevant to a review of the s43 Order.

"The Respondent relies on the lawyers' budget in breach of the principle of the equality of arms guaranteed under art.6 of the Convention."

96. This was not a matter relevant to a review of the s43 Order.

"Lawyers have an essential role to play in the administration of justice, in the maintenance of the Rule of Law as well as in the protection of human rights and fundamental freedoms in a democratic society."

97. The arguments under this heading which related to the legality of s43 are dealt with above. In relation to the Applicant's reference to the ability to call witnesses, this had been addressed in the judicial review and so was not a matter which fell to be determined by this Tribunal.

"The Art.8 Application: Lawyer Profession, Training Contract, Exams"

98. The Tribunal's determination of the Article 8 argument is set out above.

"Private Life, the search of a lawyer's office and unlawful confiscation of documents and the Niemietz judgment:"

99. The Tribunal noted that the Firm provided the file to the SRA in the course of the original investigation. The documents so disclosed belonged to the client and the Firm, not to the Applicant. There was no evidence of an unlawful search, and no evidence of impropriety in either the Respondent obtaining the documents or the Firm producing them. The Tribunal noted that legal professional privilege, which was a right vested in the client, not her lawyers, did not in any event prevent regulatory investigations from

proceeding. There was no evidence that the Adjudicator had relied on documents improperly provided to or seized by the SRA.

"The investigation and interference was not necessary and not in accordance with the law"

100. The Applicant asserted that a series of procedural breaches had taken place, but provided no evidence to support that assertion. The SRA were investigating a serious allegation and, in the course of that investigation, the conduct that was the subject of the s43 Order came to light. The SRA was perfectly entitled to investigate both matters, and there was no evidence that it had not followed the law in doing so.

101. The Applicant complained that he had not been reminded of his convention rights. There was no obligation to warn him about conduct that might lead to regulatory action. In any event it was noted that the Applicant's case was that he did not produce the impugned documents in response to the complaint, but rather as part of an unrelated review of his case files. Any warning would not, therefore, have prevented the creation of the documents. In any event, it was not reasonable to expect the regulator to remind individuals of their duties every single time they corresponded, or to anticipate all types of wrongdoing that might occur and warn against it.

"There was no conduct, no harm, no damage, no loss, no wrong to investigate; the SRA was in fact using the investigation to justify the human rights violations."

102. This was largely a repeat of the previous submission. The Tribunal noted that misleading the regulator caused harm in itself.

"The proceedings and fairness"

103. This paragraph consisted of a quote from a publication by Susanna Heley which made comment about the s43 regime, and was therefore not a relevant factor for the Tribunal in carrying out a review.

"The high court judges hurt my dignity and prevented me from making a proper argument"

104. The way in which the judicial review was conducted was not a matter for the Tribunal.

"The high court's decision on the standard of proof does not replace the previous decisions as there is a case law still binding which is Re A Solicitor [1993] QB 69 and of the Privy Council in Campbell Hamlet [2005] 3 All ER 1116 are authority for the proposition that the standard of proof applicable in disciplinary proceedings brought against solicitors is the criminal standard. The actual matter in my case was not the standard of proof; the Respondent focused on the civil standard to justify the human rights violations. As such, the high court's decision on the SDT's powers, the facts and civil standard is unlawful, disproportionate and therefore cannot stand. Because the SDT is the actual expert in this field therefore it is the SDT's actual power and duty enforce art.6. By denying these powers, the high court breached the Convention and made a disproportionate, unconstitutional and political decision."

105. The Tribunal noted that these matters had been dealt with in the judicial review and were therefore out of the scope of the Tribunal's review of the s43 Order. The Tribunal's determination of the Article 6 arguments are set out above. The paragraphs

following this sub-heading also included criticism of the Administrative Court, which issue was not a matter for the Tribunal.

"In this case the high court hearing was purely biased and political. The high court's approach was totally disproportionate and unconstitutional."

106. The way in which the judicial review was conducted was not a matter for the Tribunal.

"The fairness of the proceedings and the procedural guarantees afforded are factors to be taken into account when assessing the proportionality of an interference with the right to private life under art.8 of the Convention."

107. The Tribunal's determination of the Article 6 and Article 8 arguments is set out above.

108. The Respondent made 21 points in summary, all of which are covered by the submissions listed above.

109. The Respondent invited the Tribunal to take the following six steps:

"1. Revoke the Order was reinstated by the high court's disproportionate and unconstitutional decision dated 11 November 2016;"

109.1 The Tribunal did not have jurisdiction to take this step for the reasons set out above.

"2. Decide that the case of Liaqat Ali has been applied by a wrong and unlawful analogy to my case as there is no connection between the two cases at all;"

109.2 The Tribunal has addressed this matter as set out above.

"3. Decide that s.43 of the 1974 Act is disproportionate, unclear, ambiguous, vague and incompatible legislation under the HRA 98 and the Convention for the following reasons and not applicable (and refer the case to the Supreme Court for incompatibility):

- That the section does not allow a lawyer to foresee its future in terms of timing and removing restrictions to continue its professional life in the society;

- That the section (43(1)(a)(b) is not clear as to on which situations (i.e. ambiguous, absurd and open to abuse: " ... which is such that in the opinion of the Society it would be undesirable for the person to be involved in a legal practice ... /(b) ... in the opinion of the Society, occasioned or been a party to, with or without the connivance of a solicitor, an act or default in relation to a legal practice which involved conduct on his part of such a nature that in the opinion of the Society it would be undesirable for him to be involved in a legal practice ... ") order is needed.

- That the section is disproportionate and not compatible with the Convention in giving the arbitrary and unclear abusive power to the authority to keep the order in force indefinitely which is a flagrant violation of a fundamental right namely art.8."

109.3 The Tribunal did not have jurisdiction to make such declarations for the reasons set out above.

"4. Decide that the high court did not apply the proportionality test; restricted the SDT's powers in breach of the Convention."

109.4 The Tribunal did not have jurisdiction to interfere with a decision of the Administrative Court.

"5. Decide that s.6 of the HRA, art.6 and art.8 of the Convention, the ECtHR case law and the proportionality and the rule of law tests applies to these proceedings;"

109.5 The Tribunal agreed that s6 of the Human Rights Act and Articles 6 and 8 applied to these proceedings. There was no evidence that those rights had been infringed in the making of the s43 Order. The Applicant had been given opportunities to make representations to the SRA, to the previous Tribunal and to the Administrative Court. He had also been given the opportunity to make detailed submissions before this Tribunal, both orally and in writing.

Conclusion

110. The Tribunal considered all the Applicant's submissions individually and cumulatively. The Tribunal had to decide whether to quash the s43 Order, vary it or confirm it. The Applicant clearly wished it to be quashed.

111. The making of the s.43 Order had been the subject of a previous application to another division of the Tribunal and that division's decision had been reviewed by the Administrative Court, and the original s.43 Order reinstated by that Court. The Tribunal's scope for a review was therefore limited as set out above. Having taken account of any matters which it could properly take into account, the Tribunal had found no evidence of a serious procedural or other error in the making of the s43 Order. The making of the s43 Order had been closely examined by the Administrative Court and found to be free from procedural error. Insofar as the Applicant had raised new points, the Tribunal had considered those and found them to lack merit. In the circumstances it was not appropriate to quash the s43 Order as it had been properly made following the appropriate procedure.

112. There was no basis on which to vary the s43 Order and, in any event, it was difficult to see what variation could be made that would both leave the Order intact but also be of assistance to the Applicant.

113. The Applicant's application was therefore refused and the s43 Order was confirmed.

114. The Applicant was reminded that if he wished to apply for the s43 Order to be revoked, he must make that application to the SRA.

Costs

Respondent's Application and Submissions

115. Ms Sheppard-Jones applied for an order that the Applicant pay the Respondent's costs in the sum of £4,782.12 as set out in a cost schedule. Ms Sheppard-Jones submitted that the costs were reasonable and proportionate as the Applicant had pursued a review which the Respondent had to reply to. The matter had gone part-heard but no further claim was made for the additional day.

116. In response to a query from the Tribunal concerning the Respondent's initial view on jurisdiction and the incorrect advice it had given the Applicant, Ms Sheppard-Jones explained that the reason that advice had been given to the Applicant was what had been said by the Court in Arslan. While it was the wrong advice, it was a fair piece of advice to have been given in light of the judicial comment. It seemed to the Respondent, given the comment in Arslan, that an application for revocation should be made to the Tribunal. This belief was reviewed following the Tribunal's decision in Mordi, and Counsel's Advice was sought. As soon as it came to the Respondent's attention that the question of the Tribunal's jurisdiction to hear a revocation application was a potential issue, the Applicant and the Tribunal had been notified. The Tribunal had decided to deal with the issue as a preliminary point. Ms Sheppard-Jones noted that the Tribunal had spent some time considering this point.

117. Ms Sheppard-Jones opposed the Applicant's application for costs

Applicant's Application and Submissions

118. The Applicant opposed the Respondent's application for costs, and sought his own costs in the sum of £1,200.

119. The Applicant raised a number of complaints about the way in which the issue of jurisdiction had been dealt with by the Respondent and by the Tribunal, and about the general conduct of the hearing, during which he alleged that he had been prevented from making submissions. The Applicant submitted that the Tribunal should not have entertained argument on the jurisdiction issue, which should have been dealt with in October 2021, or at the Case Management Hearing in December 2021.

120. The Applicant alleged that the Respondent had not stated whether it would oppose or support his application when he first its sought advice as to where the application should be made, and that this was unlawful and discriminatory.

121. In relation to his own costs, the Applicant submitted that he had spent 24 hours at £50 per hour preparing for the hearing. He emphasised that he was not seeking to make money out of these proceedings and had kept his costs at a reasonable level.

122. The Applicant did not provide details of his personal financial circumstances beyond stating that he was not currently employed, and referring the Tribunal to the issue of his finances discussed and recorded in the case management Order.

The Tribunal's Decision

123. The Tribunal considered the Respondent's application for costs first as the substantive application had been unsuccessful. The Tribunal was satisfied that the Respondent should have at least some of its costs.

124. The Tribunal understood why the remarks made in Arslan had led to the Respondent advising the Applicant as it had. That said, it was also right that it was no fault of the Applicant that he had been mis-directed to make an application to the Tribunal which it did not have jurisdiction to hear, and the Tribunal did not consider that he should be required to pay for the Advice the Respondent subsequently received from Counsel on the jurisdiction point.

125. The Respondent had notified the Tribunal and the Applicant on 7 January 2022 of its revised position on this point. The Applicant was not therefore "ambushed" on the day of the hearing, but did have sufficient time to consider the issue before the substantive hearing commenced. The Tribunal noted that the Case Management Hearing had taken place on 3 December 2021, before the Mordi hearing on 17 December, when the jurisdiction issue had come to the Respondent's attention. The Applicant had contested the jurisdiction point raised by the Respondent, and had not been successful.

126. The Tribunal considered that it was, nevertheless, appropriate to make some reduction to the time spent on the jurisdiction point. The Tribunal determined that it was appropriate to reduce the Respondent's costs by £450 to remove the fee for Counsel's advice, certain correspondence and approximately half a day of the hearing.

127. The Tribunal was satisfied that the remainder of the Respondent's costs were reasonable and proportionate. The Applicant, having been given time to consider the Tribunal's ruling on its jurisdiction to hear the revocation application, had elected to pursue an application for a review. The Respondent was therefore required to respond to that application, and was entitled to its costs of that exercise given that the review application had been unsuccessful. The Applicant had not provided details of his means and so there was no basis for a further reduction.

128. In relation to the Applicant's application for costs, this lacked merit in circumstances where he had been entirely unsuccessful, both in his challenge of the Respondent's position on jurisdiction, and in the review application which he had elected to pursue in preference to making a revocation application to the SRA. There was no basis on which to order the successful Respondent to pay the costs of the unsuccessful Applicant. The Applicant's application for costs was therefore refused.

Statement of Full Order

129. The Tribunal Ordered that the application of HUSEYIN ARSLAN for review of a S.43 Order be **REFUSED** and it thereby **CONFIRMS** the Order, and it further Ordered that the Applicant do pay the costs of and incidental to the response to this application fixed in the sum of £4,332.12.

Dated this 21st day of March 2022
On behalf of the Tribunal

H Dobson
Chair