

Guidance Note on Other Powers of the Tribunal

6th Edition

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INTRODUCTION

This Guidance Note on Other Powers consists of a distillation of current Solicitors Disciplinary Tribunal (“the Tribunal”) principles brought together in one document. The document includes general guidance on applications by suspended and struck-off solicitors, Registered European Lawyers (REL) and Registered Foreign Lawyers (RFL) for termination of a period of suspension and restoration to the Roll or Register of European or Foreign Lawyers respectively. It also includes guidance on applications by a solicitor’s employee for review and revocation of an Order imposed under Section 43 of the Solicitors Act 1974 (as amended). Every case is fact-specific, and this Guidance Note consists of guidelines for applications; it is not intended in any way to fetter the discretion of the Tribunal when deciding such applications. The exercise of its powers and the granting of applications are matters solely for determination by the Tribunal. The purpose of this Guidance Note is to assist the parties, the public and the legal profession in understanding the Tribunal’s decision-making process.

The Tribunal is the statutory tribunal responsible for adjudicating upon applications made under the provisions of the Solicitors Act 1974 (as amended) (“the Act”).

It is the function of the Tribunal to protect the public from harm, and to maintain public confidence in the reputation of the legal profession (and those that provide legal services) for honesty, probity, trustworthiness, independence and integrity. The public must be able to expect to receive a high standard of service from a competent and capable solicitor.

The Tribunal deals with an infinite variety of cases. Prescriptive, detailed guidelines for applications in individual cases are neither practicable nor appropriate. The Tribunal adopts broad guidance.

The contents of this Guidance Note are reviewed at least annually.

The respondent in the original proceedings leading to suspension, strike off/removal, or the imposition of a Section 43 Order will be the applicant for the purpose of an application under the Tribunal’s Other Powers.

OTHER POWERS OF THE TRIBUNAL

A. APPLICATION FOR TERMINATION OF A PERIOD OF SUSPENSION

1. The length of the period of suspension is determined by the seriousness of misconduct, and the potential for harm to the public and to public confidence in the reputation of providers of legal services and solicitors in particular.
2. Indefinite Suspension can be terminated only by the Tribunal upon the application of the respondent (who becomes the applicant for the purpose of their application). In considering any such application, the Tribunal will need to be satisfied that termination of the indefinite suspension would not adversely affect the reputation of the legal profession nor be contrary to the interests of the public. If the application is granted, the Tribunal has power to impose proportionate conditions on the individual's return to practice for the protection of the public and the maintaining of confidence in the reputation of the profession.
3. An application for the termination of an indefinite suspension or early termination of a fixed term of suspension must be supported by evidence of changed circumstances sufficient to justify the application.
4. Although suspension is one step below the ultimate sanction of strike off, the factors considered by the Tribunal will be similar to those listed below in relation to restoration to the Roll (former solicitors) or Register (former REL or RFL) and vice versa.
5. In considering an application to terminate an indefinite period of suspension, the Tribunal will have regard to the following factors, which are provided for guidance and which are not intended to be an exhaustive list:
 - details of the original order of the Tribunal leading to suspension. The Tribunal should consider this information for guidance as to the seriousness and circumstances of the original breach or misconduct and the steps the Tribunal regards as being relevant in supporting an application.

- if the suspension was imposed due to concerns regarding the applicant's fitness to practise due to physical or mental ill-health or addiction, evidence of rehabilitation and future prognosis must be provided from a suitably qualified expert.
- evidence must be provided to establish any training undertaken by the applicant or that they have kept their legal knowledge up to date in their area of practice.
- evidence of any employment together with safeguards and supervision which have been put in place by the applicant's employer or alternatively a stringent oversight of the applicant's potential employment together with third party risk and personal management arrangements to be put in place by a prospective employer. Please refer to the SRA Ltd's website (www.sra.org.uk) for information about the circumstances in which the SRA Ltd may, following an application by a particular firm to the SRA Ltd, make an order permitting that firm to employ or remunerate a suspended solicitor and the procedure by which such applications are to be made.
- evidence of genuine reformation of character of the applicant including evidence of insight into the nature and effects of the misconduct and steps taken by the applicant to ensure that the wrongdoing does not reoccur.
- the length of time since the suspension was imposed.
- whether the Tribunal which made the original order, having paid due regard to its inability to fetter the discretion of any future Tribunal considering an application for the termination of the suspension, indicated that it had in mind the possibility of an eventual termination of the indefinite suspension.
- whether there is any continuing risk to the public.
- the Tribunal considers that the public would not harbour concerns about the propriety of the applicant returning to practice.

- if the suspension was subject to conditions, evidence that they have been complied with.
- if financial penalties were imposed, evidence that they have been discharged or attempts made by the applicant to discharge them.
- character references.
- the regulator's response to the application.
- responses received by the Tribunal from others under Rule 17 (7) of the Solicitors (Disciplinary Proceedings) Rules 2019 following the applicant's advertisement of their application as required by Rule 17 (6) of those Rules.

B. APPLICATION FOR RESTORATION TO THE ROLL/REGISTER

6. The Tribunal has the power to restore to the Roll/Register the name of a former solicitor or REL or RFL whose name has been struck off (solicitor) or removed (REL/RFL). An application in such a case must be supported by a statement setting out:

- details of the original order of the Tribunal leading to strike off/removal.
- details of the applicant's employment and training history since the Tribunal's order of strike off/removal.
- details of the applicant's intentions as to and any offers of employment within the legal profession in the event that the application is successful

7. An application for restoration is not an appeal against the original decision to strike off/remove. The Tribunal's function when considering an application for restoration is to determine whether the applicant has established that they are now a fit and proper person to have their name restored to the Roll/Register.

8. In considering any application for restoration to the Roll/Register, the Tribunal will have regard to the following guidance and factors:

- the guidance provided by **Bolton v Law Society 1 WLR 512**:

“Only infrequently, particularly in recent years, has [the Tribunal] been willing to order the restoration to the Roll of a solicitor against whom serious dishonesty had been established, even after a passage of years, and even where the solicitor had made every effort to re-establish himself and redeem his reputation.”

“the most fundamental [purpose of sanction] of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain

public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied re-admission.”

- in relation in particular to cases where solicitors have been struck off for dishonesty, the guidance provided by Lord Donaldson in **Case No. 5 of 1987 (unreported)**:

“however sympathetic one may be towards an individual member of either branch of the legal profession, if you fall very seriously below the standards of that profession and are expelled from it, there is a public interest in the profession itself in hardening its heart if any question arises of your rejoining it. Neither branch of the profession is short of people who have never fallen from grace. There is considerable public interest in the public as a whole being able to deal with members of those professions knowing that, save in the most exceptional circumstances, they can be sure that none of them have ever been guilty of any dishonesty at all”.

- a finding of dishonesty by the Tribunal or a criminal conviction recorded against an applicant involving dishonesty can constitute an almost insurmountable obstacle to a successful application for restoration (see **Solicitors Regulation Authority v Kaberry [2012] EWHC 3883 (Admin)**).
- in relation to cases where strike off was imposed for disciplinary offences not involving dishonesty, the guidance provided by Lord Donaldson in **Case No. 11 of 1990 (unreported)** that the Tribunal should ask:

“If this was the sort of case where, even if the back history was known (that is whatever explanation and mitigation was available to explain why the solicitor committed the original offence), and without the explanation as to what has happened subsequently, the members of the public would say ‘that does not shake my faith in solicitors as a whole’.”

- the period which has elapsed since the order of strike off/removal was made. Save in the most exceptional circumstances an application for restoration within

six years of the original strike off/removal is likely to be regarded by the Tribunal as premature.

- evidence of rehabilitation. This will usually require detailed evidence of substantial and satisfactory employment within the legal profession in the period since strike off. Please refer to the SRA Ltd's website (www.sra.org.uk) for information about the circumstances in which the SRA may, following an application by a particular firm to the SRA Ltd, make an order permitting that firm to employ or remunerate a struck-off solicitor and the procedure by which such applications are to be made.
- the applicant's future employment intentions and whether another solicitor would be willing to employ the applicant within a practice in the event that the applicant's name is restored.
- the extent to which the applicant has repaid any losses sustained by others as a result of the applicant's original misconduct, including any fines and cost orders made by the Tribunal. The applicant must be in a position to demonstrate that they have made a sustained effort to meet any such liability.
- responses received by the Tribunal from others under Rule 17 (7) of the Solicitors (Disciplinary Proceedings) Rules 2019 following the applicant's advertisement of their application as required by Rule 17 (6) of those Rules.

C. APPLICATION FOR REVIEW AND REVOCATION OF SECTION 43 ORDER

9. The Tribunal has jurisdiction under Section 43(3) and (3A) of the Act to decide an application by the person subject to a Section 43 Order or by the SRA for review of that Order (Section 43(3)(a)). In addition, the Tribunal having made a Section 43 Order, may at any time revoke it (Section 43(3)(b)). Under Section 43(3A) 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. The Tribunal, on hearing any application under Section 43(3) may make an order for the payment of costs by any party to the application.

10. Section 43(1) states as follows:

“(1) Where a person who is or was involved in a legal practice but is not a solicitor—

- (a) has been convicted of a criminal offence which is such that in the opinion of the Society it would be undesirable for the person to be involved in a legal practice in one or more of the ways mentioned in subsection (1A), or*
- (b) has, 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 in one or more of the ways mentioned in subsection (1A),*

the Society may either make, or make an application to the Tribunal for it to make, an order under subsection (2) with respect to that person.”

11. A Section 43 Order has a regulatory function, not a punitive function. That is why the Order is of indefinite duration, subject to review and revocation as set out at paragraph 9 above. The purpose of the Order is to safeguard the public and the reputation of the legal profession by ensuring that certain steps in relation to employment can be taken.

Applications for revocation of the Section 43 Order

12. If the SRA made the original Section 43 Order an application for it to be revoked must be made to the SRA (see Section 43(3)(b)). If the SDT made the original Order then an application for revocation of the Order must be made to the SDT (see Section 43(3)(b)).
13. On an application to the Tribunal for revocation the question that the Tribunal must consider is *whether it is, in all the circumstances, any longer necessary for the level of regulatory control to be imposed upon the person subject to the Section 43 Order* (per Wilkie J in *SRA v Ali* [2013] EWHC 2584 (Admin) at paragraph 41).
14. On an application for revocation made to the Tribunal in respect of an Order which the Tribunal made, the Tribunal will consider any relevant facts and circumstances which have arisen since the making of the original Order and is required to make findings in respect of any disputed facts on the civil standard of proof.

Application for review of a Section 43 Order

15. The Tribunal has the power to review a Section 43 Order made by the SRA or one made by itself. In conducting such a review, the Tribunal is not acting as a Tribunal of fact nor is it conducting a re-hearing of the original decision. The principles by which such a review is conducted are contained in *SRA v Arslan* [2016] EWHC 2862 (Admin) at paragraphs 38 – 42. In particular:

Paragraph 38: “... *A 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 the 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*”; and

Paragraph 40: “... *Where a challenge is made to conclusions of primary fact, the weight to be attached to the finding of the original decision-maker will depend upon the extent 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. Another important factor with the*

extent to which the original decision involved an evaluation of the facts on which there is room for reasonable disagreement. In such a case the reviewing body ought not generally to interfere unless it is satisfied that the conclusion reached stay outside the bounds within which reasonable disagreement is possible”.

16. Where the SRA has refused to revoke an Order which it had made, then the Tribunal has the power to review the original Order made by the SRA in light of the facts and circumstances which were before the SRA on the application to revoke. On such a review the Tribunal will apply the principles as set out in Arslan having regard to the facts and matters which were before the SRA on the application to revoke and will ask itself the fundamental question as to whether in light of those facts and circumstances the SRA was wrong to keep the Order in place, having regard to the principles as set out in the judgment in Arslan.

D. COSTS

17. Generally, the Tribunal has the power to make such order as to costs as it thinks fit, including the payment by any party of costs or a contribution towards costs of such amount (if any) as the Tribunal may consider reasonable (Section 47 of the Act). Such costs are those arising from or ancillary to proceedings before the Tribunal.
18. The Tribunal may make an order for the payment of a fixed amount of costs. This will be the usual order of the Tribunal where the parties are in agreement as to the liability for, and the amount of, those costs. Otherwise, the Tribunal will determine liability for costs, and either summarily assess those costs itself or refer the case for detailed assessment by a Costs Judge.

