Appeal No. UKEAT/0304/18/LA

EMPLOYMENT APPEAL TRIBUNAL

7 ROLLS BUILDINGS, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 14 May 2019
Judgment handed down on
19 June 2019

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

MS K BILGAN

MR M WORTHINGTON

MR RICHARD PAGE — APPELLANT

1)LORD CHANCELLOR / SECRETARY OF STATE FOR JUSTICE
2) LORD CHIEF JUSTICE OF ENGLAND AND WALES — RESPONDENT

JUDGMENT

Revised

APPEARANCES

For the Appellant	Mr Paul Diamond (of Counsel) Instructed by: Direct Public Access
For the Respondent	Miss Naomi Ling (of Counsel) Instructed by: Government Legal Department Employment Team One Kemble Street London WC2B 4TS

SUMMARY

RELIGION OR BELIEF DISCRIMINATION

VICTIMISATION

The Claimant, who is a practising Christian, was a lay magistrate sitting on family cases involving adoption decisions. The Claimant holds the firm faith-based belief that it is "not normal" for a child to be adopted by a single-parent or a same-sex couple. The expression of those views led to a reprimand. He was instructed to seek advice before speaking to the media. The Claimant continued to engage with the media without seeking advice. During one BBC interview, he said that his responsibility as he saw it was "to do what [he] considered best for the child, and [his] feeling was therefore that it would be better if it was a man and a woman who were adoptive parents". The Claimant was subsequently removed from the Magistracy. The Claimant issued claims of discrimination (direct and indirect) because of religious belief, harassment and victimisation. The Employment Tribunal dismissed the claims finding that the decision to remove the Claimant was made because (amongst other matters) he had chosen to advertise the bias that he would apply in the exercise of his judicial functions and had disregarded the instruction to seek advice before contacting the media.

Held (dismissing the appeal): that the Tribunal had not erred in concluding that the words spoken by the Claimant had not amounted to a protected act, but even if part of what was said during the BBC interview had done so, the reasons for the Respondents' actions were properly separable from that act. The Tribunal had correctly applied the principles established in Martin v Devonshires Solicitors [2011] ICR 352. The Claimant's arguments based on Article 10 of the ECHR (right to freedom of expression) could not be accepted. Whilst Judges are not precluded from speaking out on matters of controversy, if they choose to do so, they must not undermine

judicial impartiality or respect for the judiciary. In the present case, the Claimant's remarks were found to be likely to prejudice judicial impartiality.

THE HONOURABLE MR JUSTICE CHOUDHURY

Introduction

1. The Claimant appeals against a decision of the London South Employment Tribunal, Employment Judge H Williams QC presiding, dismissing his complaints of discrimination on the grounds of religious belief and victimisation following his removal from office as a lay magistrate.

Factual background

2. The Claimant is a practising Christian. He had held the office of lay magistrate, hearing cases in both criminal and family matters, since March 1999. Upon his appointment as a Magistrate, the Claimant had signed a "Declaration and Undertaking" in the following terms:

> **"I acknowledge and undertake:**
>
> - **That it will be my duty to administer justice according to the law.**
> - **That my actions as a magistrate will be free from any political, racial, sexual or other bias.**
> - **That I will be circumspect in my conduct and maintain the dignity and good reputation of the magistracy at all times in my private, working and public life."**

3. Upon appointment, the Claimant also took the judicial oath by which he swore to "*do right to all manner of People, after the laws and usages of this realm, without fear or favour, affection or ill will*".

4. In 2012, the Clerk to the Kent Justices, Mr Dodds, circulated an Advice Note, which the Claimant received, about Magistrates' contact with the media. This stated, amongst other things, that the general guidance for all levels of judiciary was that they should not communicate with the media and that they should avoid public comments either on general issues or particular cases which cast any doubt on their complete impartiality.

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5. There were no problems with the Claimant's Magistracy prior to 2014. In July 2014, the Claimant was part of a panel of Magistrates hearing a same-sex adoption application concerning a young child. Although the adoption was unopposed and there was a comprehensive report from a social worker in support, the Claimant expressed views to his fellow Magistrates which made it clear to them that he had a problem with the notion of a same-sex couple adopting the child. The Tribunal described the incident as follows:

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> **"36. By letter dated 2 July 2014 'C', the Chairman of a panel of magistrates who had, sat with 'A' and the Claimant hearing a same sex adoption application concerning a young child, raised concerns about his conduct (pages 219 — 220). Describing it as 'an incident of extreme and overt prejudice", she said no objection was raised to the adoption at the hearing, but that during the panel's consideration of the comprehensive report from the social worker it had become clear the Claimant had a problem with the notion of a same-sex couple (men) adopting the child. Although the clerk had reminded the panel that they could not raise any objections as they were not the parties and the adoption was unopposed, the EF Claimant had refused to sign the document formally approving the adoption. She observed that "*such manifest prejudice cannot exist within our judicial system and it is my view that consideration be given as to whether Mr Page should continue to sit as a Magistrate, particularly with the Family Court, or indeed elsewhere*".**
>
> **37.A similar concern was raised by 'B', the Clerk to the panel (page 221). She said that it "*became clear that Mr Page had a deep-seated problem with homosexuality and explained that this is based on both moral and religious grounds. He also considered that the child was likely to suffer if brought up with parents of the same sex*". Following receipt of these communications, Mr Dodds contacted 'A' who then supplied an account (page 222). She said that: "*it became clear that Mr Page was not happy with the same sex adopting due to his Christian beliefs, which I felt was to a degree understandable, but he should have put this to one side and not be prejudicial. I do question whether he should continue to sit on the Family Bench or indeed in the Adult Court. It was extremely concerning that Mr Page would not sign the Order...*"**

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6. A report on the matter was prepared by a Dr Taylor, the Deputy Chair of the Advisory Committee for Kent, on 10 August 2014. He concluded that there was a case to answer and recommended the appointment of a Conduct Panel to investigate the complaints further. The hearing before the Conduct Panel took place on 2 September 2014. The Tribunal noted that the Claimant said to the Panel that:

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> **"41. … "*he knew his judicial duty was to do what was best for the child. He said that what was best for a child was being cared for by a man and a woman. That was his starting point. He argued that there had been so few same sex adoptions over such a short time that there was no reliable evidence on their outcomes*". The Panel's report also records him as saying: "*a man and a woman were the natural parents or the natural family for a child and in the best interests of the child. In certain circumstances adoption by a same sex couple might be appropriate if there was no other option*". When questioned by Mr Purchase, Mr Page accepted that this was and remained his position."**

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7. The Conduct Panel found that the Claimant's beliefs had unreasonably affected his judgment and that he lacked insight, not appreciating or accepting that his beliefs prevented him from objectively considering same-sex adoption. The panel noted that it had given the Claimant ample opportunities to state that he had no general objection to adoption by same-sex couples, but he had declined to do so. The panel also found that the Claimant had advanced no convincing reasons for failing to follow the recommendations in the social worker's report. The complaints against the Claimant were therefore upheld. It was recommended that the Claimant receive a reprimand "*to show that it is unacceptable for him to allow his religious beliefs to prevent him from acting in an unbiased and unprejudiced manner*".

8. After a further report prepared by the Judicial Conduct Investigation Office ("JCIO"), which recommended a more severe sanction, the Respondents decided that a reprimand was sufficient. A letter dated 19 December 2014 was sent by the Lord Chief Justice to the Claimant in the following terms:

> **"We are seriously concerned about the level of prejudice displayed by you during this case. Despite your assertion that this was part of your decision-making process based solely on the best interests of the child, your assessment of this case, was not based on evidence, but was, as you have admitted, influenced by your religious beliefs that two men could not be considered a natural family. We believe that you should have recused yourself from this particular matter because of your beliefs. Your conduct is significantly aggravated by the fact that you have failed to recognise at any stage of this investigation that discriminating against a couple on the grounds of their sexual orientation was both wholly inappropriate and contrary to the requirements of the Equality Act.**
>
> **Whilst we entirely accept that you are entitled to your personal religious beliefs, such beliefs cannot influence your judgment to the extent that this conflicts with your duties as a judicial office order to apply the law fairly and without prejudice.**
>
> **Your lack of insight and poor judgment are such that the Lord Chancellor and I do agree with the Conduct Panel's recommendation that you be given a reprimand. However, we also require that you receive remedial training on this before you assume sitting."**

9. It was subsequently clarified to the Claimant that the reprimand did not mean that the Claimant was entitled to pick and choose which cases he wished to sit on and that he would be required, following training, to sit on all cases that came before him.

10. On 25 January 2015, an article was published in the MailOnline (and in the Mail on Sunday) about the Claimant being disciplined for expressing his belief that a child should be raised by a mother and a father. The Tribunal refers to the article as follows:

> **"56. … Mr Page did not suggest that he was misquoted. The article quoted him as follows: "*There is tremendous pressure to keep quiet and go along with what is seen to be politically correct. Everyone else seems to be allowed to stand up for their beliefs except for Christians*"; "*I think there is something about a man, a woman and a baby, that it's natural and therefore the others are not. That's the comment that I made*"; "*What I was staggered by was that they were saying I was a Christian and therefore I was prejudiced. They were far more prejudiced in their complaint than I was in what I said*"; and "*We all have views and that's what you have to bring to decision-making and mine are Christian views*". In characterising matters in this way, the Tribunal considered Mr Page gave an unfair and inaccurate summary of the complaint against him and the reasons he had been given for the finding of judicial misconduct and penalty imposed."**

11. The Claimant was quoted in another article in the Daily Telegraph published on 19 January 2015, in which he attributed his view as to the best interests of the child in the adoption case as stemming from his Christian faith.

12. Concerns were expressed about the Claimant's contact with the media. Dr Taylor prepared a further report on 10 February 2015. Dr Taylor's view was that the Claimant's public statements "*may be construed as seeking to bring pressure on senior members of the judiciary to revoke decisions that have been taken after due consideration of the appropriate evidence*". Once again, Dr Taylor concluded that there was a case to answer but that there was not a sufficient degree of misconduct on the part of the Claimant to justify the convening of another Conduct Panel. Instead, it was recommended that the Claimant should at all times take close account of the advice given to Magistrates about their conduct in public and private life. The Bench Chairman confirmed that he had spoken to the Claimant about these matters.

13. On 12 March 2015, the Claimant appeared on BBC Breakfast News in relation to an item discussing a new report on workplace religious discrimination that had been published by the Equality and Human Rights Commission. The Tribunal described this appearance as follows:

> **"61. … The reporter introduced the Claimant thus: "*Richard Page is a magistrate in Kent who works with the family courts. Last year, ahead of an adoption hearing with a gay couple, he expressed a view that resulted in him being suspended and disciplined*". The footage then showed Mr Page speaking. His broadcast words have already been set out ([2], above). The reporter then continued that: "*After diversity training, Richard was reinstated but says he finds it hard that his religious beliefs as a Christian were seen as prejudice. The Equality and Human Rights Commission heard from many Christians who felt pressured to keep their religion hidden at work or felt discriminated against when it came to wearing religious symbols or expressing their beliefs*"."**

14. The "**Broadcast Words**" to which the Tribunal referred, spoken by the Claimant, were as follows:

> **"*My responsibility as a magistrate, as I saw it, was to do what I considered best for the child and my feeling was therefore that it would be better if it was a man and a woman who were the adopted parents*"**

15. The Claimant confirmed that he had not sought advice from the judicial press office or the Bench Chairman before becoming involved in the broadcast. Dr Taylor prepared a further report arising out of the Claimant's conduct. The Tribunal referred to this as follows:

> **"65. Dr Taylor found that there was a case to answer within the terms of rules 31 and 36 of the 2014 Magistrates Rules and recommended that the Conduct Panel be appointed to consider the complaints further. He said Mr Page appeared to have willfully disregarded the advice and guidance previously given to him. He observed that the developments in the media could be construed as seeking to bring pressure on senior members of the judiciary to revoke their earlier decisions and, as such, this could be construed as conduct bringing the Magistracy into disrepute. Mr Diamond probed Dr Taylor's reasons for determining there was a case to answer. Dr Taylor stressed that he was particularly concerned that Mr Page had not taken advice before speaking to the media. He also confirmed that his reasons were threefold, as set out at [29] of his witness statement, namely (a) Mr Page had failed to follow the advice he had been given regarding contact with 4 the media; (b) the consequence of this was publicity negative to the Respondents, which could bring the judiciary into disrepute; and (c) the apparent breach of his judicial oath. In re-examination, Dr Taylor indicated that as regards (b), his concern related to the public nature of the criticism of the Respondents, rather than the content of the criticism. The Tribunal accepted that Dr Taylor gave a genuine and accurate account of his reasons."**

16. The Tribunal referred to the Conduct Panel's decision in the following terms:

> **"67. The Conduct Panel found that the Claimant was guilty of misconduct because: (a) he had willfully ignored the contents of the Advice Note; and (b) his comment in the BBC broadcast had brought the Magistracy into disrepute because he had expressed a personal view on same-sex adoption which did not reflect the law. As such, it could create the public perception that members of the judiciary were biased against same-sex adoption. Also, it was not in accordance with his judicial oath. Given the earlier reprimand and formal advice he had already been given, the panel recommended his removal from the Magistracy.…"**

17. The Claimant asked for the matter to be reconsidered by a Disciplinary Panel. In his submissions to the Disciplinary Panel, the Claimant stated that, "*it is no part of a Magistrate's*

duties or rights to give effect to any high principle (such as equality between heterosexuals and homosexuals) except one, and one only: the best interests of the child"; and that "*where the law left a matter to the discretion of the magistrate, it was inevitable that his personality and beliefs would influence his decision. He added that he still held these views*."

18. The Disciplinary Panel's decision was described by the Tribunal as follows:

> **"71. The Disciplinary Panel did not endorse the first of the Conduct Panel's findings of misconduct. The contents of the Advice Node were guidance, so that failing to follow it could not amount to misconduct. However, the Panel agreed with the second finding of misconduct. Mr Page was 'wholly mistaken' to argue that his comments should be viewed as a dissenting judgment; the Panel was concerned with what was said in the BBC broadcast, months after the adoption case was heard. A Magistrate's function, like any other judge, was to apply the law. Judges of all levels are forbidden from introducing evidence into cases and were required to decide them on the evidence presented at the hearing. The limited matters that 'judicial notice' could be taken of did not include matters of controversy. "*It is the unanimous view of the Panel that by his comments transmitted via the BBC interview… he would undoubtedly have caused any reasonable person to conclude that he would be biased and prejudiced against single sex adopters. The fact that his opinion may be genuinely and honestly held is irrelevant. Similarly, Mr Page's religious persuasion is wholly irrelevant.*" The Panel said they did not make a recommendation to remove from office lightly, but the history of the matter, coupled with the "*extremely damaging nature of the comments made, given the inevitable suggestion of bias, to together with the lack of any apparent insight by Mr Page as to the effect of his comments*" meant there was no other option. The Panel noted that Mr Page confirmed his views had not changed and that he did not see any harm in relying upon 'evidence' acquired outside of the court hearing, which showed "*a remarkable lack of judgment*".**

19. By letter dated 29 February 2016, the Claimant was informed that the Respondents had decided he should be removed from the Magistracy. The Tribunal referred to the letter as follows:

> **"75… The letter said that the Respondents agreed "*with the disciplinary panel's finding that the comments you made in [the BBC interview] … would have caused any reasonable person to conclude that you would be biased and prejudiced against single sex adopters. We believe that by making such comments you have brought the magistracy into disrepute and that this is a matter of serious misconduct*". The letter referred to the disciplinary history and the terms of the declaration which the Claimant had breached. The Respondents said that he had "*demonstrated a serious lack of sound judgment*" and his removal was necessary to maintain confidence in the Magistracy."**

20. The Claimant was accordingly removed from office with effect from 9 March 2016.

The Tribunal's Judgment

21. The Claimant's claim before the Tribunal relied upon various heads of claim, including direct discrimination because of religion or belief, indirect discrimination, harassment, victimisation and claims under the **European Convention on Human Rights** ("**ECHR**") and the Charter of Fundamental Rights.

22. The Tribunal rejected all of these complaints. Whilst the Tribunal concluded that the belief that a child should be adopted by a heterosexual couple rather than by homosexual couple stemmed from his Christian faith, it found as a fact that the Respondents had acted for the reasons they gave contemporaneously, rather than on the basis of any assumption that the Claimant had an animus towards homosexual couples. As to the allegation of direct discrimination on the grounds of religion or belief, the Tribunal held as follows:

> **"135. Applying the distinction identified and discussed at [84] - [94] above, the Tribunal concluded that the finding of misconduct and the decision to remove the Claimant were based on his inappropriate conduct in publicly displaying a preconceived bias towards same-sex adopters in relation to his judicial role, contrary to the declaration and oath and likely to bring the judiciary into disrepute and thereafter showing no insight or remorse or willingness to accept that his conduct was inappropriate for a judicial officer holder. The decision did not stem from his Christianity or from the manifestation of his Christianity or indeed from the belief itself. Furthermore, the decision-makers would have acted in exactly the same way if a member of a different faith or an atheist had acted in that way.**
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> **136. For the reasons explained below, the Tribunal also concluded that the Claimant's removal did not involve an unjustified interference with Article 9 and/or Article 10 rights. Accordingly, the Convention and EU provisions relied upon by Mr Diamond, could have no impact upon the 2010 Act causes of action: see [104], [117] above."**

23. As to the claim of victimisation, the Tribunal considered first what the protected act being relied upon was. It held:

> **"139. As reflected in the terms of issue 8 of the agreed list of issues, the Claimant's pleaded case that he had undertaken a protected act was founded on his comments broadcast during the BBC programme on 12 March 2015. The Tribunal was quite clear that these words did not constitute a protected act, given they make no allegation of discrimination, but rather put forward the preconceptions the Claimant would apply in adoption cases, as we have discussed above.**
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> **140. In [41] of his Skeleton Argument, Mr Diamond took a broader approach to what was said to amount to a protected act.**
>
> **141. The Tribunal was particularly mindful of what the presenter said immediately after the Claimant's broadcast comments: "*Richard was reinstated but says he finds it hard that his religious beliefs as a Christian were seen as prejudice*" (page 357). Immediately after this, the**

presenter referred to instances of workplace religious discrimination. If it was legitimate to focus upon this aspect of the transcript, the Tribunal concluded it indicated that the Claimant said he had been disciplined because of his religious views as a Christian. Accordingly, this was an allegation that he had suffered religious discrimination that would constitute a protected act within section 27(2)(d).

142. The Tribunal therefore considered whether it was appropriate to conclude that the Claimant had undertaken a protected act when this was not how the listed issue had been formulated. Not without some hesitation, we considered that it was. The parties had had the opportunity to address the wider way the victimisation contention was put in closing and the listed issue had raised the wider context. Although indication that the point should be evaluated in the way the Claimant had pleaded it, Mr Purchase accepted during closing submissions that context was relevant to our evaluation. It appeared over-technical and not in the interests of justice to not have regard to what was said during the rest of the short broadcast.

143. However, for the avoidance of doubt, the Tribunal repeats that the Claimant's broadcast comment as to how he saw his responsibility as a magistrate was not a protected act."

24. Having apparently found, therefore, that at least part of the content of the BBC interview as reported amount to a protected act, the Tribunal turned its attention to considering whether the reason for the Respondents' decision was because of that protected act. It held as follows:

"144. As we have indicated when addressing the direct discrimination allegation, the Respondents and the Conduct Panel and the Disciplinary Panel made the decision to remove the Claimant because he chose to advertise the bias he would apply in the exercise of his judicial functions via the BBC: [130] and [135], above. The Claimant's broadcast statement in that respect was not a protected act and they did not act because of any protected act, but for the reasons they gave contemporaneously.

145. The Claimant attached significance to the analysis of Dr Taylor in recommending that there was a case to answer. Amongst other factors, Dr Taylor referred to the Claimant's public criticism of the Respondents: [65] above. As we have indicated earlier, the Tribunal accepted Dr Taylor's account of his reasons. It therefore followed that his particular concern in this respect was around the publicity the Claimant had deliberately generated and the possibility that this could be seen as bringing the judiciary into disrepute if it was construed as the Claimant seeking to put pressure on the Respondents. It was not the *content* of the Claimant's criticism that gave rise to a case to answer. Furthermore, all this was only one of three factors that led Dr Taylor to conclude there was a case to answer: [65], above.

146. Thus, in so far as there was an element of Dr Taylor's decision that was a response to the Claimant's criticism of the Respondents, the distinction identified by the EAT in *Martin v Devonshire Solicitors* ([100], above) is in point. It was quite clear to the Tribunal that Dr Taylor did not decide there was a case to answer in whole or in substantial part because the Claimant had undertaken a protected act, but for the separable reasons identified and discussed at [65] and [145], above."

25. In relation to the **ECHR** claims, the Tribunal proceeded on the assumption that Article 10 (freedom of expression) was engaged, notwithstanding the Respondents' arguments to the contrary. The Tribunal, having set out its reasons for rejecting the Claimant's contention that certain **ECHR** authorities were supportive of his case, concluded as follows:

> **"160. The key consideration is the articulation of principle contained in these authorities, which we have set out at [111], above. The ECtHR expressly recognised that whilst there may be circumstances in which judges have an Article 10 protected right to make public pronouncements, the same only extends to the making of moderate and proper statements and in particular it does not extend to making of statements that compromise the office holder's judicial impartiality. As we have already indicated, this was not the case with Mr Page's public statements.**
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> **161. We have also noted earlier that the fairness of the process involved may be relevant to proportionality: [111], above. In this instance we consider that our findings of fact show that the Claimant was afforded a very fair and transparent process, which enabled him to know the concerns raised, material relied upon and afforded him multiple opportunities to give his response.**
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> **162. Accordingly, in all the circumstances the Tribunal concluded that the finding of misconduct and the imposition of the sanction of removal from the Magistracy was plainly a proportionate limitation upon the Claimant's right to freedom of expression and the right to manifest his religion and as such would be regarded as necessary in a democratic society.**
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> **163. As the Tribunal found there had not been an unjustified interference with the Claimant's Article 9 and/or Article 10 rights, no question of re-interpreting the 2010 Act arose."**

26. Finally, the Tribunal rejected Claimant's claim under EU law and the Charter on the basis that these did not assist the Claimant in circumstances where it had not been shown that there was any undue interference with his **ECHR** rights.

Legal framework

27. Although the claim before the Tribunal comprised many heads of claim, it is only the Tribunal's decision in relation to victimisation that is challenged. Accordingly, the relevant statutory provisions may be set out quite briefly:

28. Section 27 of the **Equality Act 2010** ("the 2010 Act"), so far as relevant, provides:

> **"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—**
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> **(a) B does a protected act, or**
>
> **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act—**
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> **(a) bringing proceedings under this Act;**
>
> **(b) giving evidence or information in connection with proceedings under this Act;**
>
> **(c) doing any other thing for the purposes of or in connection with this Act;**
>
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**

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

29. The Claimant contended before the Tribunal that the statements made during the BBC broadcast were protected acts falling within s.27(2)(d); that is to say they amounted to the making of an allegation (whether or not express) that a person has contravened the 2010 Act. Whether or not something is a protected act and whether the impugned act is done because of that protected act are questions of fact for the Tribunal. In **Martin v Devonshires Solicitors** [2011] ICR 352, the Tribunal was required to consider whether an employee had been dismissed by reason of a protected act in circumstances where she had brought persistent and unfounded grievances complaining of harassment and victimisation against her employer. Underhill P (as he then was) held as follows:

"22. We prefer to approach the question first as one of principle, and without reference to the complex case law which has developed in this area. The question in any claim of victimisation is what was the "reason" that the respondent did the act complained of: if it was, wholly or in substantial part, that the Claimant had done a protected act, he is liable for victimisation; and if not, not. In our view there will in principle be cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act (say, a complaint of discrimination) but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not the complaint as such but some feature of it which can properly be treated as separable. The most straightforward example is where the reason relied on is the *manner* of the complaint. Take the case of an employee who makes, in good faith, a complaint of discrimination but couches it in terms of violent racial abuse of the manager alleged to be responsible; or who accompanies a genuine complaint with threats of violence; or who insists on making it by ringing the managing director at home at 3 a m. In such cases it is neither artificial nor contrary to the policy of the anti-victimisation provisions for the employer to say "I am taking action against you not because you have complained of discrimination but because of the way in which you did it". Indeed it would be extraordinary if those provisions gave employees absolute immunity in respect of anything said or done in the context of a protected complaint. (What is essentially this distinction has been recognised in principle—though rejected on the facts—in two appeals involving the parallel case of claims by employees disciplined for taking part in trade union activities: see *Lyon v St James Press Ltd [1976] ICR 413* ("wholly unreasonable, extraneous or malicious acts": see per Phillips J at p 419 c - d) and *Bass Taverns Ltd v Burgess [1995] IRLR 596* .) Of course such a line of argument is capable of abuse. Employees who bring complaints often do so in ways that are, viewed objectively, unreasonable. It would certainly be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against employees simply because in making a complaint they had, say, used intemperate language or made inaccurate statements. An employer who purports to object to "ordinary" unreasonable behaviour of that kind should be treated as objecting to the complaint itself, and we would expect Tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases. But the fact that the distinction may be illegitimately made in some cases does not mean that it is wrong in principle.

23. We accept that the present case is not quite like that. What the Tribunal found to be the reason for the Claimant's dismissal was not the unreasonable *manner* in which her complaints were presented (except perhaps to the extent that Mr Hudson referred to the fact that some of the grievances were repeated). Rather, it identified as the reason a combination of inter-related features—the falseness of the allegations, the fact that the Claimant was unable to accept that

> **they were false, the fact that both those features were the result of mental illness and the risk of further disruptive and unmanageable conduct as a result of that illness. But it seems to us that the underlying principle is the same: the reason asserted and found constitutes a series of features and/or consequences of the complaint which were properly and genuinely separable from the making of the complaint itself. Again, no doubt in some circumstances such a line of argument may be abused; but employment Tribunals can be trusted to distinguish between features which should and should not be treated as properly separable from the making of the complaint.**
>
> **24. …**
>
> **25. We conclude, therefore, that the distinction made by the Tribunal in reaching its conclusion as to the employers' reason for dismissing the Claimant ought as a matter of principle to be regarded as legitimate. The distinctions involved may appear subtle, but they are real; and they require to be recognised if the anti-victimisation provisions, important as they are, are to be confined to their proper effect and not to become an instrument of oppression. This is an area of law where, alas, the questions to be answered cannot always be straightforward—not so much because the law is complex as because of the complexities of legislating for the subtleties of human motivation." (Emphasis added)"**

30. Thus, there may be situations where it is open to the Tribunal, depending on its findings, to conclude that the employer's reason for the impugned act was not the protected act itself, but some other feature of it which can be treated as properly separable.

31. The Claimant also relies upon Article 10, **ECHR** and the obligation on the Tribunal under s.3, of the **Human Rights Act 1998** ("the 1998 Act") to interpret statutory provisions so far as possible in a way which is compatible with Convention rights.

32. Article 10, **ECHR** provides:

> **"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers…**
>
> **2.The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing disclosure of information received in confidence, or for maintaining the authority or impartiality of the judiciary. (Emphasis added)"**

The grounds of appeal

33. The grounds of appeal as originally drafted were dismissed on the sift. The Claimant's renewed application for permission came before Her Honour Judge Katherine Tucker on 27 November 2018, when the Claimant was permitted to proceed on a single ground of appeal, which had by then been reformulated as follows:

> **"In considering the Issue of the "severability" of parts of the protected acts as defined in section 27 of the Equality Act 2010, and required by Martin v Devonshire [2011] the Tribunal failed:**
>
> **a. to analyse fully why the protected act was severable**
>
> **b. misapplied Martin v Devonshire**
>
> **c. failed to correctly apply Article 10 of the ECHR (to make a public statement) as required by s.3 of the HRA 1998."**

Submissions

34. Mr Diamond, who appears for the Claimant (as he did below), made submissions on a broad range of matters, several of which were not directly relevant to the issues before this Appeal Tribunal. These included submissions as to the many occasions on which other Judges in other contexts have discussed matters of controversy or political sensitivity in a public forum, and where individuals in other roles, including academics and athletes, had been dismissed and/or vilified for expressing Christian views in public. Given the narrow compass of this appeal, these submissions, whilst diverting, were not particularly illuminating of the issues which we had to consider.

35. As to the first of those issues, namely whether the Tribunal erred in its application of s.27 of the 2010 Act, Mr Diamond submits that the Tribunal erred in treating only part of the Claimant's remarks during the BBC broadcast as amounting to a protected act. He contends that the comments made by and attributed to him during the BBC broadcast amounted to an allegation of discrimination against the Claimant and ought to have been treated as such in their entirety. He relies upon the fact the remarks appeared in the context of a programme, the subject matter of

which was discrimination against religious adherents, and were made in order to support his contention that he been discriminated against by the Respondents for his Christian beliefs. He highlights the fact that s.27 of the 2010 Act specifically provides that the allegation can be one that is implied and need not be made expressly.

36. Mr Diamond submits that the Tribunal's failure to identify clearly what was the protected act undermined any analysis as to whether any features were properly separable from that protected act on a **Martin v Devonshires** approach. Mr Diamond contended that the test for determining whether an act was done because of a protected act is simply one of "but for" causation, and, on that basis, it is clear that had the Broadcast Words not been spoken, the Claimant would not have been removed. The fact that he was removed, there being no suggestion that his comments were made in bad faith, was therefore a clear instance of victimisation. Mr Diamond further submits that the circumstances in cases such as **Martin v Devonshires** and **Panayioutou v Chief Constable of Hampshire** [2014] IRLR 500, where features were held to be properly separable from the protected act, were very far removed from those in the instant case.

37. In relation to Article 10, ECHR, Mr Diamond submits that whilst judicial members should show restraint in manifesting their right to freedom of speech, the kind of comments which the Claimant made during the BBC broadcast fell well within the broad latitude conferred by Strasbourg case law on members of the judiciary in exercising that right.

38. Ms Ling, who appears for the Respondents, submits that the Tribunal did not err in its identification of the protected act, but that in any event, this is a case where the Tribunal's findings as to the reason for the treatment were clear. In those circumstances, the Tribunal was entitled to

A treat as properly separable from the making of a complaint, those matters upon which the Respondents relied in deciding to remove the Claimant from office. She submits that this is, like **Martin v Devonshires**, a case where the Tribunal made clear findings of fact as to the separable features, none of which have been appealed. These include the Respondents' concern that the Claimant's public criticism of the Respondents had the potential to bring the judiciary into disrepute, either because his conduct could be construed as seeking to put pressure on the Respondents to reverse their earlier decisions, or because a reasonable person would, having heard the Claimant, conclude that he would be biased and prejudiced against same-sex adoptors. Neither of these matters amounted to or were embedded in an allegation or complaint made by the Claimant that the Respondents had breached their obligations under the 2010 Act.

39. In relation to Article 10, Ms Ling submits that the Article 10 right to make public pronouncements only extended, as far as judicial office holders were concerned, to the making of moderate and proper statements and not to statements that could be seen to compromise the office holder's judicial impartiality or bring the judiciary into disrepute. None of the other examples cited by the Claimant would lead a reasonable person to conclude in respect of those cases that the maker of that statement would always decide a particular type of case in a specific way irrespective of the evidence or the law. However, that is what the Tribunal found that the Claimant's remarks would lead a reasonable person to conclude.

Discussion and Conclusions

40. In determining whether something amounts to a protected act within the meaning of s.27(2)(d) of the 2010 Act, it is necessary to bear in mind that what is required is the making of an allegation that another person has contravened that Act. Whilst such an allegation might be made implicitly and still fall within subsection, it would not be correct in our view to regard the context in which the relevant statement is made as determinative; that, in our view, would be to

put context above everything else. In the course of an investigation into alleged discriminatory conduct, for example, the complainant may make many statements. However, it does not seem to us to be correct to say that every such statement would necessarily amount to the making of an allegation that there has been a contravention of the Act just because that statement was made in the context of that investigation. Whether or not it does will involve applying the statutory wording and reaching a determination as to whether the particular statement in question amounts to the making of an allegation that there has been a contravention. In particular circumstances, the allegation may be implicit, but there still needs to be an allegation.

41. In the present case, the Broadcast Words spoken by the Claimant were indeed said in the context of a programme discussing discrimination against persons on the grounds of their religious beliefs. However, that is not to say that the Broadcast Words necessarily amounted to an allegation for the purposes of the 2010 Act. The Broadcast Words were as follows:

> **"My responsibility as a Magistrate as I saw it was to do what I considered best for the child, and my feeling was therefore that it would be better if it was a man and a woman who were adoptive parents."**

42. On the face of it, those words do not include any allegation at all against the Respondents. Even when read with the immediately preceding introductory remarks made by the reporter:

> **"Richard Page is a magistrate in Kent who works with the family courts. Last year, ahead of an adoption hearing with a gay couple, he expressed a view that resulted in him being suspended and disciplined"**

One cannot infer that there was any specific allegation being made against the Respondents. The Claimant does no more than explain his position and why he did what he did. In doing so, he makes no reference to his Christian beliefs or that they formed a part of the reason for him being suspended and disciplined. We therefore agree with the Tribunal's finding (at [139]) that the Broadcast words did not constitute a protected act, given that they make no allegation of discrimination. It is also relevant to note that the way in which the Broadcast words were

introduced do not make it at all clear whether they were said in response to a specific question which was similar to the introductory remarks made by the reporter. The way in which the Claimant's remarks were edited into the report means that one cannot reach any conclusion about that.

43. In our judgment, the Tribunal was correct to treat the Broadcast Words as not amounting to a protected act.

44. We do not accept Mr Diamond's contention that the Tribunal's conclusion as to the protected act was confused. The Tribunal begins by focusing on the Broadcast Words because they were the subject of the agreed list of issues: see [19] and [139]. Having determined that those words did not amount to a protected act, the Tribunal proceeded to consider the broader argument relied upon by Mr Diamond as to what constituted a protected act, notwithstanding the fact that that went beyond the agreed list of issues. In doing so, the Tribunal considered what was said by the presenter immediately after the Broadcast Words:

> **"141. The Tribunal was particularly mindful of what the presenter said immediately after the Claimants broadcast comments: "*Richard was reinstated but says he finds it hard that his religious beliefs as a Christian were seen as prejudice*". Immediately after this, the presenter referred to instances of workplace religious discrimination. <u>If it was legitimate to focus upon this aspect of the transcript</u>, the Tribunal concluded <u>it indicated</u> that the Claimant said he had been disciplined because of his religious views as a Christian. Accordingly, <u>this</u> was an allegation that he had suffered religious discrimination that would constitute a protected act within section 27(2)(d)." (Emphasis added)**

45. At [142], the Tribunal considered that, "*It appeared over-technical and not in the interests of justice to not have regard to the what was said during the <u>rest of the short broadcast</u>*". In our view, the underlined words in those passages indicate that the Tribunal was specifically considering whether the remainder of the broadcast, and not the Broadcast Words themselves, gave rise to a protected act, and concluded (at [142]) that it did. That view is supported by the Tribunal's reiteration ("*for the avoidance of doubt*") at [143] of its primary conclusion that the

actual Broadcast Words as to how the Claimant saw his responsibility as a Magistrate did not amount to a protected act. Furthermore, the Tribunal makes the same point for a third time in [144] where, having referred back to its earlier conclusions as to direct discrimination, it states, "*The Claimant's broadcast statement in that respect was not a protected act and they did not act because of any protected act, but for the reasons they gave contemporaneously*." That conclusion appears to us to be entirely consistent with the Tribunal's approach to the BBC Broadcast which was not to treat it as an indivisible whole. The Tribunal sought to draw a clear distinction between the Broadcast Words and the remainder of the Broadcast. As we have set out above, the mere fact that the context of the Broadcast was one in which there was an allegation of discrimination on the grounds of religious belief does not necessarily mean that every remark made in that context was a protected act. The Tribunal was entitled, in our view, to focus upon different aspects of the Broadcast and to consider whether each of them satisfied the statutory test.

46. Mr Diamond's submission that the entirety of the Broadcast should be taken to amount to a protected act is therefore not supported by the Tribunal's reasoning (as analysed above), and is rejected. That means that Mr Diamond's causation submission, which was that "but for" the Broadcast Words being spoken, the Claimant would not have been removed from office, does not get off the ground because the Broadcast Words were not a protected act. However, even if they were (either on their own or as a result of the context in which they were spoken), there is no proper basis for contending that a simple "but for" analysis is appropriate. The question to be answered under s.27 of the 2010 Act is whether the Respondents acted as they did "because of" the protected act. Mr Diamond does not point to any authority in support of his submission that that question involves a simple "but for" approach to causation. Indeed, his submission appears to ignore decades of authority confirming that the question to be determined in discrimination cases is the 'reason why' the employer acted as it did.

47. Prior to the 2010 Act, victimisation was established if there was less favourable treatment of a person than another "by reason" that that person had done a protected act.[1] In **Chief Constable of West Yorkshire Police v Khan** [2001] ICR 1065, Lord Nicholls of Birkenhead, held:

> **"29. Contrary to views sometimes stated, the third ingredient ('by reason that') does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the 'operative' cause, or the 'effective' cause. Sometimes it may apply a 'but for' approach. For the reasons I sought to explain in *Nagarajan v London Regional Transport* [2001] 1 AC 502, 510-512, a causation exercise of this type is not required either by section 1(1)(a) or section 2. The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."**

48. Lord Scott in the same case held:

> **"77. Was the reference withheld "by reason that" Sergeant Khan had brought the race discrimination proceedings? In a strict causative sense it was. If the proceedings had not been brought the reference would have been given. The proceedings were a causa sine qua non. But the language used in section 2(1) is not the language of strict causation. The words "by reason that" suggest, to my mind, that it is the real reason, the core reason, the causa causans, the motive, for the treatment complained of that must be identified."**

49. Any suggestion that their Lordships would have taken a different approach had the current "*because of*" formulation been before them is put to rest by the following passage in the judgment of Lord Nicholls:

> **"31. Mr Hand submitted that Cornelius v University College of Swansea [1987] IRLR 141 was wrongly decided. I do not agree. Employers, acting honestly and reasonably, ought to be able to take steps to preserve their position in pending discrimination proceedings without laying themselves open to a charge of victimisation. This accords with the spirit and purpose of the Act. Moreover, the statute accommodates this approach without any straining of language. An employer who conducts himself in this way is not doing so <u>because of</u> the fact that the complainant has brought discrimination proceedings. He is doing so <u>because</u>, currently and temporarily, he needs to take steps to preserve his position in the outstanding proceedings. Protected act (a) ("by reason that the person victimised has—(a) brought proceedings against the discriminator … under this Act") cannot have been intended to prejudice an employer's proper conduct of his defence, so long as he acts honestly and reasonably. Acting within this limit, he cannot be regarded as discriminating by way of victimisation against the employee who brought the proceedings." (Emphasis added)**

[1] Reg 4 of the now repealed **Employment Equality (Religion or Belief) Regulations 2003**.

A

50. It is clear from these passages in **Khan** that in this context, all of the various formulations, i.e. "by reason that", "on the grounds of" and "because of", are interchangeable[2] and do not give rise to different approaches to the question of causation. The question for the Tribunal continues to be: "Why did the employer act as it did?", or, "What was its motivation for doing so?"

B

51. We turn then to the second aspect of Mr Diamond's argument under s.27 of the 2010 Act, namely that the Tribunal misapplied **Martin v Devonshire** in concluding that the reasons for the Respondents acting as they did are properly separable from the protected act. To the extent that the Respondents' reasons for acting were based on the Broadcast Words, which were found not to be a protected act, no claim for victimisation can be established. For reasons already discussed we consider that the Tribunal found that the protected act comprised the remainder of the Broadcast, in which the Claimant was reported to have said that he "*finds it hard that his religious beliefs as a Christian were seen as prejudice*". As we understood Mr Diamond's submissions, his contention is that these remarks are not properly separable from the other matters upon which the Respondents purported to rely in subjecting the Claimant to disciplinary action. The Tribunal found that the other matters were: (a) that the Claimant had failed to follow the advice he been given regarding contact with the media; (b) that the consequence of this was negative publicity which could bring the judiciary into disrepute; and (c) the apparent indication that the Claimant was willing to breach his judicial oath: see [65].

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52. The first of these matters could be said to relate to the *manner* in which Claimant made his allegation. Thus, the Claimant chose to disregard express advice not to contact the media in order to make his allegations. In our view, that is the kind of matter which it was open to the Tribunal to find as amounting to something separate from the allegation itself. The Claimant's conduct

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[2] See also **Onu v Akwiwu** [2014] ICR 571 at [19].

involved going against advice with which judicial officers are expected to comply. Of course, we recognise the note of caution sounded by the EAT in **Martin v Devonshires** that Tribunals must be careful to guard against abuse in adopting this type of analysis. There may well be cases where going against an employer's advice in the course of making an allegation would not of itself amount to conduct sufficiently distinguishable from the allegation, or sufficiently culpable or blameworthy, to warrant treating it as separable from the allegation being made. In the present case, however, it is our judgment that the Tribunal was clearly right to treat this as a properly separable matter. The disregard of advice in the context of a judicial office holder is, it seems to us, a matter of particular significance, especially given the history of this matter where the Claimant had recently been specifically spoken to about seeking advice.

53. The second of the two matters is that the negative publicity generated by the Claimant's conduct could bring the judiciary into disrepute. This must be read with the Tribunal's findings at [130] and [135] of the Reasons, where the Tribunal considered that the decision to remove the Claimant was based on his "*inappropriate conduct in publicly displaying a preconceived bias towards same-sex adopters in relation to his judicial role, contrary to the declaration and oath and likely to bring the judiciary into disrepute…*". Potentially bringing the judiciary into disrepute is a consequence of the way in which the Claimant sought to make his complaint publicly. It was certainly open to the Tribunal to conclude that that consequence was something separable from the allegation that the Claimant had been discriminated against.

54. Mr Diamond sought to urge upon us that the circumstances of this case were far removed from those in **Martin v Devonshires** itself, where repeated, unmeritorious complaints had been made by a person who had rendered herself unmanageable as a result, and those in **Panayioutou,** where an employee had become a "*one-man industry*" of complaints. We consider that the

A approach in **Martin v Devonshires** is permitted by the question which the Tribunal has to consider, namely why did the employer act as it did. In answering that question, it is open to the Tribunal, depending on its findings, to conclude that the reason for acting (in this case by instituting disciplinary proceedings) was not the protected act itself, but some other feature of it which can be treated as properly separable. There is no requirement that similar circumstances to those in **Martin v Devonshires** must obtain in other cases for that approach to apply (as the examples given by Underhill J (as he then was) in that case establish: see **Martin** at [22]).

55. The final matter relied upon in bringing disciplinary proceedings is the Claimant's apparent indication, by his remarks, that he does not intend to abide by his judicial oath. His statement that it was his responsibility as a magistrate to do what was best for the child and that it was better if it were a man and a woman to be adoptive parents, does suggest that he would regard an adoption by parents who did not fit that mould less favourably, irrespective of the evidence before the Court and/or the law. That, in our judgment, is potentially a very serious flouting of the judicial oath. It is a matter which is quite properly separable from the complaints being made by the Claimant. The position can perhaps be compared to an employee who, in the course of making a relevant allegation reveals that he has, or is about to breach some other important rule imposed by the employer. An employer who takes action to deal with the breach or proposed breach would be doing so because of that breach and not necessarily because of the protected act, although obviously the Tribunal would have to be careful to ensure that action relating to the breach was genuinely and properly separable from the allegation. We would add that we agree with Miss Ling's submission in this regard that it would be surprising if a judicial office holder, having publicly declared an apparently pre-determined and biased approach against a potential group of adopters, could be shielded from any form of action to address impartiality merely because that declaration was made in the context of a protected act.

56. Before leaving this part of the appeal, we feel we should say something about the broader arguments relied upon by Mr Diamond as to the public remarks made by judges in other contexts. In our judgment, none of these matters assist the Claimant. In the first place, s.27 is not dependent on there being any comparison or "less favourable treatment" of an individual than might be meted out to another. It suffices if a person is subject to the detriment. As such, the treatment of other judges in other contexts is entirely irrelevant to the analysis which the Tribunal was required to undertake in this case. Further, and in any event, these other public statements are of no assistance because none of them involve, as Ms Ling submits, any indication by the maker that he or she intends to breach the duty of judicial impartiality. Criticisms or comments made in general terms about an aspect of law or procedure, even if made in trenchant terms, but which give no indication of a pre-determined approach or starting point in a particular case, are of an entirely different character. They provide us with no assistance at all in determining whether or not the Tribunal erred in law in rejecting the Claimant's claim of victimisation.

57. It follows that, for all these reasons, the Claimant's appeal in respect of victimisation fails and is dismissed.

Article 10

58. In relation to Article 10, the Claimant's argument appears to be that the Tribunal erred in construing the effect of certain Strasbourg authorities. Particular reliance is placed upon the cases of **Wille v Liechtenstein** (1999) 30 EHRR 558, **Kudeshkina v Russia** (2011) 52 EHRR 37, **Baka v Hungary** (2015) 60 EHRR 12 and **Vajnai v Hungary** (2010) 50 EHRR 44.

59. In our judgment, none of these cases advances the Claimant's case at all.

60. In **Wille v Lichtenstein**, the applicant, who was the President of the Administrative Court of Liechtenstein, was informed by the Prince of Liechtenstein that he would not be appointed to any public office in the future following various public comments made by him which the Prince considered to be contrary to the Constitution. In considering whether there had been a violation of Art 10, the European Court of Human Rights ("ECtHR") held:

> **"67. The Court accepts that the applicant's lecture, since it dealt with matters of constitutional law and more specifically with the issue of whether one of the sovereigns of the State was subject to the jurisdiction of a constitutional court, inevitably had political implications. It holds that questions of constitutional law, by their very nature, have political implications. It cannot find, however, that this element alone should have prevented the applicant from making any statement on this matter. The Court further observes that in the context of introducing a bill amending the Constitutional Court Act in 1992, the Liechtenstein Government had, in its accompanying comments, held a similar view, which had been opposed by the Prince but had found agreement in the Liechtenstein Diet, albeit only by a majority. The opinion expressed by the applicant cannot be regarded as an untenable proposition since it was shared by a considerable number of persons in Liechtenstein. Moreover, there is no evidence to conclude that the applicant's lecture contained any remarks on pending cases, severe criticism of persons or public institutions or insults of high officials or the Prince.**
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> **68. Turning to the Prince's reaction, the Court observes that he announced his intention not to appoint the applicant to public office again, should the applicant be proposed by the Diet or any other body. The Prince considered that the above-mentioned statement by the applicant clearly infringed the Liechtenstein Constitution. In this context, he also made reference to a political controversy with the Liechtenstein Government in October 1992 and, in conclusion, he reproached the applicant, who had been a member of Government at that time and President of the Liechtenstein Administrative Court since 1993, with regarding himself as not being bound by the Constitution. In the Prince's view, the applicant's attitude towards the Constitution made him unsuitable for public office.** [44]
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> **69. The Prince's reaction was based on general inferences drawn from the applicant's previous conduct in his position as a member of Government, in particular on the occasion of the political controversy in 1992, and his brief statement, as reported in the press, on a particular, though controversial, constitutional issue of judicial competence. No reference was made to any incident suggesting that the applicant's view, as expressed at the lecture in question, had a bearing on his performance as President of the Administrative Court *591 or on any other pending or imminent proceedings. Also the Government did not refer to any instance where the applicant, in the pursuit of his judicial duties or otherwise, had acted in an objectionable way.**
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> **70. On the facts of the present case, the Court finds that, while relevant, the reasons relied on by the Government in order to justify the interference with the applicant's right to freedom of expression are not sufficient to show that the interference complained of was "necessary in a democratic society". Even allowing for a certain margin of appreciation, the Prince's action appears disproportionate to the aim pursued. Accordingly the Court holds that there has been a violation of Article 10 of the Convention." (Emphasis added)**

61. Mr Diamond submits that this decision demonstrates that Judges are permitted to speak out on matters of controversy (especially one – the merits of same sex adoption - in respect of which there was no Europe-wide consensus: see **Frette v France** (2004) 38 EHRR 21 at [40] to [42]) and should not be removed from office for doing so. It is, however, notable that the Court in

Wille highlighted the fact that the applicant in that case had not made any remarks about "pending cases", the implication being that had he done so the interference with his right to freedom of expression might have been justified on the grounds of preserving judicial impartiality. In the present case, the steps taken against the Claimant were not because he had spoken out on an issue of controversy, but because the statements he made could create the public perception that he was predisposed against adoptions by same-sex couples. That would be prejudicial to judicial impartiality.

62. The next case relied upon is **Kudeshkina v Russia** in which a Judge stood for election for a seat on the State Duma on a judicial reform ticket. The Judge made various broadcasts making harsh criticisms of the Courts, the President of the Court and other senior figures in the legal establishment. She failed to be elected and sought to return to her judicial role. She was subsequently dismissed for bringing the judiciary into disrepute. She brought a complaint that her removal from office for making critical public statements amounted to a violation of Art 10. Upholding the complaint, the ECtHR held:

> **"93. Having concluded on the existence of a factual background for the applicant's criticism, the Court reiterates that the duty of loyalty and discretion owed by civil servants, and particularly the judiciary, requires that the dissemination of even accurate information is carried out with moderation and propriety. [20] It will therefore continue to examine whether the opinions expressed by the applicant on the basis of this information were nevertheless excessive in view of her judicial status.**
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> **94. The Court observes that the applicant made the public criticism with regard to a highly sensitive matter, notably the conduct of various officials dealing with a large-scale corruption case in which she was sitting as a judge. Indeed, her interviews referred to a disconcerting state of affairs, and alleged that instances of pressure on judges were commonplace and that this problem had to be treated seriously if the judicial system was to maintain its independence and enjoy public confidence. <u>There is no doubt that, in so doing, she raised a very important matter of public interest, which should be open to free debate in a democratic society. Her decision to make this information public was based on her personal experience and was taken only after she had been prevented from participating in the trial in her official capacity</u>.**
>
> **95. Insofar as the applicant's motive for making the impugned statements may be relevant, the Court reiterates that an act motivated by a personal grievance or a personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection. [21] Political speech, on the contrary, enjoys special protection under art.10 . [22] The Court has previously established that even if an issue under debate has political implications, this is not by itself sufficient to prevent a judge from making any statement on the matter. [23] The Court notes, and it is not in dispute between the parties in the present case, that the interviews were published in the context of the applicant's election campaign. <u>However, even if the applicant allowed herself a certain degree of exaggeration and generalisation, characteristic of the pre-election agitation, her statements were not entirely devoid of any</u>**

> **factual grounds, [24] and therefore were not to be regarded as a gratuitous personal attack but as a fair comment on a matter of great public importance." (Emphasis added)**

63. Mr Diamond submits that the Claimant too had done little more than express opinions on a matter of public importance and had done so in a moderate and proportionate manner. The difficulty with those submissions is that the Claimant in this case *did* do more than just express an opinion on a matter of controversy. Judges are not precluded from expressing views, but if they choose to do so, they must do so without undermining judicial impartiality or respect for the judiciary. As held by the ECtHR more recently in **Baka v Hungary**, where the President of the Supreme Court was removed from office after giving four speeches criticising controversial bills which he claimed were liable to interfere with the independence of the judiciary:

> **"164. The Court has recognised that it can be expected of public officials serving in the judiciary that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called in question. [123] The dissemination of even accurate information must be carried out with moderation and propriety. [124] The Court has on many occasions emphasised the special role in society of the judiciary, which, as the *457 guarantor of justice, a fundamental value in a law-governed state, must enjoy public confidence if it is to be successful in carrying out its duties. [125] It is for this reason that judicial authorities, in so far as concerns the exercise of their adjudicatory function, are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges. [126]**
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> **165. At the same time, the Court has also stressed that having regard in particular to the growing importance attached to the separation of powers and the importance of safeguarding the independence of the judiciary, any interference with the freedom of expression of a judge in a position such as the applicant's calls for close scrutiny on the part of the Court. [127] Furthermore, questions concerning the functioning of the justice system fall within the public interest, the debate of which generally enjoys a high degree of protection under art.10 . [128] Even if an issue under debate has political implications, this is not in itself sufficient to prevent a judge from making a statement on the matter. [129] Issues relating to the separation of powers can involve very important matters in a democratic society which the public has a legitimate interest in being informed about and which fall within the scope of political debate. [130]**
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> **166. In the context of art.10 of the Convention, the Court must take account of the circumstances and overall background against which the statements in question were made. [131] It must look at the impugned interference in the light of the case as a whole, [132] attaching particular importance to the office held by the applicant, his statements and the context in which they were made.**
>
> **167. Finally, the Court reiterates the "chilling effect" that the fear of sanction has on the exercise of freedom of expression, in particular on other judges wishing to participate in the public debate on issues related to the administration of justice and the judiciary. [133] This effect, which works to the detriment of society as a whole, is also a factor that concerns the proportionality of the sanction or punitive measure imposed." (Emphasis added)**

64. It has not gone unnoticed that the Judges removed from office in these cases held far more senior positions than that held by the Claimant in the present case. However, in none of those

A cases did any question arise as to the individual's impartiality in relation to a particular current or future case or as to any group of persons whose lives may be affected by a judicial decision of that individual. The special importance of judicial impartiality is highlighted by its express inclusion in Art 10(2). Where, as in the present case, there has been found to be conduct which could be seen to prejudice that impartiality, then the interference with Art 10 rights may be justified. In our judgment, the Tribunal was entirely correct to conclude, as it did at [157] to [160] of its Reasons, that the circumstances in each of these cases was very different from those pertaining to the Claimant.

65. Mr Diamond also relied upon the case of **Vajnai v Hungary** (2010) 50 EHRR 44. This was not a case about the judiciary, but about a member of a left-wing political party who had, during a lawful demonstration, worn a five-pointed red star as a symbol of the international workers' movement. He was subsequently prosecuted and convicted for having worn a totalitarian symbol. The ECtHR found that there was a violation of his Art 10 rights:

> **"56. As to the link between the prohibition of the red star and its offensive, underlying, totalitarian ideology, the Court stresses that the potential propagation of that ideology, obnoxious as it may be, cannot be the sole reason to limit it by way of a criminal sanction. A symbol which may have several meanings in the context of the present case, where it was displayed by a leader of a registered political party with no known totalitarian ambitions, cannot be equated with dangerous propaganda. However, s.269/B of the Hungarian Criminal Code does not require proof that the actual display amounted to totalitarian propaganda. Instead, the mere display is irrefutably considered to do so unless it serves scientific, artistic, informational or *1102 educational purposes. [23] For the Court, this indiscriminate feature of the prohibition corroborates the finding that it is unacceptably broad.**
>
> **57. The Court is of course aware that the systematic terror applied to consolidate Communist rule in several countries, including Hungary, remains a serious scar in the mind and heart of Europe. It accepts that the display of a symbol which was ubiquitous during the reign of those regimes may create uneasiness amongst past victims and their relatives, who may rightly find such displays disrespectful. It nevertheless considers that such sentiments, however understandable, cannot alone set the limits of freedom of expression. Given the well-known assurances which the Republic of Hungary provided legally, morally and materially to the victims of Communism, such emotions cannot be regarded as rational fears. In the Court's view, a legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling—real or imaginary—cannot be regarded as meeting the pressing social needs recognised in a democratic society, since that society must remain reasonable in its judgement. To hold otherwise would mean that freedom of speech and opinion is subjected to the heckler's veto.**
>
> **58. The foregoing considerations are sufficient to enable the Court to conclude that the applicant's conviction for the mere fact that he had worn a red star cannot be considered to have responded to a "pressing social need". Furthermore, the measure with which his conduct was sanctioned, although relatively light, belongs to the criminal law sphere, entailing the most serious consequences. The Court does not consider that the sanction was proportionate to the**

legitimate aim pursued. It follows that the interference with the applicant's freedom of expression cannot be justified under art.10(2) of the Convention." (Emphasis added)

66. Mr Diamond sought to suggest that the removal of the Claimant for having expressed his view that it was in the best interests of the child to be adopted by a mother and father was to give effect to the "*hecklers veto*" pursuant to which the right to freedom of expression was being restricted by irrational fears or "*in order to satisfy the dictates of public feeling*". We found it difficult to see any analogy at all between the **Vajnai** case and the present one. The Tribunal stated at [155] that the particular context in **Vajnai** "*involved a ban on wearing symbols that could give rise to irrational fears. There was nothing irrational about the Respondents' expressed concerns*". We agree.

67. A further recurring theme in Mr Diamond's submission was that this was not a case where any Court had found that the Claimant's initial decision not to confirm the adoption was wrong in law; on the contrary, he contends that the Claimant was the only one of the Magistrates to have applied the law correctly in that he afforded paramountcy to the best interests of the child. This argument is not really relevant to the issues on appeal since the basis for the Claimant's challenge was not that the initial adoption decision was correct, but that the Respondents' responses to the Claimant's stance were discriminatory. As Dr Taylor stated to the Tribunal, he did not consider the detail of the adoption case: see footnote 17 of the Reasons. In any case, the suggestion that the Claimant was merely applying the law appears to us to be fundamentally incorrect. Mr Diamond suggested that the Claimant expressed legitimate reservations about the lack of evidence and was concerned that the proposed adopters lived in Northern Ireland. This point was raised before the Tribunal, which noted that in cross-examination, the Claimant accepted that his view would have been the same whether or not the Northern Ireland dimension had existed: see [38] and footnote 3. Furthermore, far from basing his decision on the evidence before him, as he

A was required to do, the Claimant clearly considered it appropriate to rely on external 'evidence' that was not before the adoption panel, and continued to maintain that position throughout: see [71]. Similarly, Mr Diamond's argument that the Claimant was doing no more than giving paramountcy to the best interests of the child was also one was considered by the Tribunal: see [118] and [119]. As the Tribunal found, the obligation to consider the best interests of the child as a paramount consideration does not mean "*that the judicial officer can/should take into account his own preconceived views about which kind of adoption are more desirable for a child, rather than deciding the particular case on the evidence*." Once again, we agree.

68. In our judgment, the Tribunal did not err in concluding that the Claimant's removal from the Magistracy was a proportionate limitation upon his right to freedom of expression and as such would be regarded as necessary in a democratic society for maintaining the authority or impartiality of the judiciary: see [162].

The Respondents' Grounds of Response – Was Article 10 engaged at all?

69. The Respondents sought to rely upon a further ground in support of the Tribunal's conclusion: this was that Article 10 was not engaged at all because the matters of which the Claimant complained related to his suitability to hold judicial office rather than to his freedom of expression. Reliance is placed upon **Kudeshkina**, in which the ECtHR stated as follows:

> **"79. As regards the scope of this case, the Court observes, and this is common ground between the parties, that the decision to bar the applicant from holding judicial office was prompted by her statements to the media. Neither the applicant's eligibility for public service nor her professional ability to exercise judicial functions were part of the arguments before the domestic authorities. Accordingly, the measure complained of essentially related to freedom of expression, and not the holding of a public post in the administration of justice, the right to which is not secured by the Convention. 2 It follows that art.10 applies in the present case."**

70. It was argued before the Tribunal that Article 10 was not engaged as the reasons for the Claimant's removal related to suitability for public office rather than his freedom of expression,

since the principal objection was to the Claimant speaking to media. The Tribunal found that the proposed distinction between suitability to hold public office on the one hand and freedom of expression on the other, was not as sharply drawn in the **Kudeshkina** case as was being suggested, and proceeded on the assumed basis that Art 10 was engaged: see [109]. Before us, Ms Ling sought to bolster the Respondents' argument that Art 10 was not engaged by reference to a decision of the Fourth Section of the ECtHR on admissibility in the case of **Harabin v Slovakia**, Appln no. 62584/00. The issue there was whether the revocation of the term of office of the President of the Supreme Court of Slovakia for certain acts which "*cast doubt on the trustworthiness of the Supreme Court and of the judiciary as a whole*" infringed Art 10. The Fourth Section held that Art 10 was not engaged. It concluded that the report that had formed the basis of the decision to remove showed that the applicant did not meet the professional and moral requirements for holding the post of President of the Supreme Court, and that although the report referred to certain views which the applicant had expressed on proposed constitutional amendments, it did not indicate that the proposal to remove the applicant from office was "*exclusively or preponderantly prompted by those views*": see pp 9 to 11 of **Harabin**. It went on to hold that the:

> **"… the disputed measure essentially related to the applicant's ability properly to exercise the post of Pres of the Supreme Court, that is to the appraisal of his professional qualifications and personal qualities in the context of its activities and attitudes relating to State administration of the Supreme Court."**

71. Ms Ling submits that these authorities show that where action is taken against a judicial office holder essentially for reasons relating to his ability to carry out the duties of the office, rather than for the expression of certain views, then Art 10 is not engaged. Mr Diamond contended that the circumstances of **Harabin** were quite different in that the President there had been accused of corruption and forging documents, and no valid comparison could be drawn.

72. We consider that Ms Ling's submissions are to be preferred. It is clear to us that whether or not Art 10 is engaged will depend on the reasons put forward by the authority for acting as it did. If, as in the present case, those reasons related to an office-holder's ability properly to carry out his functions, then Article 10 may not be engaged, notwithstanding the fact that concerns as to ability had emerged in the course of the public expression of personal views. It was not the Claimant's views on same-sex adoption which either "*exclusively or preponderantly*" prompted the Respondents to remove him, but the clear indication emerging from those views that he would not be impartial in any adoption decision where same-sex adopters were involved. In our view, the Respondents are correct to say that, in the circumstances of this case, Article 10 was not engaged at all.

73. However, even if it was engaged, for the reasons already set out, we are satisfied that the Tribunal did not err in concluding that his removal from the magistracy was a proportionate limitation upon his right to freedom of expression and as such would be regarded as necessary a democratic society: see [162].

Conclusions

74. For all of these reasons, this appeal fails and is dismissed.