IN THE MATTER OF THE LOCALISM ACT 2011

STANDARDS HEARING PANEL RE: COUNCILLOR MIKE TAYLOR

LEGAL ADVICE ON THE RIGHT TO FREEDOM OF EXPRESSION UNDER ARTICLE 10 OF THE CONVENTION ON HUMAN RIGHTS

Summary of Advice

The right of freedom of expression in Art 10 is of particular importance in the political sphere. Cllr Taylor's letter to PINS could be categorised as "political expression", which attracts enhanced protection from interference. Interference with that right may only be justified to the extent that an exception arises in law. A finding of a breach of the code is, on the face of it, an interference with that right.

Politicians are expected in law to have a "thicker skin" than officers. Officers of the Council should not expect to undergo the same level of scrutiny and criticism of their actions as elected members and the level of seniority of the officers in question should also be considered.

The criticism in Cllr Taylor's letter appears to be directed at Council officers (a planning case officer and, arguably, his team leader). Those officers are not of such seniority that they should be expected to carry a higher level of scrutiny or criticism.

Officers are entitled to carry out their duties with the confidence of the public and free from undue perturbation. An interference with the right to freedom of expression may be justified in order to maintain that protection. No evidence was presented supporting the allegation that the officers had been unduly influenced. As such, the perturbation appears to be "undue", and also considering the level of seniority of those officers, the interference with Cllr Taylor's right to freedom of expression appears to be justified.

Legal Framework

It is established through case law that imposing sanctions on a member can engage the Right to Freedom of Expression under Article 10 of the Convention on Human Rights. It is therefore necessary for the Panel to consider whether Article 10 is engaged in this case and if so, whether any interference is justified under the terms expressed in the HRA and Convention.

Even in cases where the panel is entitled to conclude that a member is in breach of the code, the panel cannot make such a finding if in doing so this results in a disproportionate interference with the subject member's Convention rights. A finding in those circumstances could be overturned by a court.[1]

The right, according to Article 10(1) *"shall include the freedom to hold opinions and to receive and impart information and ideas without interference by public authority…"*

[1] See, for example, R(Calver) v Adjudication Panel for Wales [2012] EWHC 1172

Art 10(2) provides the circumstances where such rights can be interfered with. It says that *"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****… for [inter alia] the protection of the reputation or rights of others"* (my emphasis).

The UK courts recognise the potential difficulties in carrying out the balancing act between the right and the duties and responsibilities which the right carries with it. In Calver[2], Mr Justice Beaston said *"the more egregious the conduct, the easier it is likely to be for the Panel, and for the court, to undertake the balancing that is required and justifiably to conclude that what was said or done falls within one of the exceptions to freedom of expression under common law, statute or the Convention. If the conduct is less egregious, it is likely to be more difficult to do this. This is because the interests-freedom of expression and, in the present context, proper standards of conduct by members of local authorities, are not easily commensurable."*

Under the European jurisprudence, the ECHR has said that *"while freedom of expression is important for everybody, it is especially so for an elected representative of the people…"*[3]

The British Courts have also said that, when considering justification for interference under Article 10(2), "political expression" or "the expression of a political view" attract a higher degree of protection, whilst expressions in personal or abusive terms do not attract the same higher level of protection.[4] The phrase "political expression" is to be understood in a broad sense. It encompasses matters of public concern and public administration generally, including revealing information about public figures.[5]

The ECHR draws a distinction between political expression and criticism of civil servants, which by extension must also apply to Council Officers exercising their official duties. In its judgement in Janowski v Poland[6], the Court said that:

"…It cannot be said that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to the extent to which politicians do and should therefore be treated on an equal footing with the latter when it comes to the criticism of their actions. What is more, civil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks and it may therefore prove necessary to protect them from offensive and abusive verbal attacks when on duty…"

In Cornerstone on Councillor's Conduct, the following guidance is given[7]:

"A greater degree of tolerance will be extended to the words of councillors when they are directed towards other elected members than where they are directed to officers of the local authority (or other citizens). Elected representatives voluntarily enter the political arena. They are expected and required to have thicker skins and more tolerance to criticism than ordinary citizens. Officers of the

[2] Ibid, at paragraph 49
[3] Castells v Spain (1992) 14 EHRR 445
[4] R (Dennehy) v London Borough of Ealing [2013] EWHC 4102 at para 24
[5] Calver, at paras 61-64
[6] ECHR Judgement, January 21, 1999
[7] 1st Edition, 2015, Paragraph 3.55 at page 66

local authority are not elected and do not choose to lay themselves open to criticism in the same way. The relative seniority of the officer is also likely to be a relevant factor when the local authority comes to consider any alleged breach of the local code arising out of comments made to officers. The more senior the officer, the more responsibility they can be expected to shoulder and the greater degree of scrutiny they can expect to face in respect of their actions."

In considering whether a finding that a member has breached a code of conduct and/or any sanction imposed had contravened article 10, the Courts have established[8] that there are 3 questions to be asked:

(1) Was the tribunal entitled as a matter of fact to conclude that the Cllr's conduct was in breach of the Code;
(2) If so, was the finding in itself, or the imposition of a sanction prima facie a breach of article 10; and
(3) If so, was the restriction involved one which was justified by reason of the requirements of article 10(2)

Analysis

Applying the tests in Sanders, question (1), is a question of fact for the Panel. If the Panel concludes on the evidence that Cllr Taylor is in breach of either or both codes, then the remaining tests are engaged.

As to question (2), a finding of a breach is, prima facie a breach of Cllr Taylor's Freedom of Expression under Article 10. In essence, by saying he has breached the code by writing the letter to the Planning Inspectorate, the Council is interfering with Cllr Taylor's right to impart information and ideas.

The third question therefore falls to be considered: firstly, to the finding of a breach, and second to any sanction.

The conduct in question is restricted in this case to the letter which Cllr Taylor wrote to PINS. It is not in personal or abusive terms and appears to be within the scope of "political expression". As such, it attracts a higher degree of protection from interference. It also, however, raises questions in a public forum (the documents in a planning appeal are viewable online by the public) about the probity of TMBCs planning officers, unsupported by any evidence.

Those officers are entitled to enjoy public confidence free from undue perturbation. The perturbation in this case appears to be "undue", as no evidence has been advanced to support the assertion made in the letter to PINS. The officer in question was the planning case officer (and possibly also his team leader), and therefore not of such seniority that they should be expected to carry a higher level of scrutiny or criticism.

The requirement of "necessity in a democratic society" sets a high threshold. However, in the current circumstances, as discussed above, case law establishes a justification for interference with the right to freedom of expression to protect confidence in the officials of the Council, in the

[8] Sanders v Kingston (No.1) [2005] EWHC 1145 (Admin)

interests of good public administration. The interference (by way of a finding of a breach of either or both codes) therefore appears to be justified.

Kevin Toogood

15 December 2015