Neutral Citation Number: [2023] EWCA Civ 888

Case Nos: CA-2021-000980
CA-2011-002759/60

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE HONOURABLE MR JUSTICE SAINI
[2021] EWHC 275 (Admin)
THE HONOURABLE MRS JUSTICE SHARP
[2011] EWHC 2077 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/07/2023

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LADY JUSTICE MACUR
and
LADY JUSTICE FALK

- -

Between:

FARID EL DIWANY	**Claimant/ Appellant**
- and -	
SOLICITORS REGULATION AUTHORITY	**Defendant/ Respondent**

And Between

FARID EL DIWANY	**Claimant/ Appellant**
- and -	
(1) ROY HANSEN **(2) TORILL SORTE**	**Defendants/ Respondents**
- and -	
MINISTRY OF JUSTICE & THE POLICE, NORWAY	

- -
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The **Appellant** appeared in person (Mr El Diwany)
Benjamin Tankel (instructed by **Capsticks LLP**) for the **Solicitors Regulation Authority** (the SRA)

Hearing date: 27 June 2023
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JUDGMENT

Sir Geoffrey Vos, Master of the Rolls, Lady Justice Macur, and Lady Justice Falk:

Introduction

1. There are three applications by Mr El Diwany before the Court of Appeal (the Applications). They have been preceded by a long litigation history, which we will summarise briefly.

2. In essence, however, Mr El Diwany seeks to re-open, under CPR Part 52.30, this court's refusal to grant him permission to appeal against two orders. The first order was made by Sharp J (as she then was) on 29 July 2011 dismissing a defamation claim brought by Mr El Diwany (the defamation claim). The second order was made by Saini J on 11 February 2021 dismissing Mr El Diwani's appeal from a decision of the Solicitors' Disciplinary Tribunal (the SDT) striking him off the Roll of Solicitors (the SDT appeal). Mr El Diwany claims that judges that have dealt with previous applications have been affected by actual or apparent bias against him.

3. Mr El Diwany was admitted to the Roll of Solicitors on 1 September 1987. He worked as a solicitor until 2017. Before he qualified, he had met a Norwegian national, referred to before the SDT and Saini J as "Ms H", and developed a relationship with her. The relationship deteriorated and Ms H made allegations of harassment. These allegations resulted in two convictions in Norway, one in 2001 when Mr El Diwany received a fine, and another in 2003 when he received an 8-month suspended prison sentence (the convictions).

4. The events that led to the convictions included correspondence sent by Mr El Diwany to Ms H, material sent by him to other people containing personal information about Ms H and a website set up by Mr El Diwany.

5. In 2017, the firm where Mr El Diwany was then working became aware of the convictions as a result of a disclosure by him. The firm made a report to the SRA, which led to the SDT's decision on 17 January 2020 to strike Mr El Diwany off on the grounds of (i) the existence and nature of the convictions, and (ii) the fact that they had not been disclosed.

6. The first application before us (the SRA Application) was made by Mr El Diwany on 22 August 2022 to re-open the application for permission to appeal Saini J's order on the grounds that Warby LJ was biased. Warby LJ had, on 31 March 2021, dismissed Mr El Diwany's application for permission to appeal Saini J's order in the SDT appeal.

7. Mr El Diwany argues that the Norwegian proceedings leading to the convictions were unfair. The main plank of his case relates to provocation. His case is that Ms H had made very serious accusations against him, including falsely accusing him of attempted rape and threats to kill Ms H's young son. Mr El Diwany alleges that Ms H had, from 1995, been behind a number of seriously damaging and false articles in the Norwegian press (the articles). The articles had obviously racist elements.

8. Mr El Diwany brought the defamation claim in respect of an interview (the interview) conducted in 2005 by Roy Hansen, a Norwegian journalist, with Torill Sorte, a Norwegian police officer who had investigated the harassment allegations. Articles

relating to the interview were published in Norway in December 2005 and January 2006, and one of them appeared on Mr Hansen's website. Mr El Diwany was named.

9. The defamation claim was brought by Mr El Diwany against Mr Hansen, Ms Sorte and Ms Sorte's employer, the Norwegian Ministry of Justice and Police. Sharp J struck it out on the basis that (a) there had been no actionable publication in this jurisdiction, (b) there was no legal merit in the claim, and (c) the proceedings were an abuse of process, on the basis of both the convictions and unsuccessful defamation claims against Ms H in Norway.

10. The second application before us (the Defamation Application) was made by Mr El Diwany on 10 March 2023 to re-open his application for permission to appeal Sharp J's strike out order in the defamation claim. It is his fifth application for the same relief. The application for permission to appeal had been dismissed by Hooper LJ on 1 February 2012 on the grounds that it was not arguable that this court would interfere with Sharp J's conclusions in relation either to publication within the jurisdiction or abuse. The first application to re-open was dismissed by Jackson LJ and was certified as having been totally without merit. The second to fourth applications to re-open were dismissed by Popplewell LJ and were certified to have been totally without merit.

11. The third application before us (the Amendment Application) was made by Mr El Diwany on 25 January 2023 to amend the SRA Application, after Andrews LJ had, on 19 January 2023, adjourned the SRA Application to an oral hearing.

12. Mr El Diwany has provided a considerable volume of papers for the purposes of the three applications. We had, as is usual, done a considerable amount of pre-reading before we heard Mr El Diwany orally. We have considered his written and oral submissions carefully.

13. The SRA appeared at the hearing at our request. They provided additional relevant documentation and clarified much of the chronology. Their oral submissions were confined to some very limited comments about the Amendment Application and a further written submission made by Mr El Diwany shortly before the hearing.

14. We will deal with the three applications as follows: (i) further factual background (ii) further details of the three applications, (iii) legal principles concerning bias and CPR Part 52.30, (iv) our decision on the three applications, (v) some further observations, (vi) consideration of a general civil restraint order, and (vii) conclusions.

Further Factual Background

The articles and hate emails

15. Saini J, who considered a number of the articles in the Norwegian press, said this:

> 64. It is deeply troubling that the authors of these articles repeatedly (and unnecessarily) repeat the fact that the unnamed harasser is a "Muslim man" (19 times in one article) or that he is "half-Arab". The aim of the articles is undoubtedly to play to racist stereotypes of muslim men. They are unsubtle in deploying the colonial trope of Arab men as preying on Anglo-Saxon women.

> 65. As I indicated to Mr El Diwany at the hearing, I needed no persuading that these publications were very upsetting to him and that they plainly included racist and anti-muslim content …

16. Mr El Diwany contends that the actions that led to the convictions were in effect an exercise of a right to reply, which he was denied by the Norwegian press and legal system.

17. In December 2005, persons who had visited the website that Mr El Diwany had established sent him a series of emails (the hate emails). Saini J considered them and observed at [85]:

> They are truly vile, shocking and despicable examples of anti-muslim and racist abuse directed at him and all Muslims in general. The SRA shared this view before me. I will not set out these grossly offensive communications in this judgment because such content deserves no further publicity. Mr El Diwany was right to find them highly distressing. There can be no justification for such hate speech.

18. Saini J also found that the hate emails post-dated the matters in issue in the proceedings before him and were not relevant to the issues that he was required to decide. This is one of the conclusions that Mr El Diwany seeks to challenge.

Related litigation

19. First, in 2011 Mr El Diwany complained to the Bar Standards Board (the BSB) about the conduct of David Hirst, a barrister. Mr Hirst had appeared for Ms Sorte and her employer before Sharp J in 2011. The complaint was rejected by the BSB but was renewed to Mr Hirst's chambers, 5RB, in 2019, which also rejected it.

20. In 2011, Mr El Diwany also unsuccessfully complained to the Office for Judicial Complaints (subsequently the Judicial Conduct Investigations Office) about the conduct of Sharp J, to the Judicial Appointments and Conduct Ombudsman about the rejection of that complaint and in 2014 (via his MP) to the Lord Chancellor. The complaint was revived in 2019 to the Lord Chief Justice, leading to correspondence with his office that involved material abuse of court staff. Subsequently, complaints were made about the conduct of Popplewell LJ in relation to his refusals to re-open Mr El Diwany's appeal against Sharp J's decision, which were also rejected. Unsuccessful complaints were also made in relation to Saini J. In January 2022 Sweeting J made two extended civil restraint orders (the ECROs) of his own motion in connection with Mr El Diwany's attempts to obtain judicial review of the ombudsman's decisions.

21. In 2019, Mr El Diwany lodged a complaint with the SRA about Mr Hirst's instructing solicitor at the hearing before Sharp J, Mr James Quartermaine, and then sought judicial review of the SRA's decision not to investigate it. That claim was certified by Jay J in May 2021 as totally without merit, as was an attempt to appeal to this court (an order made by Bean LJ).

22. In 2021, Mr El Diwany also complained to the SRA about the conduct of the two solicitor members of the SDT who had heard his case. His application for permission for judicial

review of the SRA's decision not to investigate was refused and an attempt to renew it was dismissed by Collins Rice J as totally without merit.

23. Mr El Diwany was also found by Sweeting J to be in contempt of court for breaching an interim injunction that had been granted under the Protection from Harassment Act 1997 to prevent him harassing individuals at the SDT and was given a suspended sentence in February 2022. A permanent injunction was granted by Bennathan J in March 2022.

24. Also in 2021, Mr El Diwany sought judicial review of the BSB's failure to investigate Rory Mulchrone, a barrister who had represented the SRA before Saini J and who was the subject of a further complaint by Mr El Diwany to the BSB. Permission was refused by Heather Williams J in July 2022 on the basis that the application was totally without merit.

25. Mr El Diwany also applied in August 2021 to have his name restored to the Roll. His appeal against the SDT's refusal to do so (in November 2021) was dismissed by Murray J in November 2022 ([2022] EWHC 2882 (Admin)). Murray J also issued an ECRO in favour of the SRA the following month ([2023] EWHC 1707 (Admin)). It is apparent from that decision that individuals at the SRA, their solicitors, Capsticks, and barristers had received or been the subject of highly abusive communications from Mr El Diwany in connection with the proceedings. It is also worth noting that one of the matters that Murray J had to address was the SDT's dismissal of an application for the entire panel to recuse itself on the grounds that only an all-Muslim panel would be properly qualified to adjudicate on the matter, given that the Norwegian convictions were against a background of Islamophobic abuse.

26. Finally, a number of judges have been the subject of lengthy publications by Mr El Diwany in highly critical terms.

Further details of the three applications

The Defamation Application

27. The sole basis of the third and fourth applications to re-open was bias. In the third application Mr El Diwany complained that Popplewell LJ should have recused himself from determining the second application on the basis that he had been friends with Dame Victoria Sharp by reason of having been barristers in the same Chambers, giving rise to apparent bias. In dismissing the application, Popplewell LJ explained that they were never in the same Chambers and their only relationship was as judicial colleagues. The fourth application alleged that there was actual or apparent bias on grounds of Islamophobic racism, which Popplewell LJ rejected on the basis that he was not and that there was nothing in the papers that could cause a fair-minded observer to conclude that he was.

28. The Defamation Application alleges bias against Popplewell LJ, in the form of prejudice and a lack of perception about Islamophobia. This is said to be demonstrated by the fact that he did not comment on the hate emails or what had been said in the Norwegian press in response to any of the applications, choosing to stay silent rather than condemning Islamophobic comments as Mr El Diwany says he was asked to do. Sharp J, Hooper LJ and Jackson LJ are similarly criticised. Mr El Diwany maintains that there is a link with the defamation proceedings struck out by Sharp J that goes beyond the publications in

issue in that case. This is because those proceedings were initiated as a result not only of the defendants' actions in relation to the interview with Ms Sorte and the articles that followed it but the hate emails and other articles in the Norwegian press relating to Mr El Diwany in which he was the victim of Islamophobia. Mr El Diwany says that silence amounts to condonation.

The SRA Application

29. Warby LJ dismissed Mr El Diwany's application for permission to appeal Saini J's order on the ground that his carefully reasoned conclusion that it was proper for the SDT to rely on the convictions as proof of guilt was unassailable, and that whilst both the SDT and Saini J had recognised that there was provocation, that did not excuse Mr El Diwany's conduct. There was also no basis to interfere with Saini J's carefully reasoned conclusion that the SDT was entitled to impose the sanction of striking off.

30. The SRA Application was made on the basis that Warby LJ should have recused himself from considering the application for permission to appeal because of his relationship with Mr Hirst. At the time that Mr Hirst had appeared before Sharp J in 2011, Warby LJ had been the joint head of 5RB.

31. The SRA Application initially came before Warby LJ. His order of 17 October 2022 explained that he had not been involved in the 2011 case and had no recollection of knowing about the case either at the time or at any time before the permission to appeal application. Warby LJ had also left 5RB in 2014, well before the complaint to 5RB in 2019. Warby LJ concluded that, while he did not consider that he was disqualified from dealing with the application, it was preferable to refer it to another judge. The application was referred to Andrews LJ, who, as we have said, adjourned it to an oral hearing.

32. Mr El Diwany contends that a fair-minded observer would consider that Warby LJ would have discussed the case with Mr Hirst in 2011, bearing in mind that a few days before Sharp J handed down her judgment the far-right terrorist Anders Breivik had blown up the Ministry of Justice's headquarters in Oslo, killing several people and seriously injuring a lawyer working with Mr Hirst on the case, before going on to murder many more on the island of Utøya. Mr El Diwany claims that Mr Hirst had condoned the hate emails and had wrongly suggested that Mr El Diwany was mentally unstable. Further, the complaint to the BSB in 2011 would have been discussed in chambers and Warby LJ would have been informed. By not taking action against Mr Hirst, his actions were being condoned by Warby LJ. Mr El Diwany also complains about an entry on the 5RB website in 2013 congratulating Sharp J on her elevation to the Court of Appeal.

The Amendment Application

33. The Amendment Application was made pursuant to a provision in Andrews LJ's order which permitted an application within 14 days to add further complaints raised in a witness statement of Mr El Diwany that Andrews LJ had considered when making her order. An appendix to the Amendment Application addressed a number of points under six headings. As well as reiterating his arguments that Warby LJ should have recused himself on the basis of his association with Mr Hirst, Mr El Diwany made a number of points relating to the merits of the underlying appeal. He asserted that, given the strength of his case, the integrity of the proceedings before Saini J and Warby LJ were critically

undermined and the conclusion that he should be struck off needed to be reopened to avoid real injustice. The alleged defects are in summary:

a) A failure to recognise the circumstances of the convictions. The 2003 conviction should have been found to be unsafe on natural justice grounds. The 2001 conviction followed a prosecution that would never have occurred in the UK and the facts leading to it were misunderstood by Saini J and Warby LJ, who also wrongly failed to see that Mr El Diwany's actions were justified comment.

b) A failure to grasp the extreme nature of the provocation, including a failure by Saini J to read all the (22) articles relied on by Mr El Diwany, and Saini J's willingness to excuse Ms H as a vulnerable individual.

c) Warby LJ's comment that Mr El Diwany's conduct could have founded a successful prosecution under section 3 of the Protection from Harassment Act (to which Mr El Diwany takes strong objection).

d) A failure by Saini J and Warby LJ to see the bigger picture of religious hatred.

e) A failure to recognise Mr El Diwany's lack of intention to break the law and his view that the material he had disclosed about Ms H was already public.

f) A failure to appreciate that Mr El Diwany's website was set up five years after the press onslaught began and reflected a need to find an efficient way to get across Mr El Diwany's right of reply. It was a proportionate response.

g) A failure to recognise the relevance of the hate emails, in response to press allegations.

h) A failure to recognise the significance of the SDT's error in finding that the press stories had not emanated from Ms H.

In summary, Mr El Diwany contends that there has been a serious miscarriage of justice.

Legal principles

Bias

34. A decision will be set aside if it was affected by either actual or apparent bias. The test for apparent bias was established by Lord Hope in *Porter v. Magill* [2001] UKHL 67, [2002] 2 AC 357 at [102]-[103] as follows:

> The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.

Where decision-making would be affected by actual or apparent bias, judges should, therefore, recuse themselves.

35. The "informed observer" is not someone like a judge who may be familiar not only with court procedures but with other judges, but an ordinary, reasonably well-informed member of the public: *Locabail (UK) Ltd v. Bayfield Properties Ltd* [2000] QB 451 (CA) (*Locabail*) at [17].

36. In *Locabail*, at [18], the Court of Appeal (Lord Bingham CJ, Lord Woolf MR and Sir Richard Scott VC) said, first, that it is often appropriate to inquire whether the judge knew of the matter relied on as undermining his impartiality, "because if it is shown that he did not know of it the danger of its having influenced his judgment is eliminated and the appearance of possible bias is dispelled". The court returned to this at [55], holding:

> In our view, once the hypothesis that the judge "did not know of the connection" is accepted, the answer, unless the case is one to which the *Dimes* case, 3 H.L.Cas. 759 applies, becomes obvious. How can there be any real danger of bias, or any real apprehension or likelihood of bias, if the judge does not know of the facts that, in argument, are relied on as giving rise to the conflict of interest?

(The reference to *Dimes* is to *Dimes v. Proprietors of Grand Junction Canal* (1852) 3 H.L.Cas. 759, and relates to a situation where the judge has a personal interest in the outcome of the litigation: *Locabail* at [4]-[15]. It is not relevant here.)

37. Secondly, *Locabail* addressed the position of barristers in private practice who become judges. After commenting at [20] that those appointed will know of their own affairs and that the "independent, self-employed status of barristers practising in chambers will relieve them of any responsibility for, and (usually) any detailed knowledge of, the affairs of other members of the same chambers", the court went on at [25] to include "membership of the same Inn, circuit, local Law Society or chambers" in a list of associations which could not, at least ordinarily, give rise to a soundly based objection. Later in [20] the court commented that the "greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be".

CPR Part 52.30

38. The circumstances in which an appeal may be reopened under what is now CPR Part 52.30 were first established in *Taylor v. Lawrence* [2002] EWCA Civ 90, [2003] QB 528 and have most recently been considered by this court in *Municipio de Mariana v. BHP Group plc* [2021] EWCA Civ 1156, [2022] 1 WLR 919 (*Municipio de Mariana*) and *UCP plc v. Nectrus Ltd* [2022] EWCA Civ 949, [2023] 1 WLR 39 (*UCP*). It is worth noting that *UCP* was a case where an appeal was, exceptionally, reopened on the grounds of apparent bias on the part of a judge of this court.

39. CPR Part 52.30(1) provides as follows:

> The Court of Appeal or the High Court will not reopen a final determination of any appeal unless—
> (a) it is necessary to do so in order to avoid real injustice;
> (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and
> (c) there is no alternative effective remedy.

40. The principles applicable to applications to reopen were set out fully in *Municipio de Mariana* at [57] to [64], which we will not set out. For the purposes of this decision the following points are worth highlighting:

    a) The circumstances described in CPR Part 52.30 are truly exceptional. The jurisdiction can only be invoked if it is shown that the integrity of the earlier proceedings has been critically undermined.

    b) There must be a powerful probability that a significant injustice has occurred.

    c) Paradigm cases include bias or the judge reading the wrong papers.

    d) In considering applications for permission to appeal a judge must grapple with the issues raised, in the sense of addressing the essential points raised by the grounds. If the judge either failed to do so or did do so but made a mistake which corrupted the whole process (such as wholly failing to understand a clearly articulated point) and there is a powerful probability that there would otherwise have been a different result, then the requirements of CPR Part 52.30 may be met.

Our decision on the three applications

41. Mr El Diwany has a very strong perception that he has been unfairly treated. From his perspective he was on the receiving end of seriously damaging and false articles in the Norwegian press and was not afforded a right of reply by either by the press or by the Norwegian legal system. The articles had obviously racist elements and contained unjustified allegations, in particular that Mr El Diwany had spent a period in a mental hospital. The steps he took which resulted in the convictions were, in his view, entirely justified and did no more than set out the "hard facts". He believes that he would never have been prosecuted for those actions in the UK. When he was later named by Mr Hansen, potentially affecting his reputation, he attempted to bring a defamation claim in this jurisdiction but failed, a conclusion which Mr El Diwany cannot accept given the injustice that he believes he suffered in Norway. The subsequent proceedings which resulted in Mr El Diwany being struck off the Roll of Solicitors were also tainted in his view by what he regards as a failure to recognise the extent of the abuse he has suffered. He complains, in particular, about a failure of the SDT to read the offending articles as it had been invited to do, and an alleged failure by Saini J to read all but a small number of them. Mr El Diwany says that, given all that he has suffered over the course of 28 years, we should show some mercy. He should not have been struck off.

42. We entirely agree with Saini J's comments about the articles and the hate emails. It does not, however, follow that the continued actions of Mr El Diwany in this jurisdiction in connection with them are acceptable. They are not.

The Defamation Application

43. Mr El Diwany's application to re-open his attempt to obtain permission to appeal from Sharp J's decision in 2011 is wholly unmeritorious. Permission to appeal was refused in 2012. Mr El Diwany made reference at the hearing to new evidence having become available in 2013, but even if that could conceivably have made a difference it was well before his first renewal application was dismissed in 2016 as totally without merit.

44. The challenges to Popplewell LJ's impartiality are wholly inappropriate. Having explained that he had never been in the same chambers as Sharp J (a matter which would not ordinarily give rise to bias in any event: see [37] above), Mr El Diwany then resorted to a claim of Islamophobic racism. As explained below, a failure by a judge to express condemnation about racist language, or indeed anything else, when that matter does not fall to be decided cannot possibly give rise to a justified accusation of apparent bias or any other ground for complaint. Mr El Diwany provides no other justification for reopening the appeal. The Defamation Application must be dismissed as totally without merit.

The SRA Application and the Amendment Application

45. Similar points arise in relation to the appeal against Saini J's decision. Again, the main criticism in relation to Warby LJ's impartiality relates to his membership of the same chambers as Mr Hirst, but that would not ordinarily be grounds for complaint: see [37] above. This is so irrespective of whether one or both of them had a leadership role. Mr El Diwany relies on the atrocities that occurred in Oslo close to the hand down of Sharp J's judgment and their impact on Mr Hirst's client. Quite apart from the fact that the atrocities occurred well after the conduct of Mr Hirst complained of at the trial and the inherent unlikelihood of any discussion in chambers going beyond shock and condemnation, Mr Hirst's own conduct has not been found to be wanting in any respect. These points would in our view fully dispose of any doubt that a fair-minded observer might otherwise have, but in any event Warby LJ has made clear that he has no recollection of the case. That should itself be a complete answer: see [36] above. There is no proper basis to conclude that Warby LJ's confirmation should not be accepted. It is wholly unjustifiable for Mr El Diwany to seek to maintain an allegation of bias in those circumstances.

46. As to Mr El Diwany's other reasons for seeking to reopen the appeal against Saini J's decision, we can detect nothing in Warby LJ's decision to refuse permission to appeal that could come anywhere near the high threshold in CPR Part 52.30. On the contrary, Warby LJ grappled with the issues and obviously reached the correct conclusion. Saini J's judgment is in our view unimpeachable. If we had been considering the application for permission to appeal afresh would have had no hesitation in reaching the same conclusion as Warby LJ, namely that the appeal neither has a real prospect of success nor was there any other compelling reason for an appeal to be heard.

47. Saini J was conducting a review, not a rehearing, of the SDT's decision making. The SDT's decision was based on the existence of the convictions and Mr El Diwany's failure to disclose them, neither of which was in dispute. Saini J was entirely correct to conclude that the SDT was entitled to find that there were no exceptional circumstances to justify going behind the convictions, that Mr El Diwany's behaviour and failure to inform the SRA could not be excused and that the appropriate sanction was striking off.

48. In reaching his conclusions, Saini J applied the correct principles and clearly took full account of Mr El Diwany's submissions. He obviously did understand the nature of the provocation and was under no obligation to read all the articles in order to do so. That provocation did not, however, excuse Mr El Diwany's actions, which Saini J expressly found at [74] would have been capable of prosecution under the Protection from Harassment Act 1997 and the Malicious Communications Act 1988. As Mr El Diwany

should know, as a former solicitor, it makes no difference whether Mr El Diwany did or did not intend to break the law. As to Saini J's allegedly incorrect description of Ms H as vulnerable, this was a description that Mr El Diwany himself accepted at the appeal hearing: see Saini J's judgment at [19]. Saini J was also clearly entitled to deal with the SDT's apparent error in finding that press articles had not emanated from Ms H by finding that it did not affect the ultimate conclusion. Further, Saini J was correct to identify the hate emails as irrelevant, because they post-dated the convictions.

49. Mr El Diwany made a further submission shortly before the hearing in which he sought to rely on guidance issued by the SRA in 2022 in respect of convictions arising from "matters of principle or social conscience", which he submitted described his case. Disregarding the point that the guidance was obviously not in place when the SDT considered his case, the circumstances to which the guidance applies, such as participation in peaceful protests, are very far from Mr El Diwany's actions in this case. In any event the guidance emphasises the importance of the reporting obligation that exists in any event, and the fact that the SRA will consider the facts of each case and use its broad discretion.

50. Accordingly, both the Amendment Application and SRA Application fall to be dismissed and should in our view be certified as totally without merit.

Further observations

51. The three applications are, as already indicated, part of a broader picture. There are some common themes on which we should comment further.

52. Mr El Diwany appears to allege Islamophobia against any judge who does not go out of their way actively to condemn abuse against him. The proper role of judges is to decide the issue or issues before them. They are not required actively to call out religious abuse, or indeed inappropriate behaviour of any kind, nor to make any other comment about it unless it is part of the essential reasoning for their decision. Of course, they may choose to comment on it, as Saini J did, and that may be entirely appropriate. But judges cannot be criticised for not doing so where it is not required to perform their role, still less should they be subject to entirely unjustified allegations of racism, religious hatred or of holding any other form of unacceptable view by reason only of their failure to do so.

53. This last point applies not only to judges but to others such as court and tribunal staff, barristers, solicitors, regulators such as the BSB and the SRA and their respective staff, some of whom have been subjected to completely inappropriate and unfair criticism and abuse.

54. Similarly, it is wholly unacceptable to seek to challenge a decision of a judge on grounds of bias (actual or apparent) simply because they do not actively condemn inappropriate action, or more generally because they follow, or may follow, a different religion from that of the applicant. As the court said in *Locabail* at [25]:

> We cannot … conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge.

The fair-minded observer will appreciate that behind this is the fundamental obligation on judges to act with impartiality.

55. It is equally unacceptable for a litigant to refuse to accept the accuracy of what a judge says about their own position in response to a challenge on grounds of bias where there is no proper basis for doing so. As this court said in *Locabail* at [19], any statement about what the judge knew at the relevant time must be considered on the facts of the case, but there is no question of cross-examining the judge or seeking disclosure from them. The point was reiterated at [64] where the court added the following:

> If the judge's statement about his knowledge is, objectively viewed, cogent, then that is the basis on which the reasonable onlooker, or the court personifying the reasonable onlooker, will ask whether there was any real danger of bias. If the judge's statement is, objectively viewed, an improbable one, then that is how the reasonable onlooker will approach it.

56. We would emphasise that, unless the objective facts give rise to a real reason to doubt what the judge has said, a statement by the judge about their knowledge should be accepted without more. This is relevant to the unjustified criticism of both Warby LJ and Popplewell LJ.

57. It is also unacceptable to seek to criticise a judge by seeking to infer what they have or have not read otherwise than by reference to their judgment. As already indicated, one of the criticisms of Saini J was that he had only read a small number of the articles (3 out of 22). Mr El Diwany sought to demonstrate this by the fact that only a small selection were in the bundle, that he had directed the judge to his website and that the tracking he had in place had (allegedly) detected that the judge had only visited the site for a very limited period, whereas (it is said) the judge had confirmed at the hearing that he would read all the articles.

58. A judge's process of decision-making is one for the judge. It results in a decision and it is that decision, and the reasoning expressed in it, that a dissatisfied litigant must seek to challenge. Saini J's decision shows that he obviously did understand the nature and indeed extent of the provocation. Having seen a selection of the articles and heard Mr El Diwany's obviously detailed submissions about them he did not need to read all 22 to do so. In any event it was for the judge, not Mr El Diwany, to determine what needed to be read and it was wrong to direct the judge to the website with a view to tracking, and commenting on, his visit to it.

59. More broadly, it is important to recognise the function of courts and tribunals, which is to decide the issues in the case in accordance with the evidence and the law. Appellate courts generally also have a limited role, in the form of a review to determine whether something went materially wrong, rather than a rehearing. Where a discretion has been exercised, for example as to sanction, appellate courts will only usually interfere if the decision was outside the ambit of reasonable decision-making.

60. The important point of principle is one of finality of decision making. Once legitimate challenges have been addressed, disappointed litigants must accept decisions however much they may dislike them. This is relevant here to the convictions (which were the subject of attempted appeals, including to the ECHR), to the decisions of Sharp J and the

SDT (as upheld by Saini J and Murray J) and to the complaints to regulators in respect of which Mr El Diwany has attempted to obtain judicial review.

61. One aspect of the finality principle is that appeals should be determined on a timely basis. In all but exceptional cases, of which this is certainly not one, it would be wholly inappropriate to seek to unpick a decision taken many years ago in respect of which appeal rights were exhausted at the time. This applies here both to Sharp J's judgment and to any attempt to go behind the convictions.

62. The history of the various proceedings exemplifies the SDT's findings of a complete lack of insight on the part of Mr El Diwany. He presented his actions to this court as a justified response to the abuse he had received in the Norwegian press. In doing so he did not address the findings of the Norwegian courts in both 2001 and 2003 (annexed to Sharp J's decision) that the press interest had initially been prompted by Mr El Diwany's own actions in sending material about Ms H to many others. More significantly, even if the abuse had been entirely unprompted, Mr El Diwany has wholly failed to appreciate that the nature and extent of his response was inappropriate and that there was a serious failure on his part to comply with his professional obligations. Strong views about press abuse and hate emails, however appropriately held, cannot justify either his actions or his failure to report the convictions to the SRA. Still less does it justify the aggressive campaign he has since waged against individuals who have had any connection with the proceedings in this jurisdiction or in relation to Mr El Diwany being and remaining struck off, or the time wasted and costs incurred as a result of his unwarranted attempts to pursue complaints against those individuals.

Should a General Civil Restraint Order be made?

63. The CPR makes it clear that, when the court dismisses an application as totally without merit, it must at the same time consider whether a civil restraint order is appropriate: see CPR Parts 23.12 and (in the context of appeals) 53.20(5) and (6).

64. Mr El Diwany is already subject to three ECROs made by the High Court. Those apply to claims and applications in the High Court and County Court (but not this court) "concerning any matter involving or relating to or touching upon or leading to" the proceedings in which the relevant orders were made, namely the attempts to secure judicial review in relation to complaints about Sharp J and Popplewell LJ and the challenge to the SDT's decision not to restore Mr El Diwany to the Roll.

65. While a further ECRO would operate to restrain applications in this court as well as the courts below, we consider that it is necessary to go further and consider the imposition of a general civil restraint order (GCRO) in this case.

66. A GCRO may be imposed in the following circumstances ([4.1] of Practice Direction 3C (PD3C)):

> … where the party against whom the order is made persists in issuing claims or making applications which are totally without merit, in circumstances where an extended civil restraint order would not be sufficient or appropriate.

67. In *R (Kumar) v. Secretary of State for Constitutional Affairs* [2006] EWCA Civ 990, [2007] 1 WLR 536 (*Kumar*) at [60] Brooke LJ, giving a judgment of the court, said that this language:

> … is apt to cover a situation in which one of these litigants adopts a scattergun approach to litigation on a number of different grievances without necessarily exhibiting such an obsessive approach to a single topic that an extended civil restraint order can appropriately be made against him/her.

68. In *Chief Constable of Avon and Somerset Constabulary v. Gray* [2019] EWCA Civ 1675 at [14] Irwin LJ approved the test for imposition of a GCRO set out by the judge below (Stuart-Smith J) in a passage which, after referring to *Kumar*, articulated the question as being whether an order is:

> … necessary in order (a) to protect litigants from vexatious proceedings against them and/or (b) to protect the finite resources of the Court from vexatious waste.

Stuart Smith J added that:

> This question is to be answered having full regard to the impact of any proposed order upon the party to be restrained.

69. The question of persistence also arises in the context of an ECRO (where the language refers to "has persistently issued") and was considered in that context by Males LJ in *Sartipy v. Tigris Industries Inc* [2019] EWCA Civ 225, [2019] 1 WLR 5892. Three totally without merit claims or applications is the minimum, but whether persistence is made out will require an evaluation of overall conduct, and it will be easier to establish if a party "seeks repeatedly to re-litigate issues which have been decided" ([30]). Males LJ also reconfirmed at [37] (referring to *Kumar* at [67]-[68]) that a court can take into account previous claims or applications which it is satisfied were totally without merit even if they were not so certified at the time.

70. Where a GCRO is made by the Court of Appeal the party against whom it is made will be restrained from issuing claims and making applications in any court without first giving notice in the prescribed manner and obtaining the permission of a specified judge: ([4.2]-[4.6] of PD3C). A GCRO may be made for a period not exceeding three years: [4.9] of PD3C (previously the maximum period was two years).

71. Although all the proceedings that we have considered are connected in some way to Mr El Diwany's actions in respect of Ms H, the articles and the convictions and his reaction to them, so they might in some sense be regarded as reflecting an "obsessive approach to a single topic", they have ranged broadly. The defamation proceedings struck out in 2011 are quite separate from the proceedings challenging the decisions to strike Mr El Diwany from, or not restore him to, the Roll of Solicitors. The existence of separate ECROs in the High Court is consistent with this view (see also para [40] of Murray J's reasons at [2023] EWHC 1707 (Admin)).

72. We are entirely satisfied that Mr El Diwany persists in issuing claims and making applications that are totally without merit. These include not only the three applications but the claims and applications leading to the ECROs made by Sweeting J and Murray J

and the attempts to obtain permission to judicially review the BSB and SRA (see [19]-[25] above). Mr El Diwany will not take no for an answer and seeks repeatedly to re-open decisions that have become final.

73. Indeed, in the past three years alone, at least 9 individual orders have been certified against Mr El Diwany as being totally without merit. They include the following:

    a) 2 December 2020, *El Diwany v. Ministry of Justice and Police, Norway*, Case A2/2011/2457(B) and A2/2011/2458(B), Court of Appeal (Civil Division), Popplewell LJ.

    b) 28 May 2021, *R (El Diwany) v. SRA*, Case CO/2500/2020, Administrative Court, Jay J.

    c) 22 December 2021, *R (El Diwany) v. SRA*, CA-2021-001688, Court of Appeal (Civil Division), Bean LJ (upholding the order of Jay J, dated 28 May 2021).

    d) 19 January 2022, *R (El Diwany) v. Judicial Appointments and Conduct Ombudsman*, Case CO016082021, Sweeting J.

    e) 24 January 2022, *R (El Diwany) v. SRA and SDT*, Case CO/3269/2021, Administrative Court, Collins Rice J.

    f) 1 July 2022, *R (El Diwany) v. BSB and Mulchrone*, Case CP/4402/2021, Administrative Court, Heather Williams J.

    g) 18 October 2022, *El Diwany v. SRA* [2022] EWHC 2882 (Admin), Administrative Court, Murray J (judgment giving reasons dated 15 November 2022).

    h) 7 November 2022, *El Diwany v. Hansen, Sorte and Ministry of Justice and Police, Norway*, Case CA-2011-002759-C, Court of Appeal (Civil Division), Popplewell LJ.

    i) 1 March 2023, *El Diwany v. Hansen, Sorte and Ministry of Justice and Police, Norway*, Case CA-2011-002759-D, Court of Appeal (Civil Division), Popplewell LJ.

74. This list demonstrates that an ECRO is not sufficient. Mr El Diwany has continued to issue meritless claims, applications and appeals, despite the orders of Murray J and Sweeting J.

75. We have considered whether it is appropriate to consider making a GCRO without notice to Mr El Diwany. In that regard, we have had regard to the very recent decision of this court in *Gopee v. The Financial Conduct Authority* [2023] EWCA Civ 881. It is, in our judgment appropriate to do so, but Mr El Diwany will, under any order we make, have the opportunity, without obtaining prior permission to do so, to apply set aside the part of our order imposing the GCRO. That application, if made, will be dealt with in the manner that this court will direct when it sees such an application and the grounds for it.

76. For the reasons we have given, it is, in our judgment, appropriate to impose a GCRO, and to do so for the maximum three years.

Conclusions

77. We have decided, after careful consideration, that each of the Applications should be dismissed and certified as having been totally without merit. We will impose a GCRO on Mr El Diwany for a period of three years.