IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2019] EWHC 1792 (Admin)

CO/5035/2018

Royal Courts of Justice

Thursday, 20 June 2019

Before:

MR JUSTICE MOSTYN

B E T W E E N :

THE QUEEN
ON THE APPLICATION OF
AKINDELE OGUN — Claimant

- and -

SOLICITORS REGULATORY AUTHORITY — Defendant

THE CLAIMANT appeared as a Litigant-in-Person.

MR D. BENEDYK (instructed by Capstick Solicitors LLP) appeared on behalf of the Defendant.

J U D G M E N T

MR JUSTICE MOSTYN:

1 The claimant, Akindele Ogun, attended the Inns of Court School of Law and was called to the Bar by Lincoln's Inn in 1985. In 1986 he was called to the Nigerian Bar. He did not practise at either Bar. In 1987 he joined the corporate tax team at Lovell White Durrant. In 1995 he was admitted as a solicitor. In 1997 he left Lovell White Durrant and established his own law firm.

2 In early 2005, the exact date being unknown, he applied to the Law Society for the grant of the Higher Courts (Civil Proceedings) qualification which would, if granted, entitle a solicitor to exercise rights of audience in all civil proceedings in the higher courts. The grant of that qualification had been enacted by Parliament in the Courts and Legal Services Act 1990.

3 In early 2005 the claimant's application was governed by the Higher Courts Qualification Regulations 2000, which had been made by the Council of the Law Society with the approval of the Lord Chancellor on 13 July 2000.

4 These stated:

> "3(1) The Society may grant one of the following qualifications to a solicitor… who meets the requirements of these regulations… Higher Courts (Civil Proceedings) Qualification which shall entitle the solicitor… to exercise rights of audience in all civil proceedings in the higher courts, including judicial review and any proceedings arising from any criminal courts.
>
> 4(1) Solicitors… applying for a higher courts advocacy qualifications must demonstrate to the satisfaction of the Society that they are competent to undertake advocacy in the proceedings in relation to which they have applied by satisfying the society… accreditation route (b) that they have practiced as lawyers for at least three years and that they have at least three years' appropriate experience of litigation in the higher courts of England and Wales… and have satisfied any conditions and have undertaken assessment and any further step specified by the Society under regulation 6.
>
> 4(2) Before being granted a higher court advocacy qualification applicants must (a) supply the Society with at least one reference as to the nature and extent of their litigation and advocacy experience from those whose standing as a member of the judiciary, the Court Service or the legal profession would enable them to offer informed opinions; and (b) attend for interview if required to do so by the Society."

Regulation 6(1) and 6(2) essentially repeat the content of regulation 4(1)(b). However, regulation 6(3) reads:

> "Applications under this regulation must be received by the Society before 1 November 2005."

5 The claimant argues that the reference in regulation 6(3) to "application" is a reference to the initial application alone and not to any later application for the actual grant of the qualification following successful completion of the advocacy assessment as referred to in regulation 4(1)(b) and 6(1)(d). He argues that in circumstances where he completed the advocacy assessment successfully on 25 August 2006 any application for the grant of the qualification made after that date would fall foul of regulation 6(3). He argues that the 2000 regulations can only make sense if the reference to an application is to the initial application and nothing else.

6 Following the submission of his initial application, which was accompanied by two references, the claimant received a certificate of eligibility to attempt advocacy assessment for the higher courts qualification. This was subject to certain conditions, of which the only relevant one, for my purposes, is that the assessment had to be undertaken within two years. Again, the claimant argues that this shows that the only relevant application for the purposes of the 2000 regulations is the initial application because he was given until 5 May 2007 to complete the advocacy assessment, a date well after that mentioned in regulation 6(3).

7 As mentioned above, the claimant completed the advocacy assessment successfully on 25 August 2006. The assessment, such as it was, was undertaken by an external contractor, namely BPP, which issued a certificate which stated:

> "Higher Rights of Audience Certificate of Competence. This is to certify that the claimant has achieved the required standard in advocacy assessment - civil".

8 Following receipt of that certificate, the claimant concluded that he had been awarded the qualification by an agent of the Law Society, namely BPP. He did not apply to the Law Society for a certificate to that effect. Indeed, he had no communication with the Law Society about this matter whatsoever. Following the receipt of that certificate from BPP, the claimant regularly appeared for clients in the higher courts.

9 One such case was an arbitration appeal under the 1996 Act which was heard in the Commercial Court by Sir Jeremy Cooke in July 2018. For reasons which I cannot fully understand, the respondent to that appeal questioned the claimant's right to appear for his client and raised the matter with the SRA. This led to an investigation as to whether the claimant had ever actually been granted or awarded the relevant qualification. This investigation led to the decision under review, which was given on 19 October 2018 in these terms:

> "While you completed the necessary advocacy assessment in 2006, you failed to notify and apply to us for the higher rights of audience qualification. You are therefore not entitled to exercise civil higher rights of audience."

10 On 17 December 2018, the claimant issued judicial review proceedings to quash the decision. He argues that the decision was irrational and not compatible with the terms of the 2000 regulations. He also added, for good measure, that the decision violated his rights under Article 1 Protocol 1 of the European Convention on Human Rights and that a letter sent by the SRA to the solicitors for the respondents to the arbitration appeal on 19 October 2018 was defamatory of him. Even though this letter was sent on the same day as the

decision under review and relates to the same subject matter, it is procedurally completely aberrant for this libel claim to have been tacked onto the judicial review claim.

11 On 17 December 2018, Chowdhury J refused interim relief and opined that the claim was unarguable. However, on 28 January 2019 Laing J granted permission, holding that the grounds were arguable and so it is that today, 20 June 2019, the matter comes before me. The case has caused the SRA to incur costs of £18,000. The claimant has put in a costs schedule of over £36,000, asserting that he has spent over 60 hours on this matter at his normal hourly charging rate of £350.

12 I have to say that this litigation appears completely disproportionate when one has in mind that in order to rectify the imperfect situation in which he finds himself all the claimant had to do was to attend a 2-day advocacy course at a cost of about £600 including VAT; fill in a form; pay a fee of £75; and pay the cost of postage to the SRA. I have no doubt that the grant of the qualification would have been a formality. Yet the matter has proceeded to this final, expensive trial because the claimant says that to him it is an issue of high principle.

13 I have reached the clear conclusion that the claimant's case is untenable. I deal first with his point about regulation 6(3). It is true that by the time that he did his advocacy assessment on 25 August 2006 the date in regulation 6(3), namely 1 November 2005, had passed. However, on 28 October 2005, the 2000 regulations had been amended by the Council of the Law Society with the approval of the Lord Chancellor. The only relevant amendment for my purposes was to change the date in regulation 6(3) to 31 December 2006. Further amendments were later made to push the date further back. I have no idea why this clumsy and cumbersome process was adopted, but the amendment clearly fatally undermines the claimant's argument in this respect.

14 The terms of the regulations clearly presuppose that following the successful completion of the advocacy course there will be an application to, and a full grant by the Law Society of, the qualification. In my judgment, it is this application to which regulation 6(3) refers. In this case, following the successful completion of the advocacy course on 25 May 2006, it was incumbent on the claimant to have applied to the Society for the formal grant or award of the qualification. I have been given version 2 of the guidance notes for solicitors who wish to apply for rights of audience in the higher courts published in March 2005. The claimant says I should not assume that his application was made after those notes were published. Unfortunately, version 1 cannot now be located. It is, however, highly likely, for reasons which I will explain, that version 1 was in the same terms as version 2. At para.3.13 of version 2 it is stated:

> "Please note the advocacy assessment is mandatory and the qualification cannot be awarded until confirmation has been received that the applicant has successfully completed this part."

And para.3.14 states:

> "Individuals will submit an application with a certificate of successfully passing the assessment and evidence of it having satisfied any other conditions prescribed by the Society."

These notes clearly confirm that the application is in two parts. First, there is the initial application seeking the certificate of eligibility. Then, after the advocacy course has been

successfully completed, there is the second part seeking the formal grant or award of the qualification.

15 The claimant accepts that version 2 of the guidance notes clearly mandate this process. But he says there is no evidence that version 1, which would have been in force if his initial application in fact predated version 2, says the same thing.

16 In his third witness statement dated 20 March 2019, the claimant formally called on the SRA to produce version 1. Had they been able to lay their hands on it and produce it, it would, he accepted, had it been admitted into evidence (and it would have been not least because he asked for it) have been the end of his case if it had said the same thing as version 2. The SRA has not been able to find version 1, but they have been able to find, and they have very recently produced, what they say is the next best thing, namely a document published in June 2004 entitled "Higher Rights of Audience: Introduction to Gaining Higher Rights of Audience". The claimant objects to the admission of this document, saying that its production at this late stage violates the directions as to evidence given by Laing J. I am not at all impressed by this black-letter approach. As I said in argument, it seems as if the claimant is running with the hare and hunting with the hounds. It is not acceptable for him to call for the production of version 1 but then to object to the admission of what the SRA says is the next best thing. I therefore formally admit the document. This says, on p.2:

> "Applicants will receive a certificate of eligibility from the Law Society to attempt in advocacy assessment, success at which will ultimately allow them to apply for an award."

17 I am therefore satisfied on the strong balance of probabilities that version 1 would have said the same thing as version 2 and that the claimant, who surely would have read the notes at the relevant time, would have been well aware that there was a necessity to apply formally to the Law Society following the completion of the advocacy course for the grant of the qualification.

18 Had he done so, he would have received his certificate in the same form as that which is in the bundle at p.245 which would have said that the claimant had been granted the relevant qualification and was entitled to exercise rights of audience in all the higher civil courts.

19 But the claimant never did so, and it follows that he has, by virtue of an administrative error on his part - an innocent mistake, it is accepted - been exercising rights of audience in the higher courts for over 12 years without having the formal qualification to do so. He now needs to put his house in order by taking the steps I have mentioned above.

20 The claimant's primary claim is therefore dismissed.

21 The claimant accepts that if he fails on his first ground, then he must fail on the second and third and they are both, therefore, consequentially dismissed.

LATER

22 The claimant seeks permission to appeal. That is refused. I am not satisfied that an appeal would have any real prospect of success or that there is some other good reason for an appeal to be heard.

LATER

23 An application is made for costs. The normal rule as expressed in CPR 44.2 is that costs should follow the event. The claimant has argued that costs should not follow the event because it would be unjust to do so as my decision is demonstrably wrong; but that is not an argument that can work here. Of course, if he were to succeed in his appeal then my order for costs would no doubt be reversed, just as my principal decision would be reversed.

24 He argues that an order for costs would disrespect the grant of permission in this case by Laing J. I have to say that that is an argument that simply cannot run. Many is the time when permission is granted but on close examination on the merits the arguability of the claim as perceived by the permission judge is not upheld. In any event, that is not, insofar as I can tell in my fairly extensive knowledge of the costs jurisprudence, and has never before been, a reason for not applying the primary rule of costs following the event.

25 The claimant argues that the SRA were insufficiently swift or full in their response to his pre-action letter. Sometimes there are complaints made about the quality of the responses to the pre-action letters, but I am not satisfied that this is a case where sufficient valid criticism can be made to disapply the general rule. So, the general rule will be applied.

26 The next question is whether the sum claimed is reasonable. I note that in this case the solicitors and counsel instructed by the Solicitors Regulation Authority have agreed to do this matter on a fixed fee of £15,000 plus VAT. I have to say that that is a very commendable way of proceeding. Indeed, the reasonableness of their charges are to be compared to the hourly charging rate cost referred to in my judgment generated by the claimant of over £36,000. I am satisfied that the sums claimed are reasonable and proportionate, so I award costs in the sum of £18,000, including VAT.

CERTIFICATE

Opus 2 International Ltd. Hereby certifies that the above is an accurate and complete record of the judgment or part thereof.

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This transcript has been approved by the Judge.