Neutral Citation Number: [2020] EWHC 1394 (Admin)

Case No: CO/2574/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/06/2020

Before:

LORD JUSTICE FLAUX

and

MR JUSTICE FORDHAM

- -

Between:

MR SYED MUZAHER NAQVI	**Appellant**
- and -	
SOLICITORS REGULATION AUTHORITY	**Respondent**

- -
- -

The Appellant appeared in person
Mr Simon Paul (instructed by **Capsticks LLP**) for the **Respondent**

Hearing dates: Tuesday 12 May 2020

- -

Approved Judgment

Lord Justice Flaux:

Introduction

1. In this appeal under section 49 of the Solicitors Act 1974, the appellant, Mr Naqvi, appeals against the order of the Solicitors Disciplinary Tribunal dated 13 May 2019, pursuant to which Mr Naqvi was struck off the Roll and ordered to pay £24,946.50 costs to the respondent, to which I will refer as "the SRA".

Factual and procedural background

2. Mr Naqvi was admitted to the Roll on 16 March 2009, having previously qualified and practised as a lawyer in Pakistan. He was a sole practitioner at Naqvi & Co (Solicitors).

3. The proceedings before the SDT arose out of a television documentary produced by Hardcash Productions and broadcast on ITV in July 2015 called "*ITV Exposure UK: The Sham Marriage Racket"*, concerning sham marriages entered into for immigration purposes. That documentary included footage of an undercover reporter Mr Ali posing as a client ("Client A") seeking advice from Mr Naqvi. Client A visited Mr Naqvi's offices on two occasions. There was an initial meeting or interview (of which an audio recording was made) and a second interview on 27 March 2015, of which an audio and video recording was made.

4. On 30 June 2015, following correspondence with Hardcash before the broadcast, Mr Naqvi notified the SRA about the documentary. A Mr Page from the SRA subsequently attended at his offices. On 7 January 2016, the SRA wrote to Mr Naqvi saying it was closing the file but that it might seek to re-open the matter at a later stage.

5. On 24 February 2017 the SRA received an email from the Home Office saying that it was conducting an investigation in which three solicitors had offered to assist in the arrangement of sham marriages which had been caught on camera during the ITV programme. The Home Office was trying to establish whether this had been referred to the SRA. The three were then named and included Mr Naqvi. The email then stated: "They have been arrested and are on bail awaiting CPS advice". In the case of Mr Naqvi this was not correct, as he had only ever been interviewed under caution, but as set out below, the SRA did not ascertain this until a later stage.

6. On 28 November 2017, the SRA obtained a Court order requiring production by ITV Plc of all recorded material and copies of transcripts in relation to the documentary. Then, on 8 March 2018, Ms Mandeep Sandhu, the SRA's Investigation Officer, sent Mr Naqvi an "Explanation With Warning" letter, enclosing a USB stick containing the video recording and a transcript of the second meeting. On 4 April 2018, Mr Naqvi responded, denying the allegations, and, amongst other things, relying on entrapment.

7. On 18 April 2018 Ms Sandhu prepared a memo for the Disciplinary Proceedings Team to consider whether it was appropriate to authorise disciplinary proceedings against Mr Naqvi. The memo enclosed the transcripts and video footage of the second interview. It indicated that an audio recording of the first interview was available. An

Authorised Officer considered the memo and on 27 April 2018 made the Decision that Mr Naqvi's conduct should be referred to the SDT and was satisfied that the public interest and evidential tests were met.

8. On 18 September 2018, Ms Hannah Lane, one of the solicitors at Capsticks LLP with the conduct of this matter on behalf of the SRA made a Statement under Rule 5 of the Solicitors (Disciplinary Proceedings) Rules 2007 formally commencing disciplinary proceedings against Mr Naqvi. The allegations made against Mr Naqvi were as follows:

> "1. When advising Client A on a possible application for a visa:
>
> 1.1 he failed to advise Client A that applying for a visa as a spouse or partner, on the basis of a relationship which was not genuine, was unlawful, and by reason of such failure breached any or all of Principles 2, 4 and 6 of the SRA Principles 2011;
>
> 1.2 he advised Client A that, in the event that Client A wished to apply for a visa as a spouse or partner on the basis of a relationship that was not genuine, Client A should not disclose this fact to him, and by reason of such failure breached any or all of Principles 1, 2, 3 and 6 of the SRA Principles 2011;
>
> 1.3 he indicated that he was willing to advise and/or assist Client A on the process of applying for a visa as a spouse or partner after Client A made clear that he intended or was likely to make the application based on a relationship that was not genuine, and by reason of such failure breached any or all of Principles 1, 2, 3 and 6 of the SRA Principles 2011; and
>
> 1.4 he advised Client A on steps that could be taken by Client A to increase the prospects of an application for a visa as a spouse or partner being successful when he knew or ought to have known that the relationship on which the purported application would rely was not genuine and by reason of such failure breached any or all of Principles 1, 2 and 6 of the SRA Principles 2011."

9. The SRA Principles 2011 applicable at the time of the SDT hearing were as follows:

> "Principle 1, to uphold the rule of law and the proper administration of justice;
>
> Principle 2, to act with integrity;
>
> Principle 3, to not allow your independence to be compromised;
>
> Principle 4, to act in the best interests of each client; and

> Principle 6, to behave in a way that maintains the trust the public places in you and in the provision of legal services."

10. The Statement enclosed the video footage on a USB stick together with a transcript of the second interview prepared by Hardcash. By this stage, a further transcript of the second interview with translations of the passages in Urdu had been prepared by Ubiqus, official Court reporters. This was also exhibited to the Rule 5 Statement. The exhibits to the Rule 5 Statement included the email dated 24 February 2017 from the Home Office.

11. On 25 September 2018, the SDT wrote to Mr Naqvi informing him that a Solicitor Member of the SDT had certified the matter as showing a case to answer and enclosing standard directions with listing for a three day hearing on 17-19 April 2019.

12. On 26 October 2018, Mr Naqvi made an application to vary the standard directions, asking for the hearing before the SDT to proceed on paper. In that application he also drew attention to the inaccuracy in the Home Office email in saying that he had been arrested when he had only been interviewed under caution by the Home Office.

13. On 31 October 2018 he served a revised version of this application now seeking *"quashment"* of the proceedings or in the alternative, that the hearing be dealt with on paper. He alleged that the decision that there was a case to answer had been obtained by prejudicing the mind of the SDT *"at the outset by misrepresentation, misstatement and fraud"* and that Capsticks had *"flagrantly disregarded"* the SRA Principles by "*Misrepresenting, Misleading and Cheating…Recklessly Relying on False Evidence…to obtain a favourable decision of a case to answer*." The basis for these allegations was the Home Office email.

14. On 22 November 2018, Mr Naqvi's applications were heard at a Case Management Hearing before the SDT. For that hearing he served written submissions which referred again to the Home Office email and contended that this and the Rule 5 Statement were a *"Fake, Fraudulent, Forged, Concocted Document"* and that both the decision to refer the complaint to the SDT and the Rule 5 Statement were invalidated.

15. The SDT determined that it would treat Mr Naqvi's application as an application to strike out the proceedings as an abuse of process. In a Memorandum dated 4 December 2018 it dismissed that application and his alternative application for a hearing on paper. The Memorandum recorded that counsel for the SRA clarified that the Home Office email was not material to any of the allegations against Mr Naqvi, but had been exhibited to the Rule 5 Statement as background. However, the SRA offered to redact the Home Office email to remove any reference to Mr Naqvi's arrest, and to ensure that only the redacted version was available to the Tribunal for the substantive hearing. At [43] of the Memorandum, the SDT said that it was satisfied that it had been reasonable for the SRA to accept the Home Office email and exhibit it as an accurate document. It had not been improper conduct for the SRA not to investigate the content of the document further particularly as it had been provided by a government agency.

16. Mr Naqvi had complained that the SRA had been selective in its reference to the video footage in the Rule 5 Statement, but the SDT held that there was no impropriety

by the SRA and it was possible for Mr Naqvi to have a fair trial. The unedited video footage could be seen and heard by the Tribunal at the final hearing, which would remedy any unfairness.

17. On 21 December 2018, Capsticks wrote to Mr Naqvi asking him to agree the contents of the Ubiqus transcript of the second interview, and, if not, to indicate with which parts he disagreed, and why. In his response on 27 December 2018, Mr Naqvi said:

> "I accept the contents of the Ubaiq [sic] Translation pages 11-31, subject to the reservation, that the contents of the same, presumed to be objectionable erroneously by the Applicant and quoted in the Rule 5 Statement out of the Transcript, may also be "Redacted" in line with the out of way provision provided to the Applicant. Otherwise there will be material irregularity in this case."

18. He also indicated that he "vehemently" objected to the redaction of the Home Office email as this had caused: "*further material irregularity to a degree which offends the principles of natural justice."*

19. Between 8 and 22 January 2019, Capsticks continued to seek to clarify with him whether he objected to the accuracy of the Ubiqus transcript in any respect and, if so, on what basis. His position was that the entirety of the transcript should be redacted along with corresponding references in the Rule 5 Statement, apparently on the basis that the Home Office email was being redacted. He did not identify any particular sections of the transcript to which he objected and why.

20. On 23 January 2019, Mr Naqvi wrote to Ms Daveena Ogene Head of Case Management at the SDT about an email in which she had noted from the Memorandum that the SRA was to provide a redacted version of the Home Office email and asking for it to be provided as soon as possible. Mr Naqvi asked Ms Ogene to clarify which part of the Tribunal's ruling dated 4 December 2018 required the provision of a redacted version of the email. An exchange of emails between them followed from which it emerged that Mr Naqvi now objected to the provision of a redacted version of the Home Office email to the SDT, on the basis that he now wanted to rely on the presence of that unredacted version as evidence of prosecutorial misconduct.

21. On 18 March 2019, Mr Naqvi wrote to Capsticks indicating that he had now instructed Mr Alper Riza QC and that he was requesting an adjournment as, in order to properly make his entrapment argument, he would need (a) disclosure of all the instructions given to the "*undercover agent*", and (b) for the agent to be available for cross examination. A formal application was made the following day. The SRA responded on 22 March 2019 opposing an adjournment and indicating that any arguments based on entrapment should be dealt with at an oral hearing.

22. On 26 March 2019, the SRA served a witness statement from Ms Joanna Potts, the producer of the Hardcash programme. Capsticks also wrote to Mr Naqvi explaining that the SRA had now located an audio recording of the first meeting with Client A. The letter explained that, although that recording had been provided to SRA pursuant to the December 2017 High Court order, it had not been passed by the SRA's

Supervision Directorate to its Legal and Enforcement team, and thus had been overlooked until enquiries were made after Mr Naqvi made a disclosure request on 15 March 2019 for a video recording of the first interview. That audio recording was provided to him by USB on 3 April 2019.

23. On 1 April 2019 Mr Naqvi confirmed that he wanted the unredacted version of the Home Office email included in the bundle as he wanted to rely upon it as part of his abuse of process argument. On the same day, the SDT gave a written decision in relation to the adjournment application which it had considered on paper. It said that on the evidence currently available it was satisfied Mr Naqvi would have a fair trial, but that if Agent A refused to attend or was not called that would be an additional ground for reopening the case of abuse based on unfairness and it would be able to hear such an application at the hearing on 15 April 2019.

24. Also on 1 April 2019, Mr Naqvi issued a further application to strike out the proceedings on the grounds of abuse of process which focused again on alleged prosecutorial misconduct in relation to the redaction of the Home Office email. In the alternative he gave notice that he wished to cross-examine Client A, Ms Lane, Ms Sandhu and Ms Jennifer Dunlop (the SRA Authorised Officer). On 4 April 2019, he issued witness summonses in the High Court for those four witnesses plus Ms Ogene and Ms Potts (notwithstanding that the SRA had indicated it would be calling her to give evidence at the hearing). The relevance of Ms Sandhu, Ms Dunlop and Ms Lane was said to be "prosecutorial misconduct".

25. On 4 April 2019, Mr Naqvi served a so-called "Counter-Notice" under Rule 13(3) (in other words a counter-notice to a hearsay notice). In that document he alleged that the transcript of the second interview had been edited and sought disclosure of similar cases dealt with by the SRA concerning other solicitors filmed in the same programmes. He also contended that the audio recording of the first interview was inadmissible even though he had sought its disclosure.

26. In his oral submissions on the present appeal, Mr Naqvi addressed the Court at some length about the application to strike-out dated 1 April 2019 and the "Counter-Notice" dated 4 April 2019, contending that the SDT had failed to deal with either. This was all part of his assertion that he was "unheard", to which I will return later in the judgment. For the present I need only note that, when asked repeatedly by the Court whether there was anything of substance in either document that was not repeated in one or other of his Skeleton Arguments before the SDT referred to in [27] and [29] below, he was unable to identify anything of substance that was not in those Skeletons. In those circumstances, it is unnecessary to consider either the application to strike out or the Counter-Notice in any further detail.

27. On 10 April 2019, Mr Naqvi served his Skeleton Argument for the SDT hearing, which was in two sections. The first three and a half pages dealt with the issue of entrapment and were signed by Mr Riza QC. There then followed a section headed "Credibility Issues with the Prosecution Evidence" running to the equivalent of six pages which was signed at the end by Mr Naqvi himself. It seems pretty clear (as is borne out from what happened at the hearing) that Mr Riza QC was not prepared to put his name to that second section.

28. On 10 April 2019, the SRA applied to set aside the witness summonses against Ms Lane, Ms Sandhu and Ms Dunlop. Ms Ogene made a parallel application. That application was heard by Freedman J on 11 April 2019 and he set aside the summonses. In his judgment the judge said that there was nothing in the allegation of fraudulent or dishonest conduct in relation to these witnesses and in any event that was not the case before the SDT, which concerned the events of 27 March 2015. So far as the redaction issue concerning Ms Ogene was concerned, he said at [49] that her understanding about the meaning and effect of the SDT Ruling of 4 December 2018 appeared to him to be justified, namely that the SDT was prepared to act on the basis of the redaction to the Home Office email which was to be undertaken by the SRA. However, he said that he made no final ruling because the SDT was better placed than the Court to opine on what happened.

29. On 15 April 2019, Mr Naqvi served a Supplementary Skeleton Argument on Abuse of Process signed by Mr Riza QC which dealt in particular with criminal offences which Client A was alleged to have committed and repeated that it was required that he attend to be cross-examined.

The hearing before the SDT

30. The hearing before the SDT took place over three days, 15 to 17 April 2019. In terms of what happened at the hearing, it is important to note what was recorded by the Tribunal in its judgment in the section headed: "Preliminary Matters". Having recorded at [12] that the application to adjourn had not been pursued although its basis was the same as that of the abuse of process submissions, the SDT continued at [14] to [16]:

> "14. The Tribunal had further received a counter notice under Rule 13(3) of the Solicitors (Disciplinary Proceedings) Rules 2007 ("SDPR") from the Respondent dated 5 April 2019. This document raised complaints about the timing of the disclosure of the audio recording of the first interview. It also included submissions that the Respondent had been entrapped and that the Applicant had engaged in prosecutorial misconduct. It also included submissions that the video and translations had been edited. It further contained a request for disclosure. The points raised in this document were all incorporated in to the submissions in relation to the Abuse of Process argument and were considered by the Tribunal in that context.
>
> 15.The Tribunal had also previously received a copy of a request for disclosure from the Respondent addressed to the Applicant dated 9 April 2019. No application for disclosure was pursued at the hearing but reference was made to it in the Respondent's own submissions and the Tribunal noted the Respondent's position. The Tribunal addressed the question of disclosure as part of its consideration as to whether there had been an Abuse of Process.

> 16.Mr Riza told the Tribunal that he would only be advancing the submissions referred to in his Skeleton Argument but that the Respondent himself may choose to make additional submissions. In the event the Respondent did not make any additional oral submissions to those made by Mr Riza. However, the Tribunal had regard to points raised in the Respondent's written submissions filed prior to the hearing."

31. The SDT then went on to consider the application to strike out the proceedings for abuse of process where the oral submissions on behalf of Mr Naqvi were advanced by Mr Riza QC. I will return to those submissions below. What happened after Mr Riza made his opening submissions on abuse of process is recorded at [17.19] of the judgment:

> "The Respondent began to make a submission concerning disclosure. After a short break in proceedings, Mr Riza assisted by explaining that the Respondent wanted disclosure of what had happened in other similar cases. He submitted that it was only fair he and the Tribunal should know how persons who featured in same programme, pursuant to this undercover operation were dealt with. This had been raised in correspondence between the parties. The Tribunal's attention was drawn to the Respondent's letter to the Applicant's solicitors dated 4 April 2019."

32. In his oral submissions to this Court, Mr Naqvi alleged that the members of the Tribunal had walked out of the hearing room and had refused to listen to his oral submissions. As he put it, he was "unheard". That is certainly not the impression one gets from [17.19], which is that once Mr Riza QC had finished his submissions and the applicant started addressing them, the Tribunal decided that it would be appropriate to have a break. When the members of the Tribunal returned, Mr Naqvi did not seek to address them again. Rather Mr Riza QC explained the nature of the disclosure application, with which the SDT then dealt in the judgment at [17.64]. There is no hint in [17.19] either that Mr Naqvi tried to make oral submissions after the break or that he was precluded from doing so. Mr Riza QC had told the Tribunal that Mr Naqvi might choose to make oral submissions (see [16], quoted above) and there would have been no reason for the Tribunal to preclude him from doing so if he had chosen to address them further.

33. During his oral submissions on this issue, the Court repeatedly asked Mr Naqvi if [17.19] accurately reflected what happened, but as we received no clear response, there is no basis for querying the accuracy of the account. One suspects that in the break, Mr Riza QC advised Mr Naqvi that it would be better if he explained the point about disclosure to the Tribunal and if Mr Naqvi did not make oral submissions, but that having taken that advice, Mr Naqvi now regrets doing so. Towards the end of his oral submissions, Mr Naqvi submitted that he should not be penalised for what Mr Riza QC had done, apparently suggesting that Mr Riza QC had been negligent in some way. However, as I pointed out, if Mr Naqvi had been proposing to advance that allegation, the Court would expect him to waive privilege so that Mr Riza QC could respond and provide an explanation. I would certainly not be prepared on the material before the Court to countenance any criticism of Mr Riza QC.

34. In any event, I am quite satisfied that there is no question of the SDT having stopped Mr Naqvi from making oral submissions if he had chosen to do so. It is clear from the judgment that the SDT approached its task conscientiously and considered carefully all the oral and written submissions of the parties as it expressly stated it had at [16] and again at [17.43] of the judgment. Indeed, [17.50], to which I will return below, provides an example of the Tribunal dealing specifically with one of the points that had only been raised by Mr Naqvi in written submissions. Furthermore, I have no doubt that if, as Mr Naqvi suggested, the SDT had shut him out from making oral submissions, Mr Riza QC would have registered a strong protest which would have led at the very least to an explanation in the judgment as to why the Tribunal had shut him out. In those circumstances, an allegation of unfairness in the conduct of the hearing and of breach of the rules of natural justice would no doubt have featured prominently in the Grounds of Appeal settled by Mr Riza QC. However, neither the judgment nor the Grounds of Appeal contain any hint of such a complaint.

35. Returning to the course of the hearing, after Mr Riza QC's explanation of the disclosure application, Mr David Bennett who then represented the SRA, made submissions in opposition to the strike out application. He then called Ms Potts to give evidence. She was cross-examined by Mr Riza QC. Mr Riza QC then made submissions in reply. As recorded in [17.65] of the judgment, the SDT then rejected the abuse of process case in its entirety and directed that the case should proceed, which it then did in the normal way.

36. After the three day hearing, the SDT reconvened on 13 May 2019 for a fourth day to deliberate and gave its decision that day, having heard submissions in mitigation and in relation to sanction. The written reasons for the decision were handed down on 7 June 2019.

The judgment of the SDT

37. In [9] of the judgment, the SDT recorded the SRA case that Client A had attended Mr Naqvi's office for the purpose of ascertaining whether there was a sufficient basis to carry out a second interview which would be video recorded. The judgment then sets out the transcript of the first interview. I do not propose to lengthen an already long judgment by setting out all those exchanges. Where passages matter for the purposes of the appeal, they are quoted later in this judgment.

38. At [10] of the judgment the SDT noted that following that interview, Hardcash obtained authorisation from ITV to carry out a further covert recording including by video of a second interview. This took place on 27 March 2015. The SDT then sets out the relevant exchanges between Client A and Mr Naqvi in the second interview. Again, I do not propose to set out all those exchanges as where they matter for the purposes of the appeal they are quoted later in this judgment.

39. The SDT then set out the Preliminary Matters to which I have already referred. In the next section of the judgment, [17], it dealt with the abuse of process application. It recorded in detail the submissions of Mr Riza QC as to why, in his submission, this had been entrapment amounting to an abuse of process. He relied upon the principle in *R v Loosley* [2001] UKHL 53 which he submitted applied not only to entrapment by state agents but by non-state agents. He submitted that *The Council for the Regulation of Healthcare Professionals v General Medical Council and Saluja* [2006]

EWHC 2784 (Admin); [2007] 1 WLR 3094, upon which the SRA relied, was distinguishable as it related only to doctors.

40. The SDT then set out the submissions of Mr Bennett for the SRA. At [17.24] it noted his submissions about the differences between state agents and non-state agents:

> "There was a significant degree of difference in the nature of proceedings and it would be an error of law for the Tribunal not to have those differences in mind. In this case, Mr Bennett submitted, the bar was not reached at all. There had been no misconduct and certainly no gross misconduct. At the first interview, far from being pushed into answering, the Respondent had responded to questions that had been put to him in a neutral and non-leading way."

Mr Naqvi insisted in his written and oral submissions that this was an admission of entrapment by the SRA. It was nothing of the kind. On the contrary, it was a submission as to why there had not been entrapment in this case.

41. The SDT summarised the evidence of Ms Potts, who was called by the SRA on the abuse of process issue. The SDT's decision rejecting Mr Naqvi's case on abuse of process is set out at [17.43] to [17.65]. It rejected the submission that the absence of Client A rendered the proceedings abusive, having regard to the availability of the recordings of the two interviews and of Ms Potts for cross-examination. The SDT did not consider that there was anything which Client A could usefully add to the evidence Ms Potts had given, on which she had been robustly cross-examined at length by Mr Riza QC.

42. At [17.50] the SDT dealt with the point made by Mr Naqvi in his written submissions that there was an abuse of process because the SRA had referred the matter to the SDT in April 2018 without being in possession of the audio recording of the first interview. The SDT pointed out that the SRA may not have had the recording, but they had the transcript. Ms Potts had said that the first interview was part of the research stage and the SDT found it assisted with understanding the context of the second interview. The absence of the recording of the first interview was not an abuse of process. There was enough evidence from the second interview to justify the reference to the SDT.

43. The judgment went on to consider *R v Loosley*, concluding that it was concerned with the conduct of state agents and executive agents of the state such as the police and was therefore not of assistance. In contrast, *Saluja* concerned the conduct of a journalist pretending to be a patient and the subsequent regulatory proceedings against the doctor. At [17.58] the SDT said it was entirely satisfied that *Saluja* not *Loosley* was the applicable authority as it addressed issues of entrapment in the context of the professional regulatory framework and at [17.59] the SDT rejected Mr Riza QC's submission that *Saluja* had no applicability to solicitors or that the SRA was under a greater duty of care than the police because solicitors were officers of the court.

44. At [17.60] and [17.61] the SDT made findings that there had not been any entrapment or criminality in fact:

> "17.60 The questions put by Client A to the Respondent in the interviews appeared open and fair. Crucially, the questions could have led to a different answer being provided by the Respondent to that which was given. The Tribunal did not find that Client A's role amounted to entrapment. The effect of those questions on the Respondent would be a matter for the Tribunal to determine after hearing all the evidence in the case. That would be the appropriate point to consider matters such as whether they had been talking at cross-purposes.
>
> 17.61The Tribunal considered Mr Riza's submission that the material forming the evidence against the Respondent had been obtained through criminality. Ms Potts had been cross-examined extensively. She said she would not have broadcast the material if she had any concerns as to the way in which the interviews had been conducted. There had been no Police investigation into her, into Hardcash or into ITV. There had been no complaint or finding by Ofcom. At all relevant stages of the process Ms Potts had been required to obtain clearance from the legal team at ITV. The Tribunal found no evidence that the material in this case had been obtained by criminality."

45. At [17.62] the SDT dealt with Mr Naqvi's suggestion that the transcripts were inaccurate or had been edited or manipulated in some way, concluding that this was not supported by any evidence and was no more than assertion and speculation on his part. It would have been open to him to produce his own transcripts but he had not done so despite having the transcript and video of the second interview from the outset of the proceedings.

46. At [17.64] the SDT dealt with the question of disclosure, stating:

> "The material that the Respondent sought was not relevant to the facts on which the Tribunal had to make a determination in this case. If a different decision had been taken in respect of different individuals, albeit in similar circumstances, that did not mean that the case against the Respondent should be halted and did to make that material relevant. The question for the Tribunal at the conclusion of the evidence and submissions would be whether it was satisfied beyond reasonable doubt that the Respondent was guilty of the professional misconduct alleged by the Applicant. The basis of the Allegations was limited to those matters contained in the Rule 5 Statement. The conclusion that may or may not have been reached in other cases was of no relevance. The Tribunal saw no basis to order disclosure and therefore did not consider that the absence of such material amounted to an abuse of process."

47. Having rejected the abuse of process case, the SDT dealt with the substantive allegations in its judgment. It summarised the live evidence given by Ms Potts who was recalled and by Mr Naqvi. It noted at [21] that the SRA was required to prove the allegations to the criminal standard and said at [22] that it had considered carefully all

the documents, witness statements and oral evidence together with the oral and written submissions.

48. In relation to the relevant legal principles, the SDT set out at [23] the test for integrity set out by Jackson LJ in *Wingate v SRA* [2018] EWCA Civ 366 at [100]. At [25] it set out the test for what constitutes dishonesty set out by Lord Hughes JSC in *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67 at [74]. At [26] the SDT said that it applied the *Ivey* test and adopted the following approach:

> "Firstly it established the actual state of the Respondent's knowledge or belief as to the facts, noting that the belief did not have to be reasonable, merely that it had to be genuinely held. Secondly, once that was established, the Tribunal then considered whether that conduct was honest or dishonest by the standards of ordinary decent people."

49. The SDT then dealt with each of the allegations set out in the Rule 5 Statement as quoted at [8] above in turn. In relation to Allegation 1.1 the SDT set out Mr Bennett's submission that Mr Naqvi had failed to advise Client A that applying for a visa as a spouse or partner on the basis of a relationship that was not genuine was unlawful. The SDT then set out Mr Riza QC's submissions, which it noted were applicable to all the allegations. At [27.4] it recorded his submission that this was a classic case of two people talking at cross purposes.

50. The SDT then made its findings. At [27.13] it rejected the argument that late service of the audio recording of the first interview rendered the proceedings unfair. At [27.14] it dealt with Mr Naqvi's repeated assertions that the audio and/or video evidence may have been edited and that the translations were inaccurate. In view of the significance which Mr Naqvi placed on this issue in his submissions on this appeal, it is worth quoting in full their findings at [27.14.1], [27.14.2], [27.14.3] and [27.14.5]:

> "27.14.1 The Respondent had repeatedly asserted that the audio and/or the video evidence may have been edited. He had also asserted that the translation and transcription had been done inaccurately and/or been edited. The Tribunal found no evidence to support the Respondent's assertions on this point. The Tribunal had heard evidence from Ms Potts about the circumstances of the recording. She had confirmed that the material that Hardcash had handed over was the unedited rushes of both interviews. Ms Potts had not been cross-examined on that point with any great vigour, but to the extent that she had been asked to confirm that the unedited footage had been handed over, she had done so. The Tribunal had found her to be a convincing and credible witness of truth. She had considerable expertise and experience in her field and it accepted her evidence.
>
> 27.14.2 Mr Bennett had provided the Tribunal with a certificate showing that the transcripts had been prepared by official Court reporters who were independent of the parties. There was no

> evidence to suggest that the transcription had been done improperly.
>
> 27.14.3 The Tribunal noted that it had been open to the Respondent to adduce expert evidence if he wished to challenge the authenticity or accuracy of the footage and/or the transcript. He had been in receipt of the footage and transcript of the second interview since the commencement of proceedings and he had not presented any evidence of the footage being doctored or the translations being wrong or of the transcription being inaccurate. He had also been in possession of the audio recording of the first interview for some weeks prior to the hearing.
>
> 27.14.5 The Tribunal was satisfied beyond reasonable doubt that what it had seen and heard was an unedited version of the two interviews and that there was therefore nothing in the argument advanced by the Respondent concerning the authenticity or accuracy of the audio or video footage or the transcripts."

51. At [27.15] the SDT considered again the issue of entrapment and the role of Client A as, although it had been unsuccessful as an abuse of process argument, it was relevant to whether it was established beyond reasonable doubt that Mr Naqvi was guilty of professional misconduct. At [27.15.2], it found that the justification for the second interview could be found in this exchange in the first interview:

> "[Client] A: I know some people who are married and they are staying here.
>
> N[aqvi]: Married? Here?
>
> A: Yes
>
> N: Yes, sometimes it is natural but sometimes people hook up. That is risky. We have got the visa for 5 years but those are genuine girls, but according to their circumstances, we provide them with legal aid."

52. At [27.15.3] the SDT said there was clearly a distinction being drawn between a "natural" situation and one which was "risky". The Tribunal was confident that the process gone through by the broadcasters and their lawyers had been robust and they had reasonable grounds for authorising a second interview. At [27.15.4] the SDT rejected the suggestion of entrapment in relation to the second interview, essentially for the same reasons as in relation to the abuse of process argument, saying:

> "Client A had not led the Respondent into saying what he had. There had been an element of Client A narrowing down the options but he had not taken it so far such that relying on the evidence would compromise the integrity of the proceedings. The Police did not investigate and neither had Ofcom. Client

> A's role had been scripted in compliance with the guidelines and the authority given."

53. At [27.18] and [27.19] the SDT identified and explained the difference between a legitimate arranged marriage and a sham marriage. At [17.20] the SDT noted that Mr Naqvi had argued he had been advising about an arranged marriage and that his reference to "hook up" or "tankah" in Urdu had been to welding two families together. The SDT said that evidence was not credible or consistent with the evidence of the transcript, several passages of which the Tribunal then relied upon.

54. At [27.21] it cited a passage at the beginning of the second interview, where, as it said, Mr Naqvi had drawn a distinction between the two types of marriage scenario:

> "N: Either you go properly towards a marriage
>
> A: Mmm.
>
> N: That is, if you have an offer and someone is available
>
> A: Mmm.
>
> N: Like you have some relatives on whom you can trust or someone similar. Then you can go for that.
>
> A: Mmm.
>
> N: Otherwise if you will give money for it, then that is very shaky
>
> A: Mmm.
>
> N: It is doubtful.
>
> A: I see
>
> N: They will take the money, 2, 3,000, 5,000, 10,000, and then they will vanish.
>
> A: Mm-hmm.
>
> N: And at the eleventh hour from the marriage centre, civil centre, if you are caught, that is also very shameful
>
> A: Mmm. But, I mean, there is somewhat risk in it but it is that something that, I mean, if I decide to go ahead with it, [Urdu] what will happen? Is it possible or impossible?
>
> N: It is possible but depends on your own ties."

55. At [27.22] the SDT cited the following passage from later in the second interview as relevant to whether what was being discussed was a genuine or non-genuine relationship:

> "A: But how? I mean, actually I cannot live with her.
>
> N: Why?
>
> A: So you are saying [drops the sentence]. Because it is not a genuine relationship in any case.
>
> N: Then don't tell me. I don't know that.
>
> A: Mm-hmm.
>
> N: As far as I am concerned, you will bring evidence and give it to me
>
> A: Right, right, right.
>
> N: Whether it is genuine or not, I don't know that. Whoever comes to me is a genuine man giving me authority to certify the papers to proceed the application."

56. At [27.23], the SDT cited this further passage:

> "N: Obviously. We are not concerned, we just have been provided, this is the evidence; these are the people; they are just giving their own evidence. So, we, there is no other responsibility
>
> A: Ok
>
> N: because we are not taking any undue money, like, 10,000, 15,000, 20,000 as there are people doing it. We are not doing it like that; we are just charging whatever is just the services –
>
> A: Yeah, regardless –
>
> N: -legal services
>
> A: Regardless of whether the relationship is genuine or not.
>
> N: You see, we will work only when you will give us your undertaking. We believe in your declaration."

57. At [27.24] to [27.26] the SDT made these findings about these exchanges:

> "27.24 The Tribunal found that it was abundantly clear that Client A was referring to a relationship that would not be genuine as he had explicitly said so. The starkest example of this was when he had told the Respondent "it is not a genuine relationship in any case". This left no room for misunderstanding or talking at cross-purposes.

> 27.25 The Tribunal rejected the Respondent's evidence as it was contradicted by the contemporaneous evidence.
>
> 27.26 The Tribunal was satisfied beyond reasonable doubt that the Respondent was fully aware of what Client A was asking him about. The Respondent had advised him that such an arrangement may be "very shaky", "very shameful" and risky but at no time did he advise him that to make an application on this basis would be unlawful."

58. Accordingly, it concluded at [27.28] that the factual basis of Allegation 1.1 was proved beyond reasonable doubt. Mr Naqvi was said to have been in breach of three of the SRA Principles, 2, 4 and 6 quoted at [9] above. The SDT found that breach of each of those principles was proved beyond reasonable doubt.

59. At [28.2] the SDT recorded Mr Bennett's submissions, applicable in relation to both Allegation 1.2 and Allegation 1.3 (as set out at [8] above). He submitted that Mr Naqvi had acted in breach of SRA Principles 1, 2, 3 and 6. At [28.3] the SDT set out Mr Bennett's submission that Mr Naqvi's conduct had been dishonest.

60. The SDT set out its findings from [28.5] onwards. It dealt first with Mr Naqvi's explanation that much of the advice he had given to Client A was generic. It identified a number of passages in the second interview which were relevant to the question whether Mr Naqvi had advised Client A not to tell him if he was making an application based on a non-genuine relationship, starting with the passage I have already cited at [55] above and then a later passage:

> "A: Mmm. If it is not genuine at the time of the beginning, and it is not genuine at the time the application was filed, then what?
>
> N: I don't know that."

61. The SDT cited the following passage as relevant to the provision of evidence:

> "N: Where different banks are, you provide them. This is our rent agreement, here we have moved –
>
> A: Mm-hmm.
>
> N:- transfer our bank statements here –
>
> A: Mmm
>
> N:- for the post to deliver.
>
> A: Whether in reality we are living there or not
>
> N: I don't know this. You are living there –it's not for me."

62. At [28.6] the SDT concluded:

> "The Tribunal was satisfied beyond reasonable doubt that on several occasions the Respondent advised Client A that he did not wish to know that the relationship may not be genuine and that he should therefore not disclose it to him. The Tribunal had already rejected the suggestion that they had been talking at cross-purpose when considering Allegation 1.1."

63. Accordingly, it found that the factual basis of Allegation 1.2 was proved beyond reasonable doubt. It went on to find breach of Principles 1, 2, 3 and 6 proved beyond all reasonable doubt. The SDT went on to conclude at [28.12] that Mr Naqvi knew Client A was contemplating a relationship that would not be genuine and that he was considering making an application to the Home Office based on that non-genuine relationship. He knew that this was wrong as he had advised Client A not to tell him this. There were repeated examples of Mr Naqvi advising Client A not to tell him something. This was not generic advice but specific advice being given in the knowledge that Client A was talking about a sham marriage. Mr Naqvi had been deliberately closing his eyes to the obvious so as to avoid responsibility and to be able to deny it if the sham were exposed. The SDT found beyond reasonable doubt that this would be dishonest by the standards of ordinary decent people.

64. In relation to Allegation 1.3 (as set out at [8] above), at [29.3] the SDT repeated its finding that Client A had made it clear that he was intending or likely to make an application based on a relationship that was not genuine. The SDT said that Mr Naqvi's willingness to advise and assist in that application was clear from the transcript. At no time did he say that he could not advise or assist, he was clearly offering his services. The SDT found the factual basis of Allegation 1.3 proved beyond reasonable doubt, as were breaches of Principles 1, 2, 3 and 6.

65. At [29.5], the SDT found that Mr Naqvi was aware that he was offering to advise and/or assist Client A as that was the whole purpose of the second interview. He also knew the distinction between the different types of marriage and when advising and assisting would have been in no doubt that the only option being seriously considered by Client A was a non-genuine marriage. The SDT found beyond reasonable doubt that advising and assisting in that knowledge would be considered dishonest by the standards of ordinary decent people.

66. In relation to Allegation 1.4, at [30.1] the SDT noted Mr Bennett's submission that Mr Naqvi had proactively advised Client A on the steps that could be taken to increase the prospects of the visa application being successful in circumstances where he knew or ought to have known that the relationship that would form the basis of this application may not be genuine.

67. In its findings at [30.4] the SDT identified several passages in the second interview where Mr Naqvi had specifically advised Client A on steps he could take to increase his prospects of the application being successful. First, he advised as to the documentary evidence Client A should obtain:

> "A: If we both come to you, how can you help in this?
>
> N: In that case, we will advise you to go to the Council and register it and then, further, we will lodge your application

> stating: These are the proofs of our joint living. You need to immediately start making joint living proofs."

68. The SDT also referred to this passage later in the interview:

> "N: You will provide evidence that these are our joint living proofs.
>
> A: So you just show your joint living proofs?
>
> N: What else do you need? Her ID, your ID for the purpose of getting your marriage registered. Once that is registered, you can go for a spouse visa.
>
> A: I see. So, other than proof of address you don't need anything else. So, its ID and proof of address?
>
> N: Evidence, very solid evidence, like surgery letters in the name of both of you at the same address. Your bank statements in the same name, in the same bank, even if it is not in the same bank account you name should be there from the, at the same address though from the different banks, but your bank statements should be coming at the same address.
>
> A: Mm-hmm.
>
> N: And then the council tax –
>
> A: I see
>
> N: -or utility bill, gas bill, Asda card, Tesco card, Sainsburys –
> A: So –
>
> N: You know."

69. The SDT noted that Mr Naqvi had also advised Client A on how to deal with any questions about the relationship, of which an example was:

> "N: In the interview [Urdu], they ask how you met each other, where you met, how, where, when, what happened?
>
> A: When you will submit the file, what would you have to write in it? Will you pass on all that evidence you mentioned?
>
> N: Yes. There will be evidence; your statements should be ready; we will prepare your declarations.
>
> A: What will be there in the declaration?
>
> N: Your statements. Declaration is such a thing as you cannot later deny because that is a legal document. But we will only

> give a statement because sometimes something gets over emphasised or under emphasised, and one can cover it up.
>
> A: So what will you write in that statement?
>
> N: It will be like how your relationship developed –
>
> A: Ok.
>
> N: -and your statuses –
>
> A: Mmm.
>
> N:- and how it turned up into the relationship, genuine relationship, and how you became indispensable for each other"

70. As the SDT said, Mr Naqvi had also advised that the nationality of the proposed spouse might affect the application:

> "A: And then should the girl be a British National or European? [Urdu]. Which of the two is easier?
>
> N: It is good for back home but if she is from the European Union [Urdu] it would be easier.
>
> A: Okay. So is there any age etc?
>
> N: She should be exercising her [European Union] Treaty Rights. [Urdu] She must be living here and working here."

71. He had also advised that the prospects of success would diminish if the proposed spouse did not have a good level of English language skills:

> A: Ok. A question comes to mind, if I go and file an application and my partner is suppose Eastern European, European girl, whose English is let's say a bit weak. Would they not ask how, I mean, how you guys are marrying each other? Why are you doing it?
>
> N: Yes they will ask. This is a very demerit in the case."

72. Having cited those passages from the second interview the SDT concluded at [30.5]:

> "The Tribunal found that this advice was tantamount to a coaching session. The Respondent had referred to Client A producing "unrebuttable" evidence as they were official documents. In doing so he was giving Client A a list of documents and other advice in the context of what was clearly a sham marriage. He further advised that it was Client A who had to sign the declaration."

The SDT found the factual basis of Allegation 1.4 proved beyond reasonable doubt, as were breaches of Principles 1, 2 and 6.

73. At [30.8] the SDT considered the issue of dishonesty in relation to Allegation 1.4. It concluded:

> "The Respondent knew that he was providing the Client with a list of things to do and say. He had told him that he did not want to know if the basis was untrue, simply stating "we believe in your declaration". The evidence which he was advising the Client to get would, in itself, be untrue. The Respondent knew this as he knew that the relationship proposed was not a genuine one."

The SDT found beyond reasonable doubt that Mr Naqvi's conduct would be dishonest by the standards of ordinary decent people.

74. The SDT went on to consider mitigation. It noted that Mr Riza QC contended that whilst there had been a finding of dishonesty, Mr Naqvi's misconduct was mitigated by the fact that it had been provoked by the deception of Agent A, without which it would not have occurred. Mr Naqvi had voluntarily contacted the SRA. This was a single episode in an otherwise unblemished career.

75. The SDT then considered the question of sanction by reference to the Guidance Note on Sanctions (December 2018). In assessing culpability, it identified the following factors: (i) it was not a case of entrapment but it had been prefaced by Client A coming into the office and seeking advice. Mr Naqvi did not know that he was a real client and clearly considered him one when giving advice; (ii) the advice was spontaneous as he did not know Client A would ask the questions he did; (iii) the public trusted solicitors to give proper advice in accordance with the law and there had been a breach of trust which impacted the public. Mr Naqvi also had a duty to the Home Office not to advise on illegitimate applications; (iv) Mr Naqvi had direct control over the circumstances as he alone was responsible for the advice he chose to give; and (v) he was experienced.

76. In assessing harm, the SDT accepted that no harm had come to Client A. The damage to the profession was huge. The matter had been broadcast on national television which would have a significant impact on the public perception of the profession.

77. The aggravating factors were dishonesty and that Mr Naqvi knew or ought to have known that his conduct was in material breach of his obligations. The SDT rejected Mr Riza QC's submission that the involvement of Client A was a mitigating factor as if Client A had been a genuine client he would have received the same advice. It considered that Mr Naqvi's notification to the SRA and the fact that it was an isolated episode were mitigating factors. There had been no admissions but he had fully engaged with the proceedings. The Tribunal had detected no insight having listened carefully to his evidence.

78. The misconduct was so serious that a reprimand, fine or restriction order were not sufficient sanction to protect the public or the reputation of the profession from future harm by Mr Naqvi. The misconduct was at the highest level and the only appropriate

sanction was striking off. The Tribunal considered whether there were any exceptional circumstances making such an order unjust. At [55] it rejected the suggestion that the involvement of an undercover reporter was exceptional, holding that: "[his] presence was an interesting aspect of the background but the prime mover had been [Mr Naqvi] and that excluded the possibility of exceptional circumstances." No other factor had been identified as exceptional circumstances by Mr Riza. The Tribunal ordered that Mr Naqvi be struck off the Roll and that he pay the SRA's costs.

The grounds of appeal

79. Grounds of Appeal dated 26 June 2019 were settled by Mr Riza QC. Grounds 1 to 4 related to the entrapment issue. Grounds 1 and 4 contend that the SDT erred in law in not applying *Loosley* which is said to be of general application. Ground 2 contends that it was an abuse of process to rely on evidence tainted by illegality and Ground 3 contends that it was an abuse of process to rely upon the evidence of Client A without calling him.

80. Ground 5 of the Grounds settled by Mr Riza QC contends that the SDT erred in law in its finding of dishonesty. Ground 6 contends that it erred in fact and law in its finding at [55] that the involvement of the undercover reported did not amount to exceptional circumstances.

81. Mr Naqvi then served Additional Grounds drafted and signed by him dated 2 July 2019 which raised the following:

(A) There had been discrimination against him by the SDT declining disclosure of similar cases;

(B) The SDT had erroneously ignored his application to strike out dated 1 April 2019;

(C) The SDT erred in not appreciating that Ms Potts was an "interested witness".

(D) The SDT erred in not taking account of errors in the translations to which Mr Naqvi had objected from the outset.

(E) The SDT erred in ignoring Mr Naqvi's Notice to Admit dated 9 April 2019;

(F) The SDT erred in concluding that he was dishonest given its finding that he had no insight and the absence of the necessary *mens rea*.

(G) The SDT erred in appreciating the presence of *mens rea* behind the recurring abuse of process by the SRA.

(H) The SRA did not call any expert evidence on immigration law to challenge his advice.

82. Grounds (I) to (K) complain about the award of costs and raise the issue of Mr Naqvi's financial circumstances.

The applicable legal principles

83. Before considering the submissions of the parties, it is appropriate to set out the applicable legal principles as to the approach to be adopted by this Court to an appeal against the decision of a specialist disciplinary tribunal such as the SDT, These were summarised in my judgment in the Divisional Court case of *Solicitors Regulation Authority v Siaw* [2019] EWHC 2737 (Admin) at [32]-[35]:

> "32. The appeal is by way of review not rehearing: CPR 52.21(1), so that the Court will only allow an appeal where the decision is shown to be "wrong": CPR 52.21(3)(a). This can connote an error of law, an error of fact or an error in the exercise of discretion. That an appellate court should exercise particular caution and restraint in interfering with the findings of fact of a lower court or tribunal, particularly where that court or tribunal has reached those findings after seeing and evaluating the witnesses, has been emphasised time and again in the authorities, most recently in the case of the SDT by the Divisional Court (Davis LJ and Foskett and Holgate JJ) in *Solicitors Regulation Authority v Day* [2018] EWHC 2726 (Admin), where many of the authorities are usefully cited at [64] to [68] of the judgment, culminating in citation of what was said by Lord Reed in *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 WLR 2600 as to the correct approach, at [62] and [67] of his judgment:
>
> > "The adverb "plainly" [qualifying "wrong"] does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached….
> >
> > It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."
>
> 33. As the Divisional Court went on to say at [69], the appropriate restraint on the part of an appellate court is still called for where the conclusion of the lower court or tribunal is not just as to the primary facts, but as to the evaluation of those facts. The appellate court should only interfere if there was an error of principle in carrying out the evaluation or for any other reason the evaluation was "wrong", in other words, was an evaluative decision which fell outside the bounds of what the

> court or tribunal could properly and reasonably have decided. The particular caution and restraint to be exercised before interfering with an evaluative judgment by a specialist tribunal, where that tribunal has made an assessment having seen and heard the witnesses, was emphasised in the context of the SDT by the Divisional Court in *Day* at [71] and in the context of the Medical Practitioners Tribunal ("MPT") by the Court of Appeal in the recent cases of *General Medical Council v Bawa-Garba* [2018] EWCA Civ 1879; [2019] 1 All ER 500 at [67] of the judgment of the Court (Lord Burnett CJ, Sir Terence Etherton MR and Rafferty LJ) and *General Medical Council v Raychaudhuri* [2018] EWCA Civ 2027; [2019] 1 WLR 324 at [57] per Sales LJ (as he then was) and at [74] per Bean LJ.
>
> 34. Similar restraint should be exercised by an appellate court before interfering with the sanction imposed by a specialist disciplinary tribunal for professional misconduct. That involves a multi-factorial exercise of discretion and evaluative judgment by the relevant tribunal, which is particularly well-placed to assess what sanction is required in the interest of the profession and to protect the public. It is well-established that the court will only interfere if the sanction passed was "in error of law or clearly inappropriate": see the authorities cited and summarised by Carr J at [69] and [70] of her judgment in *Shaw v Solicitors Regulation Authority* [2017] EWHC 2076 (Admin); [2017] 4 WLR 143; and see also my judgment in the Divisional Court in *Solicitors Regulation Authority v James* [2018] EWHC 3058 (Admin); [2018] 4 WLR 163 at [53]-[55].
>
> 35. Applying those principles to the present appeal, this Court should only interfere with the decision of the SDT that the respondent was not dishonest and as to the appropriate sanction if satisfied that in reaching the particular decision the SDT committed an error of principle or its evaluation was wrong in the sense of falling outside the bounds of what the SDT could properly and reasonably decide."

84. In relation to the test as to when the Court will interfere with the sanction imposed as set out at [34] of that judgment, Mr Naqvi relied upon the judgment of Mostyn J in *Obi v Solicitors Regulation Authority* [2013] EWHC 3578 (Admin) where the judge deprecated the use of the adverb "plainly" before "wrong" in determining whether the decision on sanction is one with which the Court would interfere. However, as Mr Simon Paul, counsel for the SRA submitted, on analysis of what that judge said at [7]-[8] of his judgment, he was not in fact advocating a different test from that which other cases have held should be adopted: see [70] of the judgment of Carr J (as she then was) in *Shaw* where *Obi* is cited.

The parties' submissions

85. Mr Naqvi served a number of documents for this appeal hearing: (i) a "Skeleton Argument on the Core Issue of Page 1"; (ii) a 60 page document entitled:

"Appellants' Essential Pages, Passages and Sentences on Entrapment and Abuse of Process of Law" and (iii) The Appellant's Reply to the Respondent's Skeleton Arguments. Various versions of the first two documents were served, but the Court had regard to what Mr Naqvi informed us were the most up to date versions dated 4 May 2020. The Reply to the SRA Skeleton was served on 11 May 2020, the day before the hearing. These documents raise a number of matters, some of which go beyond the Grounds and Additional Grounds. Whilst it is not possible to set out every point made in what is already a long judgment, the Court has considered carefully each of those documents and the oral submissions from Mr Naqvi at the hearing, which extended for some 4 ¼ hours including his reply. What follows is intended to be a summary or distillation of the main issues raised in his documentary and oral submissions, not a recitation of every point he made.

86. In relation to the issue of entrapment, Mr Naqvi submitted that the SDT had wrongly proceeded on the basis that entrapment only applied in the case of a state agent. He submitted that it could be equally applicable to a non-state agent like Client A. The SDT had been wrong to conclude that the unavailability of Client A for cross-examination was not an abuse of process. Mr Riza QC had wanted to cross-examine him on a number of issues, including his intentions, his instructions and whether he had exceeded his instructions.

87. He submitted that it was no answer to say that the SDT had had the transcript of the two interviews, given that the transcripts could well have been edited and inaccurate. Mr Naqvi relied upon a conversation he had had with Mr Gull of Gull Law Chamber, another solicitor who had been the subject of a documentary, as it transpired not the ITV documentary which exposed Mr Naqvi but a BBC programme. Mr Gull had told him that the transcripts of his own interview had been edited. Mr Naqvi submitted that given that there was a possibility the transcripts of his own interview had been edited and that the translations were inaccurate, cross-examination of Client A was crucial. He had been deprived of a fair hearing and of the opportunity to test Client A. He drew attention to the paragraphs in the judgment referring to matters on which Mr Riza QC had wanted to cross-examine Client A.

88. The suggestion that the transcripts of the interviews had been edited and the translations were inaccurate featured repeatedly in Mr Naqvi's oral submissions. The Court reminded him that the SDT had accepted the evidence of Ms Potts as a convincing and credible witness and her evidence had been that the material handed over by Hardcash had been unedited. We also reminded him of what the SDT had said about the absence of any evidence from him that the transcripts were edited and the translations inaccurate and asked him what evidence he had to support that assertion. He was unable to identify any evidence. He continued to criticise the SDT for declining to order disclosure of the similar cases of other solicitors exposed by undercover agents particularly Mr Gull whose transcript had been edited and contended that this had been discrimination against him.

89. Mr Naqvi maintained his criticism of Ms Potts as an interested witness, in the sense that she was aware that it was being said that Mr Naqvi had been entrapped and that Hardcash had misconducted themselves and, in the correspondence with Hardcash, Mr Naqvi had said he would sue them. The suggestion appeared to be that because of those matters, her evidence was untruthful or unreliable. He also contended that her evidence was unreliable because it was hearsay. He relied upon the fact that it was Ms

Double not Ms Potts who had handed over the video of the second interview and the fact that in her evidence summarised at [17.35] reference was made several times to "they" meaning Hardcash as a company rather than Ms Potts individually.

90. Mr Naqvi also spent some time taking the Court through the transcript of the second interview seeking to demonstrate that he and Client A had been at cross-purposes and that the advice he had given had been generic advice about an arranged marriage. He submitted that both the SRA and the SDT had been selective, picking and choosing passages whereas the transcript as a whole demonstrated that he had not been guilty of misconduct.

91. The "Core Issue of Page 1" is Mr Naqvi's complaint about the incorrect reference in the Home Office email of 24 February 2017 to his having been arrested and released on bail. This matter assumed considerable prominence in his written and oral submissions to the Court. Mr Naqvi appeared to be making a number of points: (i) that there had been prosecutorial misconduct by the SRA in failing to investigate the accuracy of the email before exhibiting it to the Rule 5 Statement; (ii) that he had been prejudiced by the unredacted email having been before the SDT at the time of the decision that there was a case to answer and (iii) that the redaction of the email by the SRA without an Order from the SDT was a misuse of power. The first two points were said to vitiate the entire proceedings so that there was an abuse of process. Mr Naqvi submitted that the SDT had failed to deal at all with this Core Issue and that he had been "unheard".

92. Mr Naqvi maintained his criticism of the fact that, when the SRA referred the matter to the SDT in April 2018 they had done so without having the audio recording of the first interview. He submitted that it was an abuse of process to have done so.

93. On behalf of the SRA, Mr Paul submitted that there were two broad grounds of appeal being pursued by Mr Naqvi before the Court: (i) that the SDT had wrongly concluded that there was not an abuse of process given the nature of the evidence from the undercover reporter; and (ii) having gone on to consider the substantive case, the SDT had been wrong to make the findings of fact it did.

94. He submitted that there was no error of law in the decision to dismiss the abuse of process application and the SDT had carefully weighed all the relevant factors. The background was the two interviews which were recorded and broadcast in the ITV programme then shared with the Home Office who in turn shared the matter with the SRA who then pursued the disciplinary proceedings. It would be surprising if it were an abuse for the SRA to look into the matter, as doing so clearly reflected the public interest. Although the SDT did not have Client A to give evidence, it had something a fact finder rarely has, a recording and transcription of the entirety of the relevant transactions. Mr Paul submitted that, unless Mr Naqvi could successfully attack the SDT finding that the transcript was unedited and complete, he had a very high hurdle in attacking the findings of fact which were made at the end of a three day hearing at which Mr Naqvi was represented by leading counsel, who had cross-examined Ms Potts extensively. The SDT findings were crystal clear in rejecting comprehensively Mr Naqvi's case that he and Client A had been at cross purposes.

95. In relation to Grounds 1 and 4 drafted by Mr Riza QC, Mr Paul submitted that there was no error of law in applying *Saluja* and not *Loosley* in this case, which clearly

concerned a non-state agent. The application of the principles of *Saluja* to non-state agents generally had been confirmed by Lord Burnett of Maldon CJ giving the judgment of the Court of Appeal Criminal Division in *R v L(T)* [2018] 1 WLR 6037 which approved *Saluja*. Mr Paul asked the Court to note that the SDT had, in any event, found at [17.60] that on the facts there was no entrapment and there was no ground of appeal that if *Saluja* applied, those findings nevertheless satisfied the *Saluja* test of gross misconduct or commercial lawlessness.

96. In relation to Ground 2, that the SDT had erred in relying on evidence tainted by illegality, Mr Paul submitted that there was no coherent case put forward as to what the illegality of Client A was. There was a suggestion in the grounds that he had committed an inchoate criminal offence of attempting to procure a visa by deception. However, section 1 of the Criminal Attempts Act 1981 required *mens rea*, in other words an intent to commit the offence. It was not clear how Client A could have had an intent to commit the offence of obtaining a visa by deception when his intention was not to obtain a visa but to investigate Mr Naqvi's activities.

97. In any event, Ms Potts had been cross-examined about this issue and at [17.61] the SDT found there was no criminality. Even if the source of the evidence were illegality that would not have rendered the proceedings an abuse. Mr Paul relied upon *Jones v University of Warwick* [2003] EWCA Civ 151; [2003] 1 WLR 954 where the Court of Appeal said this at [24] about illegally obtained evidence:

> "Fortunately, in both criminal and civil proceedings, courts can now adopt a less rigid approach to that adopted hitherto which gives recognition to the fact that there are conflicting public interests which have to be reconciled as far as this is possible. The approach adopted in *R v Karuna* [1955] AC 197 and *R v Sang* [1980] AC 402 and *R v Khan (Sultan)* [1997] AC558 which was applied by the Judge has to be modified as a result of the changes that have taken place in the law. The position in criminal proceedings is that now when evidence is wrongly obtained the court will consider whether it adversely affects the fairness of the proceedings and, if it does, may exclude the evidence (section 78 of the Police and Criminal Evidence Act 1984). In an extreme case, the court will even consider whether there has been an abuse of process of a gravity which requires the prosecution to be brought to a halt (see *R v William Loveridge & Others* [2001] 2 CAR 29 and *R v Mason &* Others [2002] 2 CAR 38 (paragraph 50, 68 and 76). In civil proceedings, as Potter LJ recognised this in *Rall v Hume* [2001] 3 All ER 248, he commenced by saying:
>
> > "In principle the *starting point* in any application of this kind must be that where video evidence is available which, according to the defendant undermines the case of the claimant to an extent that would substantially reduce the award of damages to which she is entitled, it will usually be in the overall interests of justice to require that the defendants should be permitted to cross-examine the

> claimant and her medical advisors upon it." (emphasis added)"

98. Mr Paul also made the point that given that one of the allegations against Mr Naqvi was that he failed to advise Client A that the proposed course of conduct would be unlawful, it would be strange if he could rely on the very illegality of which it was alleged he had failed to advise Client A to defeat an allegation of professional misconduct based on that potential illegality.

99. In relation to Ground 3, that the SDT erred in concluding that the proceedings could continue without Client A being called as a witness, Mr Paul submitted that the SRA had carefully weighed all the relevant factors including the recording of the entire interviews and that Mr Riza QC had been able to cross-examine Ms Potts on the matters he would have put to Client A. The SDT had been entitled to conclude there was no unfairness in proceeding without Client A and this Court could not interfere unless that was a decision no reasonable tribunal could have reached.

100. Mr Paul submitted that, contrary to submissions advanced by Mr Naqvi, there was no absolute right to cross-examine and what fairness requires is context specific, relying on [109]-[110] of *R (Bonhoeffer) v General Medical Council* [2011] EWHC 1585 (Admin). In this case the SDT had been entitled to weigh the relevant factors and conclude that the proceedings could be conducted fairly despite Client A's absence.

101. In relation to the findings of dishonesty, contrary to Ground 5, there was no error of law and the approach of the SDT could not be faulted. It had cited the relevant test from *Ivey* and then restated the necessary two-stage approach at [26] of its judgment. It then made findings of fact adopting that approach, rejecting Mr Naqvi's cross purposes case and finding not only that he deliberately closed his eyes when talking about sham marriage but that he knew that Client A was talking about sham marriage because he had expressly said so. Having made those findings as to Mr Naqvi's state of mind, the SDT considered the second stage, whether the conduct was objectively dishonest and concluded that it was, a conclusion which cannot be faulted.

102. The various points made in the Submissions at [5] of the Grounds drafted by Mr Riza QC were misconceived. At (a) it was said that the conduct of Mr Naqvi was not of an acquisitive nature, but there is no requirement in law for conduct to be acquisitive for it to be dishonest. Motive is often relevant to allegations of dishonesty but it is not a necessary ingredient: *Mortgage Agency Services v Cripps Harries LLP* [2016] EWHC 2483(Ch) at [88] per Mann J.

103. At (b) it is suggested that Mr Naqvi could not be dishonest in a vacuum and the dishonesty here was towards someone who was himself dishonest. Mr Paul submitted that the premise was not correct, as the gravamen of the allegation against Mr Naqvi was not only related to Client A, but that he was prepared to engage in a course of conduct to deliberately circumvent the Immigration Rules. In any event the fact that Client A was allegedly dishonest would not preclude a finding of dishonesty against Mr Naqvi as claims for contribution between people who have dishonestly assisted in the same fraud demonstrate.

104. At (d) Mr Riza QC contended that the finding of dishonesty was wrong in law because the highest it could be put was that Mr Naqvi had turned a blind eye to

whether the proposed marriage would be genuine. Mr Paul submitted that this was wrong as a matter of law since it was well-established that blind-eye knowledge was sufficient to establish dishonesty and, in any event, overlooked the fact that the SDT had also found that Mr Naqvi had actual knowledge that what was being discussed was a non-genuine marriage.

105. In relation to the findings of the SDT on mitigation and the appropriate sanction, Mr Paul submitted that there was no basis upon which it could be said that the evaluation of the SDT that the only appropriate sanction for this misconduct and dishonesty was striking off and that there were no exceptional circumstances here making the imposition of that sanction unjust was in error of law or clearly inappropriate. In particular the SDT had been right to reject Mr Riza QC's submission that the involvement of an undercover reporter constituted exceptional circumstances. The SDT had correctly concluded at [55] that Mr Naqvi was the "prime mover" in the sense that the questions Client A asked were not leading, he had not lured Mr Naqvi into the misconduct but simply afforded him the opportunity to commit dishonest professional misconduct.

Discussion

106. Contrary to the submissions made on behalf of Mr Naqvi, the SDT did not err in law in concluding that the principles enunciated in *R v Loosley* [2001] UKHL 53; [2001] 1 WLR 2060 did not apply in the present case. The two appeals heard together both concerned alleged entrapment by the police and the principles enunciated were thus concerned with alleged misconduct by state agents such as the police. This is clear from [25] of the opinion of Lord Nicholls of Birkenhead:

> "25. Ultimately the overall consideration is always whether the conduct of the police or other law enforcement agency was so seriously improper as to bring the administration of justice into disrepute. Lord Steyn's formulation of a prosecution which would affront the public conscience is substantially to the same effect: see *R v Latif* [1996] 1 WLR 104, 112. So is Lord Bingham of Cornhill CJ's reference to conviction and punishment which would be deeply offensive to ordinary notions of fairness: see *Nottingham City Council v Amin* [2000] 1 WLR 1071, 1076. In applying these formulations the court has regard to all the circumstances of the case."

107. To like effect is the opinion of Lord Hoffmann at [36]:

> "Entrapment occurs when an agent of the state—usually a law enforcement officer or a controlled informer—causes someone to commit an offence in order that he should be prosecuted."

108. *The Council for the Regulation of Healthcare Professionals v General Medical Council and Saluja* [2006] EWHC 2784 (Admin); [2007] 1 WLR 3094 concerned a doctor who had offered in return for payment to provide a fake sick note to a journalist posing as a patient. The Council for the Regulation of Healthcare Professionals appealed against the decision of the General Medical Council to stay disciplinary proceedings against the doctor as an abuse of process on the grounds that

since the journalist's actions were not those of an agent of the state, this was not abusive entrapment. Goldring J allowed the appeal. At [79] to [85] of his judgment he set out the principles he derived from the authorities, in so far as they are relevant to the present appeal:

> "79. First, to impose a stay is exceptional.
>
> 80. Second, the principle behind it is the court's repugnance in permitting its process to be used in the face of the executive's misuse of state power by its agents. To involve the court in convicting a defendant who has been the victim of such misuse of state power would compromise the integrity of the judicial system.
>
> 81. Third, as both domestic and European authority make plain, the position as far as misconduct of non-state agents is concerned, is wholly different. By definition no question arises in such a case of the state seeking to rely upon evidence which by its own misuse of power it has effectively created. The rationale of the doctrine of abuse of process is therefore absent. However, the authorities leave open the possibility of a successful application of a stay on the basis of entrapment by non-state agents. The reasoning I take to be this: given sufficiently gross misconduct by the non-state agent, it would be an abuse of the court's process (and a breach of article 6) for the state to seek to rely on the resulting evidence. In other words, so serious would the conduct of the non-state agent have to be that reliance upon it in the court's proceedings would compromise the court's integrity. There has been no reported case of the higher courts, domestic or European, in which such "commercial lawlessness" has founded a successful application for a stay. That is not surprising. The situations in which that might arise must be very rare indeed.
>
> 82. As will become apparent, I do not accept that for a journalist to go into a doctor's surgery and pretend to be a patient in circumstances such as the present is similar to abuse of power by an agent of the state.
>
> 83. Fourth, in the present disciplinary hearing there is no state involvement in the proceedings being brought. These are proceedings *3111 brought against a doctor by his regulator in order to protect the public, uphold professional standards and maintain confidence in the profession. These are to a significant degree different considerations from those that apply to a criminal prosecution and misuse of executive powers by the state's agents.
>
> 84. Fifth, it would be an error of law in considering any application for abuse of process for the tribunal not to have well in mind the differences to which I have referred. It would

> not be appropriate for an FPP to approach the conduct of journalists as though they were agents of the state.
>
> 85. Sixth, "commercial lawlessness" can be a factor in an application to exclude evidence under section 78 , although again different considerations apply as between state and non-state agents."

109. This is clear authority, with which I agree, that the principles enunciated in *Loosley* do not apply to non-state agents and that, in the case of non-state agents, the Court will only stay proceedings as an abuse of process where the alleged entrapment entails gross misconduct or commercial lawlessness on the part of the non-state agent in question. The general application of the principles set out by Goldring J to cases of non-state agents was confirmed by Lord Burnett of Maldon CJ giving the judgment of the Court of Appeal Criminal Division in *R v L (T)* [2018] EWCA Crim 1821; [2018] 1 WLR 6037, a case concerned with a defendant charged with attempting to meet a child following sexual grooming, having been in internet contact with a vigilante paedophile hunter posing as an underage girl. The trial judge stayed the proceedings as an abuse of process. The appeal by the prosecution was allowed. The judgment dealt with the distinction between state agents and non-state agents at [31] and [32]:

> "31. Consideration of the speeches in *R v Loosley* demonstrates that the principles there explained apply to the conduct of agents of the state. Involvement of agents of the state in unacceptable behaviour is at the heart of the reasoning. It is the court's unwillingness to approbate seriously wrongful conduct by the state, by entertaining a prosecution, that is the foundation of this aspect of the abuse jurisdiction. So much is clear from *R v Loosley* itself and was recognised in the *Shannon* case in both the domestic proceedings and in Strasbourg and also in *R v Marriner*. The judge's approach allowed no distinction between the conduct of Mr U, as a private citizen, and agents of the state, when considering whether to stay the prosecution as an abuse of process. In our judgment he erred in that respect. For that reason, the judge's conclusion cannot be supported.
>
> 32. In both domestic jurisprudence (see the *Health Care Professionals* case) and in Strasbourg when looking at conduct for the purposes of article 6 (see the *Shannon* case) there is a recognition that the conduct of a private citizen may in theory found a stay of proceedings as an abuse of process. As Goldring J recognised in the former case, no question of the state seeking to rely upon evidence which flows from its own misuse of power arises. The underlying purpose of the doctrine of abuse of process is not present. None the less, a prosecution needs evidence; and it is not inconceivable that given sufficiently gross misconduct by a private citizen, it would be an abuse of the court's process (and a breach of article 6) for the state to seek to rely on the product of that misconduct. The issue would be the same: would the prosecution be "deeply

> offensive to ordinary notions of fairness" or "an affront to the public conscience" or "so seriously improper as to bring the administration of justice into disrepute". In other words, as Goldring J put it, "so serious would the conduct of the non-state agent have to be that reliance upon it in the court's proceedings would compromise the court's integrity". He observed that there had been no reported case in which such activity has founded a successful application for a stay. Like him, we do not find that surprising. Given the absence of state impropriety, the situations in which that might occur would be rare."

110. For the sake of completeness, I would add that Mr Naqvi relied upon an article by David Sleight in 2010 following the sentencing hearing of John Terry's father for supplying cocaine to an undercover reporter. To the extent that the article suggests that entrapment in non-state agent cases should be governed by the principles in *Loosley*, it is simply an incorrect statement of the law and contrary to *Saluja* to which it does not refer.

111. It follows that there is nothing in the distinction Mr Riza QC sought to draw between *Saluja* and the present case on the basis that the principles in that case did not apply to solicitors' disciplinary proceedings. The SDT was entirely correct in applying *Saluja*. I would note that, in any event, at [17.60] the SDT found on the facts that the questions asked by Client A were open and fair so that his role had not amounted to entrapment. That was a finding which the SDT was entitled to make and with which this Court will not interfere. Grounds 1 and 4 of the Grounds of Appeal must be dismissed.

112. In relation to Mr Riza QC's submission on Ground 2 that the SDT erred in not concluding that it was an abuse of process to rely on evidence tainted by illegality, in my judgment there are two short answers to that submission. First, the SDT made a finding at [17.61] that there was no criminality or illegality here. As it found, Ms Potts had been cross-examined extensively and made it clear that she would not have broadcast the programme if she had had any concerns about the way the interviews were conducted. There was no police investigation or complaint to Ofcom.

113. Second, in so far Mr Riza QC was able to identify what offence was allegedly committed by Client A, it was an attempt to obtain an immigration visa by deception. The obvious difficulty with that is that, as the opening words of section 1(1) of the Criminal Attempts Act 1981 make clear, Client A would have had to have the intent to commit the relevant offence. Given that what he was intending to do was investigate and expose Mr Naqvi's conduct and not commit any criminal offence, this requirement places an insuperable difficulty in the way of the argument that there was criminality here. In the circumstances, it is not necessary to consider whether, even if there had been criminality, the evidence from the transcript would have been admissible applying the principles in *Jones v University of Warwick*.

114. Ground 3 contends that it was an abuse of process for the SRA to rely upon the evidence of Client A without calling him. However, as Mr Paul correctly submitted, contrary to Mr Naqvi's submission, he had no absolute right to cross-examine his accuser. This is made clear in the discussion of the position in both criminal and disciplinary proceedings in the judgment of Stadlen J in the Divisional Court in *R*

(Bonhoeffer) v General Medical Council [2011] EWHC 1585 (Admin).at [108] to [110]:

> "108. From this review of authorities I derive the following propositions:
>
> i) Even in criminal proceedings the right conferred by Article 6(3)(d) to cross-examine is not absolute. It is subject to exceptions referable to the absence of the witness sought to be cross-examined, whether by reason of death, absence abroad or the impracticability of securing his attendance.
>
> ii) In criminal proceedings there is no "sole or decisive" rule prohibiting in all circumstances the admissibility of hearsay evidence where the evidence sought to be admitted is the sole or decisive evidence relied on against the defendant.
>
> iii) In proceedings other than criminal proceedings there is no absolute entitlement to the right to cross-examine pursuant to Article 6(3)(d).
>
> iv) However disciplinary proceedings against a professional man or woman, although not classified as criminal, may still bring into play some of the requirements of a fair trial spelt out in Article 6(2) and (3) including in particular the right to cross-examine witnesses whose evidence is relied on against them.
>
> v) The issue of what is entailed by the requirement of a fair trial in disciplinary proceedings is one that must be considered in the round having regard to all relevant factors.
>
> vi) Relevant factors to which particular weight should be attached in the ordinary course include the seriousness and nature of the allegations and the gravity of the adverse consequences to the accused party in the event of the allegations being found to be true. The principal driver of the reach of the rights which Article 6 confers is the gravity of the issue in the case rather than the case's classification as civil or criminal.
>
> vii) The ultimate question is what protections are required for a fair trial. Broadly speaking, the more serious the allegation or charge, the more astute should the courts be to ensure that the trial process is a fair one.
>
> viii) In disciplinary proceedings which raise serious charges amounting in effect to criminal offences which, if proved, are likely to have grave adverse effects on the career and reputation of the accused party, if reliance is sought to be placed on the evidence of an accuser between whom and the accused party there is an important conflict of evidence as to whether the

> misconduct alleged took place, there would, if that evidence constituted a critical part of the evidence against the accused party and if there were no problems associated with securing the attendance of the accuser, need to be compelling reasons why the requirement of fairness and the right to a fair hearing did not entitle the accused party to cross-examine the accuser.
>
> 109. These propositions do not in my judgment provide an automatic answer to the question raised in this claim for judicial review. The answer to that question involves a consideration of whether and if so what special principles apply where, as in this case, a question arises in disciplinary proceedings as to the availability of the complainant to give oral testimony in person or by video link or the consequences to the complainant in the event of him or her giving such testimony.
>
> 110. In criminal proceedings the 2003 Act makes statutory provision for the admission of hearsay statements of complainants (among others) in certain circumstances and subject to certain safeguards. As mentioned above, the Supreme Court in *Horncastle* has held that the 2003 Act represents a crafted code enacted by Parliament which regulates the admission of hearsay evidence at trial in the interests of justice which struck the correct balance between ensuring the fairness of the defendant's trial and protecting the interests of the victim in particular and society in general that a guilty person should not be immune from conviction where a witness who has given critical and apparently reliable evidence in a statement is unavailable through death or some other reason to be called at trial. It further held that so long as the provisions of the 2003 Act were observed there would be no breach of Article 6 and in particular Article 6(3)(d) if a conviction were based solely or to a decisive extent on hearsay evidence. The ECHR had itself recognised the need for exceptions to the strict application of Article 6(3)(d) but in any event the crafted code represented by the 2003 Act contained specific safeguards which did not include a "sole or decisive" rule and rendered such a rule unnecessary. Accordingly, no such rule applies in criminal proceedings to render inadmissible hearsay evidence which constitutes the sole or decisive evidence relied on against a defendant or to render unlawful a conviction consequent upon the admission of such evidence."

115. The SDT made a careful evaluation in its judgment and concluded that there was no abuse of process or prejudice to Mr Naqvi in the proceedings continuing in the absence of Client A, essentially for two main reasons: (i) that Ms Potts had been able to answer questions that would have been put to Client A in cross-examination in relation to the alleged entrapment and there was nothing Client A could have added to the evidence she had given ([17.49] of the judgment) and (ii) that the SDT had the

advantage not usually available to a fact-finding Court or Tribunal of a complete transcript of the relevant interviews between Mr Naqvi and Client A. I consider that this evaluative judgment by the SDT cannot be faulted.

116. Mr Naqvi maintained his criticism of Ms Potts as somehow an interested witness but there is nothing in that criticism. Mr Naqvi's point about her evidence being hearsay is misconceived. She was called as a witness from Hardcash management who could give evidence of what the instructions given to Client A were and of matters such as that the transcripts were unedited (to which I return below). the fact that she may not have physically performed all the tasks on behalf of the company (such as the handing over of the transcripts) does not mean that she was not able to give reliable evidence about what had occurred, on which the SDT was entitled to rely. The SDT had the advantage (which this Court has not had) of seeing and hearing Ms Potts giving evidence, facing sustained cross-examination by Ms Riza QC. The SDT concluded that she was a credible and honest witness as it was entitled to do and there is no basis whatsoever for the Court to interfere with that evaluation.

117. In the circumstances, the SDT was entitled to conclude that the absence of Client A had not prejudiced Mr Naqvi and that to continue with the proceedings in his absence was not an abuse of process.

118. In his written and oral submissions, Mr Naqvi sought repeatedly to assert that the transcripts of the two interviews were edited but, as the SDT rightly concluded at [17.62] and [27.14], this was no more than assertion and speculation on his part and unsupported by any evidence. He had the transcript and video of the second interview from the outset of the proceedings and the transcript and audio of the first interview before the hearing, but had not produced any evidence to demonstrate which parts of the transcript were inaccurate, despite being repeatedly invited by Capsticks to do so. The SDT was also entitled to rely upon and accept Ms Potts' clear evidence that what was handed over by Hardcash to the SRA was unedited. Before the Court, Mr Naqvi was likewise unable to point to any evidence to support the assertion that the transcripts were edited. He was driven to rely upon what he had been told by Mr Gull about the transcripts of his own interview having been edited, but given that Mr Gull was involved in a different programme by a different broadcaster, that is simply not evidence supporting a case that the transcripts of Mr Naqvi's interviews with Client A were edited. The SDT was entitled to conclude, as it did at [27.14.5] that it was satisfied to the criminal standard that the transcripts of the interviews were unedited.

119. Mr Naqvi also asserted that the translations from Urdu were inaccurate but there was nothing in that point either. The transcripts were prepared by official Court reporters and there is no reason to suppose any translations they put forward were inaccurate. If Mr Naqvi had wanted to, he could have instructed his own official translators and put forward a rival translation of the Urdu. The SDT might then have had to hear evidence to resolve any translation issue. He did not do so and his assertion in submissions that translations were inaccurate is no basis for interfering with the decision of the SDT based on the official translations the SRA had provided.

120. Mr Naqvi also sought to make much in his oral and written submissions of the fact that the SDT had declined his application for disclosure of the transcripts of interviews with other solicitors. This was a matter on which Mr Riza QC made oral submissions explaining the reasons for the application as explained in [17.19] of the

judgment which I have set out at [31] above. Accordingly, this is not a matter on which Mr Naqvi could say he was "unheard" even if there were any force in that contention, which I have already held there is not. The SDT set out at [17.64] its reasons for refusing the application for disclosure, which were essentially that how other solicitors had been treated was irrelevant to the issues the SDT had to decide. The fact that other solicitors might have been treated differently in similar circumstances did not mean that the case against Mr Naqvi should be halted. The question for the SDT was whether Mr Naqvi was guilty of the professional misconduct alleged against him. The conclusion reached in other cases was of no relevance. Given that the disclosure sought was irrelevant, there can be no question of discrimination against Mr Naqvi. In my judgment, the reasoning of the SDT on this question is unassailable. It is also worth pointing out, as Mr Paul told us, that, although it maintained that the other transcripts from the programme were irrelevant, the SRA did in fact disclose the other transcripts to Mr Naqvi.

121. Another aspect of Mr Naqvi's case that the SDT had erred in not staying the proceedings for abuse of process was the so-called "Core Issue" concerning the Home Office email. This case was totally without merit, however it was put. As the SDT found at [43] of its written Memorandum of 4 December 2018, following the hearing on 22 November 2018, the SRA had been entitled to accept the email as being accurate and the SDT had not misconducted itself in not investigating the document further. As the SDT said: "if the SRA was required to investigate the authenticity of every document provided to it, this would be a disproportionate use of the SRA's resources, particularly where those documents were official and originated from a government agency." The allegation of "prosecutorial misconduct" was baseless.

122. Furthermore, there is no question of Mr Naqvi having been prejudiced by the unredacted email having been exhibited to the Rule 5 Statement. The SRA had not referred in the body of the Statement to the email or relied on it and it had only been included in the exhibits as part of the chronological background for completeness. There was ample material in the Rule 5 Statement from which the Solicitor Member of the SDT was entitled to conclude that there was a case to answer. In the Memorandum of 4 December 2018, the SDT recorded that the SRA was offering to redact the email to remove the reference to Mr Naqvi being arrested and released on bail, so that the differently constituted SDT which heard the substantive case would not be aware of the reference. That is why the Memorandum is headed: "This Memorandum is not to be disclosed to the Tribunal dealing with the substantive hearing". The SRA having undertaken to redact the document, there was no need for the SDT to make an Order. It would expect the SRA to comply with the undertaking without the need for an Order, as Ms Ogene explained to Mr Naqvi in her email of 7 February 2019. The attempt to characterise the redaction without an Order as a "misuse of power" is nonsensical and any criticism of Ms Ogene wholly unwarranted. The irony is that the only reason why the unredacted email was before the SDT at the substantive hearing is that Mr Naqvi insisted on its inclusion in order to run this unmeritorious abuse point.

123. There is also nothing in the point that the SDT had failed to deal with this point. Mr Naqvi referred the Court repeatedly to the Strike-out Application dated 1 April 2019 which set out his case on this "Core Issue", suggesting that the SDT had not dealt with this and that he had been shut out from making oral submissions. As I have

already said at [26] above, the points which he considered of substance in the Strike Out Application document were repeated in one or other of Mr Naqvi's skeleton arguments and Mr Naqvi was unable to suggest the contrary. In fact, the points about the "Core Issue" were developed by Mr Naqvi at [1] to [3] of that part of the skeleton argument dated 10 April 2019 signed by him. As I have also already found at [31] to [34] above, there is no question of the SDT having shut Mr Naqvi out from making oral submissions. There is nothing in the point that the SDT did not refer in terms to this Core Issue. It clearly had proper regard to all the oral and written submissions on the overall issue of abuse of process in making its determination and was not obliged to set out every argument, especially one as unmeritorious as is this "Core Issue".

124. The final point made by Mr Naqvi in relation to abuse of process was that, when the SRA referred the matter to the SDT in 2018 they had done so without having the audio recording of the first interview even though such a recording was available. The suggestion that somehow this was an abuse of process is totally without merit. The SDT dealt with this issue at [17.50], to which I referred in [42] above. As the SDT said, it was what occurred at the second interview on 27 March 2015 that formed the basis of the allegations against Mr Naqvi in the Rule 5 Statement, not what happened in the first interview. As the SDT found, there was enough evidence from the second interview to justify the referral to the SDT. In any event the SDT was made aware of the fact that the first interview had taken place at [13] of the Statement and thus could have asked for a transcript if it had thought that was of any relevance to the decision whether there was a case to answer, which it clearly did not think it was.

125. Accordingly, there is nothing in any of the arguments put forward by Mr Naqvi seeking to impugn the decision of the SDT refusing to stay the proceedings as an abuse of process.

126. In relation to the substantive findings of the SDT, in my judgment there is nothing in the suggestion in Mr Riza QC's submissions in the Grounds of Appeal that the SDT erred in law in its approach to the issue of dishonesty. The SDT correctly stated the legal test as stated by Lord Hughes JSC in *Ivey* at [74]:

> "the test of dishonesty is as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* and by Lord Hoffmann in *Barlow Clowes*… When dishonesty is in question the fact-finding Tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledgeable belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the factfinder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

127. At [26] of its judgment the SDT then set out the two-stage approach to be adopted, which it then correctly applied. Contrary to Mr Riza QC's submissions, it is nothing

to the point that there was no finding that the conduct of Mr Naqvi which was found to be dishonest was of an acquisitive nature. It has long been recognised is cases of fraud or dishonesty that whilst an acquisitive motive may be relevant evidence to support a finding of fraud or dishonesty, it is not a necessary legal requirement to establish fraud or dishonesty. Likewise, there is nothing in Mr Riza QC's point that Mr Naqvi cannot have been dishonest in a vacuum and the SDT was not entitled to conclude the conduct was dishonest if directed at the undercover agent. As Mr Paul submitted, that is based on a false premise since the dishonesty was in part that Mr Naqvi was prepared to engage in a course of conduct to deliberately circumvent the Immigration Rules.

128. Mr Riza QC's submission that the SDT erred in making a finding of dishonesty because the highest the findings against Mr Naqvi could be put was that he had blind-eye knowledge that what was discussed was a sham marriage is simply wrong. In the case of each of allegations 1.2, 1.3 and 1.4, the SDT also found that Mr Naqvi had actual knowledge that what was being discussed was a sham marriage: see [28.12.3], [29.5.3] and [30.8.1] of the judgment. In any event, even if the findings had been limited to blind-eye knowledge as Mr Riza QC suggests, it is well-established that blind-eye knowledge is sufficient to establish dishonesty. As was said by the Court of Appeal in *Group Seven Ltd v Notable Services LLP* [2019] EWCA Civ 614; [2020] Ch 129 at [59]:

> "The discussions of knowledge by Lord Hoffmann and Lord Millett in *Twinsectra* indicate that knowledge of a fact may be imputed to a person if he turns a blind eye to it, as Nelson is supposed to have done at Copenhagen, or if in legal parlance he deliberately abstains from enquiry in order to avoid certain knowledge of what he already suspects to be the case. It is convenient to use the expression "blind-eye knowledge" to denote imputed knowledge of this type. In the context of dishonest assistance for breach of trust or fiduciary duty, it was common ground before us, and we consider it correct in principle, to equate blind-eye knowledge with actual knowledge for the purposes of the first stage of the test laid down in *Tan* and endorsed in *Barlow Clowes* and *Ivey*."

129. Finally in relation to the SDT's findings of dishonesty, in his Additional Grounds, Mr Naqvi seized upon the conclusion of the Tribunal in the context of mitigation that he had shown no insight into his own misconduct to contend that this demonstrated that the necessary *mens rea* for a finding of dishonesty was absent. Quite apart from the fact that this takes a finding being made against him in relation to mitigation completely out of context in circumstances where the SDT made clear findings of actual and blind-eye knowledge, the point is wrong as a matter of law. Since the law on dishonesty was clarified by *Ivey* it is no longer necessary to show that the wrongdoer was subjectively aware that what he was doing was objectively dishonest, as is made clear in the last sentence of the passage from Lord Hughes JSC's judgment quoted at [122] above.

130. Mr Naqvi did not develop in his oral submissions the contention at E of his Additional Grounds that the SDT erred in ignoring his Notice to Admit dated 9 April 2019. That sought admission of various alleged facts, the thrust of which was that he had not

been involved in any actual applications for visas which relied upon a sham marriage. This was and is a bad point. Quite apart from the fact that, as Mr Paul points out, the Solicitors (Disciplinary Proceedings) Rules 2007 did not contain any provision for the service of a notice to admit on the SRA, the matters on which admissions were sought were irrelevant, since the proceedings were founded solely on Mr Naqvi's conduct at the second interview on 27 March 2015.

131. Mr Naqvi's point at H of his Additional Grounds that somehow the SRA is to be criticised for not calling expert evidence on immigration law is another bad point. The allegations against him in the Rule 5 Statement which the SDT found proved against him to the criminal standard, did not depend upon any issue of immigration law, but upon the application of general standards of professional integrity and honesty. The SRA did not need to rely upon any expert evidence of immigration law to make good those allegations. If Mr Naqvi had somehow wished to exculpate himself by reference to such expert evidence, it was for him to call an expert, not for the SRA to procure such expert evidence on his behalf.

132. In so far as the findings made by the SDT as to the professional misconduct of Mr Naqvi and his dishonesty are concerned, as I have said, in his oral and written submissions, Mr Naqvi sought to justify his conduct and reiterate at length his case that he and Client A were at cross-purposes and that the advice he gave was generic. However, this was no more than an attempt to reargue the case before this Court in circumstances where the SDT rejected that case and disbelieved his evidence about it as contrary to the clear terms of the transcript. Mr Naqvi could not begin to show that the conclusions the SDT reached on his misconduct and dishonesty were ones it was not entitled to reach and, accordingly, there is no basis for this Court to interfere.

133. In relation to mitigation, in my judgment no issue can be taken with the assessment by the SDT of the various aggravating and mitigating factors. This was serious professional misconduct involving dishonesty which was at the highest end of the spectrum involving serious damage to the reputation of the profession and a serious breach of the trust that the public is entitled to place in the profession. The SDT rightly concluded that in cases of dishonesty the only appropriate sanction is striking off unless exceptional circumstances can be shown.

134. There were no exceptional circumstances in this case. Once the SDT had found, as it was entitled to do, that there was no impropriety in the conduct of Client A and no entrapment, the involvement of Client A was not capable of being exceptional circumstances. He had not lured Mr Naqvi into the misconduct or dishonesty, but simply afforded the opportunity for Mr Naqvi to act as he did. Far from being disproportionate as Mr Naqvi sough to suggest, the sanction imposed was clearly correct in the circumstances of this case.

135. Equally, given the findings made by the SDT against Mr Naqvi, its conclusion that he should pay the costs of the SRA was clearly correct. As the SDT found at [59] of the judgment, Mr Naqvi had failed to file a Statement of Means, so that it was not able to take his financial circumstances into account in assessing costs. It is too late for Mr Naqvi to seek to put information about his financial circumstances before the Court when he did not do so before the SDT and in any event he has no basis for challenging its costs order. Despite the multitude of criticisms of the conduct of the SRA advanced by Mr Naqvi in his written and oral submissions, those criticisms are,

as I have found, without foundation, so that there is no reason why the SRA should be penalised in its recovery of costs against Mr Naqvi.

Conclusion

136. For all the reasons set out above, this appeal against the decision of the SDT must be dismissed.

Mr Justice Fordham

137. I agree.