



6 December 2017

PRESS SUMMARY

O'Connor (Appellant) v Bar Standards Board (Respondent) [2017] UKSC 78 *On appeal from [2016] EWCA Civ 775*

JUSTICES: Lady Hale (President), Lord Kerr, Lord Wilson, Lady Black, Lord Lloyd-Jones

BACKGROUND TO THE APPEAL

The Appellant is a practising barrister and is black. She alleges that the Respondent discriminated against her on grounds of her race by bringing disciplinary proceedings which ended in her acquittal on appeal. On 9 June 2010, the Respondent's Complaints Committee brought 6 disciplinary charges against the Appellant. On 23 May 2011, the Disciplinary Tribunal found 5 of these charges proved. The Appellant appealed to the Visitors of the Inns of Court ("the Visitors"). On 17 August 2012, her appeal was allowed on the basis that none of the alleged conduct involved any breach of the Bar Code of Conduct.

On 21 February 2013, the Appellant issued the present proceedings, which included an allegation of violation of Article 14 of the European Convention on Human Rights ("ECHR") read in conjunction with Article 6 ECHR, contrary to section 6 of the Human Rights Act 1998 ("the 1998 Act"). In its defence, the Respondent maintained that this claim was time-barred under section 7(5)(a) of the 1998 Act which provides that proceedings must be brought before the end of the period of one year beginning with the date on which the act complained of took place.

On 3 January 2014, the Respondent issued an application seeking an order that the statement of case be struck out on the basis that none of the Appellant's claims had a real prospect of success and, in any event, there was a complete defence under section 7(5)(a). On 2 April 2014, the Respondent's application for strike out was granted. The Appellant appealed. On 18 December 2014, Warby J held that there was a sufficiently pleaded case that the Respondent indirectly discriminated against the Appellant. However, he also held that the claim was time-barred under section 7(5)(a) of the 1998 Act.

The Appellant appealed to the Court of Appeal. The Court of Appeal held that the limitation period under section 7(5)(a) had started to run when the Disciplinary Tribunal had found the charges against the Appellant proved and so had expired before she had issued her claim. The Appellant was granted permission to appeal to the Supreme Court on the time-limit issue under section 7(5)(a). The issues arising before the Supreme Court were: (i) whether the disciplinary proceedings against the Appellant were to be considered a series of discrete acts or a single continuing act and (ii) if the latter, did that act end with the verdict of the Disciplinary Tribunal or with the verdict of the Visitors?

JUDGMENT

The Supreme Court unanimously allows the appeal. Lord Lloyd-Jones gives the lead judgment with which the other Justices agree.

REASONS FOR THE JUDGMENT

As a preliminary issue, the Court was required to determine the precise nature of the discrimination claim which the Appellant wished to make [15]. In this regard, the Court concluded that the Appellant's

challenge was to the conduct of the Respondent in bringing and pursuing disciplinary proceedings against her, not to an alleged state of affairs in which BME lawyers were more likely to be the subject of such proceedings. Therefore, the bringing and pursuit of the disciplinary proceedings must be the focus of the investigation in terms of section 7(5)(a) of the 1998 Act [16-21].

The question which then arose in relation to the application of section 7(5)(a) was whether the bringing of disciplinary proceedings by the Respondent was to be considered a series of discrete acts or a single continuous act [22]. Section 7(5)(a) should not be read narrowly and must be capable of providing an effective and workable rule for situations where the infringement of a Convention right arises from a course of conduct. Leaving a claimant to have recourse only to the discretionary remedy in section 7(5)(b) is inappropriate [23].

The alleged infringement of Convention rights in this case arose from a single continuous course of conduct. The essence of the complaint made by the Appellant was the initiation and pursuit of the proceedings to their conclusion. It cannot have been the intention of Parliament that each step should be an “act” to which the one year limitation period should apply [29].

Under section 7(5)(a) time begins to run from the date when the continuing act ceased, not when it began [30]. In determining when the continuing act ceased, it was necessary to consider whether the Respondent’s conduct in proceedings before the Visitors should be considered as forming part of the same continuing act as its conduct in proceedings before the Disciplinary Tribunal. In order to answer this question, it was necessary to consider the nature of the regulatory scheme and the precise features of the Respondent’s conduct [32-34]. Several features of the regulatory scheme and the Visitors’ jurisdiction, as applicable to the disciplinary proceedings against the Appellant, led to the conclusion that the Respondent’s part in the proceedings before the Disciplinary Tribunal and those before the Visitors should be regarded as part of a single continuing act [35].

Therefore, the single continuing act in this case continued until the Visitors allowed the Appellant’s appeal on 17 August 2012. The Appellant commenced the present proceedings on 21 February 2013, within the period of one year beginning with the date on which the act complained of took place, as required by section 7(5)(a) and the appeal should accordingly be allowed [39].

The Respondent asked the Court to uphold the Court of Appeal’s decision on the alternative ground that Warby J was wrong to hold that the Article 14 ECHR claim of indirect discrimination had real prospects of success. The Respondent argued that this claim could have no real prospect of success without statistics sufficient to raise a potential case of discrimination, general statements of disproportionate impact being unlikely to be sufficient [41].

The Court observed that it was “adventitious” that this point was before the Court [42]. However, the Appellant was entitled to rely upon a 2013 report into the Respondent’s complaint system which analysed data from 2007-11, in conjunction with the unhappy history of the proceedings against her, as supporting her case that she had been the victim of indirect discrimination. The European Court of Human Rights had made clear that indirect discrimination can be proved without statistical evidence [43].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>