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Supreme Court to hear human rights and race discrimination claim against the Bar Standards Board

Miss Daphne Evadne Portia O'Connor v.
Bar Standards Board
UKSC 2016/0174

Article by David Bowden

BAR STANDARDS BOARD
REGULATING BARRISTERS

The Supreme Court has granted permission to Miss O'Connor to bring a final appeal in this case on the basis that it raises a point of law of general public importance. Both the Court of Appeal and Warby J dismissed Miss O'Connor's appeal against a decision of Deputy Master Eyre to strike out her claim against the Bar Standards Board ('the BSB'). Miss O'Connor had made 4 distinct claims against the BSB. These included serious allegations that the BSB had discriminated against her on the grounds of race, that the BSB had harassed her, and it had conducted misfeasance in public office. Warby J found there was only 1 human rights claim which was adequately pleaded but he ruled that this claim was made out of time.

Miss Daphne Evadne Portia O'Connor v. Bar Standards Board
UKSC 2016/0174 8 December 2017
Supreme Court of the United Kingdom (Lady Hale DPSC, Lords Clarke and Toulson JJSC)

What are the facts?
An agreed chronology was prepared for the hearing. On 30 September 2009 the BSB received a complaint from Mr Alexander Cunliffe who was then an in-house solicitor at Lloyds TSB. The complaint alleged that Miss O'Connor had signed statements of truth on court pleadings and that her firm (Pegasus Legal) was not authorised to do so under the Courts and Legal Services Act 1990 and the Bar Code of Conduct.

On 9 June 2010 disciplinary charges against Miss O'Connor were referred to a Disciplinary Tribunal and on 23 May 2011 5 charges were found proven. The tribunal chaired by Rosalind Wright QC decided to give Miss O'Connor some advice on her future conduct and made a modest costs order of £292 against her. On 17 August 2012 Miss O'Connor successfully appealed those disciplinary findings to the Visitors of the Inns of Court chaired by Sir Andrew Collins. The BSB received further complaints (from Mushtaq & Co and Cleggs respectively) about Miss O'Connor on 19 July 2011 and 25 November 2011 but these were later dismissed for lack of merit.

On 21 February 2013 Miss O'Connor brought this court claim against the BSB and served her particulars of claim in June 2013. The claim sought relief under 4 heads:

- Misfeasance in public office,
- Breach of the Human Rights Act 1998 ('HRA') by contravening articles 6 and 14 of the European Convention on Human Rights,
- Damages for harassment under the Protection from Harassment Act 1997, and
- Discrimination contrary to the Equality Act 2010.

What happened when the case came before Deputy Master Eyre?
In November 2013 the BSB applied to strike out parts of the claim and in January 2014 it applied to strike out the entire claim. At a hearing before Deputy Master Eyre on 28 March 2014 he granted the BSB's application in full. He accordingly struck out Miss O'Connor's statements of case, dismissed her claim and gave judgment for the BSB with costs. Miss O'Connor appealed this ruling.

What happened when the case came before Warby J?
In a written reserved judgment handed down on 9 December 2014, Warby J dismissed Miss O'Connor's appeal. His conclusions were:

- The Article 6 claim had no real prospect of success. It was 'fanciful to suggest that she did not have adequate time to prepare' her submissions for the Disciplinary Tribunal,
- The Article 14 claim as originally formulated did adequately state a case which is 'not fanciful',
- However there was no pleaded case that the BSB behaved in a discriminatory manner in respect of Miss O'Connor's appeal to the Disciplinary Tribunal and neither was it alleged that the BSB acted in a discriminatory manner in investigating the 2 further complaints it received,
- The BSB pleaded in its defence that Miss O'Connor's claim was time barred under the Limitation Act 1980 but no reply was served to that making any positive case as to why time should be extended, and
- The claims were therefore time barred.

What grounds did Miss O'Connor advance for appealing Warby J's ruling?
Miss O'Connor then sought permission for a 2nd appeal to the Court of Appeal on a number of different grounds. The main 3 were whether the judge below erred:

- By failing to re-take the decision on limitation in circumstances in which part of the Deputy Master's reasoning on strike-out was undermined,
- By failing to take any account of the merits and importance of Miss O'Connor's claim, and
- In relation to the limitation point by failing to take adequate account of the fact that the proceedings that resulted in the claim were only concluded less than a year before the claim commenced.

However, Lord Justice Longmore on 3 June 2015 granted permission to appeal only in relation to the 3rd issue. Longmore LJ also directed that any renewed application for permission to appeal any other grounds on which he refused permission could only be made to the full court at the hearing of the actual appeal. Miss O'Connor duly sought this permission at the appeal hearing.

What applications did the BSB make to the Court of Appeal?
The BSB put in a Respondent's Notice seeking to affirm the decision of Warby J below on other grounds. This was that Warby J was wrong to find that the BSB had **indirectly** discriminated against Miss O'Connor because the mere fact of statistical differences in treatment between 2 groups is not enough to establish on its own that the effect of a practice or measure was discriminatory.

The BSB applied to adduce further evidence. This evidence was a recent report the BSB had commissioned which contained regression analysis of complaints in relation to earlier years including those years when the 3 sets of complaints were received by it in relation to Miss O'Connor.

What reports had the BSB commissioned on this issue?
There were 3 reports or relevance that the BSB had commissioned in relation to equality and diversity in the barrister's profession. These are:

- 'Report on Diversity of Barristers subject to complaints 2013' www.barstandardsboard.org.uk/media/1451930/diversity_report__2012_report.pdf (published in February 2013),
- 'Diversity Review – The BSB's complaints system' prepared by Inclusive Employers www.barstandardsboard.org.uk/media/1538013/inclusive_employers_-_diversity_review_-_bsb_complaints_system.pdf (published 8 January 2014), and
- BSB data regression analysis report (published January 2016).

Miss O'Connor in the Court of Appeal also sought to rely on a research that Professor Gus John had published which she said was critical of some of the methodology used or conclusions reached by the BSB. Professor John had previously advised the Law Society and the SRA on their equality and diversity obligations. Professor John is an associate professor of education and honorary fellow at the University of London's Institute of Education. www.gusjohn.com

What does the BSB say?
For the Court of Appeal it prepared and served a skeleton argument. It was represented at the appeal hearing by the junior counsel, Miss Alison Padfield, who appeared below before Warby J. The BSB had put in a respondent's notice. The BSB submitted that Warby J was correct to uphold the striking out of the claim by the Deputy Master. The BSB said that the Diversity Review report concluded that there was a high level of consistency in the way the BSB handles complaints and that the BSB's process is not of itself discriminatory. It denied indirect racial discrimination and said the later Strasbourg case of *Orsus* is more persuasive than *DH*.

The BSB said that the decision to refer a complaint for disciplinary action is a one-off act, not a continuing one and that the claims in this case are time barred as they were made more than 1 year after the BSB made that decision. It relied on *Ronex* as to why the Deputy Master was right to strike this case out on limitation grounds.

The BSB also sought to put in as evidence the January 2016 report. This had been more extensive root cause analysis carried out by the BSB and which seeks to strip out some false cognates in previous reports.

What does Miss O'Connor say?
In the Court of Appeal she said that the BSB is a public body and is subject to the Human Rights Act 1998. She alleges that there is systemic bias against barristers who are of black and minority ethnic

('BME') heritage. She submits that BME barristers are more likely to face disciplinary action by the BSB and that this amounts to indirect racial discrimination. She submits that the BSB has provided no justification for the disproportionate use of the complaints mechanism against BME barristers. She challenges the BSB's prosecution process. The indirect discrimination claim is made by reference to the Strasbourg case on Roma children in the Czech Republic ('*DH*').

Although there is a 1 year time limit for bringing human rights claims, she says that in setting in train a disciplinary process (which the BSB could bring to an end at any time by discontinuance) that this was a continuous act of discriminatory conduct by the BSB and therefore her claims were brought within the 1 year time limit. She submits that *Somerville* assists her in overcoming limitation.

Are there any prior authorities of any relevance?
These authorities are highly relevant:

Orsus v Croatia ***(2009) 49 EHRR 26, [2008] ELR 619***
Where Croatian schoolchildren had been placed in Roma-only classes at primary school, there was no violation of the ECHR articles 2 or 14 because such segregation was based on an insufficient command of the Croatian language and not on racial or ethnic grounds. The children had not suffered a demonstrably poorer quality of education than that enjoyed by non-Roma children.

DH v Czech Republic **(2008) 47 EHRR 3, [2008] ELR 17**
Roma children complained that the state had indirectly discriminated against them in the enjoyment of their right to education. They had been placed in special schools intended for children with mental deficiencies who were unable to attend ordinary primary schools but their parents had either consented to or requested the placements. Where the head teachers of the special schools consented to the placements, written notice of the decision with a right to appeal was forwarded to the parents but none chose to appeal. Some parents later requested that the education authority revoke the special school placements. The children submitted that the interpretation of discrimination had been too restrictive and was incompatible with both the aim of article 14 of the ECHR and with prior Strasbourg case law. It was held that the application of Czech Republic domestic law had resulted in a disproportionate number of Roma children being erroneously placed in segregated special schools in violation of the ECHR article14.

A v Essex County Council **[2011] AC 280**
Lord Kerr: The judge had been right not to extend the time for bringing the claim. Few cases under s.7(5) of the HRA 1998 lent themselves to the application of a burden of proof, and an open-ended application of the factors on either side of the argument was preferred. The judge's analysis had been sound, particularly his finding that it was highly unlikely that any significant sum would have been awarded had the action been brought within time and been successful.
Lord Clarke: The case should not go to trial merely because it was said to be a test case.
Lady Hale: The judge had erred in refusing to extend time. The delay in bringing the claim had not been long and had not prejudiced the local authority. Although expedition was important in public law claims, it was less so in a claim in vindication of human rights (or for damages) which were retrospective remedies.

Somerville v Scottish Ministers **[2007] 1 WLR 2734**
The court considered whether a claim for damages based on a breach of a Convention right by a member of the Scottish Executive was subject to the time bar in HRA 1998 section 7(5) and whether, when a continuing breach of Convention rights over a period of time was alleged, time began to run from the first date on which the breach occurred. The majority held that the ministers had exercised their statutory functions in a way that was incompatible with any of his Convention rights could raise proceedings under the HRA or the Scotland Act 1998. As s.100 of the Scotland Act did not mention the HRA s.7(5) HRA time bar, that limitation did not apply. Parliament had very deliberately chosen not to impose the same time limit on proceedings by reference to the Scotland Act as on proceedings under the HRA. The issue of when time began to run for the purposes of s.7(5) HRA had been rendered academic by the conclusion on the Scotland Act.

Ronex Properties v John Laing Construction **[1983] QB 398**
A defence under the Limitation Acts was a bar to the remedy not the claim, and one which had to be specifically pleaded. Where limitation would provide a complete answer a defendant might apply to strike out the proceedings as being frivolous or vexatious.

What did the Court of Appeal rule?
On 25 July 2016 Lord Dyson MR handed down the reserved judgement of the Court of Appeal - **[2016] EWCA Civ 775.** He dismissed Miss O'Connor's appeal for these 3 reasons:

- As a matter of ordinary language section 7(5)(a) of the Human Right Act 1998 contemplated that an 'act' was a single event which occurred on a single day, and there was no express provision for an 'act' which extended over a period of time. If the 'act' had taken place more than one year before proceedings were brought, the claim was barred even if its consequences did not appear until later.
- In opposing an appeal by a convicted defendant a prosecutor was not continuing the prosecution which had come to an end, but rather it was seeking to uphold the decision of the court or tribunal which had convicted the defendant. That act was a categorically different act from the act of prosecuting. If a defendant were to complain of breach of Convention rights in relation to the conduct of the appeal, such a complaint would differ from a complaint about the decision to prosecute or the manner in which the prosecution was conducted. Since there was no allegation that the BSB had acted in breach of Convention rights in relation to Miss O'Connor's appeal, the 1 year time limit had started to run when the disciplinary tribunal had found the charges against the Miss O'Connor proved. The time limit had therefore expired before Miss O'Connor had issued her claim 21 months later. Her claim was therefore statute-barred unless the one-year period was to be extended.
- A party wishing a court to exercise its discretion to grant an extension of time was obliged to make that clear to the court and to the opposing party, setting out the grounds and evidence on which she wished to rely. Since Miss O'Connor had failed to apply to the Deputy Master to exercise his discretion, the Deputy Master had not been at fault in not considering on his own initiative whether to do so. Warby J had been fully justified in holding that in the circumstances it was unreasonable for a legal professional to complain that the Deputy Master had not raised the issue. It had been incumbent on Miss O'Connor to apply if she had wanted an extension, and her decision to appeal the deputy master's decision was consistent with her belief her claim was not statute-barred. There was no basis for her submission that an extension was sought by implication.

Were there any interventions made in the Court of Appeal which are not in its judgment?
At the end of the hearing on 13 July 2016, Lord Justice Elias made a prescient observation that the 'O'Connor' surname of itself gave no indication that Miss O'Connor was BME. He asked the BSB's counsel how the BSB would know whether Miss O'Connor was black or not. In response Miss Padfield said that the BSB **did** hold data on the ethnic origins of barristers but that this data was not available within the BSB to those staff who make decisions as to whether to refer complaints for disciplinary action. When pressed by Lord Dyson MR, rather surprisingly, the BSB's counsel said this point had not formed part of its case and that there was no evidence on this before the court below.

How is diversity and inclusion data meant to be handled?
The 7th Data Protection principle in the Data Protection Act 1998 requires that there be '*appropriate technical and organisational measures*' to protect the security of data. As the BSB holds sensitive personal data on ethnic origin and disability (as well as data on age, sex, caring obligations, whether a barrister was educated privately or at a state school and whether a barrister was the first in her/his family to go to university), it would be required to build a system that such data could only be accessed and processed by those with a need to know. If the BSB's technical measures mean such data is not or is never accessible to those making enforcement or prosecution decisions then that must be a complete answer to any race discrimination claim.

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David Bowden is a solicitor-advocate and runs David Bowden Law which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at info@DavidBowdenLaw.com or by telephone on (01462) 431444.