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**Case Alert 3, January 2007**

### **Implications of the judgment in the Mayor Livingstone case**

The High Court judgment in the case concerning Mr Ken Livingstone, the Mayor of London, has significant implications for the interpretation of the Code of Conduct.

In particular, the judgment suggests that a member can only breach the Code of Conduct if they are performing their functions as a member, and that the Code of Conduct only applies to private conduct in limited cases. The Code covers members who misbehave when performing their duties, or who misuse their status while acting in a private capacity.

The judgment also established that the Code of Conduct cannot interfere with a member's right to freedom of speech in their private life.

### **The incident**

Mr Livingstone had allegedly made offensive comments to a journalist on the evening of 8 February 2005, likening him to a concentration camp guard. Mr Livingstone was leaving a reception at City Hall when he was confronted by the reporter. During their exchange, Mr Livingstone asked the reporter whether he was "a German war criminal". The reporter pointed out that he was Jewish, and was offended by the remark, to which Mr Livingstone said: "Well you might be, but you're just like a concentration camp guard. You're just doing it 'cause you're paid to, aren't you?"

The Ethical Standards Officer investigating the case would ordinarily have referred this matter to the Greater London Authority's Standards Committee, but believed this was not appropriate because the London Assembly had already taken a view on Mr Livingstone's conduct. The Ethical Standards Officer therefore referred the matter to the Adjudication Panel for England.

The Adjudication Panel's case tribunal decided that Mr Livingstone had failed to comply with the Code of Conduct by bringing his office as Mayor into disrepute. The tribunal decided to suspend Mr Livingstone for four weeks from 1 March 2006.

Mr Livingstone appealed to the High Court against the decision, and the suspension was stayed pending the appeal.

### **Private capacity and disrepute**

Mr Justice Collins, the judge presiding in the case, decided that Mr Livingstone had not been acting in his official capacity when he spoke to the reporter or performing his functions as Mayor. As a result, the requirement under paragraph 2(b) of the Code of Conduct, to "treat others with respect" while carrying out official duties, did not apply.

This still left the question of whether Mr Livingstone's conduct was covered by the duty to avoid behaviour which

could bring his office or authority into disrepute. This duty, under paragraph 4 of the Code of Conduct, applies when a member is acting in an official capacity, or in “any other circumstance”:

*A member must not in his official capacity, or any other circumstance, conduct himself in a manner which could reasonably be regarded as bringing his office or authority into disrepute.*

Mr Justice Collins found that the “any other circumstance” is limited to situations where a member is *performing his functions* as a member of the authority. This is in accordance with the commitment a member makes on assuming office, to:

*...give to the authority a written undertaking that in performing his functions he will observe the authority's code of conduct...*

(Section 52(1)(a) of the *Local Government Act 2000*)

In this case, Mr Justice Collins found that Mr Livingstone was off-duty and not performing his functions as Mayor, and so paragraph 4 of the Code of Conduct did not apply to his behaviour.

This judgment means there are large areas of members' private lives, when they are not 'performing their functions' as members, which are not covered by the Code of Conduct. Even unlawful conduct, such as convictions for shoplifting, drink-driving, or sexual offences, would not be covered by the Code, if the offences have nothing to do with the person's position as a member (although members who are convicted of a criminal offence and sentenced to more than three months' imprisonment are automatically disqualified from public office for five years).

Mr Justice Collins also found that the Adjudication Panel had applied the wrong test in relation to the issue of disrepute. His view was that damage to the reputation of the member as a person did not necessarily affect the reputation of his or her office or authority. He stated that there was a “real distinction between the man and the office”. There was a distinction between “misuse of office”, which can bring disrepute on the office, and “personal misconduct”, which is unlikely to do so. So, a politician may tarnish their own personal reputation by making offensive or insulting comments, but not necessarily that of their office.

Mr Justice Collins expressed the view that private capacity conduct will rarely be capable of bringing a member's office or authority into disrepute. The Code of Conduct will only cover a member's private behaviour where there is a direct link between the conduct and the office – for example, where a member uses their status as a member in a private dispute.

### **Freedom of speech**

The right to freedom of expression, under Article 10 of the *European Convention on Human Rights*, is not an absolute one, but is:

*...subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others...*

An earlier High Court judgment had already stressed the need for a high level of protection to be given to political views (*Sanders v Kingston [2005] EWHC 1145*) but made it clear that because of the Code of Conduct members acting in their official capacity were not free to abuse people.

However, Mr Justice Collins found that when a member is not acting in an official capacity or performing their functions as a member the right to freedom of speech includes the right to abuse people:

*Anyone is entitled to say what he likes of another provided he does not act unlawfully and so commits an*

*offence under, for example, the Public Order Act ... Surprising as it may perhaps appear to some, the right of freedom of speech does extend to abuse.*

Mr Justice Collins judged that it was disproportionate to apply the Code of Conduct to Mr Livingstone's remarks, as such a restraint on freedom of expression was not shown to be "necessary in a democratic society", even if the remarks were not political views.

The Code of Conduct cannot therefore interfere with a member's right to express inappropriate, intemperate or offensive views in their private life. This is in spite of what anyone might think of the views in question, and whether they are political opinions or personal abuse.

While Mr Justice Collins found that the statements were made in a private capacity and not covered by the Code, he nonetheless saw fit to criticise Mr Livingstone's comments to the journalist as "unnecessarily offensive", "intemperate", and "inappropriate", and suggested that he could have resolved the matter by making an apology.

### **The High Court's decision**

The High Court allowed the appeal, set aside the finding that Mr Livingstone had failed to comply with the Code of Conduct, and quashed the suspension.

A summary of the case is available on our site

A copy of the High Court's decision is available via the Adjudication Panel for England's website.