Neutral Citation Number: [2019] EWHC 37 (Admin)

Case No: CO/798/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 January 2019

Before :

THE HONOURABLE MR JUSTICE LAVENDER

- -

Between :

MALIK MOHAMMED NAZEER	**Appellant**
- and -	
SOLICITORS REGULATION AUTHORITY	**Respondent**

- -
- -

Geoffrey Williams QC (instructed by **Malik & Malik**) for the **Appellant**
Rory Dunlop (instructed by **Capsticks Solicitors LLP**) for the **Respondent**

Hearing date: 26 September 2018

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JUDGMENT

MR JUSTICE LAVENDER:

(1) Introduction

1. This is an appeal against certain aspects of a decision of the Solicitors Disciplinary Tribunal dated 1 February 2018. The Appellant contends that the Tribunal was wrong:

   (1) to find one of the allegations against him proved;

   (2) to impose a fine of £20,000 on him; and

   (3) to impose certain conditions on him. Those conditions were as follows:

   > "2.1 The First Respondent may not:
   >
   > 2.1.1 Practise as a sole practitioner or sole manager or sole owner of an authorised or recognised body;
   >
   > 2.1.2 Be a partner or member of a Limited Liability Partnership (LLP), Legal Disciplinary Practice (LDP) or Alternative Business Structure (ABS) or other authorised or recognised body;
   >
   > 2.1.3 Be a Compliance Officer for Legal Practice of a Compliance Office for Finance and Administration;
   >
   > 2.1.4 Work as a solicitor other than in employment approved by the Solicitors Regulation Authority."

2. I heard this appeal on 26 September 2018, but invited written submissions thereafter on certain issues. The last of these was dated 8 October 2018. Mr Dunlop then drew my attention to the judgment of Butcher J in *Nna v Health and Care Professions Council* [2018] EWHC 2967 (Admin), which he contended was relevant to the present appeal. That judgment was given on 17 October 2018, but a full transcript was not immediately available. I invited submissions from the parties on that judgment. The last of these was dated 21 November 2018. This judgment was sent to the parties in draft on 21 December 2018.

3. CPR 52.21(3) provides that:

   > "The appeal court will allow an appeal where the decision of the lower court was—
   >
   > (a) wrong; or
   >
   > (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court."

4. This is an appeal from a specialist tribunal whose understanding of what the solicitors' profession expects of its members deserves respect.

(2) The Appellant and his Firm

5. The Appellant, who was born in October 1964, was admitted to the roll of solicitors on 2 April 1997. At all material times he practised with his brother, Malik Mohammed Saleem, in partnership under the firm name Malik & Malik Solicitors or, following incorporation, as directors of Malik & Malik Limited. I will refer to the firm or company as Malik & Malik or the firm.

6. By November 2017 Malik & Malik employed 18 people: 6 assistant solicitors, 2 prospective trainees, 2 unadmitted fee earners and 8 support staff. 80% of Malik & Malik's fee income came from immigration work. I am told that 16 of the firm's employees worked in the immigration department. The Appellant's brother was the head of the immigration department. One of the solicitors who worked for Malik & Malik in the immigration department has been referred to in this case as Person A. He was the individual at Malik & Malik who dealt with certain clients who have been referred to as client 8 and client 9. Person A worked under the supervision of the Appellant's brother.

7. The Appellant specialised in criminal law. He was responsible for the general management and administration of the firm. He was the Compliance Officer for Legal Practice and Compliance Officer for Finance and Administration. The duties of a Compliance Officer for Legal Affairs (also known as a "COLP") are set out in rule 8.5(c) of the SRA Authorisation Rules 2011 as follows:

> "The *COLP* of an *authorised body* must:
>
> (i) take all reasonable steps to:
>
> (A) ensure compliance with the terms of conditions of the *authorised body's authorisation* except any obligations imposed under the *SRA Accounts Rules*;
>
> (B) ensure compliance with any statutory obligations of the body, its *managers*, *employees* or *interest holders* or the *sole practitioner* in relation to the body's carrying on of *authorised activities*; and
>
> (C) record any failure so to comply and make such records available to the *SRA* on request; …"

8. Paragraph (vii) of the accompanying guidance notes states as follows:

> "COLPs and COFAs are responsible for ensuring that the firm has systems and controls in place to enable the firm, as well as its managers and employees and anyone who owns any interest in the firm, to comply with the requirements on them. The firm and its managers are not absolved from any of their own obligations and remain fully responsible for compliance (see Rule 8.1)."

9. It is by now well known that the process of this court is open to abuse in immigration cases if applications for judicial review are made which have no merit, but which are

brought solely for the purpose of delaying the removal of an individual from the United Kingdom. The courts have repeatedly warned solicitors of their responsibilities in this regard. For instance, in *Madan v Secretary of State for the Home Department* [2007] EWCA Civ 770, a case concerning judicial review proceedings brought just before the proposed removal of the Claimants, Buxton LJ said as follows in paragraph 8:

> "We mention now one unsatisfactory feature of both of these cases, which is that serial applications were made for reconsideration on the basis of changed circumstances. Before making such an application, which is very demanding on public resources, advisers need to consider very carefully whether the application is justified. It will amount to professional misconduct to make an unjustified application with a view to postponing the implementation of a previous decision."

10. The Claimants' solicitors in that case were Malik & Malik. Buxton LJ said as follows about their conduct of the matter, in paragraph 14:

> "We have seen that the process with which Mitting J was concerned was initiated, and brought before the judge, on the very day on which removal was to take place, despite the solicitors having known, in the case of Mr Kapoor for several months, that deportation had been ordered. Mitting J concluded that the delay was deliberate, in order to make it impossible for proper judicial consideration to be given to the underlying merits. He was quite right to say that proper consideration could not be given to the merits: hence, in part, this court being obliged, reluctantly, to remit the matter to the Administrative Court. It is also wholly understandable that on the material and submissions made to him the judge thought that the applications were an abuse. We have now received from the solicitors a 120 paragraph witness statement which, although revealing a most unsatisfactory state of affairs, denies any deliberate misleading of the court. We accept that denial at face value, but set out how in other ways these matters were conducted unsatisfactorily."

11. That was in 2007. Between then and 2014 Malik & Malik had to appear on three occasions before the court pursuant to the procedure set out in *R (Hamid) v Secretary of State for the Home Department* [2012] EWHC 3070 Admin. The third of those appearances was in 2014 in *R (Butt) v Secretary of State for the Home Department* [2014] EWHC 264 Admin, when the President of the Queen's Bench Division, Sir Brian Leveson, said as follows in paragraphs 16 to 18 of his judgment:

> "16. The final case before the court is slightly different. In one sense in *R (Patel) v Secretary of State for the Home Department*, the solicitors, Messrs Malik & Malik, present a particularly serious problem given that they have twice before appeared in Hamid courts. However, the explanation for what is conceded to have been an abusive application in this case is based upon the dishonesty of an employee who felt pressured to make the application and to deceive the senior partner into signing the appropriate cheque to pay the court fee.
>
> 17. It is not necessary to enter into the merits of the particular case. The relevant employee has undergone disciplinary proceedings and been

> dismissed. He himself has signed a statement for the court apologising fully and unreservedly and with the highest degree of shame and embarrassment, not blaming anyone but himself for his actions. The senior partner of the firm of solicitors also expressed his mortification in having to appear before the court in these circumstances. We recognise that the unauthorised actions of a trusted individual are difficult to stop. The firm will have to reflect upon what the senior partner needs to see before signing cheques on the firm's behalf, and will doubtless have learnt a salutary lesson in relation to this particular problem.
>
> 18. In the circumstances, although reading the papers before seeing this explanation we were minded to refer this firm to the Solicitors Regulation Authority, we have decided not to take that step but to accept the apology. Again, the firm will write to the Administrative Court Office identifying what steps it has taken to improve its procedures to ensure that this will not happen again. It is almost inconceivable that Malik & Malik will survive a further referral to a Hamid court."

12. As Mr Dunlop submitted, it is hard to think of a starker warning from the judiciary than that delivered to Malik & Malik in the case of *Patel*. Moreover, the judgments in *Madan* and *Patel* mean that there is no substance in Mr Williams' submission that the Appellant "had no reason not to trust [his brother] to supervise [immigration] work efficiently." On the contrary, the Appellant had every reason to believe that the immigration department, as supervised by his brother, was behaving improperly and that it was his duty as COLP to do something about that.

13. The judgment in *Patel* was given on 28 January 2014. The Home Office later informed the Solicitors Regulation Authority ("the SRA") that Malik & Malik had between 17 April 2014 and 3 July 2015 submitted 35 cases which were certified as totally without merit. The SRA commenced an investigation on 5 April 2016.

(3) The SRA's Allegations

14. The investigation led the SRA to make an application to the Tribunal. The allegations made by the SRA and the facts and matters supporting the application and each allegation were set out in a statement filed under rule 7(1) of the Solicitors (Disciplinary Proceedings) Rules 2007 ("the Rule 7 statement").

15. Six allegations (referred to as allegations 1.1 to 1.6) were made against the Appellant. Those same allegations were also made against the Appellant's brother, together with a seventh allegation, referred to as allegation 2.1:

    (1) Allegation 1.1 was found proved against the Appellant and his brother in relation to clients 8 and 9. I will have to consider the terms of allegation 1.1 in some detail, since most of Mr Williams' submissions focused on the terms of this allegation.

    (2) Allegation 1.2 to 1.4 were not proved against the Appellant. I need say no more about them.

(3) Allegation 1.5 contained a statement about how allegations 1.1 to 1.4 were pleaded, so it will be necessary to consider allegation 1.5 in more detail.

(4) Allegation 1.6 concerned certain files. In the course of its investigation, the SRA was informed that these files had been lost. That led to the allegation that the Appellant and his brother had failed to take reasonable steps to protect, keep confidential and provide to the SRA client files which were requested by the SRA, in breach of principles 7, 8 and 10 of the SRA Principles 2011. The Tribunal found that allegation proved against both the Appellant and his brother. That finding is not challenged.

(5) Allegation 2.1 was made against the Appellant's brother alone. It was an allegation that he failed adequately to supervise Person A The Tribunal found that allegation proved.

(3)(a) Allegation 1.1

16. Allegation 1.1 was in the following terms:

> "The allegations made against both Respondents by the SRA are that:
>
> 1.1 Between around January 2014 and December 2015, they facilitated the abuse of litigation by bringing or facilitating judicial review claims on behalf of clients, including Clients 7-9, in circumstances where they knew or should have known that the claim was not properly arguable and its true purpose was to thwart and/or delay lawful removal and/or procure release from lawful detention. This was a breach of any or all of Principles 1, 2, and 6 of the SRA Principles 2011 and a failure to achieve Outcome 5.6 of the SRA Code of Conduct 2011."

17. In relation to clients 8 and 9, Malik & Malik did not bring any judicial review claims. It facilitated them. The firm provided what were known as "unbundled" services, drafting claims for clients 8 and 9 which they brought as litigants in person.

18. Since Malik & Malik did not bring these claims, the material part of allegation 1.1 was that the Appellant and his brother "facilitated" the abuse of litigation by "facilitating" the judicial review claims made by clients 8 and 9. Mr Williams submitted, by reference to paragraph 225 of the judgment of Laing J in *Secretary of State for the Home Department v LF* [2017] EWHC 2685 (Admin), that "facilitating" means "the taking of positive steps which make something easier". I reject that submission, which involves taking a sentence from Laing J's judgment out of context. In an appropriate case, a person can facilitate something by inaction. That is consistent with the normal, dictionary definition of the word "facilitate" used by the Tribunal: "make (an action or process) easy or easier".

19. It was part of allegation 1.1 that the Appellant and his brother facilitated the abuse of litigation "in circumstances where they knew or should have known that the claim was not properly arguable and its true purpose was to … delay lawful removal …". As to this:

(1) The Tribunal found, and it was not disputed for the purposes of this appeal, that it was a fact that the claims made by clients 8 and 9 were not properly arguable and their true purpose was to delay lawful removal. The Tribunal found that the claims were therefore abusive.

(2) The Tribunal also found, and it was not disputed for the purposes of this appeal, that Person A (who drafted those claims) knew or should have known that fact.

(3) Person A was supervised by the Appellant's brother. The SRA alleged, and the Tribunal found, that the Appellant's brother failed adequately to supervise Person A. The Tribunal also found that, if the Appellant's brother had supervised Person A adequately, the deficiencies in his drafting of client 8's and client 9's claims ought to have come to light and been prevented. In other words, the Appellant's brother ought to have known of the defects in those claims.

20. However, the Appellant did not supervise Person A and there was no allegation that he failed adequately to supervise Person A. Indeed, there was no evidence that the Appellant knew anything about these particular claims, which were just two of many claims drafted by a busy immigration department. The SRA did not put its case on the basis that the Appellant either knew, or should have known, any of the detail of these two particular claims.

21. Mr Dunlop submitted that it was sufficient for the purposes of proving allegation 1.1 against the Appellant if the SRA proved that the Appellant's brother knew or should have known the matters set out in allegation 1.1. He submitted that Mr Williams' submission to the contrary depended on misreading allegation 1.1 (by, in effect, inserting the word "each" between the words "they" and "knew"). I do not accept Mr Dunlop's submission as to the meaning of allegation 1.1 viewed in isolation. (I will have to consider his further submission as to the effect of the Rule 7 statement.) Where a single charge or allegation is formulated against two or more people, the natural and ordinary meaning of the charge is that, absent express words to the contrary, all elements of the charge have to be proved against one of those people if he is to be found guilty as charged.

(3)(b) Allegation 1.5

22. When considering the meaning of allegation 1.1, it is necessary to consider allegation 1.5, which was in the following terms:

> "Allegations 1.1 to 1.4 are pleaded on the basis that the Respondents knew or recklessly disregarded the fact that at least some of the totally without merit claims they brought or facilitated were not properly arguable and/or out of time. In the alternative, if they considered that all or any of those claims were properly arguable and failed to notice that the claims for Clients 3, 5 and 6 were out of time, that would demonstrate manifest incompetence in breach of any or all of Principles 1, 5 and 6 of the SRA Principles 2011 and thereby failing to achieve any or all of Outcomes 1.2, 1.4 and 1.5 of the SRA Code of Conduct 2011."

23. It will be noted that allegation 1.5 was in two parts. The first sentence of allegation 1.5 was not a separate allegation at all, but a statement of the basis on which allegations 1.1 to 1.4 were pleaded. The second sentence of allegation 1.5 was an allegation made in the alternative to allegations 1.1 to 1.4. The Tribunal only found that allegation proved against the Appellant's brother, and then only in a particular respect which is irrelevant for the purposes of this appeal. Given its finding on allegation 1.1, the Tribunal did not consider the second sentence of allegation 1.5 insofar as it concerned the Appellant and clients 8 and 9.

24. On its face, the first sentence of allegation 1.5 clarified and limited allegation 1.1 by stating that it was pleaded on the basis that the Appellant (and his brother) either:

(1) knew; or

(2) recklessly disregarded the fact,

that at least some of the totally without merit claims which they facilitated were not properly arguable.

(4) The Rule 7 Statement

25. This is reflected in paragraph 108 of the Rule 7 statement, which was one of those paragraphs (i.e. 107 to 109) which particularised allegation 1.1. Paragraph 108 stated as follows:

> "The Respondents have knowingly and/or recklessly facilitated abusive judicial review claims."

26. This general allegation was particularised in 12 sub-paragraphs. These included sub-paragraphs 108.11 and 108.12, which concerned clients 8 and 9 and which provided as follows:

> "108.11 The Firm assisted Client 8 to bring a judicial review claim to thwart his lawful removal. The statement of facts and grounds contain submissions which the drafter and any supervisor must have known were not properly arguable – in particular the contention that he had a viable asylum claim simply because blood feuds exist in Albania (see Allegation 1.4 below for more detail). The employees of the Firm involved in assisting Client 8 either knew or recklessly disregarded the fact that Client 8's claim was not properly arguable but an abusive device to thwart lawful removal and secure his release from lawful detention.
>
> 108.12 The Firm assisted Client 9 to bring a judicial review claim to thwart his lawful removal. The statement of facts and grounds contain submissions which the drafter and any supervisor must have known were not properly arguable - in particular the contention that Client 9 could not internally relocate to a safe part of Kosovo simply and solely because his partner's family were 'actively pursuing them' (see Allegation 1.4 below for more detail). The employees of the Firm involved in assisting Client 9 either knew or recklessly disregarded

> the fact that Client 9's claim was not properly arguable but an abusive device to thwart lawful removal and secure his release from lawful detention."

27. It will be noted that these sub-paragraphs alleged knowledge or recklessness on the part of: (a) the drafter (i.e. Person A); (b) any supervisor (i.e. the Appellant's brother); and (c) the employees of the firm involved in assisting client 8 or 9 (i.e. Person A and the Appellant's brother). It was not the SRA's case that the Appellant fell into any of these categories.

28. However, Mr Dunlop also sought to rely on paragraph 125 of the Rule 7 Statement. This was one of the paragraphs (i.e. paragraphs 123 to 128) which concerned allegation 1.5. It stated as follows:

> "Further, allegations 1.1 to 1.4 are pleaded on the premise that the Respondents were either aware that the claims they were bringing, or encouraging/facilitating Clients to bring, were not properly arguable and/or out of time or they failed to turn their minds to that possibility."

29. This paragraph explained what was meant by the statement in allegation 1.5 that allegations 1.1 to 1.4 were pleaded on the basis that the Appellant and his brother "recklessly disregarded the fact that at least some of the totally without merit claims they … facilitated were not properly arguable". The meaning of recklessness has been controversial, at least in the criminal law. But in the present case, paragraph 125 spelt out that it included the Appellant failing to turn his mind to the possibility that the claims which were facilitated were not properly arguable.

30. It is also relevant to note that, although the Rule 7 statement referred to *Hamid* and contained a section (i.e. paragraphs 21 to 35) entitled "The Firm's history of TWM claims", it contained no reference to *Patel*, nor to the fact that Malik & Malik had been summoned before the Court under the *Hamid* procedure.

(5) The Evidence at the Hearing

31. The Appellant's brother produced a witness statement which was 52 pages long. He addressed the nature and complexity of immigration law in generic terms, including in particular the question of which cases are assessed to be totally without merit. He also commented on the individual cases which were the subject of the allegations against him. He spoke of the firm's approach to training and quality control and of its provision of what are known as unbundled services to litigants in person.

32. The Appellant's brother dealt in general terms with the question of the firm's approach to weak cases. He said as follows in paragraph 78 of his witness statement:

> "Subject to the point above about asylum cases, the Firm would adhere to the following practice, albeit flexibly:
>
> - consider going on the record in cases with prospects of 45% or higher;
>
> - generally, not to go on the record in cases with prospects in the 21% to 44% range, but, taking into account a range of factors including the

client's best interests, their vulnerability and whether they were in fear, consider advising and/or assisting (i.e. providing 'unbundled services' to clients as a 'litigant-in-person' ('LIP');

- not assist at all in cases with prospects of 20% or below except to advise the client that we considered such cases to be bound to fail."

33. He added the following in paragraphs 80 and 81:

> "80. The merits assessment approach above was not an exact science, but rather an exercise of judgment carried out in good faith by the caseworker in question, under the appropriate degree of supervision by me, using the best of our judgement. The judgment as to which cases would be TWM was not an easy one. As a matter of principle however, it is, in my view, fundamentally wrong to assert or imply that a solicitor or barrister should not take on weak cases. The Firm had a high volume of immigration clients; many of those clients were often vulnerable persons with weak cases.
>
> 81. My perception of the professional boundary on this subject was that I was obliged by conduct rules to not make legal arguments or pursue cases which I knew were unarguable, or warranted a synonymous label such as 'bound to fail' or 'helpless'. Refusing to act in cases that I thought might result in a TWM certificate from the Court would, in my view, have been excessively exacting and prejudicial, particularly in an area of practice such as immigration where the law is complex and changes frequently."

34. Insofar as he dealt with clients 8 and 9, the Appellant's brother did not accept that their claims were unarguable, but, as I have said, the Tribunal disagreed and there is no challenge to the Tribunal's finding in that respect.

35. The Appellant's brother did not in his statement refer to the fact that Malik & Malik had been criticised in *Madan* and had been brought before the court three times under the *Hamid* procedure. Nor did he identify any steps which he had taken in response to those incidents with a view to addressing the court's concerns.

36. The Appellant's witness statement was only 3 pages long. After describing his own background and position in the firm, he said as follows in the final paragraph of his witness statement:

> "I have had the opportunity of reading the statement of my brother and I would adopt the said statement in its entirety; this is because I have no involvement with the immigration side of the Firm's work, and my ability to respond to the Allegations made by the Applicant is therefore limited to information conveyed to me by my brother Malik Mohammed Saleem. I am surprised that the Applicant is pursing misconduct proceedings against me given that its practice in other similar cases appears to be that it commences action only against those 'principals' who are involved in, or responsible for, the area of work in which misconduct is said to have occurred."

37. Like his brother, therefore, the Appellant did not in his statement refer to the fact that Malik & Malik had been criticised in *Madan* and brought before the court three times under the *Hamid* procedure. Nor did he identify any steps which he had taken in response to those incidents with a view to addressing the court's concerns. On the contrary, he confirmed that he had no involvement with the immigration side of the firm's work.

38. The hearing before the Tribunal took place over 5 days, from 27 November to 1 December 2017. *Madan* and *Patel* were referred to by Mr Dunlop in opening the case and were the subject of cross-examination. In particular, the Appellant's evidence was that:

    (1) Although he was the COLP, he did not see the 120 paragraph witness statement submitted by Malik & Malik in *Madan*, but simply relied on his brother.

    (2) He thought that his firm came out of the *Patel* judgment positively. He did not take any action in response to the *Patel* judgment, after having a report back from his brother, whom he trusted. His evidence included the following question and answer:

        "Mr Dunlop: So, let me just make sure I understand your evidence. You're saying that, from your brother's response, you trusted what he was saying, that, really, the firm didn't do anything wrong, and nothing needed to change. Is that your evidence?

        Mr Nazeer: Yes. …"

39. This evidence was, frankly, astonishing. The Tribunal were justified as regarding it a matter of the gravest concern that the Appellant had responded in this way to three appearances before the Court under the *Hamid* procedure and the strong warning issued in *Patel* by the President of the Queen's Bench Division.

(6) Submissions to the Tribunal

40. Given the way in which this appeal was argued, it is appropriate to consider the submissions made to the Tribunal. Mr Dunlop complained that most of the points taken by Mr Williams on appeal were pleading points which ought to have been raised before the Tribunal. However that submission gave rise to the question whether there was a reason for the Appellant's counsel to raise these points before the Tribunal.

41. In opening the case, Mr Dunlop referred, as I have said, to *Madan*, *Hamid* and *Patel*. In dealing with allegation 1.3, he said as follows:

> "And I say that this is an allegation properly brought against both respondents. The first respondent was responsible for the general management of the firm, he was the Compliance Officer, both [inaudible]. He drafted many of the relevant letters and emails I've taken you to. He must have been aware of the firm's policy decision to come off the record, and provide unbundled services, in unwinnable case."

42. Mr Dunlop did not repeat these points when he went on to deal with allegation 1.1, but he said as follows about the Appellant and allegation 1.1:

> "… this is evidence of an abusive pattern of bringing totally without merit claims on the brink of removal which, as we know, has the effect of thwarting removal. … And so, I say, because of this wider pattern, it is a claim properly brought against the first, as well as the second respondent."

43. Later, he added:

> "Now so what I say is this can't all be blamed on the drafting of Person A. This is a systemic problem with this firm reflecting a policy choice which is never to say no. To say they will always draft grounds no matter how hopeless for anyone who'll pay for them."

44. In summarising the SRA's submissions, the Tribunal said, inter alia, as follows (in paragraph 25.4 of its judgment):

> "The Respondents had knowingly and/or recklessly facilitated abusive judicial review claims. The Respondents were the sole owners, managers and directors of the Firm which was why it was right that this Allegation was brought against the First Respondent as well as the Second Respondent. The Firm was one of the three firms which had brought the highest number of TWM claims."

45. The parties put before me a transcript of the submissions made at trial. Mr Dunlop took me to passages in his opening submissions, but he did not identify any passage in which he expressly contended that it was the SRA's case that allegation 1.1 could be proved against the Appellant in relation to a client if the Tribunal was satisfied that the Appellant's brother (but not the Appellant) knew or ought to have known that that client's claim was not properly arguable and its true purpose was to delay lawful removal.

46. On the other hand, as I have said, the SRA did not put its case on the basis that the Appellant either knew, or should have known, any of the details of the claims made by clients 8 and 9. The Appellant's counsel did not submit that this was fatal to allegation 1.1. Mr Dunlop submitted that this was a pleading point which ought to have been taken before the Tribunal and which could not now be taken on appeal. I agree that the issue ought to have been identified before the Tribunal, but in all the circumstances I am not persuaded that it cannot be raised on appeal.

(7) The Tribunal's Reasons

47. Turning to the reasons why the Tribunal found allegation 1.1 proved against the Appellant, it is appropriate to quote paragraphs 25.29, 25.32 to 25.36 and 44 to 47 of the Tribunal's judgment.

48. Paragraph 25.29 concerns client 8. It is in the following terms (emphasis added):

> "The Tribunal then considered whether either of the Respondents had facilitated the abuse of litigation in respect of Client 8. <u>The Respondents were both directors of the Firm. The First Respondent was additionally COLP and</u>

> COFA and the Second Respondent was head of the Immigration department. They were each responsible for the operation of the Firm and for the actions of the fee earners that they employed. The Firm had facilitated the drafting of the grounds and the lodging of the JR claim by permitting Person A to do it at a time when there had already been a warning to the firm in the case of Patel. The Tribunal was satisfied beyond reasonable doubt that the First and Second Respondent had facilitated the abuse of litigation in respect of Client 8."

49. Paragraph 25.32 concerns client 9. It is in the following terms:

> "The Tribunal then considered whether either of the Respondents had facilitated the abuse of litigation in respect of Client 9. The same factors existed here, with regard to the Respondents' respective roles in the Firm, as for Client 8 and the Tribunal was satisfied beyond reasonable doubt that both Respondents had facilitated the abuse of litigation in respect of Client 9."

50. Paragraph 25.33 of the judgment concerns Principle 1 and Outcome 5.6. Principle 1 is as follows:

> "You must:
>
> 1. uphold the rule of law and the proper administration of justice;"

51. Outcome 5.6 is as follows:

> "You must achieve these outcomes:
>
> …
>
> O(5.6) you comply with your duties to the court;"

52. The Tribunal said as follows in paragraph 25.33 of its judgment:

> "The Tribunal found that facilitating the abuse of litigation was clearly inconsistent with the Respondents' duties to the Court and the requirement upon them to uphold the rule of law and the administration of justice. The sole purpose of the JR claims in respect of Clients 8 and 9 had been to thwart a lawful decision of the Home Office to detain and/or remove. In addition, by facilitating the lodging of claims at the UTJ that were abusive, the Respondents had created an additional workload which meant that cases as a whole took longer to move through the system. The Tribunal found beyond reasonable doubt that by allowing this to happen in respect of these clients, the Respondents had breached Principle 1 and failed to achieve Outcome 5.6."

53. Paragraph 25.34 of the judgment concerns Principle 6, which is as follows:

> "You must:
>
> …
>
> 6. behave in a way that maintains the trust the public places in you and in the provision of legal services;"

54. The Tribunal said as follows in paragraph 25.34 of its judgment (emphasis added):

> "The Tribunal was keen to emphasise that solicitors had a duty to robustly defend clients and this often included holding the executive and those in positions of authority to account. However the situation in respect of Clients 8 and 9 was that JR claims with absolutely no merit had been made for no legitimate purpose. The trust the public placed in the profession depended upon solicitors appreciating the difference between robustly defending their clients' position and abusing litigation. The Tribunal was satisfied beyond reasonable doubt that the Respondents had failed to behave in a way which maintained that trust by permitting a situation to arise where they had allowed abusive claims to be made on behalf of Clients 8 and 9."

55. Paragraph 25.35 of the judgment concerns Principle 2, which is as follows:

> "You must:
>
> …
>
> 2. act with integrity;"

56. The Tribunal said as follows in paragraph 25.35 of its judgment (emphasis added):

> "The Tribunal adopted the definition of lack of integrity as set out in Hoodless v Financial Services Authority [2003] UKFSM FSM 007 and had regard to Williams v SRA [2017] EWHC 1478 (Admin). The Tribunal noted that neither Respondent was the conducting fee earner in respect of Clients 8 or 9. They were in positions of management which carried significant responsibility but had nevertheless been one step removed from the actual process of drafting and lodging of the abusive JRs. They had facilitated the abuse through their inadequate management of the Firm and supervision of fee earners. However in respect of these two clients the absence of a positive act mean that the Tribunal could not be satisfied beyond reasonable doubt that they had lacked moral soundness."

57. Paragraph 25.36 of the judgment concerned recklessness. The Tribunal said as follows:

> "Allegation 1.5 had referred to Allegations 1.1-1.4 being put, inter alia, on the basis of reckless disregard. The Tribunal adopted the test in R v G [2003] UKHL 50. The question for the Tribunal was whether either of the Respondents perceived that there was a risk that they were facilitating the abuse of litigation. This was a subjective assessment. The SRA had audited the Firm, as explained by the First Respondent, and had not raised any issues. On the other hand Patel ought to have served as a warning to the Respondents to re-double their efforts to ensure that this sort of problem did not happen again. The Tribunal noted that Person A had not been in the cases that had resulted in Hamid hearings and he was an experienced practitioner. The supervision may have been lacking but the Tribunal was not satisfied to the requisite standard that either Respondent had perceived there to be a risk. The Tribunal was not required to consider the objective assessment of the Respondents' actions in the context of recklessness. In the particular circumstances of these matters, the Tribunal found the allegation of recklessness not proved."

58. In this paragraph, the Tribunal treated the allegation of recklessness in allegation 1.5 as limited to "subjective recklessness" as defined in *R v G* [2004] 1 AC 1034 in the context of the Criminal Damage Act 1971. The Tribunal overlooked the explanation in paragraph 125 of the Rule 7 statement that it was the SRA's case that the Appellant and his brother failed to turn their minds to the possibility that the claims brought by clients 8 and 9 were not properly arguable.

59. As I have said, the Tribunal found allegation 1.1 proved beyond reasonable doubt to the extent of a breach of Principles 1 and 6 (but not 2) and Outcome 5.6 in respect of clients 8 and 9, but not otherwise.

60. Paragraphs 44 to 47 come from the part of the judgment dealing with sanction. The Tribunal said as follows (emphasis added):

> "44. In assessing the First Respondent's culpability the Tribunal found that the management system was limited and chaotic. As the COLP and COFA he was responsible for that.
>
> 45. The absence of proper management within the Firm resulted in a situation whereby the Second Respondent had not been held in check and clients' interests were put at risk. The First Respondent was of similar experience to the Second Respondent and clearly had direct control of the circumstances albeit he had not exercised that control. Although the First Respondent had less direct involvement in the cases that the Second Respondent, this was balanced against the fact that he had specific regulatory responsibilities which he had failed to discharge.
>
> 46. The reputation of the profession was damaged in any case where failure to properly manage a Firm resulted in the abuse of litigation. The misconduct was aggravated by the fact that it had continued over a period of time and the problems were systemic. The First Respondent had shown no insight and had left the running of these cases entirely to the Second Respondent. The Tribunal was concerned in particular that the First Respondent had been unable, when giving evidence, to properly describe his role as a COLP. He also had one previous appearance before the Tribunal, the details of which the Tribunal had noted.
>
> 47. The misconduct was mitigated by the fact that the First Respondent had trusted his brother albeit he had turned a blind eye to how his brother was running the department and the deficiencies therein. The Tribunal acknowledged that the First Respondent had made the appropriate notifications regarding the data protection breach and the character references submitted on his behalf which, like those of the Second Respondent spoke well of him."

61. It is clear from the passages which I have highlighted that the Tribunal considered that the Appellant was in breach of Principles 1 and 6 and of his duty to achieve Outcome 5.6, not because he actually knew that the claims made by clients 8 and 9 were not properly arguable, nor because he was subjectively reckless about that, but because

he: failed to manage the firm adequately, despite the warnings which had been received; left the running of such cases entirely to his brother; and thereby permitted claims to be made which were totally without merit and an abuse of the process of the court.

62. I have no doubt that that finding was supported by the evidence and that the Tribunal was entitled to regard the Appellant's conduct as constituting a breach of Principles 1 and 6 and of his duty to achieve Outcome 5.6. The central question on this appeal is whether the finding was one which was open to the Tribunal in the light of the way in which the allegations were framed.

63. The Tribunal dealt with the appropriate sanction in paragraphs 48 and 49 of its judgment, as follows:

> "48. The Tribunal considered that making no order or imposing a reprimand was insufficient to reflect the seriousness of the First Respondent's misconduct. The Tribunal was satisfied that the protection of the public and the reputation of the profession did not require a suspension in the case of the First Respondent. The appropriate sanction in his case was fine together with the imposition of restrictions which the Tribunal deemed necessary for the future protection of the public. The First Respondent had failed to discharge his regulatory obligations and the consequences of that failure had been serious.
>
> 49. In considering the level of fine the Tribunal took into account all the circumstances set out above and assessed this against the indicative fine bands. The Tribunal found the First Respondent's misconduct to be very serious and falling within level 4. The Tribunal had regard to the character references adduced on behalf [of] the First Respondent and found that the appropriate and proportionate fine in his case was £20,000."

(8) The Grounds of Appeal on Allegation 1.1

64. The Appellant contends that the Tribunal could not properly find allegation 1.1 proved in circumstances where:

(1) The Appellant was not an expert in immigration law, and was therefore unable himself to judge whether individual claims were or were not totally without merit or an abuse of process.

(2) The claims made by clients 8 and 9 were only 2 cases dealt with by a large and busy immigration department.

(3) The Appellant did not prepare the claims made by clients 8 and 9 and had no personal involvement in them.

(4) The Appellant did not supervise the solicitor, i.e. Person A, who did prepare those claims.

(5) The Appellant was not accused of a failure to supervise Person A adequately.

(6) Person A was supervised by the Appellant's brother, who has been found guilty of a failure to supervise Person A adequately. Had the Appellant's brother supervised Person A adequately, there would have been no abuse of process.

(7) The Appellant had not perceived there to be a risk that they were facilitating an abuse of litigation and had not been reckless: see paragraph 25.36 of the judgment.

(8) The Appellant had not lacked moral soundness: see paragraph 25.35.

(9) The Appellant had not done any positive act: see paragraph 25.35.

(10) The Appellant had not faced an allegation of breach of principle 8, which provides that:

> "You must:
>
> …
>
> 8. run your business or carry out your role in the business effectively and in accordance with proper governance and sound financial and risk management principles;"

(11) Although the Appellant was the Firm's COLP, that does not make him vicariously liable for the misconduct of the Firm's employees.

(12) There was no allegation that the Appellant was in breach of his duties as COLP, e.g. identifying the steps which the SRA contended that he was obliged to, but had failed, to take as COLP.

65. Against that, the SRA drew attention to the following salient facts of this case:

(1) The Appellant was one of only two principals in the firm.

(2) Immigration work made up 75-80% of the firm's business.

(3) Although the Appellant was not directly responsible for the immigration department, he was responsible for the general administration of the firm and was its COLP (and COFA).

(4) The Appellant had received repeated warnings from the Court about failings in the firm's conduct in relation to immigration matters.

(5) The Appellant had done nothing in response to these warnings.

(6) There had continued to be similar failings.

66. In those circumstances, it seems to me that the Tribunal was entitled to take a very dim view of the Appellant's conduct. Not only had the firm facilitated the abuse of litigation, or abuse of process as it is more commonly known, but the Appellant himself had failed to do anything to stop it, despite his responsibilities as director and as COLP and despite the warnings given in *Butt* and *Patel*.

67. Mr Williams submitted that there are two points of central importance: the Tribunal can only convict a solicitor on the strict basis of what is pleaded against him; and in conducting the process, the SRA must be held to the facts alleged in its statement.

68. In relation to the first point, Mr Williams relied on rules 5(2) and 7(1) of the SDT Rules, which provide as follows:

> "5(2) The application shall be supported by a Statement setting out the allegations and the facts and matters supporting the application and each allegation contained in it. …"

> "7(1) The applicant may file supplementary Statements with the Clerk containing additional fact or matters on which the applicant seeks to rely or further allegations and facts of matters in support of the application. Any supplementary Statement containing further allegations against the respondent shall be treated as though it were an application for the purposes of rules 5(3) and 6(1), (2), (3) and (5)."

69. The second point is one to which the decision in *Nna v Health and Care Professions Council* [2018] EWHC 2967 (Admin) is potentially relevant. That case concerned a finding that Dr Nna was guilty of professional misconduct in making an agreement to provide a supervised research training programme at a certain site, together with accommodation, to an individual from Nigeria and: (a) doing so when he knew that he could not fulfil the agreement because the site did not have any of the necessary facilities; and (b) then not providing the training programme or the accommodation.

70. The allegation specified the agreed cost of the training programme and the accommodation as £9,200. The Conduct and Competence Committee Panel of the Health and Care Professions Council found that the cost was initially agreed at £12,000 and then renegotiated at £9,200. A challenge to this factual finding was dismissed, but Butcher J held that, even if the agreed cost had remained £12,000, that would not have affected the finding that the allegation was proved. The judgement in *Nna* illustrates the proposition that an allegation of misconduct can be found proved even if certain of the particulars set out in the allegation are not proved.

(9) Decision on Allegation 1.1

71. It clearly would have been preferable if more thought had been given to the drafting of allegation 1.1 insofar as it applied to the Appellant. In particular, there was a tension between allegation 1.1 itself, which alleged that the Appellant knew or should have known that the individual claims were not properly arguable (and which was explained by allegation 1.5 as meaning that the Appellant knew or recklessly disregarded the fact that the claims were not properly arguable) and the Rule 7 statement, from which it appeared that the SRA was not alleging that the Appellant either knew, or should have known, any of the details of the claims made by clients 8 and 9. It is regrettable that this tension was not identified by either party, or indeed by the Tribunal, in which case it could have been resolved and the position clarified, if necessary by an amendment.

72. Nevertheless, the Tribunal found that the core of allegation 1.1 was proved, i.e. that the Appellant facilitated the abuse of litigation and that that amounted to a breach of Principles 1 and 6 and a failure to achieve Outcome 5.6.

73. The Appellant's case is that the Tribunal could not find allegation 1.1 proved against him unless it had also been proved that he had the state of mind alleged in allegation 1.1, i.e. knowledge or recklessness.

74. Mr Dunlop did not accept that proposition, but in any event he asserted that:

(1) The Tribunal had, in substance, found that the Appellant was reckless in the sense alleged in allegation 1.1, as explained in allegation 1.5 and in paragraph 125 of the Rule 7 statement.

(2) The Tribunal dealt with recklessness in paragraph 25.36 of its judgment, but that paragraph only dealt with "subjective recklessness", and not the "objective recklessness" alleged in paragraph 125.

(3) The basis on which the Tribunal found that the Appellant had facilitated the abuse of litigation was, in substance, that he had failed to turn his mind to the possibility that the firm was facilitating the bringing of claims which were totally without merit. The Tribunal said, inter alia, that the Appellant lacked insight, was unable to properly describe his role as COLP, had left the running of these cases entirely to his brother, had turned a blind eye to how his brother was running the immigration department and the deficiencies therein and had facilitated the abuse through his inadequate management of the firm.

75. I agree with that submission. However, even if that were incorrect, I would dismiss the appeal on an alternative ground, as follows.

76. If an allegation of breach of the Principles includes an averment which is not necessary to establish such a breach, then the Tribunal is entitled to find the allegation proved, whether or not the unnecessary averment is established. *Nna* is an example of that, since the precise amount payable was clearly irrelevant to the allegation that Dr Nna had entered into an agreement which he knew that he could not honour. Indeed, the allegation in that case would have been perfectly adequate even if it had omitted the words "at a cost of £9,200".

77. In the present case, the essence of allegation 1.1 was that the Appellant and his brother were in breach of Principles 1, 2 and 6, and failed to achieve Outcome 5.6 because they facilitated claims which were an abuse of the Court's process. The Tribunal has explained why it concluded that the Appellant did facilitate such claims and was thereby in breach of Principles 1 and 6 (but not 2) and failed to achieve Outcome 5.6. This is not a case, as in *Akodu v SRA* [2009] EWHC 3588 (Admin), in which a solicitor has been found guilty of misconduct merely because he is a partner in a firm where misconduct has taken place. The Appellant was not only a director of Malik & Malik, he was the COLP, with the duties imposed on a COLP, and the firm had received repeated warnings from the Court which required him to act, but which he effectively ignored. The Tribunal was entitled to conclude that his failure to do anything in those circumstances facilitated claims which were an abuse of the process of the Court.

78. On that basis the Tribunal was entitled to find the Appellant in breach of Principles 1 and 6 and of his duty to achieve Outcome 5.6. It was unnecessary for that purpose for the Tribunal also to find that the Appellant either knew or ought to have known that particular claims were totally without merit. The words "they knew or should have known that" in allegation 1.1 were unnecessary insofar as they concerned the Appellant's state of mind.

79. Moreover, as I have already pointed out, it was clear from the Rule 7 statement that the SRA did not put its case on the basis that the Appellant either knew, or should have known, any of the details of the claims made by clients 8 and 9, but the Appellant's counsel did not submit that this was fatal to allegation 1.1. That indicates that neither party regarded it is a necessary precondition to a finding of breach on the Appellant's part that he personally either knew, or should have known, any of the details of the claims made by clients 8 and 9.

80. That factor is also relevant when considering whether what happened in this case amounted to a serious procedural irregularity in the proceedings before the Tribunal which rendered the outcome unjust. The case against the Appellant could undoubtedly have been set out more clearly, but it does not appear that he was unaware of the case which he had to meet. Further particulars could have been requested and/or given of what it was alleged that the Appellant ought to have done as COLP, but the absence of such particulars does not appear to me to have resulted in any injustice, especially given the Appellant's evidence that he did nothing at all in response to the *Patel* judgment, and instead continued to leave everything to his brother.

(10) The Fine

81. In *Salsbury v Law Society* [2009] 2 All ER 487 Jackson LJ said as follows (in paragraph 30 of his judgment):

> "… the Solicitors Disciplinary Tribunal comprises an expert and informed tribunal, which is particularly well placed in any case to assess what measures are required to deal with defaulting solicitors and to protect the public interest. Absent any error of law, the High Court must pay considerable respect to the sentencing decisions of the tribunal. Nevertheless if the High Court, despite paying such respect, is satisfied that the sentencing decision was clearly inappropriate, then the court will interfere."

82. Mr Williams submitted that a fine of more than, say, £10,000 was inappropriate in a case where there was no dishonesty or subjective recklessness and where the Appellant's misconduct consisted of an omission rather than a positive act.

83. Mr Dunlop drew my attention to paragraph 181 of the judgment of Irwin LJ in *Ip v SRA* [2018] EWHC 957 (Admin):

> "180. The Courts well understand the vulnerability of many of those at risk of removal or deportation from the country. They can be desperate to remain. They are often prepared to grasp at straws. The Courts are also fully alive to the technicality and difficulty of immigration law, and of the Immigration Rules. These factors add to the difficulty of representing such clients.

> However, they also add to the responsibility of solicitors engaged for such clients.
>
> 181. It is critical that solicitors, and others, representing such clients, are scrupulous in observing professional standards. The cost of not doing so to the system is obvious and has been emphasised many times. Spurious, or merely hopeless, applications to courts and tribunals add greatly to the burden on the system of justice, and to the costs of government. However, it should not be forgotten that such applications also cost the applicants, both financially and in engendering prolonged and unjustified expectations. In addition, poor, and where it arises unscrupulous, representation must, to some degree at least, overshadow careful and expert immigration lawyers. The Solicitors Disciplinary Tribunal is entirely justified in taking very seriously cases such as this."

84. I am not satisfied that the fine of £20,000 imposed on the Appellant was clearly inappropriate.

(11) The Conditions

85. Likewise, I am not satisfied that the conditions imposed by the Tribunal were clearly inappropriate. Mr Williams submitted that the Tribunal had failed in its duty (as set out in *Manak v SRA* [2018] EWHC 1958 (Admin)) to explain why the conditions were necessary or appropriate. In my judgment, however, those reasons are to be found in paragraphs 44 to 47 of the Tribunal's judgment, which I have cited. It is apparent from those reasons why the conditions have been imposed and why they have been imposed indefinitely, since the Appellant would need to show some insight before it would be appropriate for them to be removed. The fact that he had shown no insight to date was referred to in paragraph 46 of the Tribunal's judgment. Mr Williams focused in particular on the fourth condition, pursuant to which the Appellant may only work as a solicitor in employment approved by the SRA. In my judgment, the Tribunal was entitled to conclude that the factors set out in paragraphs 44 to 47 of its judgment made this level of oversight necessary and appropriate.

(12) Conclusion

86. For the reason which I have given, this appeal is dismissed.