Neutral Citation Number: [2021] EWHC 275 (Admin)

Case No: CO/350/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
ON APPEAL FROM THE SOLICITORS DISCIPLINARY TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/02/2021

Before :

THE HONOURABLE MR JUSTICE SAINI

- -

Between :

FARID EL DIWANY **Appellant**

- and –

SOLICITORS REGULATION AUTHORITY **Respondent**

- -
- -

Farid El Diwany in person
Rory Mulchrone (instructed by **Capsticks Solicitors LLP**) for the **Respondent**

Hearing dates: 3 - 4 February 2021

- -

JUDGMENT

MR JUSTICE SAINI :

This judgment is in 7 main parts as follows:

I. Overview

1. This is an appeal under section 49(1) of the Solicitors Act 1974 ('the Act') against an order of the Solicitors Disciplinary Tribunal ('the Tribunal'), made on 11 December 2019 ('the Order'), directing that the Appellant ('Mr El Diwany') be struck off the Roll of Solicitors.

2. The Order was made at the conclusion of a two-day hearing before a three-member division of the Tribunal, including two Solicitor members. The Tribunal held that the two allegations of professional misconduct, made by the Solicitors Regulation Authority ('the SRA') had been proved to the criminal standard. The Tribunal's reasons were provided in comprehensive judgment of 17 January 2019 ('the Judgment').

3. I will need to make reference to the Judgment in some detail below. The Judgment can be consulted in full at: https://www.solicitorstribunal.org.uk/sites/default/filessdt/11990.2019.El%20Diwany_0.pdf. I will however provide a summary of relevant parts of the Judgment, when addressing the particular points argued before me.

4. The two allegations which were the basis of the proceedings are in the following terms:

> "Allegation 1.1
>
> On the 2 November 2001 and the 17 October 2003 [Mr El Diwany] was convicted of harassment offences in Norway in contravention of Section 390(a) of the Norwegian Penal Code. Consequently, he acted in breach of Rule 1.08 (1) [sic] of the Solicitors Practice Rules 1990 (SPR 90)."
>
> Allegation 1.2
>
> "[Mr El Diwany] failed to notify his regulator about the convictions referred to in allegation 1.1 in breach of the following:
>
> 1.2.1 – From the date of convictions until 1 July 2007: Rule 1.08(1) of the SPR 90;
>
> 1.2.2 – From 1 July 2007 until 5 November 2011: All or alternatively any of Rules 1.02 and 1.06 of the Solicitors Code of Conduct 2007 (SCC07);

> 1.2.3 – From 5 November 2011: All or any of Principles 2, 6 and 7 of the SRA Principles 2011 (SRA P11) and outcome 10.3 of the SRA Code of Conduct 2011."

5. The SRA is the independent regulatory arm of the Law Society. It was established in January 2007, prior to which the regulation of the profession was dealt with by the Law Society itself, acting through the Office for the Supervision of Solicitors. The reference in allegation 1.2 to "*the regulator*" is therefore to the Law Society or to the SRA, depending on the time period in question.

6. The appeal before me proceeds by way of review unless the Court considers that it would be in the interests of justice to hold a re-hearing: CPR r 52.21(1). Mr El Diwany acted in person before me, as he had before the Tribunal.

7. The SRA was represented by Counsel and I am grateful to both parties for the help they have provided to me. Mr El Diwany has in particular made clear and focussed submissions on a matter which has caused him substantial and genuine distress for many years. Counsel for the SRA has acted with courtesy and made measured submissions in seeking to uphold the Tribunal's decision. He and the SRA are also to be commended for identifying certain procedural irregularities (essentially pleading errors) in relation to the allegations, which had not been identified by Mr El Diwany. I address these irregularities at Section IV of this judgment.

8. Mr El Diwany advances seventeen Grounds of Appeal, making a root and branch attack on the Judgment. Having regard to CPR r 52.21(3)(a), these grounds raise two main issues for determination:

   i) whether the Tribunal was "wrong" to find allegation 1.1 proved (I note that there appears to be no pleaded challenge to the decision to find allegation 1.2 proved); and

   ii) whether the Tribunal was "wrong" to impose a striking off order.

9. The SRA resists the appeal and invites me to uphold the Order. Essentially, the SRA says that the Tribunal was right to find the gravamen of both allegations proved on the evidence before it. It submits that quite apart from anything else, Mr El Diwany had admitted the fact of his convictions and accepted that he had not informed the SRA of them. It says that a Solicitor acting with integrity would have done so. The pleading errors, while regrettable, do not in the SRA's submission constitute serious procedural irregularities rendering the Tribunal's decision "*unjust*".

10. The SRA also submits that the Tribunal was entitled to impose a striking-off order and that sanction cannot be described as "*clearly inappropriate*" in accordance with the governing case law. It forcefully argued that the conduct giving rise to the Norwegian convictions was, on any reasonable view, completely unacceptable. It comfortably justifies a conclusion that Mr El Diwany is wholly unfit to be a solicitor. It submits that the failure to report the convictions only fortifies that conclusion.

II. The Facts

11. I based my summary of the facts on the Judgment. I will however need to supplement my summary with additional matters identified in the documents in the appeal and the oral submissions of the parties (and Mr El Diwany in particular). I have also taken into account certain post-hearing submissions made by email by Mr El Diwany. By way of preliminary observation, I note that this was not a case where there was any real factual dispute below. The issue was rather whether, on largely uncontroversial facts, Mr El Diwany was guilty of misconduct as alleged by the SRA and merited the sanction imposed.

12. As appears below, Mr El Diwany's major point (both before the Tribunal and argued with real conviction before me) was that he had been subject to provocation of a most extreme and cruel kind from Ms H (the person he was found to have harassed), and that justified the acts which the SRA characterises as misconduct. He says that the striking-off was a disproportionate response to the offences of which he was convicted in 2001 and 2003.

13. Mr El Diwany was born on 23 May 1958 and admitted to the Roll of Solicitors on 1 September 1987. His first role was with Hart Associates between 1987-1988. From 1989-1998 he was the Commercial Property Solicitor for the Port of London Authority. He then practised as a consultant at Scott & Co from 23 May 2005 until 15 May 2008. Subsequently, he practised at Nasir & Co from 8 February 2010 until 31 July 2014. He last practised as a solicitor at Gawor & Co. He was employed at that firm from 23 February 2015 until 1 February 2017. As at the date of the hearing below Mr El Diwany was not practising as a solicitor. His last Practising Certificate was for the year 2016/17 and was revoked by the SRA on 6 December 2017.

14. On 9 February 2017, the SRA received a report from a partner at Gawor & Co to the effect that Mr El Diwany had recently confessed that he had acquired a criminal record in Norway some years previously for harassment, and that he had failed to disclose that fact at his interview, or in the subsequent two years that he had been employed at that firm. Mr El Diwany was dismissed following the disclosure of his convictions. At the hearing he told me that his disclosures to the partner were made at a time of extreme distress at the passing of his mother.

15. During the SRA's investigation Mr El Diwany acknowledged the fact of the convictions and that he had not reported them to the SRA. He stated that the convictions were for harassment of a former girlfriend, including by way of a website he had set up. Mr El Diwany informed the SRA that he had received a magistrate's fine and, subsequently, an eight-month prison sentence, suspended for two years. The first conviction, resulting in the fine, had been, he said, "*in absentia*". The suspended sentence, following the second conviction, had been, he said, "*agreed under a plea bargain*".

16. Mr El Diwany also said he had not reported the matter to the regulator as it was "*an entirely personal matter not relating to my professional conduct as a solicitor*". I will need to return to the nature of each of the proceedings in due course because Mr El Diwany has made sustained complaints before me about the Norwegian legal process.

Conviction of 2 November 2001

17. As recorded in paras. 11.1-11.9 of the Judgment, the SRA's case below was that Mr El Diwany had been convicted of a violation of section 390a of the Norwegian Penal Code and sentenced to a fine of 10,000 Norwegian Krone (around £897) or, alternatively, 25 days' imprisonment.

18. Mr El Diwany helpfully provided me with copies of the entire Norwegian Penal Code and made submissions on it. Section 390a (the subject of both convictions) provides (in translation) as follows:

> "Any person who by frightening or annoying behaviour or other inconsiderate conduct violates another person's rights to be left in peace, or who aids and abets thereto, shall be liable to fines or imprisonment for a term not exceeding two years. A public prosecution will only be instituted when it is requested by the aggrieved person and required in the public interest."

19. A translation of the Norwegian Court's judgment resulting in the 2001 conviction is in the papers before me. In summary, the conviction related to Mr El Diwany's harassment of a Norwegian national, referred to in the Tribunal's Judgment as "*Ms H*", over a period of years from the mid-1990s until August 1998. Mr El Diwany had befriended Ms H in the early 1980s. Their friendship had lasted for some years but thereafter deteriorated and he explained to me in some detail the nature of their relationship. They appear to have become friends in 1982, having met on cross-channel ferry. Ms H was 18 or 19 at that time and Mr El Diwany was studying for the Law Society Finals. They clearly became close and had what can perhaps neutrally be put as a difficult friendship over some years and serious disagreements. Mr El Diwany accepted that Ms H was a vulnerable person who even at an early age had faced serious personal challenges. He stressed however that she also had the ability to be extremely cruel.

20. The harassment found by the Norwegian Court was by means of numerous telephone calls made by Mr El Diwany to Ms H and by sending over 200 letters and cards from England to her in Norway and to various individuals and entities in Norway. The content of the letters sent by Mr El Diwany centres repeatedly on themes about Ms H's sex life, abortions, suicide attempts, and her partner's drug abuse. The letters also contained references to personal issues relating to her parents.

21. In its judgment of 2 November 2001, the Norwegian Court identified a number of examples of the communications said to be representative of the harassment suffered by Ms H. I will set out two of these out because they were also the focus of the Tribunal's Judgment. I return later to the reason why Mr El Diwany says he sent these communications.

22. First, a card postmarked 7 April 1995 sent by Mr El Diwany to Ms H. In the card, Mr El Diwany had written:

> "[Ms H], in Norway it may be normal for a slut like you to sleep with tens of men (even taking heroin!) – 'for company' as you told someone but I have been scared by your sick behaviour. Your step mother called you 'a whore' after your second abortion. She was so right and she also told me you were [incomprehensible text]. The fact that you were in demand for

> sex doesn't mean you fuck like an unpaid whore. Your unborn children you put in the dustbin – the reality is even garbage like your lovers want someone better than you, Christian pervert!"

23. The second example is a text message sent by Mr El Diwany to Ms H in November 1997:

> "You know, I really wish you were dead and buried, you filthy pervert. It's hard to imagine anyone more evil and sick than you. I bet you helped kill your own mother, Even after her death you paid her memory the compliment of two abortions. You are a disgusting piece of dirt.
>
> Fuck off and die and go to hell. I don't know how you sleep at night. You hate Muslims, you hate life and only associate with criminals and odd crazy people. You represent the sickness that is in Norwegian society and for as long as I live I'll make sure you pay for the wickedness you've inflicted on me. Maybe a living death is better for you - as you get older, things will get tougher. I hope [a named individual] turns against you just as you turned against your mother and me. I will do all I can to ensure the truth is spread far and wide about you - killer!"

24. It is also important to note that the Norwegian Court found that in March and April 1995 Mr El Diwany had sent a 'report' about Ms H to her neighbours, friends and relations amongst others. The report consisted of one typed page and related Mr El Diwany's version of Ms H's life history. The report contained similar details about Ms H's life as was contained in the letters and cards sent by Mr El Diwany. It is in form of a "Press Release" in the papers before me.

25. The report was widely circulated by Mr El Diwany (50 to 60 examples were documented to the Norwegian Court), following a newspaper article in May 1995 in which Ms H had talked about her experiences. I will need to return to the newspaper articles which were based on Ms H's version of events because they are at the forefront of Mr El Diwany's case of provocation.

26. In 2001, Mr El Diwany issued a notice of proceedings in a private prosecution against Ms H and others and, in the notice, he repeated in essence the description of her past and personal circumstances which was contained in the documents to which I have referred above.

27. The harassment by Mr El Diwany was said to have had a detrimental effect on Ms H as she had to move to a secret address, obtain an unlisted number and reportedly felt scared to go out. She also informed the Norwegian court that it had been very difficult for her that so many people in her immediate environment had received the 'report' from Mr El Diwany and had thus become aware of facts concerning her life that were of a highly personal nature.

28. Mr El Diwany did not attend the proceedings and (to that extent) was convicted in his absence. The court found the charge proved beyond reasonable doubt. However, as Mr El Diwany explained to me at the hearing, he was represented by a lawyer at the trial

and made a conscious decision not to attend. He says he was advised that the offence was a strict liability offence so there was no reason to attend. Mr El Diwany did not appeal the conviction. He told me that his lawyer said there was "no point".

Conviction of 17 October 2003

29. The second conviction related to the period 25 February 2002 to 31 August 2003, over which Mr El Diwany had sent faxes from England to various individuals and entities in Norway. In these faxes he wrote about Ms H being subject to mental abuse by her mother, sexual abuse by a member of her family and engaging in highly sexualised behaviour.

30. In the faxes, Mr El Diwany encouraged recipients to obtain more information about Ms H on a website (www.norway-shockers.com) which he had created. On that site he had posted comments about Ms H, similar in nature to the comments previously made in his letters and cards. Mr El Diwany's website was publicly available from 1 September to 16 October 2003.

31. A translation of the Norwegian Court's judgment resulting in the 2003 conviction was provided to me. The SRA relied on Mr El Diwany having acknowledged his guilt before the Norwegian Court and having made an unreserved confession. In assessing sentence, the Norwegian Court attached weight to the fact that there was considered to have been a "*gross violation*" of Section 390a of the Penal Code, and that the information about Ms H was of a very private nature.

32. In that court's view, an aggravating feature of the case was the fact that the information was available to the entire world on the internet. It also noted that this was Mr El Diwany's second conviction for the same offence against Ms H, and that the publication of deeply private information on the internet indicated that the sentence should not lie at the lower end of the penalty range.

33. Mr El Diwany received an 8-month prison sentence, suspended for 2 years. The sentence was imposed with conditions including that he remove the offending information from the internet and refrain from contacting Ms H in any way. Although he pleaded guilty, Mr El Diwany said that he did this under duress because he was threatened with immediate imprisonment by the prosecutor. He did not appeal (on the basis of legal advice). I note that the notice of conviction expressly records that Mr El Diwany was informed of his right of appeal.

III. The Tribunal Proceedings and Judgment

34. It was the SRA's case that the Norwegian convictions were "self-proving" documents pursuant to Rule 15(2) of the 2007 Rules:

> "A conviction for a criminal offence may be proved by the production of a certified copy of the certificate of conviction relating to the offence and proof of a conviction shall constitute evidence that the person in question was guilty of the offence. The findings of fact upon which that conviction was based shall be admissible as conclusive proof of those facts save in exceptional circumstances."

35. The SRA contended that this provision was not limited in its territorial application, that the Tribunal had historically had regard to foreign convictions and that Tribunal should not 'look behind' such convictions, absent exceptional circumstances: SRA v Tesler [11076-2012], SRA v Gorsia [11943-2019], and the judgment of Taylor LCJ in the unreported case of Shepherd (CO/3076/95).

36. Mr El Diwany's convictions for the offences in question were alleged by the SRA to constitute a breach of "Rule 1.08 (1) of the Solicitors Practice Rules 1990", which were recited at para. 11.14 of the Judgment:

> "Solicitors are officers of the Court and must conduct themselves so as not to bring the profession into disrepute.
>
> "Solicitors, whether practising or not, are officers of the Supreme Court. Certain standards of behaviour are required of solicitors, as officers of the Court and as members of the profession, in their business activities outside legal practice and even in their private lives. Disciplinary sanctions may be imposed if, for instance, a solicitor's behaviour tends to bring the profession into disrepute."

37. As mentioned above, although Mr El Diwany has not taken the point himself, the SRA now recognises (and drew to my attention to the fact) that the above text was not actually a 'rule' as such but rather a passage from guidance published by the Law Society: see The Guide to the Professional Conduct of Solicitors, 8th Edition (1999), Chapter 1 ("*Rules and principles of professional conduct*"). There was a Rule 1 in the 1990 rules to similar effect and the above text appears to have been a gloss on that rule. However, Rule 1 could not have been pleaded in relation to allegation 1.1 as it was expressly restricted to acts done "*in the course of practising as a solicitor*". The acts in issue were not within this scope. I return to this issue below.

38. The Tribunal's decision on allegation 1.1 is recorded at paras.11.44-11.60 of the Judgment. In broad summary, the Tribunal found that:

    i) Rule 15 of the SDPR permitted it to rely upon foreign convictions, unless there were in fact specific reasons not to do so.

    ii) Its usual practice was not to go behind a conviction but to treat the conviction as proof of the allegations for which a respondent was convicted.

    iii) Mr El Diwany accepted the fact of his two convictions for harassment offences (whilst maintaining they were unsafe).

    iv) The certified copies of the Norwegian criminal court judgments were equivalent to UK certificates of conviction for the purposes of Rule 15(2). Accordingly, the fact of the two convictions had been proved beyond reasonable doubt.

    v) It was clear from the certified translations of the Norwegian criminal court judgments that the offence of which Mr El Diwany had been twice convicted was not a strict liability offence. The judgment referred to intent being a necessary element of the offence.

vi) Despite having considerable sympathy and recognising the various provocations relied upon by Mr El Diwany, the form of the action taken by him in response was unacceptable. Mr El Diwany had described in his evidence taking "*revenge*" on Ms H, as he considered her to be the originator of public lies and vilification of him. Even accepting Mr El Diwany's case in full, the way in which he responded went beyond an understandable and acceptable response. He must have known he had "*crossed the line*". The correspondence to Ms H to which the Tribunal had been directed, which Mr El Diwany accepted sending, was itself profoundly unpleasant. It could not be characterised as an understandable and acceptable response to the undoubted provocation Mr El Diwany had suffered.

vii) The "*report*" that Mr El Diwany had acknowledged circulating to Ms H's neighbours, friends and relations amongst others contained similarly personal information and could not plausibly be described solely as an attempt to "*set the record straight*" and provide his side of the story.

viii) Mr El Diwany's anger appeared to have been directed at Ms H who had not herself published anything. If Mr El Diwany's case about her vulnerability and personal difficulties were accepted as true, this made such an aggressive, personal and public campaign against her worse rather than justifying his conduct.

ix) No exceptional circumstances based on provocation had been demonstrated and accordingly this was no basis for the Tribunal to look behind the conviction.

x) No exceptional circumstances based on allegedly perjured evidence had been demonstrated. An appeal was the appropriate mechanism to pursue such a challenge and in any event the witness evidence was supported by physical evidence, which Mr El Diwany accepted he had sent.

xi) Mr El Diwany's confession leading to the 2003 conviction had not been given under duress.

xii) Contrary to Mr El Diwany's submission that the conduct would not amount to a criminal offence in the UK, his correspondence alone was likely to be capable of sustaining a harassment prosecution (even disregarding the oral evidence of Ms H).

xiii) Mr El Diwany's arguments based on Articles 8 and 10 ECHR did not raise any exceptional circumstances such that the Tribunal could go behind the decisions of the Norwegian Criminal Court. To the extent that Mr El Diwany considered that his convention rights had not been respected, the appropriate route for challenge was by way of an appeal.

xiv) The two convictions for serious harassment offences inevitably brought the profession into disrepute. Consequently, the breach of Rule 1.08(1) SPR90 was proved beyond reasonable doubt and allegation 1.1 was proved in full.

39. The Tribunal's decision on allegation 1.2 is recorded at paras. 12.12 to 12.18 of the Judgment. In broad summary, the Tribunal found that:

i) Convictions for harassment offences unambiguously fell within the circumstances about which solicitors were obliged to tell their regulator. The harassment convictions were inevitably serious matters and it should have been clear to any solicitor that it was necessary to inform the SRA of the convictions.

ii) The practical implications of reporting the convictions played a part in Mr El Diwany's decision not to do so. His evidence indicated that he was aware that reporting the convictions could have an impact on him professionally.

iii) It was not credible that a solicitor could be unaware that a conviction for harassment was a serious matter nor that it fell within the range of relevant circumstances which must be notified to the SRA. Given Mr El Diwany's views as to the fairness etc. of the convictions, the appropriate course would have been to make the report whilst also noting his points of concern in mitigation.

iv) Mr El Diwany accepted that he had failed to report the convictions to the SRA. The Tribunal found that he had in fact made a conscious decision not to disclose them.

v) The failure to report the convictions would: further bring the profession into disrepute in breach of Rule 1.08(1) [sic] of SPR90; diminish the trust that the public placed in the Respondent in breach of Rule 1.06 of the SCC07; and undermine the trust placed by the public in him and in the provision of legal services in breach of Principle 6.

vi) A solicitor acting with integrity would have reported such convictions. Mr El Diwany's failure to do so amounted to a clear failure to adhere to the ethical standards of the profession. Accordingly, Mr El Diwany had breached Rule 1.02 of the SCC 2007 and Principle 2 at the relevant times.

vii) By failing to report the convictions to the SRA, Mr El Diwany had:

a) breached Principle 7 ("you must… comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and cooperative manner");

b) failed to achieve Outcome 10.3 ("*you notify the SRA promptly of any material changes to relevant information about you including serious financial difficulty, action taken against you by another regulator and serious failure to comply with or achieve the principles, rules, outcomes and other requirements of the handbook*")

viii) The fact that Mr El Diwany genuinely considered that the convictions were unsafe or that the surrounding circumstances exonerated or excused him was no answer to the failure to report; any such arguments or explanation should have been provided along with the disclosure rather than Mr El Diwany effectively usurping the role of the regulator to form its own conclusion.

40. As to sanction, having recorded Mr El Diwany's position on provocation in some detail at paragraphs 14-19, the Tribunal's decision on sanction appears at paragraphs 20-29

of the Judgment following an assessment of aggravating and mitigating factors. In broad summary:

i) In assessing culpability, the Tribunal found that the motivation for the conduct on which the convictions were based was "*revenge*" (using Mr El Diwany's own words).

ii) The failure to report the convictions was caused by Mr El Diwany's wish to avoid the issues that doing so would bring, together with his conviction that in all the circumstances the convictions were unsound. It amounted to the continuing misleading of the regulator. It is acknowledged by the SRA that the Tribunal's analysis in this regard ought not to have included the penultimate sentence of para. 21 of the Judgment (I address this point further below at [81]).

iii) The form of conduct which led to two convictions for harassment inevitably caused harm to the reputation of the profession.

iv) Mr El Diwany's conduct amounted to a significant failure to act with integrity. He took the deliberate decision to send the communications he did and to make public the details in the way he did. The Tribunal assessed the harm caused as significant.

v) There were a number of aggravating features**.** It was particularly noteworthy that in the second hearing before the Norwegian Court in 2003 Mr El Diwany had agreed and was ordered to take down his website which had been a material aspect of that case but had not done so by 2019, some 16 years later. The Tribunal considered that Mr El Diwany had no insight into his misconduct whatsoever.

vi) The Tribunal accepted that Mr El Diwany's anger and sense of grievance at the publication of articles in the Norwegian press about him were genuinely and strongly, and even understandably, held, but did not consider that this amounted to an adequate justification for his behaviour towards Ms H which took the form of repeated harassment.

vii) Mr El Diwany's reaction was "totally unacceptable" and amounted to a "*protracted and profound departure from the range of potentially reasonable responses to the provocation he faced*".

viii) The overall seriousness of the misconduct was high, such that the Tribunal did not consider that No Order, a Reprimand, Fine, Restrictions on practice or Suspension were adequate sanctions.

ix) Whilst recognising the very strong personal mitigation presented by Mr El Diwany, the Tribunal considered that his complete lack of insight heightened the risks identified. His website was still published at the date of the hearing. The Tribunal considered that the public would be profoundly concerned by the misconduct and that the implications for the reputation of the profession were very significant.

x) Accordingly, the Tribunal determined that the findings against Mr El Diwany required that he be struck off from the Roll.

IV. Pleading issues

41. The SRA fairly and properly identified a number of procedural irregularities before me. These have not been raised or relied upon by Mr El Diwany, but I have considered them of my own motion given that he is acting in person. Some of the points were minor (relating to dates) and I will not refer to them further. There were however two points of substance.

42. The first is a mistaken reference in both allegations to "*Rule 1.08(1) of the Solicitors Practice Rules 1990*". In fact, there was no Rule 1.08(1) in the 1990 rules and the text subsequently identified as "*Rule 1.08(1)*" was in fact from official guidance published by the Law Society on the meaning and application of the 1990 rules. I am satisfied that the correct pleading for allegation 1.1 would have been that, by reason of his convictions, Mr El Diwany had been "*guilty of conduct unbefitting a solicitor*": See Wingate v SRA [2018] 1 WLR 3969 at [64]. That was in substance the charge he faced, and he has rightly not suggested that he was prejudiced in any way. The Tribunal's reasoning at para. 12.17 in relation to its finding as to a lack of integrity captures conduct which one would regard as "conduct unbefitting".

43. The second error is the fact that allegation 1.2 should have been pleaded as a breach of Rule 1 of the 1990 rules (or, alternatively, conduct unbefitting a solicitor). Again, this could and should have been done. There was no prejudice to Mr El Diwany because the substance of such a charge was before the Tribunal, but in a different form.

44. Neither pleading error makes the Tribunal's Order in itself "unjust" within CPR r 52.21.(3)(b), and I proceed now to the substance of the first ground of appeal.

V. Ground 1: the Norwegian convictions

45. The burden is on Mr El Diwany to show that the Tribunal's Order was "*wrong*": CPR r 52.21(3). This can connote an error of law, an error of fact, or an error as to the exercise of discretion: Solicitors Regulation Authority v Day [2018] EWHC 2726 at [61].

46. Mr El Diwany's oral submissions to me ranged over a wide area. He covered a substantial number of issues and took me to many documents. In addition, I read all the materials in his appeal bundles. I have considered all of this material in some detail because one of Mr El Diwany's complaints is that the Tribunal failed to read this evidence, particularly the articles in the Norwegian Press and the web materials.

47. However, as I indicated to him during his arguments, I did not consider certain of the material to be relevant (mainly because it post-dated the events material to the matters before me). I was however concerned by the content of some of this material (emails) and will return to that matter at the end of this judgment.

48. Although he did not divide his submissions in the following way, it seemed to me that his grounds of appeal, as advanced orally, fell into essentially two broad subject-areas: (i) fairness of the Norwegian proceedings leading to the two convictions ("Fairness"); and (ii) a failure on the part of the Tribunal properly to appreciate that his acts of

claimed harassment of Ms H leading to the two convictions were the product of extreme provocation on her part and were accordingly justified ("Provocation by Ms H").

49. I will address each of these matters but I will also deal for completeness later in this judgment with the pleaded grounds of appeal (which overlap to some extent with these complaints). I emphasise, as I did in oral argument, that I am not rehearing the proceedings but performing an appellate role in considering these complaints. I am not making de novo decisions but reviewing the Judgment of the Tribunal for material errors which could satisfy me that the Order was wrong.

(i) Fairness of the Norwegian Proceedings

50. The starting point is that there is no dispute as a matter of law that the Tribunal was entitled to take into account the foreign convictions and was entitled to treat those convictions as proof of the allegations underlying them: Rule 15(2) of the SDPR 2007. However, in accordance with the cases cited in the Judgment at 11.45-11.48, this is subject to an "exceptional circumstances" carve out, which Mr El Diwany invoked.

51. The Tribunal concluded there were no such circumstances and gave detailed reasons for its decision. I detect no legal error or failure in the factual analysis by the Tribunal.

52. Mr El Diwany made complaints before me about the legal processes in Norway, but such arguments were more in the nature of complaints about civil law systems (as compared to the common law process).

53. It is also highly relevant that Mr El Diwany was legally represented and chose not to appeal against the convictions. That was the time and place to complain about alleged perjury, as the Tribunal rightly noted at para.11.53.

54. Norway is a Council of Europe Member and party to the ECHR. In principle another state party like the UK is entitled to proceed on the basis that Norway's justice system is Article 6 and Article 10 compliant. There has been no fundamental defect identified in its processes and procedures in general or in the process leading to the two convictions.

55. See, by analogy, the position in extradition cases and complaints about Article 6 ECHR violations in requesting states which are ECHR parties: Symeou v Public Prosecutor's Office [2009] EWHC 897 (Admin); [2009] 1 WLR 2384 at [66].

56. I accordingly reject the ground that the Tribunal erred in admitting the convictions on fairness grounds.

57. The Tribunal was also right to hold that the offences of which Mr El Diwany was convicted were not strict liability offences, but required intent. The Norwegian courts also found intent proved in their judgments.

(ii) Provocation by Ms H

58. This was the main plank of the appeal. It relates both to the decision to admit the convictions and the sanction, but it is probably more relevant to the latter. This was addressed in the section of the Judgment entitled "justified response": paras.11.49-11.52.

59. As I have noted, before the Tribunal Mr El Diwany said that the acts leading to the conviction were "revenge" for Ms H's acts. He made essentially the same point before me and argued that the Tribunal had not understood or appreciated the extreme nature of the provocative acts.

60. He relied upon three main factual matters in this regard. First, he had been falsely accused by Ms H of attempted rape (I was taken to a letter from Mr El Diwany's lawyer to him dated 28 February 1995 which confirms that this accusation had been made). Second, he had been falsely accused of having written to Ms H saying he would travel to Norway to kill her 2 year old son. Thirdly, Ms H was behind a number of seriously damaging and false newspaper articles. This third point (the articles) was particularly stressed by Mr El Diwany and I will address it in more detail.

61. I was taken to a number of articles from 1995. These are from what seem to be Norwegian tabloid publications. They have the appearance and content of stories sold by Ms H to the papers (she is named and photographed). I will provide a general impression of what is said in the articles.

62. The broad theme is that Ms H has been subject to thirteen years of "sex terror" from a "half-Arab" or "muslim man". Mr El Diwany is not named but he says he would have been readily identifiable to those who knew him (he is sometimes referred to as "the Englishman"). I should add that Mr El Diwany is of mixed Egyptian/German heritage.

63. The articles say that a "moslem man" suffers from "erotic paranoia". He is described as a "sick person" or "insane man", who has threatened Ms H. It would be fair to observe that the thrust overall is that the person said to be harassing Ms H is mentally unstable, sex-crazed and obsessed with her and she has had to go into hiding.

64. It is deeply troubling that the authors of these articles repeatedly (and unnecessarily) repeat the fact that the unnamed harasser is a "Muslim man" (19 times in one article) or that he is "half-Arab". The aim of the articles is undoubtedly to play to racist stereotypes of muslim men. They are unsubtle in deploying the colonial trope of Arab men as preying on Anglo-Saxon women.

65. As I indicated to Mr El Diwany at the hearing, I needed no persuading that these publications were very upsetting to him and that they plainly included racist and anti-muslim content. He says that the allegations within them are wholly false and he produced to me love letters or affectionate postcards from Ms H which suggest that the story she gave to the tabloids was far from the truth.

66. He complains that he had no right of reply in Norway and that is the context in which he acted in the ways which led to his convictions for harassment. He submitted to me that everything he had communicated had been accurate and was justified in the light of what was publicly stated about him. As I understood his case, his acts towards Ms H were in effect his exercise of a 'right of reply' when neither the Norwegian legal system, nor the local press, afforded him redress or the ability to put the record straight. He also argued that he was entitled to express his strong opposition to abortion and his use of extreme language in this regard was permissible.

67. The issue before me is whether there was any error by the Tribunal in relation to the provocation aspect of Mr El Diwany's defence. In my judgment there was no error. The

Tribunal addressed this aspect of the case in some detail (both in the misconduct and sanction parts of the Judgment). The Tribunal's analysis was as follows:

> "11.50 Despite having considerable sympathy and recognition of this provocation, the form of the action taken in response was unacceptable. The Respondent had described in his evidence taking "revenge" on Ms H, as he considered her to be the originator of the public lies and vilification of him. Even accepting the Respondent's case in full that her account and evidence was unreliable and fabricated, the way in which he responded went beyond an understandable and acceptable response. The Tribunal considered that he must have known he had "crossed the line". The correspondence to Ms H to which the Tribunal had been directed, which the Respondent accepted sending, was itself profoundly unpleasant. The Tribunal could not accept the characterisation of the examples set out in paragraph H.5 above as an understandable and acceptable response to the undoubted provocation the Respondent suffered.
>
> 11.51 The "report" that the Respondent had acknowledged circulating to Ms H's neighbours, friends and relations amongst others contained similarly personal information and could not plausibly be described solely as an attempt to "set the record straight" and provide his side of the story. The Respondent's anger appeared to have been directed at Ms H who had not herself published anything. If the Respondent's case about her vulnerability and personal difficulties were accepted as true, the Tribunal considered that this made such an aggressive, personal and public campaign against her worse rather than justifying the Respondent's conduct.
>
> 11.52 The evidence of provocation was not "fresh evidence obtained since the criminal trial" as envisaged in Hunter. The Norwegian criminal court had considered and rejected similar submissions. It was still less evidence "as entirely changes the aspects of the case" as the test from Phosphate Sewerage envisaged. The Tribunal did not consider that the provocation, even accepting the Respondent's account of the publication of unfair, untrue and offensive material without notice or right of reply, could be regarded as an exceptional extenuating circumstance such that it could or should go behind the conviction on this basis. This issue was raised with the Norwegian criminal court and in any event the Tribunal rejected the submission that reference to Ms H's sex life, mental health, suicide attempts, partner's drug use and issues relating to her parents could sensibly he regarded as any kind of legitimate response to any provocation. The Tribunal noted that appeals against both convictions were available, which according to Ratnam and Jeyaratnam was relevant to an assessment of whether exceptional circumstances existed. The Tribunal found

> that no exceptional circumstances based on provocation had been demonstrated and accordingly this was no basis for the Tribunal to look behind the conviction."

68. There is no error in this reasoning. It was plainly correct. The Tribunal also returned to the issue of provocation at para. 25 of its Judgment (when addressing sanction). They accepted the personal mitigation presented by Mr El Diwany "to be very strong". They made specific reference to his account of being identified, despite not being named, in press reports which focused on his faith and made untrue allegations about sexual threats, misconduct and mental health. They accepted that this clearly amounted to very substantial and unpleasant provocation to which anyone would wish to respond. The Tribunal noted that Mr El Diwany's anger and sense of grievance at the publication of articles in the Norwegian press about him were genuine and strong.

69. The Tribunal did not however consider that this amounted to an adequate justification for his behaviour towards Ms H, which took the form of repeated harassment. I agree. There was no error in this conclusion and indeed any other conclusion would have been unjustified.

70. Mr El Diwany complains that the Tribunal may not have understood that it was Ms H behind the publications and refers to para. 22 of the Judgment which records that the publicity to which Mr El Diwany was responding "had not emanated from Ms H". That does seem to be an error in that the articles have clearly been constructed around an account (with photos) supplied by Ms H (and probably for financial reward).

71. However, even if there was some error in this regard, I can find no fault in the Tribunal's ultimate conclusion that Mr El Diwany's culpability was high despite his genuine sense of having been falsely accused of serious wrongdoing with no right of reply. The Tribunal's conclusions (which were in my view correct on the evidence before it and the additional material on appeal) were encapsulated in the following reasons on the issue of sanction:

> "21. In assessing culpability, the Tribunal found that the motivation for the conduct on which the convictions were based was revenge for what the Respondent perceived to be lies which he had been unable to rectify through other means. He sought to balance the picture of him which had been publicly portrayed in the press. The Tribunal considered that the failure to report the convictions was caused by a wish to avoid the issues that doing so would bring, together with his conviction that in all the circumstances the convictions were unsound. The conduct was plainly planned, as it included posting information on a publicly available website and included multiple communications; the Respondent himself referred to a public information campaign which could not be described as spontaneous even if some of the specific examples were immediate responses to particular events. The Tribunal noted that Ms H had shared private and intimate information with the Respondent about her background and health and that sharing such information publicly, when he stated that he knew she had experienced menta1 health

> difficulties, was a breach of that trust, albeit in response to what he considered her own breach of trust. The Respondent had direct control of and responsibility for the form his reaction to the publication of information about him in Norway took, which was what gave rise to the harassment convictions. The Respondent was at the time an experienced solicitor, having been admitted to the Roll in 1990. This was particularly so in relation to his continuing failure to declare his convictions. The Tribunal considered that his failure to report his convictions, motivated at least in part by a desire to avoid the impact that would have, amounted to the continuing misleading of his regulator. Each year he applied for a practising certificate he wrongly confirmed that he had nothing relevant to report. The Tribunal assessed the Respondent's culpability as high.
>
> 22. The Tribunal considered the harm caused by the misconduct to have been foreseeable. The impact on Ms H was predictable and potentially very significant. This was not to minimise the impact of the publicity about the Respondent himself, which had not on the evidence emanated from Ms H but from press articles, but the response taking the form of conduct which led to two convictions for harassment inevitably caused harm to the reputation of the profession. The Tribunal considered that the form that the response took amounted to a significant failure to act with integrity. He took the deliberate decision to send the communications he did and to make public the details in the way he did. The Tribunal assessed the harm caused as significant."

72. Subject to a point concerning the issue of the practising certificate (a matter to which I return at para. [81] below), this reasoning is impeccable. I reject the complaints under the Provocation Ground.

Pleaded grounds

73. For completeness, I will also address each of the specific grounds originally pleaded but my reasons above largely deal with these points. In my judgment, those grounds reveal no error.

74. Dealing with each point, in my judgment the Tribunal was right:

i) To reject Mr El Diwany's submission that his conduct towards Ms H would not be considered a criminal offence in England & Wales. The conduct in issue would be capable of prosecution under the Protection from Harassment Act 1997 and the Malicious Communications Act 1988.

ii) To hold that no exceptional circumstances based on provocation had been demonstrated. See my reasons above.

iii) To find that, whatever provocations Mr El Diwany had endured, his response went beyond an understandable and acceptable response. See my reasons above.

iv) To hold that the proper way for Mr El Diwany to challenge the fairness of the Norwegian convictions would have been to appeal. See my reasons above.

v) To reject Mr El Diwany's submissions that the Norwegian offences were 'strict liability' (the Norwegian judgments clearly identify and address the relevant *mens rea*: "*he acted wilfully*" and "*the defendant acted with intent*").

vi) To find that misconduct could be established without any reliance on Ms H's evidence at all but on the basis of the contents of the various documents which Mr El Diwany fully accepted having sent.

vii) To decline to examine Mr El Diwany's website as at the date of the hearing (especially in circumstances where directions had been made for Mr El Diwany to file and serve the evidence on which he relied in an appropriate form). I have however considered the website.

viii) To reject the Article 8 and Article 10 ECHR arguments. I do not consider the Norwegian judgments amounted to an unjustifiable interference with Mr El Diwany's rights under these provisions. Those who commit the acts in question cannot claim human rights protection for their speech acts. Whilst it is established under Strasbourg case law that speech which offends is protected, Article 10 ECHR would not protect a person conducting the type and nature of harassment which was the subject of the convictions. I also consider Mr El Diwany was entitled to have (and to express) anti-abortion views, but that was not the basis for his convictions in Norway.

75. I reject Ground 1.

VI. Ground 2: sanction

76. Mr El Diwany argues that in the circumstances of this case (particularly by reason of provocation) striking-off was a disproportionate sanction. I begin by reminding myself of Salsbury v Law Society [2009] 1 WLR 1286 (CA) at [30]

> "… 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."

77. In order to show that the striking-off order was "wrong", Mr El Diwany must therefore satisfy the Court that it was "clearly inappropriate", i.e. outwith the range of sanctions which could properly be imposed by the Tribunal.

78. In Bolton v Law Society [1994] 1 WLR 512 (CA), Sir Thomas Bingham MR explained the purpose of sanction as follows at 518F-H:

> "It is important that there should be full understanding of the reasons why the tribunal makes orders which might otherwise seem harsh. There is, in some of these orders, a punitive element: a penalty may be visited on a solicitor who has fallen below the standards required of his profession in order to punish him for what he has done and to deter any other solicitor tempted to behave in the same way. Those are traditional objects of punishment. But often the order is not punitive in intention. Particularly is this so where a criminal penalty has been imposed and satisfied. The solicitor has paid his debt to society. There is no need, and it would be unjust, to punish him again. In most cases the order of the tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence. This purpose is achieved for a limited period by an order of suspension; plainly it is hoped that experience of suspension will make the offender meticulous in his future compliance with the required standards. The purpose is achieved for a longer period, and quite possibly indefinitely, by an order of striking off. The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied re-admission."

79. Save for a single point which has given me concern, there was no error in the Tribunal's approach. The Tribunal was entitled to regard the misconduct as extremely serious and to find that Mr El Diwany's "complete lack of insight" heightened the ongoing risk to the public. They were not in error in describing the misconduct as being "at the highest level". It clearly was. They also directed themselves expressly in accordance with the material case law.

80. It is fair to observe that before me Mr El Diwany showed a bit more insight than he had before the Tribunal. But, in my view, he still did not in reality accept the seriousness of what he had done. He said that he had gone "a bit over the top" and had been "blunt" in his communications with Ms H but maintained his position that he was essentially doing no more than, in his terms, calling "a spade a spade", in disclosing the intimate details of Ms H's troubled personal life.

81. The one point which caused me concern was whether there was an error infecting the sanction decision because the Tribunal referred at points to Mr El Diwany wrongly confirming in his applications for a practising certificate that he had nothing to disclose. Although it was not the SRA's pleaded case that the Norwegian convictions were for the equivalent of indictable offences, such that they were reportable to the SRA under Regulation 3 (they long pre-dated Regulation 3 and were reportable by reason of Mr El Diwany's duties to act with integrity and to maintain the good repute of the profession), para.12.14 of the Judgment arguably implies that, in finding allegation 1.2 proved, the Tribunal placed a degree of reliance on Regulation 3 and/or Mr El Diwany's answers

when applying to renew his practising certificate. That impression is to some extent strengthened by the Tribunal's reasons on sanction, specifically: the penultimate sentence of para. 21; the sentence in parentheses at para. 23; and the penultimate sentence of para. 27.

82. Having carefully considered the specific reasons given by the Tribunal for the sanction, I am satisfied that the decision to make a striking-off order would have been the same even absent this isolated point. The nub of the Tribunal's reasoning in para. 22 of the Judgment (set out above at [71]) would have justified the sanction in any event. I also note that the failure to report was not based just on the renewal application, but on the wider duties to report, to which I have made reference.

83. For completeness, I need to address some additional points made by Mr El Diwany in his oral submissions in relation to sanction. Mr El Diwany complained that there was some form of "double standard" applied by courts to solicitors because (using examples he cited) judges sometimes use abusive language, without sanction. He also said in general terms that Members of the Bar do much worse than he did without any penalty.

84. I cannot comment on those matters save to make two points. First, I am only concerned with whether there was an error in an appeal in this case, and other unrelated examples are not relevant. Second, the misconduct in this case was not a single and isolated example of an abusive word or conduct, but a campaign of harassment over time against a person who was vulnerable and, on any reasonable view, had faced a challenging life. The fact that such challenges as were faced by Ms H may (as Mr El Diwany submitted) have been as a result of some of her own behaviour, does not detract from the seriousness of his conduct towards a fragile person. Ground 2 is dismissed.

85. However, I will briefly and finally address a matter on which Mr El Diwany made submissions and on which he rightly had strong feelings. The matter concerns the series of emails sent to Mr El Diwany in December 2005, by those who had visited his website. Those emails post-date the matters in issue in these proceedings. They are truly vile, shocking and despicable examples of anti-muslim and racist abuse directed at him and all Muslims in general. The SRA shared this view before me. I will not set out these grossly offensive communications in this judgment because such content deserves no further publicity. Mr El Diwany was right to find them highly distressing. There can be no justification for such hate speech. They are not however of relevance to the issues I have decided.

VII. Conclusion

86. The appeal is dismissed with costs.