A Pupil v The General Council of the Bar

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The merits and demerits of the pupillage examination system have been considered in several issues of *Consultus*. In April, the criticism found another avenue. A pupil sat and failed the November pupillage examination. Dissatisfied with this result, and with the rejection of his appeal to the General Council of the Bar, he sought to review and have set aside the decision of the National Bar Examination Board. The grounds of review ranged from allegations of racism and political prejudice to economic self-interest on the part of the examiners. In support of these allegations, the pupil remarked his own scripts (with substantially improved, indeed outstanding, results).

The GCB opposed the application. A lengthy answering affidavit deposed to by the chairman, MalcolmWallis SC, set out the background of the pupillage system and its purposes, and offered another (less flattering) analysis of each of the scripts. The matter came before Mr Justice Zulman in the WLD, with the GCB being represented by its vice-chairman Michael Kuper SC and the applicant appearing in person.

The application raised three issues. Whether the decision of the Examination Board was susceptible of review and, if so, the standard of such review and its application to the facts.

The judgment of Zulman J noted that:

"The application is a novel one in the sense that it invites this court to entertain a review jurisdiction over the marking of examination scripts which were written in order to qualify the applicant to join a voluntary association."

The GCB argued that the true jurisprudential niche for such an application was not review but contract, involving the contention that a tacit term of a contract (to mark the examination scripts fairly), had been breached. The Court found this approach persuasive but did not have to decide the question as the GCB invited it to consider the merits of the applicant's examination scripts in any event.

The question of the appropriate standard of review also was not finally determined, the Court simply noting that the standard could not be review for error, but would of necessity be some less vigorous standard such as review for unreasonableness.

The hearing proceeded to examine the applicant's scripts in exhaustive detail, assessing his performance in each question.

The judgment concludes:

"I have given careful consideration to all of the answers given by the applicant in the written papers in issue. I am convinced from such consideration that the examiners were perfectly correct in the way in which they marked the papers and their mark allocation cannot be reasonably assailed in any respect. In my view the comments of the examiners upon the applicant's answers as also the independent comments of Mr Wallis SC, who is the present leader of the Bar and himself a practitioner of considerable experience and knowledge, cannot be faulted. ...In my view the answers viewed as a whole indicate a total ineptitude on the part of the applicant and demonstrate clearly that the examiners were fully justified in failing him."

The applicant's allegations of racism and political prejudice came in for special comment.

In this regard the Judge found:

"I am in full agreement with the argument of Mr Kuper SC to the effect that the 'vituperative attacks launched on the examiners and moderators' of the GCB are baseless and that the allegations of improper purpose and in particular racial discrimination are unsubstantiated. Furthermore the reliance upon the applicant's political background is irrelevant, fails to establish racial discrimination, refers to facts which would, rightly, have been unknown to the examiners or moderators and the allegation of bias in the form of pecuniary interest is of no substance."

In the result, the application was dismissed with costs, including the costs of two counsel. Whether that judgment serves to discourage future applicants, remains to be seen. ❑