

Standards in Public Life

Sinead Riach reviews the High Court's decision in the case of London Mayor Ken Livingston who was suspended by the Adjudication Panel for England for comparing a Jewish newspaper reporter to a Nazi concentration camp guard and examines the delicate interplay between holding public office and exercising rights to freedom of expression as a private individual. The decision that Mr Livingston did not breach the Model Code of Conduct as he was not acting in his official capacity as Mayor also includes the finding that the use of a Code of Conduct to limit someone expressing their views while acting in a non-official capacity does not constitute a proportionate or necessary restraint in terms of Article 10(2) of the European Convention on Human Rights.

Mr Livingston had criticised the decision of the unelected Adjudication Panel for England, claiming that it 'violated his right to freedom of expression and to a private life, and that the decision struck at the heart of democracy.

Media debate ensued as to the extent to which those elected to public office can exercise freedom of expression within the confines of statutory codes of conduct and whether it is democratic that an elected public office holder can be suspended from office by a non-elected body.

Following his suspension, Mr Livingston appealed to the High Court. The court's judgement, issued on 19 October 2006, found in Mr Livingston's favour and the Court quashed the suspension.

Mr Livingston is bound by the Local Authorities (Model Code of Conduct) (England) Order 2001, which applies to the Greater London Authority. The Adjudication Panel for England argued that Mr Livingston had contravened paragraph 4 of the Code.

Paragraph 4 states that a member must not, in his official capacity or in any other circumstance, conduct himself in a manner which could reasonably be regarded as bringing his office or authority into disrespect.

The key consideration for the court was whether Mr Livingston had been acting in his official capacity when making the remarks. The court took into consideration the Tenth Report of the Committee on Standards in Public Life, which contained a recommendation to amend the Model Code by removing the phrase 'in any other circumstances' in Paragraph 4. If such an amendment were made, the obligations on members to not conduct themselves in a manner which could reasonably be regarded as bringing their office or authority into disrespect would only apply when a member was acting in his official capacity. This is closer to the position adopted in Scotland, where the rules of conduct apply to members only when they are acting as councillors (which includes representing the council on official business). The Chief Investigating officer of the Standards Commission for Scotland explained the reasons for this position:

'In Scotland the view has been taken that the misconduct must relate in some way to the activity of the person as a councillor. If there is a link, then you can apply the terms of the Code. If the misconduct relates purely to the personal life of the councillor, then on the face of it there is a presumption that there is not necessarily a breach of the Code'.

The Adjudication Panel clearly applied a higher threshold in relation to ‘any other circumstances’. It stated that the circumstances should be sufficiently proximate to, or reasonably capable of being linked to or having a bearing on, the official capacity.

The court held that the Mr Livingston had not been acting in his official capacity when he made the remarks to the journalist, or that he had been performing his functions as Mayor. The court found that Mr Livingston had not been expressing a political opinion. The Model Code could only cover conduct that was unlawful, if it was made in a non-official capacity.

The judge referred to Mr Livingston’s comments as ‘intemperate’, ‘unnecessarily offensive’ and ‘indefensible’. However, the judge also held that the comments were not, and could not be construed to be, unlawful. Article 10(1) of the European Convention on Human Rights protects the right to freedom of expression. Any restraint on freedom of expression, by way of restriction or condition, must be proportionate and necessary in accordance with Article 10(2). The court found that the use of a Code of Conduct to limit someone expressing their views while acting in a non-official capacity did not constitute a proportionate or necessary restraint.

Mr Livingston was therefore exercising his rights to freedom of expression, as protected by Article 10. Freedom of speech extends to verbal abuse, to the extent that it is lawful. The judge quoted Lord Hoffman, who commented on the right to freedom of expression in an earlier case:

‘Freedom means...the right to say things which ‘right-thinking people’ regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute...It cannot be too strongly emphasised that outside the established exceptions...there is not question of balancing freedom of speech against other interest. It is a trump card which always wins’.

The court emphasised that however offensive and undeserving of protection Mr Livingston’s outburst may have appeared to some, individuals must know that they can say what they like as long as it is not unlawful, unless there are clear and satisfactory reasons within the terms of Article 10(2).

The court therefore allowed Mr Livingston’s appeal and set aside the finding that he had failed to comply with the Model Code. The court’s decision reflects the position adopted by the Standards Commission for Scotland, where, to the extent that conduct is not unlawful and is conducted in a non-official capacity, the conduct falls outwith the ambit of the Codes of Conduct for Councillors and those appointed to Developed Public Bodies.

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