CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application No. 38644/97
by Irving BROWN
against the United Kingdom

The European Court of Human Rights (Third Section) sitting on 24 November 1998 as a Chamber composed of

Mr J.-P. Costa, *President*,
Mr N. Bratza,
Mr L. Loucaides,
Mr P. Kūris,
Mrs F. Tulkens,
Mr K. Jungwiert,
Mrs H.S. Greve, *Judges*,

with Mrs S. Dollé, S*ection Registrar*.

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 13 June 1997 by Irving BROWN against the United Kingdom and registered on 18 November 1997 under file No. 38644/97;

Having regard to the report provided for in Rule 49 of the Rules of Court;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Canadian citizen born in 1931, is resident in London.

A. Particular facts of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

In 1988, the applicant was practising as a solicitor in Stratford, East London. In June of that year, he met JDS at a Magistrates Court. JDS proposed that he and the applicant go into business together at an office in Poland Street, Soho, London. JDS was to provide the applicant with legal clerking services in return for receiving 50% of all monies received. This arrangement was started about a month later.

Unbeknown to the applicant, JDS recently had been released from prison following a 5 year sentence for conspiring to obtain property by deception and fraudulent trading.

In about September 1988, this fact was intimated to the applicant by a fellow solicitor. The applicant states that before he had an opportunity to confront JDS, another solicitor bought the practice from him for the sum of £10,000. The applicant did not inform the purchaser of JDS's background.

Whilst working with the applicant, JDS had forged the applicant's signature on cheques causing losses of about £57,000. In the subsequent arrangement, losses to members of the public amounted to almost £500,000.

After he had sold the practice, the police had occasion to question the applicant about his dealings with JDS, and took a statement from him. No criminal prosecution ever occurred.

Following this, there was a civil action in the High Court against JDS and the solicitor to whom the applicant sold the business. In the course of this trial, the applicant gave evidence on oath about his involvement with JDS.

Following this trial, in early 1990 the Solicitors Complaints Bureau (SCB) wrote to the applicant. Correspondence passed between them.

On 27 November 1995, proceedings were issued against the applicant for professional misconduct. He eventually faced three allegations:

1. that he had been guilty of conduct unbefitting a solicitor in that he established and operated a solicitor's practice principally managed by an unqualified clerk in circumstances which were improper having regard to the extent of his knowledge of the said clerk and the supervision provided;

2. that he had been guilty of conduct unbefitting a solicitor in that, being in possession of information indicating that the said clerk was dishonest, having been convicted of serious offences of dishonesty and sentenced to a term of imprisonment, he failed to take any reasonable or sufficient steps to protect the profession or the public; and

3. that he had been guilty of conduct unbefitting a solicitor and/or failed to comply with Rule 7 of the Solicitors Practice Rules 1987 and 1988 (fee sharing) in that he established and operated a solicitor's practice on the basis that the said unqualified clerk would be entitled to receive one half of the gross fees thereof to cover, inter alia, office overheads for which the said clerk was to be responsible.

The hearing of the Solicitors Complaints Tribunal (SCT) took place on 12 March 1996. The applicant represented himself. At the conclusion of the hearing the charges were found to be proved against him and he was fined a total of £10,000. In their written findings of 17 May 1996 the SCT divided the sum between the three charges.

On 25 March 1996, the applicant appealed to the Queen's Bench Division of the High Court. Correspondence began between himself and the court with regard to the length of time required for the hearing. The applicant's estimation was for a two day hearing. The court allotted 1.5 to 2 hours.

The hearing was on 5 November 1996 and lasted for half an hour. The applicant had provided a skeleton argument and a lengthy list of authorities beforehand.

The issues raised on appeal were the same as those raised before the SCT. The applicant did not question the facts as found by the SCT, but claimed that all the evidence against him was technically inadmissible and therefore there was no case against him. The evidence consisted of the statement made to the police, the evidence given by the applicant in the civil trial and correspondence between the applicant and the SCB.

In the Divisional Court's judgment of 5 November, rejecting the applicant's appeal and holding him liable in costs, the Lord Chief Justice held that the SCT had a discretion not to apply the strict rules of evidence. He observed that the applicant had also consented to the police evidence going before the SCT. Insofar as the applicant argued that the evidence given on oath in the civil proceedings should not have been used against him as it infringed his right to self-incrimination, Lord Bingham held that:

> "[the applicant] is not being sued or prosecuted for any statement that he made in the witness box. He is the subject of Disciplinary Tribunal proceedings not as a result of what he said in the witness box but of what he did [in relation to JDS]".

On 20 November 1996, the applicant applied for leave to appeal to the Court of Appeal. There was a brief hearing on 4 June 1997 after which that application was rejected. Costs were awarded against him.

B. Relevant domestic law

Proceedings against solicitors are governed by the Solicitors Act 1974, as amended, and give the SCT the power to fine solicitors, suspend them from practice or to strike them off the practitioners' roll. The limits of the fines may be increased in line with inflation by secondary legislation. In 1974, the amount was limited to £750. In 1983, this was increased to £3,000. On 1 June 1990, the sum was increased to £5,000 in respect of each offence proved against the solicitor. For the purposes of the Act, the relevant date is that of the hearing.

Section 48(4) of the Solicitors Act 1974 states that the fine is to be considered as if it was made by a High Court Judge. As with any civil debt, if the amount remains unpaid, the defaulter is liable to imprisonment on default for a period of up to one year (section 4(4) Debtors Act 1869). In the case of solicitors, this is also a breach of their position as an officer of the court under which they can be committed to prison under the discretionary ground in section 1 of the Debtors Act.

COMPLAINTS

The applicant claims that there have been a number of violations of the Convention in respect of the proceedings brought against him.

He submits that at the time of the offence the maximum penalty that could be imposed was £3,000, thus imposition of the higher penalty of £5,000 is in violation of Article 7. He complains that the delay between the conduct complained of and the institution of disciplinary proceedings violates Article 6 § 1 and that by limiting the amount of time he had to present his case both in the SCT and the High Court there was a violation of both Articles 10 and 13. He contends that there was a violation of Article 14 as not all solicitors are dealt with similarly, and also due to the fact that he appeared in person he was not properly heard and had to sit in a different place, and that treating him in such a way was in violation of Article 3. Finally, he complains that the award of costs was a double punishment, contrary to Protocol 7 and in violation of Article 1 of Protocol 1.

THE LAW

1. The applicant complains of a violation of Article 7 of the Convention in that he has had a retrospective penalty awarded against him. The maximum penalty available to the SCT at the time of his offence was £3,000, whereas he was fined £10,000.

Article 7 of the Convention, insofar as relevant, reads:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence ... at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

Whilst the Court accepts that the disciplinary proceedings involved the determination of civil rights and obligations, in order for the applicant to avail himself of the protection of Article 7 the proceedings have to amount to the determination of a criminal charge. The Court recalls that, in deciding whether an offence is to be considered as criminal within the autonomous meaning of the Convention, the Court must adopt the three-fold test set out in the Engel case and have regard to the classification in domestic law, the nature of the offence itself and the nature and severity of the sentence which can be imposed (Eur. Court HR, Engel v. Netherlands judgment of 23 November 1976, Series A no. 22, p. 35, § 82).

In the instant case, the Court notes that the charges against the applicant were classified under domestic law as disciplinary offences, being examined in a tribunal without any involvement by the police or prosecuting authorities. The Court notes that the charges faced by the applicant related to matters of professional behaviour and organisation, emphasis being given to the standards of conduct befitting a solicitor. The Court finds that the offences are of a disciplinary nature, applying only to persons of a specific, professional group rather than the general public (see eg. Eur. Court HR, Öztürk v. Germany judgment of 21 February 1984, Series A no. 73, p.20, § 53).

The Court has considered whether, notwithstanding the non-criminal character of the proscribed misconduct, the nature and degree of severity of the penalty that the person concerned risked incurring - the third criterion - may bring the matter into the "criminal" sphere.

The Court notes that the powers available to the SCT included a fine, to a maximum amount of £3,000 in total under the 1983 rules and £5,000 per offence under the 1990 rules, suspension, or striking off. The SCT did not have a power of imprisonment, (c.f. Eur. Court HR, Garyfallou Aebe v. Greece judgment of 24 September 1997, to be published in Reports 1997). Although a possible course for any non-payment of a fine would be committal for contempt, such imprisonment could only occur after further consideration by a court, whose procedures would be attended by judicial guarantees (see eg. Eur. Court HR, Ravnsborg v. Sweden judgment of 23 March 1994, Series A no. 284, p. 31, § 35.)

The Court has had regard to the purpose of the fine. A fine which is punitive and deterrent rather than compensatory, may suggest that the matter is "criminal" in nature if the penalty is sufficiently substantial (eg. Eur. Court HR, Bendenoun v. France judgment of 24 February 1994, Series A no. 284, p.20, § 47). While the size of the fine in the present case is such that it must be regarded as having a punitive effect, the Court observes that the fine was imposed in respect of three serious disciplinary offences and that the level of the fine equalled the amount for which the applicant sold the practice after his brief involvement in it. Nor was there any investigation into the means of the applicant prior to the imposition of the penalty, which is a pre-requisite of any criminal fine in domestic proceedings. There was no involvement of the police or prosecuting authorities in these proceedings.

In these circumstances, having regard in particular to the essential disciplinary context of the charges, the Court finds that the severity of the penalty was not, of itself, such as to render the charges “criminal” in nature.

Consequently, the complaint does not fall within the scope of Article 7 and must be rejected as incompatible *ratione materiae*, pursuant to Article 35 § 3 of the Convention.

2. The applicant also makes various complaints about the court proceedings which the Court regards as being inadmissible for the reasons set out below.

The applicant invokes Article 6 § 1 of the Convention, which guarantees a fair trial within a reasonable time, in complaining about the delay in bringing the charges against him and concluding the hearing. Accepting that Article 6 § 1 applied in that the applicant's civil rights and obligations were in issue, the Court recalls that, for the purposes of determining the length of proceedings, time runs from the date of the relevant court procedure determining the dispute, not from the conduct in question (eg. Eur. Court HR, Guincho v. Portugal judgment of 10 May 1984, Series A no. 81, p. 13, § 29). The Court finds that the time which elapsed from the charges in November 1995 to the final determination of the appeal in June 1997 was not unreasonable in the circumstances of this case.

The applicant also complains that he was not given enough time to speak in court, in violation of his freedom of expression under Article 10 of the Convention and depriving him of a domestic remedy, contrary to Article 13. The Court finds no evidence to substantiate these complaints. It is generally for domestic courts to regulate their own proceedings, including the time to be taken in making submissions. In the instant case, the applicant had provided a skeleton argument and a list of authorities before the Divisional Court of the Queen's Bench, and there was also before that court a transcript of the argument as adumbrated before the SCT. The Court finds no indication that the limits imposed by the Divisional Court, or by the Court of Appeal on his application for leave to appeal, deprived him of a fair hearing or otherwise disclose an appearance of a violation of any other provision of the Convention.

The applicant complains of discrimination in his treatment before the Court of Appeal, in violation of Article 14 of the Convention, which prohibits discrimination in the enjoyment of the rights guaranteed under the Convention. The claim is wholly unsubstantiated. The applicant has failed to identify the basis of any alleged discrimination, or the exercise of which right has been prejudiced by the discrimination. Insofar as the applicant appears to complain about the different seating arrangements in the High Court, he does not state how this affected the enjoyment of any of his rights under the Convention.

Insofar as the applicant complains of degrading treatment under Article 3 of the Convention, the Court does not find that there is any evidence of any treatment capable of amounting to a breach of Article 3. While the applicant also invokes Article 1 of Protocol No. 1, which guarantees the peaceful enjoyment of possessions, the Court notes that to the extent that the imposition of a fine disclosed an interference with his property the fine was imposed by operation of law, following procedures upheld by the domestic courts. There is no appearance of any violation of Article 1 of Protocol No. 1 in the circumstances.

The Court concludes that this part of the application must be rejected as manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

3. Finally, insofar as he complains of a breach of Protocol 7, the Court notes that the UK has not yet ratified Protocol 7. This complaint is accordingly incompatible *ratione personae* and must be rejected pursuant to Article 35 § 3 of the Convention.

For these reasons, the Court, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

S. Dollé
Registrar

J.-P. Costa
President