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Reflections on the fairness of BSB prosecutions against Barristers

by Marc Beaumont, Barrister

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To be prosecuted by one's own profession is to wake up to a world in which basic certainties evaporate with terrifying speed. The essence of things suffers an irrevocable upheaval. The Barrister must fight for his or her status, reputation, livelihood and, if he or she has dependants, for *their* future too. He or she may well sustain injury to psychological health resembling the characteristics of PTSD. Disciplinary proceedings against Barristers ruin lives. But it seems almost impossible to explain this to anyone who does not know, or care.

Those who staff the offices of the regulators, do not appear to be trained to understand the tremendous power that they wield. The decisions they make, the letters they send and the style of their communications, are nuclear weapons capable of destroying lives. And that is why it is vital that every aspect of the disciplinary process is - and is seen to be - scrupulously balanced and fair. Bashing Barristers to please consumerist idealogues, is all very well: but battery may cause serious or even fatal injury.

Because the power of a modern regulator is so far-reaching, there is a pivotal role for the common law of England and the European Convention to play in achieving basic procedural standards of fairness and due process. It is for those who defend in disciplinary cases courageously to convey the message of the law, often in the face of a powerful prosecuting authority and an impervious tribunal.

Who pays the Judges ?

Barristers, like any citizens, reasonably assume that they will be tried by wholly independent tribunals. In Barrister prosecutions, the BSB (or its Complaints Committee) is the prosecuting authority. Its position as such was described by Colman J. in reference to the BSB Complaints Committee's predecessor in *Re P (a barrister)* [2005] 1 W.L.R. 3019, in this manner:

"The decision by the PCCC to institute proceedings against a barrister thus imposes upon the PCCC as agent for the Bar Council a duty to prosecute that person and, consistently with the applicable procedure, to present the case against the barrister in a manner designed to procure conviction. Whereas it is undoubtedly true that the proceedings in which the charges are prosecuted must be fairly and justly conducted, those representing the Bar Council have a duty as its agents to procure conviction or in the case of appeals before visitors to defeat an appeal. They do not have the function of a neutral amicus. Their interest is conviction or dismissal of appeals"

The BSB's function is to procure conviction of the Barrister. So it is critical that the decision-making tribunal should be wholly independent of the BSB and its Complaints Committee.

The Council of the Inns of Court ("COIC") administers and arranges the disciplinary tribunals. It recruits the Barrister and lay panel members to a list (that is not, but plainly should be, publicly available). In serious cases, a disciplinary tribunal will comprise a Circuit Judge, 2 Barristers and 2 lay people. No-one seems to know how the lay panel members are appointed, who they are, where they come from, or where their personal or political allegiances may lie. But these observations aside, how can it be right that the BSB (rather than COIC) as the prosecuting authority, pays the lay panel members a fee for sitting on the tribunal of trial ?

Further, it is understood that if the panellist lives 100 miles or more from the place of trial in London, the BSB will pay for him or her to travel first class to London. The apparent cosiness of the relations between 2/5^{ths} of a 5 person disciplinary panel and the prosecuting authority, ought to be a matter of real concern. It is surely about as possible to regard as "independent" in law a tribunal that is paid by the prosecution, as it would be a Jury that is paid by the Defence. A remarkable aspect of this arrangement is perhaps that no-one has yet challenged its legality, at least as serving to engage the *Porter v Magill* test for apparent bias.

No registry of judgments

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If this point *had* already been raised successfully in a given case, no-one in the profession would necessarily know in any event. Neither COIC nor the BSB appear to keep a searchable and public registry of interlocutory or final decisions of Tribunals, Directions Judges or of the Visitors on appeal. The BSB certainly does not appear to keep, or to readily disseminate to the defence, any records of decisions on points of principle or practice, that have gone against it in the past. I have been involved in a case in which the BSB has had an interlocutory decision made against it by a High Court Judge on a vital point of principle and procedure and it has then sought to argue the same point only weeks later without reference to the adverse decision. This is not because Counsel for the BSB are not inclined properly to disclose authorities against the BSB (as the BSB would rightly expect any regulated Barrister to do) – they are so inclined - but because the BSB will state that it *cannot* do so due to a rule that requires it to respect the confidentiality of complaints that have yet to be determined.

Plainly, this rule was meant to protect Barristers yet to be tried, not to protect the BSB from disclosing to a Judge all authorities (even adverse ones), that the Tribunal may require in order to do justice in the instant case. The careful collection, indexing and publication online of all interlocutory, final and appellate disciplinary decisions in anonymised form is long overdue. The BSB and COIC plainly have the resources to do this. It is surprising that they have not done so.

Lack of transparency

Disclosure from the BSB is akin to blood from the proverbial stone. There is no longer any routine disclosure of generic "unused material" as there was before the advent of the BSB in 2006 (and as there is in cases before the GMC). This can cause terrible anxiety (and delay and cost) for the accused Barrister, to which the BSB seems generally indifferent. A generally uncooperative BSB attitude towards disclosure turns up the heat, prolongs proceedings and drives up costs.

Unquestionably, the most vital document in all cases is something called a "Sponsor Report", for which no BSB rule makes any express provision. Most members of the Bar and their advisers will be unaware that such a document even exists. This document is a report to the BSB's Complaints Committee prepared by one member of that Committee, who is rather curiously called a "Sponsor". Again, there is no BSB rule actually providing in terms for a single Sponsor Barrister to do the work of the plenary Committee.

All accused Barristers ought without fail to ask for a copy of the Sponsor Report at the earliest possible stage of a prosecution. A defence adviser who omits to seek it, is frankly not doing his or her job.

It is a vital report, because it is generally the *only* document seen by the other Committee members before they formally decide whether or not to prosecute an accused Barrister. It is a remarkable fact that the decision-making Committee members of the BSB's Complaints Committee do not read the rest of the papers and certainly almost never read the often detailed and careful response written by the accused Barrister, before they make a decision whether or not that accused Barrister should be prosecuted.

What they *do* read, is the Sponsor's *summary* of the accused Barrister's formal response to the complaint. So it is vital that that summary is a proper and accurate representation of the accused Barrister's response. Needless to say, a lax practice designed to spare the other decision-makers all the trouble and inconvenience of actually reading the papers, is not expressly provided for in any BSB rule.

This system requires the harsh light of transparency to be cast upon it. For example, I have seen 10 or more carefully drafted pages from the accused Barrister belittlingly reduced to 5 short paragraphs in the Sponsor Report. In that case, the Committee members read those 5 paragraphs, rather than the accused Barrister's full response to the complaint. By contrast, they also read subjective commentary, opinion and recommendations by the Sponsor. The scope, *ex hypothesi*, for one person, the Sponsor, to be perceived to have "marked the card" of a particular accused Barrister is considerable, where the other decision-makers rely on that one person's opinion and recommendation. In so doing, it is submitted that they abdicate their own duty to form a personal judgment about the matter based on a proper and conscientious consideration of the evidence.

The BSB *will* now let the defence see the Sponsor's summary of the Barrister's response, but will never let the defence see the commentary, opinion and recommendations made by the Sponsor. This tends to fuel suspicions that these sections of the Sponsor Reports are rife with subjective remarks and opinionated censure. Indeed, in one case, this part of the Sponsor Report purported to carry out some kind of cruel, psychological profiling of the accused Barrister. (Those comments were not seen until a considerable time later, when it was too late to counteract them). Defence advisers fear that, believing that his or her remarks will not be read by the accused Barrister, his advisers or any Judge or tribunal, the proverbial knife can be stuck in by the Sponsor with apparent impunity, within a thoroughly nasty atmosphere of condescension, intolerance and disdain.

Another problem with the Sponsor's role is that there is some evidence that the Sponsors receive and record in the reports, information (perhaps merely anecdotal) about the accused Barrister that has never been put to him or her for comment. This rides a coach and horses through the clear requirement of the Complaints Rules that material allegations must be put to the accused Barrister before being acted upon by the BSB Complaints Committee and can contribute to the creation of an adverse view of the accused Barrister, which he or she is wholly unable to countermand before the rest of the Committee endorses a decision to prosecute.

The Sponsor's précis of the Barrister's response can be inadequately short and subtly (even sarcastically) slanted against the accused Barrister. It can also be factually inaccurate. The commentary, opinion and recommendations sections of the report, can be as scathingly personal and cruel as any presumptively private remarks made by one person in authority about another human being can ever be. Plainly, these remarks by the Sponsor will heavily - and probably decisively - influence the decision of a Committee that fails to read any of the underlying papers and, in particular, never reads the accused Barrister's response to the complaint in the accused Barrister's own words. The fact that those defence responses may have taken many hours (or even days) to compile, makes this situation all the more indefensible.

This sketch of a Kafkaesquely secret process of decision-making about whether or not to prosecute a Barrister, is now leading to a number of legal challenges to the process. Such challenges can be taken at an interlocutory stage, first, as applications for disclosure of the Sponsor Report based on the principle in *Secretary of State for Foreign & Commonwealth Affairs v Quark Fishing* [2002] EWCA Civ 1409, that a public authority facing a public law style of challenge, must as a matter of special obligation put all its cards face up on the table.

Thereafter, the matter may proceed as an application to strike-out or to stay the prosecution as an abuse of process based on the endemic defect of a system of decision-making about whether or not to prosecute, that *prima facie* infringes the *audi alteram partem* principle of natural justice – a Committee, all but one of whom does not read the papers, cannot be said to have "heard" both sides, or to have given proper *Wednesbury* consideration to all relevant material. And some practitioners seem to overlook that public law style challenges can also be mounted as a substantive defence at trial: *Boddington v British Transport Police Respondent* [1999] 2 A.C. 143 HL, a proposition that the Visitors accepted as being applicable to Barrister disciplinary cases in *BSB v H (a Barrister) (*2011).

The BSB always resists letting defence advisers, or the Tribunal, see the commentary, opinion and recommendations written by the Sponsor. A range of spurious points will be taken, including the argument that the authors of Sponsor Reports fear for their personal safety if their views about an accused Barrister *and their identity* are published, or that the Sponsor is a legal adviser whose advice is privileged, when of course he is one of the decision-makers (and most probably *the* decision-maker). However, the decision to prosecute will in every case be based on the commentary, opinion and recommendations written by the Sponsor, since none of the other Committee members read or analyse for themselves the underlying documents or the formal response of the accused Barrister. One might therefore expect this material to be very readily disclosed by the BSB acting as a ministry of impartiality and fairness - but it is not.

In truth, there is no policy justification for such secrecy as:

(1) in its Constitution and in various written publications and policy statements such as its *Strategic Plan* 2007 to 2009 (and consistent with section 28 of the Legal Services Act 2007, with which the BSB is obliged under its Constitution to comply), the BSB has specifically espoused the concept of regulatory transparency – the BSB may *mean* that it should appear to be *disciplining Barristers* in a public way, but transparency is surely a two-way street that ought to mean that the BSB's own processes are open to scrutiny by all those affected directly by them;

(2) in 2007, the BSB's own former Complaints Commissioner, Mr Robert Behrens, produced a report, "*A Strategic Review of Complaints and Disciplinary Processes,*" the 65 recommendations in which the BSB has claimed to have adopted. But this is not so. In that report, the Commissioner advocated complete disclosure of the Sponsor Reports. Yet, having espoused both the concept of transparency and the conclusions and recommendations of the report of Mr Behrens, the BSB later back-tracked and decided only to disclose the factual part of Sponsor Reports and not the commentary, opinion and recommendation sections written by the Sponsor;

(3) The BSB is constitutionally obliged to act in accordance with "Nolan" principles of accountability and openness. As to these, holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands. There is no public interest in the non-disclosure of adverse commentary that is so prejudicial and unfair and so open to impugnment, that its non-disclosure deprives the accused Barrister of a defence to the Charges within the *Boddington* principle;

(4) In prosecutions by the SRA, the underlying report of the Forensic Investigator is routinely disclosed as part of the SRA's case against the accused Solicitor;

(5) Officer's reports to decision-making committees in the local government field, are generally made public.

The diligent defence adviser may also think of asking for the Minutes of the BSB Complaints Committee meeting at which the decision to prosecute the Barrister was taken: but he or she will ask in vain. Someone, at some stage, decided that these meetings, unlike any other meeting of a Bar Council Committee, should never be minuted, despite Mr Behrens advocating that such Minutes should be taken and despite the BSB having adopted that recommendation. Therefore, the vital decision to prosecute a Barrister, a decision which may well be life-changing for the Barrister and his family, will be taken at a secret session, with secret discussions, based on a report from one person, the key (perhaps highly prejudicial and wrong) parts of which no-one can or will ever see. The only concrete evidence about process in each case therefore is that the substance of the decision to prosecute is effectively taken by one person – the Sponsor - acting alone. Any assertion that the BSB is in this context a transparent organisation would be so far from the experience of those who lock horns with it, that it would not be true.

The Charges

It is vital that the BSB properly pleads its case. A well structured request for further and better particulars and/or for further information will often reveal inherent weaknesses in the BSB's case at an early stage. High Court directions judges tend rightly to insist on the proper pleading of Charges. Sometimes, the Charges are so badly pleaded that one has the impression that there has been a failure of proper analysis of the merits by the BSB Complaints Committee (ie: the Sponsor). In this connection, reliance on the Sponsor alone to conduct that analysis can sometimes be shown to be laden with risk.

The standard of proof - hit the Bar even harder.

Despite the endemic flaws of process in a system that already, in my view, stacks the odds heavily against the accused Barrister, the BSB is currently consulting on a suggestion that allegations of professional misconduct be made subject to the civil, rather than the criminal, standard of proof. The effect of this change would plainly be such as to make it easier to convict Barristers facing professional misconduct allegations where, say, the word of the Barrister is contradicted by a client. This is a strange plan given the BSB's assertion (from data that no outsider can access), that most Barristers it prosecutes are convicted anyway and that the growing role of lawyers acting for the defence has had little effect on the incidence of such convictions.

This debate has been had in our sister profession. The Law Society opposes change. The SRA (the prosecuting authority) wants change. Notably, the SDT's (admirable) position as the tribunal of trial is that it is subject to the common law of England. Here, Solicitors set us a most laudable example of resisting ridiculous ideas.

The legal principles emerge from *Campbell v Hamlet* [2005] UKPC 19 in which Lord Simon Brown said this, a little over 6 years ago, in the Privy Council:

"That the criminal standard of proof is the correct standard to be applied in all disciplinary proceedings concerning the legal profession, their Lordships entertain no doubt. "

One is reminded of the *Privy Council in Bhandari v Advocates Committee* [1956] 1 WLR 1442 *per* Lord Tucker at p.1452:

"...we cannot envisage any body of professional men sitting in judgment on a colleague who would be content to condemn on a mere balance of probabilities...."

The BSB does not state that it can make its own laws, but is behaving as if somehow it can. It ought to be reminded that, as the late and much lamented Lord Bingham observes in his work, *The Rule of Law* (2010),

"Be you never so high, the law is above you,"

With Dr Fuller's dictum in *Gnomologia: Adagies and Proverbs* (1733) resounding in our ears, it is surely a fatuous and wrong-headed waste of time and precious Bar Council funds for the BSB to be consulting formally on doing something that the Law Lords in *Hamlet* stated clearly cannot be done. The Bar Council lumberjack will be denuding trees in vain.

Moreover, the BSB claims to be "evidence-based" in its regulation. But where is the evidence that a single guilty Barrister won a case by abusing the test of "beyond reasonable doubt." And if the COIC tribunals are a truly independent umpire, why is the prosecution able to dictate key changes in the rules of the game ? Why does this proposal not come from COIC itself ? Will it, like the SDT, firmly oppose the proposal, as a group of self-respecting

Barristers should ?

By clause 11 of its Constitution, the BSB must monitor and "*ensure the just operation of disciplinary tribunals."* It is quite impossible to understand how a move by the BSB towards the civil standard of proof can, therefore, be *intra vires* the BSB's Constitution.

Witnesses

There is a perception that the BSB tries to avoid calling witnesses, whilst expecting the Defendant Barrister to submit him or herself for cross-examination. The BSB proffers standard directions that often omit reference to the BSB's own witnesses. In every case, these directions need to be challenged, because they are unfair and one-sided. This leads to unnecessary delay in the form of contested directions hearings. It also leaves a bitter taste and the feeling that the BSB is trying to "pull a fast one." This increases tensions between the advisers.

It seems wrong in principle that the Prosecution should try to avoid calling witnesses – if there are problems with the willingness of a key witness to attend trial, why can these not be revealed before any decision is taken to prosecute the Barrister ? The practice ought to be, "no witness, no case", rather than a half-baked attempt to mount a prosecution that is bound to fail, but not before it has caused immense anguish and substantial financial outlay.

Costs

If the BSB loses a case, it will always claim that it acted out of public duty and so should not be penalised in costs. It will argue this despite a prosecution having been catastrophically misconceived, or a Charge having been hopelessly unmeritorious or poorly pleaded. It will cite *Baxendale-Walker v SRA* [2007] EWCA Civ 233.

However, this case is of dubious application to *Barrister* prosecutions. They are governed by the more flexible approach in *S (a Barrister) v The General Council of the Bar* [2005] EWHC 2472, (a case that was not cited to the CA in *Baxendale Walker*). The Tribunal is (rightly) entitled to approach the matter as it might in a civil case governed by the CPR. It is right that costs should always remain in the discretion of the Tribunal and that there should be no blanket costs immunity for the BSB, when, ultimately, this is perhaps the only way for a properly independent tribunal to police any misfeasant actions of the prosecuting regulator.

Appeals - and glasnost

Appeals lie to the Visitors to the Inns of Court. One oddity needs to be addressed urgently. If the tribunal of trial decides say, by 3 votes to 2, that the Barrister is guilty as charged, it will not say other than that the decision was a "majority" decision. The Appellant Barrister will not be told the number of minority votes, nor who voted in the minority. The minority could include the Chairman of the disciplinary tribunal in question, or a highly qualified Barrister member and yet the Appellant will not be told. Nor, until a recent decision of the Visitors, (which will probably never be published), would the minority be required to draft and publish their dissenting reasons. This is the sort of absurd secrecy that will hopefully be swept away if and when the Visitors' jurisdiction is replaced by a statutory right of appeal to the Administrative Court akin to section 49 of the Solicitors Act 1974. Neither the BSB, nor the COIC tribunals, practise the openness that they impose on the Barristers whose disciplinary trials are now (but never used to be) held under the public gaze.

In a fit of *glasnost,* the press are studiously shown by the BSB how to access the rooms on private premises in which these disciplinary trials take place. But there is little or no *glasnost* for the Barrister who wants to know whether he or she had a single ally amongst those who made a life-changing decision about him or her and, if so, who the ally or allies might have been.

Appeal in a reasonable time ?

At present, appeals to the Visitors (all of which are brought by the Barrister not the BSB), suffer from lengthy delays of about a year. It is understood that this problem arises from a lack of Judges available to sit as Visitors. The system is backed up with a large number of Barrister appeals. This issue must be urgently addressed by COIC, as it could well become a recipe for serious injustice until a right of statutory appeal to the Administrative Court is established by legislation.

Marc Beaumont, is a senior Barrister who specialises in professional disciplinary and regulatory work and advises and represents Barristers and Solicitors in disciplinary prosecutions.

See http://www.windsorchambers.com/discipline.html