

STANDARDS COMMITTEE

8 FEBRUARY 2007

DECISION OF HIGH COURT IN THE KEN LIVINGSTONE CASE

Report from: Deborah Upton, Assistant Director, Legal, Contract and Property Services

1 PURPOSE

- 1.1 To advise members about the recent decision of the High Court in relation to the appeal by Ken Livingstone against the findings of the Adjudication Panel for England.

2 RECOMMENDATIONS

- 2.1 Members of the committee are asked to note the contents of the report.

3 BACKGROUND

- 3.1 Members will recall that the case was originally heard by the Adjudication Panel for England, in February 2006. The Tribunal determined that Mayor Livingstone had failed to follow the Code of Conduct and that he should be suspended from office for a period of four weeks. The suspension itself was suspended pending the determination of the appeal.
- 3.2 Mayor Livingstone did indeed appeal the decision and the case was heard in October of this year. This report details the findings of the Judge in the case.

4 MAIN ISSUES

The Facts of the Case

- 4.1 The case revolves around events which took place on the evening of 8th February 2005. The episode that resulted in the complaint to the Standards Board for England was the subject of widespread news coverage at the time and therefore needs only brief rehearsal.
- 4.2 Mayor Livingstone had, that evening, attended a function in his capacity as Mayor. At the end of the evening, when he was leaving the function, he was approached by a reporter seeking his views as to how the evening had gone. In the exchange which followed, Mayor Livingstone made a number of comments. Amongst these, he said firstly "Were you a German war criminal?" and secondly "You are just like a concentration camp guard." These

comments were considered particularly offensive by the Jewish reporter to whom he was speaking and the wider London Jewish community.

- 4.3 Although requested to do so by representatives of the London Jewish Community and by the Greater London Authority, Mayor Livingstone refused to apologise for his comments, giving as a reason the detailed poor relationship between himself and the newspaper group for whom the reporter worked, and his own deep mistrust of that newspaper group.
- 4.4 Ultimately a complaint was made to the Standards Board for England by the Board of Deputies of British Jews. This complaint was distilled into allegations that Mayor Livingstone had failed to follow two paragraphs of the Code:-
- Paragraph 2b which states “A Member must...treat others with respect.”
 - Paragraph 4 which states “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 disrepute.” (Members should note that Paragraph 4 is one of the two paragraphs in the Code which is stated to apply in both the Member’s public and private life.)

The Decision of the Adjudication Panel for England in the Case

- 4.5 The Tribunal decided that in making the comments Mayor Livingstone was not acting in his official capacity. It was therefore determined that he had not failed to follow Paragraph 2b of the Code which applies only when a Member is acting in his official capacity.
- 4.6 The Tribunal went on to consider Paragraph 4 of the Code. In this regard it was determined that Mayor Livingstone had failed to follow the Code of Conduct, as the paragraph applies to activities undertaken by the Member in their official capacity or ‘any other circumstance’.
- 4.7 The Tribunal decision records that:-
- “Although finding that the Mayor was not at that time fulfilling his official duties (they having ceased for the day) the Case Tribunal has no difficulty in saying that the events were sufficiently proximate in time, in place and, so far as the journalist’s question was concerned in content, to mean that it is proper to regard Paragraph 4 of the Code of Conduct as being applicable to the situation. “
- 4.8 The Tribunal also decided that any interference that the decision may impose upon the Members private life or freedom of expression could be seen as necessary and permitted by law (in the form of the promulgation of the Code), for the protection of the public order and morals or for the protection of the rights and freedoms of others.

The Decision of the High Court in the Case

- 4.9 The Judgement sets out the facts of the case as outlined above and the issues to be determined.
- 4.10 As with the Adjudication Panel the Judge was of the view that Mayor Livingstone could not have failed to follow paragraph 2 b of the Code which applies only when a Member is acting in his official capacity.
- 4.11 However, the Judge came to a different conclusion with respect to the application of the Code in a Member's private life.
- 4.12 Section 50 of the Local Government Act 2000 enables the Secretary of State to issue a model code. Section 51 of the Act requires authorities to adopt a code (including any mandatory provisions in the model code). Section 52 of the Act then requires Members to give 'a written undertaking that ***in performing his functions*** he will observe the authority's code of conduct...'
- 4.13 The Judge stated that in his view that the words in heavy type must have been intended to have some effect. He did not agree that the intention was to limit the effect of the Code to the time during which the Member was in office. However, he considered that a literal interpretation of 'in performing his functions' would mean that a Councillor who was purporting to perform his functions, but was in fact misusing his position would not be caught by the Code. Instead the Judge decided that the words should be interpreted "so as to promote the purpose of the statutory provisions, namely the setting of standards for and the regulation of conduct of those who choose to enter local government." So these words include activities which are apparently within the performance of the Member's functions. In this way the Code will apply to a Member who is using his position to do or say something which amounts to misconduct. The Judge states:-
- "Thus, where a member is not acting in his official capacity (and official capacity will include anything done in dealing with staff, when representing Council, in dealing with constituents' problems and so on)), he will be covered by the Code if he misuses his position as a member."
- 4.14 Following on from this the Judge indicated that unlawful conduct is not necessarily covered by the Code. He reasoned that parliament had previously legislated to provide that certain offences and sentences would result in disqualification for election. This indicated that parliament could have made specific provision again in relation to certain offences, sentences or types of criminal procedure, with regard to action which should be taken or sanctions which should be applied under the Code of Conduct. Parliament did not choose to make such specific legislative provision, and the Judge therefore reasoned that Parliament can not have intended the Code to apply in this way.
- 4.15 In justifying his position the Judge relied upon the ability of the electorate to exercise its judgement in order to bring membership to an end in due course.

- 4.16 With regard to the potential restriction on Freedom of Expression, the Judge reasoned that whilst it would be lawful to impose restraints upon freedom of speech in order to uphold standards in public life, those restraints should be no more than is necessary to maintain those standards. It is the Judges view that the Code goes further than is necessary.
- 4.17 In addition the Judge went on to support the argument that there is a distinction to be drawn between damage to the personal reputation of the Member and damage to the office or authority which the Member represents. The Judge considered this distinction to be both real and important. He stated that “Misuse of the office can obviously bring disrepute on the office, but personal misconduct will be unlikely to do so.
- 4.18 Having regard to all these points the Judge determined that Mayor Livingstone had not failed to follow the Code of Conduct and quashed the suspension.
- 4.19 The Judge also stated that even had he considered that Mayor Livingstone had been in breach of the Code, the sanction of suspension imposed by the Panel was ‘clearly wrong’.

The Reaction of the Standards Board

- 4.20 Through discussion with the Standards Board the Director of Legal and Democratic Services is advised that the Standards Board do not intend to appeal the decision of the Court in this case, as they do not feel it would be in the public interest to do so.
- 4.21 The Standards Board have requested the Government to legislate to clarify the position with regard to whether Members are caught by the Code when acting outside of the performance of their functions.
- 4.22 The Standards Board is seeking ongoing advice from Queens Counsel in respect of the judgement and will issue guidance in due course. This guidance, which is likely to appear first in the Bulletin, will attempt to give further clarification in relation to what may or may not fall within the phrase “performing his functions”.
- 4.23 In the meantime the Standards Board is considering each of the cases it has under investigation and waiting to be heard by the Adjudication Panel. Appropriate steps will be taken to ensure that cases which do not fall within the new understanding of the remit of the Code will be reviewed to ensure that they are either withdrawn or presented appropriately if necessary.
- 4.24 In issue 31 of the Bulletin, the Standards Board have included an article entitled “The Collins Judgement”. This article highlights that the new ‘narrower interpretation’ of the Code and gives some examples of how it will apply. The article also promises further advice and guidance on the interpretation of the Code in due course.

5. LEGAL AND FINANCIAL IMPLICATIONS

- 5.1 Members of the Standards Committee will be aware that the revised Code of Conduct which is out for consultation at present seeks to deal with the issues raised in the Livingstone judgment. Any further guidance from the Standards Board on the application of the judgment will be provided to the Standards Committee when received.

Background Documents

None.

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