

R (on the application of  
JOHN SMALLEY)

Claimant

-and-

THE UK COUNCIL FOR PSYCHOTHERAPY

Defendant

-and-

[REDACTED]

Interested Party

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SUMMARY GROUNDS OF RESISTANCE

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1. The Claimant seeks to impugn a case management decision taken by the Fitness to Practice Tribunal ("FTP Tribunal") of the Defendant organisation ("UKCP") taken and communicated on 2<sup>nd</sup> June 2011. The FTP Tribunal dismissed an application by the Claimant for a permanent stay (in effect dismissal) of a complaint brought against him by the Interested Party, [REDACTED] on the basis of delay.
2. The Claim is unarguable and permission should therefore be refused. The FTP Tribunal decided that it had not been shown on the balance of probabilities that the Claimant would suffer serious prejudice by reason of delay and that a fair hearing could not take place. The contention that the decision of the FTP Tribunal is irrational is unarguable.
3. The Claim is also out of time and permission should be refused on that basis in any event.

4. Further, if there is any unfairness in the hearing of the complaint (which is denied) the Claimant also has an appropriate alternative remedy by way of appeal.

**The Claim is out of Time**

5. The Claim is out of time under CPR 54.5(1)(a) and (b). The Claim was issued on 10<sup>th</sup> October 2011 well outside the three month time limit from the date of the decision. Furthermore, as His Honour Judge Behrens held on 11<sup>th</sup> October 2011 in this claim,<sup>1</sup> the claim was not brought promptly in any event.
6. The Claimant therefore requires an extension of time to bring the Claim. There are no good reasons to extend time; on the contrary there are very good reasons why time should not be extended.
7. In relation to challenges to case management decisions of ongoing proceedings, any judicial review challenge must be brought with the utmost expedition (within days and certainly not months). The full hearing of the complaint is scheduled to be heard and determined over two days on 8<sup>th</sup> and 9<sup>th</sup> December 2011. The parties received formal notification of the hearing on 11<sup>th</sup> August 2011. All arrangements for the hearing including the booking of the venue, instructing Legal Assessor and the appointment of Stenographer have been finalised. It is contrary to public policy for disciplinary proceedings with public protection implications to be disrupted by judicial review challenges that have not been brought promptly, particularly where this will only exacerbate the delay of which the Claimant complains. His Honour Judge Behrens indicated that it is generally preferable to allow proceedings to run their course without being interrupted by applications for judicial review.

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<sup>1</sup> Dismissing an application by the Claimant for abridgment of time.

8. Accordingly, even if the Claimant had supplied a satisfactory explanation for the lack of promptness in commencing these proceedings (which he has not) no extension of time should be granted.

### **Background**

9. The Claimant is a member of the Independent Group of Analytical Psychologists (IGAP).
10. The Defendant is the UK Council for Psychotherapy (UKCP). It is a company and registered charity whose object is *inter alia* to promote the art and science of psychotherapy including high standards of practice.
11. Amongst other things, the UKCP provides a Central Final Appeals Procedure for organisations which are members of it. One such member is IGAP.
12. Under the IGAP complaints procedures, a person dissatisfied with a decision of IGAP can appeal against such decision to the UKCP.
13. ██████████ brought a complaint against the Claimant under the IGAP complaints procedure. On 1<sup>st</sup> February 2009, ██████████ appealed against IGAP's decision dismissing ██████████ complaint to the UKCP.
14. On 26<sup>th</sup> March 2010 the UKCP Central Final Appeals Procedure Panel allowed ██████████'s appeal from the IGAP complaints procedure. The UKCP Central Final Appeals Procedure Panel held that there was undoubtedly a case for the Claimant to answer.
15. The UKCP Central Final Appeals Procedure Rule 50 permits an UKCP Appeals Panel to remit the matter to the Member Organisation or require the matter to be dealt with by the UKCP complaints procedure, if it upholds an appeal.<sup>2</sup> In this case, the Panel required the matter to be determined by the

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<sup>2</sup> "In relation to an appeal on procedural grounds, and where it is satisfied that the irregularities or errors were such that the decision appealed is unsafe, the Appeal Panel may: (a) Remit the matter back to the Respondent with the direction that it rehear the case in accordance with the correct procedures;

UKCP complaints procedure. In accordance with this ruling, the complaint was referred by IGAP to UKCP in May 2010.

16. Under the UKCP complaints procedure, the FTP Tribunal or the Chair of the FTP Tribunal may give directions as to the management of the case.

### **The Decision of the FTP Tribunal under challenge**

17. On 2<sup>nd</sup> June 2011 the FTP Tribunal considered an application made by the Claimant to stay proceedings permanently. It heard very detailed submissions from the Claimant's barrister<sup>3</sup> and from ██████████'s barrister.<sup>4</sup> Legal advice was provided by the FTP Tribunal's legal assessor (a Queen's Counsel) on which the parties were permitted to, and did, comment.<sup>5</sup> The FTP Tribunal took a decision "on the facts"<sup>6</sup> dismissing the application.

18. Its decision was made and communicated to the Claimant by the Chair of the FTP Tribunal on the same day, as recorded on the Transcript of proceedings as follows:<sup>7</sup>

"What I am about to say will be fleshed out in the written response you will get from us.

On Mr Heppinstall's argument to stay the proceedings, we are not granting that. We feel that, although there has been a delay, it does not lead to a serious prejudice which would preclude a fair trial being held."

19. Subsequently on 12<sup>th</sup> July 2011 the FTP Tribunal sent the parties fuller written reasons as follows:

"The Panel were invited to, and considered:

- oral and written submissions from the Parties. The Panel considered those submissions in full before reaching their decision;
- legal advice from the Legal Assessor in relation to both the application to stay the proceedings, and also in relation to the issues relating to the scope of the proceedings. The legal advice was accepted by the Panel;
- the UKCP Central Complaints Process (CPP) rules. The Panel had these rules in mind when reaching their decision;
- a number of documents, including the bundle of documents agreed between the Parties; and

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or, (b) If it considered more appropriate in the interests of justice, require the Respondent to refer the complaint to the UKCP to be dealt with through the UKCP complaints procedures."

<sup>3</sup> Transcript of proceedings on 2<sup>nd</sup> June 2011 (Exhibited hereto) pp.13-47.

<sup>4</sup> Transcript pp.47-112.

<sup>5</sup> Transcript pp.112-115.

<sup>6</sup> Transcript p.115-116.

<sup>7</sup> Transcript p.138 Lines 2-6.

- extracts from the transcript of the CFAP hearing which took place on 26 March 2010.

#### FTP PANEL DECISION

##### Application to Stay the Proceedings

1) The Panel considered Mr. Heppinstall's application to stay the proceedings. The Panel did not grant this. Although there have been delays in bringing about the case there has not been such a delay to the extent that the allegations in relation Mr Smalley's FTP can no longer fairly be heard; the unreliability of memory recall presented in Mr Heppinstall's submissions was dismissed because the Panel were of the opinion that there is sufficient written evidence to ensure a fair hearing could take place. The Panel decided that the delay in bringing the proceedings to their current stage has not led Mr Smalley to suffer serious prejudice which would preclude a fair trial from taking place."

### **The Irrationality Challenge**

20. The FTP Tribunal asked itself, in short, whether on balance of probabilities owing to delay there would be serious prejudice to the Claimant to the extent that a fair trial was not possible. Its answer to that question is unarguably rational.
  
21. Indeed, the principal prejudice relied upon by the Claimant is the effect of the passage of time generally on the memories of those concerned. However the length of time that has elapsed (while undoubtedly not ideal) is not unusual either in respect of disciplinary proceedings before regulators or civil proceedings in the courts. The Claimant's treatment of ██████████ was between February 2006 and November 2007 and is thus,
  - 21.1. Well within the general limitation period for civil proceedings of 6 years.
  
  - 21.2. Within the time contemplated by the UKCP rules. Rule 3.4 permits any complaint to be commenced up to five years after the matters complained of and therefore contemplates determination of complaints in excess of five years after the events complained of. Rule 3.4 also permits complaints to be commenced later than five years where this is in the public interest. It is not accepted, as the Claimant states (Grounds para. 13) that there is no public interest element in the present complaint.

- 21.3. Notably, the case of *Brisbane South Regional Health Authority v Taylor* [1996] HCA 25 [Auths. Tab. 5] on which the Claimant relies related to a complaint to be determined 17 years after the event; and the case of *R (Gibson) v GMC* [2004] EWHC 2781 (Admin) [Auths. Tab 7] related to a 10 year delay.
22. The FTP Tribunal will be able to consider the time that has elapsed when deciding whether the Claimant's fitness to practice is impaired or whether any sanctions should be taken against him.
23. Moreover, in this case the respective parties set out their recollection of the facts and circumstances in great detail not long after the events in question when their recollections were fresh (see Chronology below; Bundle Tab 5). The Claimant accepts that the FTP Tribunal is entitled to place reliance upon such accounts of what occurred.<sup>8</sup> This is obviously the "written evidence" to which the FTP Tribunal was referring in its decision (and was the basis of the extensive submissions made by ██████████'s Counsel at the hearing resisting the application to stay the proceedings).

#### **Additional complaints**

24. The Claimant complains of "significant delays" by UKCP (Grounds para. 15). Since, as the FTP Tribunal found, it has not been established that there would be serious prejudice to the fairness of the proceedings this complaint (if indeed it is a separate complaint) is irrelevant. As Elias J stated in *Gibson*:
- "I bear in mind the observations of Lightman J in *R (Toth) v GMV* [2001] WLR 2209, that both the legitimate expectation of complainants and the public confidence in the regulation of the medical profession require that the complainant should, in the absence of some special and sufficient reason, be publicly investigated. It would undermine that important principle if mere unreasonable delay, absent prejudice, were to require a stay to be granted." (*Gibson* para. 36 per Elias J)
25. It is not in any event accepted that the UKCP was responsible for unreasonable delays: as the brief attached chronology shows, the UKCP was not even seized of an appeal from IGAP until 2009 or of the complaint until May 2010 and the Claimant has been responsible for delays himself.

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<sup>8</sup> Transcript pp.37-38

26. In the Grounds of Claim, the Claimant advances several further 'makeweight' points none of which has any merit:
- 26.1. The Claimant asserts (Grounds para. 18(b)), without providing any particulars, that the FTP Tribunal did not properly address the legal test. This is untenable: there was no dispute between the parties as to the legal test fell to be applied;<sup>9</sup> the parties were able to comment on the legal advice provided by the Legal Assessor to the FTP Tribunal: Claimant's Counsel made one criticism of the Legal Assessor's summary of the law and this was accepted.<sup>10</sup> The FTP Tribunal stated expressly that it followed the legal advice it received. The Claimant has not identified any error of law in the reasons given let alone an arguable error of law.
- 26.2. The Claimant next states that the FTP Tribunal failed to mention witness statements addressing the "effect of the delay on [REDACTED], C and his family" (Grounds para. 18(c)). This is also untenable. The Panel expressly stated that it took into account the material in the bundle of documents agreed by the parties. It was not required to refer expressly to each item of evidence that it took into account; nor is it apparent what relevance such evidence has to the issue of the fairness of a hearing in any event.
- 26.3. Next, the Claimant states that the FTP Tribunal did not mention the balance of interest between the complainant and the profession (Grounds para. 18(d)). The FTP Tribunal was not required to refer to this. In any event, its finding that there was no serious prejudice such that a fair trial was impossible was determinative.
- 26.4. The Claimant lastly states that the FTP Tribunal's reasons are inadequate to explain what the decision was reached (Grounds para. 18(e)). On the contrary, the reasons make clear why the application

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<sup>9</sup> Transcript p. 19 Lines 10-16; p.49 Line 3-6; p.121 Lines 1-11

<sup>10</sup> Transcript p.114-115

was refused. They are ample for a case management decision of this nature.

27. Furthermore, the various additional grounds of challenge raised by the Claimant do not justify the grant of relief which is claimed, namely, a direction that UKCP permanently stay the proceedings. Such relief could only be justified if the only decision that a reasonable FTP Tribunal could have come to was to dismiss the complaint on grounds of delay. Therefore even if the Claimant could succeed on his additional grounds they would not justify the relief claimed.

#### **Alternative remedies**

28. The Claimant also has an alternative remedy. Under Rule 13 of the UKCP complaints procedures, the Claimant can appeal any adverse decision made by the FTP Tribunal including on procedural grounds. If the hearing is unfair this can and should properly form a ground of appeal from the FTP Tribunal's decision.

#### **Amenability to judicial review**

29. UKPC expressly reserves its position as to whether it is susceptible to judicial review by the High Court in any event.

#### **Conclusions**

30. Permission should be refused for the reasons set out above.

**TOM HICKMAN**  
**Blackstone Chambers**  
**27<sup>th</sup> October 2011**



## Summary Chronology

Feb 2006-Nov 2007	Mr Smalley provides analysis for ██████████
18 <sup>th</sup> July 2008	██████████ sends letter to Mr Smalley setting out eleven complaints about the manner in which ██████ had been treated by Mr Smalley [5/67-68]
3 <sup>rd</sup> August 2008	Mr Smalley sets out a detailed response [5/69-7]
23 <sup>rd</sup> August 2008	██████████ makes a formal complaint to the ethics committee of the IGAP [5/72]
11 <sup>th</sup> October 2008	██████████ writes a second letter setting out a further seven complaints [5/73]
31 <sup>st</sup> October 2008	Mr Smalley writes a detailed 11 page response to the complaint [5/74-84]
11 <sup>th</sup> November 2008	██████████ submits a 49 page document entitled "My Response to John Smalley" [5/85-134]
25 <sup>th</sup> November 2008	IGAP Complaints Committee writes to ██████████ stating that there was no case to answer under the IGAP Code of Ethics and Practice and explaining the right of appeal under section 67 of the IGAP Complaints Procedure Code [6/135 & 7/136-156]
23 <sup>rd</sup> January 2009	The IGAP Appeals Committee rejects an appeal by ██████████ [8/157-162], and confirmed this decision on 30 January 2009 [9/163]
1 <sup>st</sup> February 2009	██████████ submits an appeal to UKCP
25 June 2009	UKCP Professional Conduct Committee accepts ██████████'s appeal.
16 <sup>th</sup> February 2010	██████████ submits a 50 page document detailing ██████ experiences with IGAP.
26 <sup>th</sup> March 2010	UKCP Central Final Appeals Panel hearing. Decision on preliminary issue that the decision made by IGAP was perverse because: " <i>In several respects there would appear to be a case to answer</i> " and, " <i>That it did not occur to Mr Smalley that some of his behaviours at the time might have been a cause for concern, troubles the Panel, and that IGAP could conclude that there was no case to answer seems perverse to this Panel.</i> " <sup>11</sup> The Panel required IGAP to refer the complaint to the UKCP to be dealt with through the UKCP complaints processes, rather than remitting the matter to IGAP. In this they applied rule 50 of the Central Final Appeals Procedure Rules.
May 2010	IGAP refers complaints to UKCP
30 <sup>th</sup> July 2010	Professional Conduct Officer writes to Mr Smalley stating that the allegations made by ██████████ amount to an allegation of lack of fitness to practise and requesting his response within 28 days.

<sup>11</sup> Paragraphs 24 and 26.

31 <sup>st</sup> August 2010	Mr Smalley wrote to UKCP stating that he was experiencing delays with his insurance company in having legal representatives appointed. He stated that he did not wish to make a response until he had legal representation.
10 <sup>th</sup> September 2010	UKCP write to Mr Smalley setting a deadline of 23 <sup>rd</sup> September 2010 for him to appoint a legal representative as they were keen to avoid delay.
22 <sup>nd</sup> October 2010	Mr Smalley's new solicitors, Irwin Mitchell, were sent formal notification of the reference of the complaint to the Fitness to Practice Panel.
18 <sup>th</sup> November 2010	Irwin Mitchell request that "no steps are taken under the procedure" until 3 <sup>rd</sup> December 2010
19 <sup>th</sup> November 2010	UKPC refused to provide any further extension of time to Mr Smalley.
6 <sup>th</sup> December 2010	██████████ applied for Directions and set out an amended list of allegations. On 7 <sup>th</sup> December 2010 Irwin Mitchell write to the clerk to the Fitness to Practise Panel indicating that they may also request directions and that a preliminary hearing may be necessary.
21 <sup>st</sup> March 2011	Telephone Directions hearing
March-April 2011	Disclosure
2 <sup>nd</sup> June 2011	Hearing of preliminary application by Mr Smalley for permanent stay and (alternatively) as to scope of the issues.
8 <sup>th</sup> – 9 <sup>th</sup> Dec 2011	Scheduled date of full hearing of complaint.