Playing by the rules: experts' duty of candour:

Chris Pamplin explains how the courts might handle experts who appear to have failed in their duty

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IN BRIEF

- Solicitors can face a formal procedure in which they have to show why they should not be referred to their regulatory body.
- A recent case has suggested that expert witnesses should be subjected to similar procedures.

The ability of the court to report a failing expert to a professional body with a view to considering disciplinary procedures is long established. But it is less common for the court to conduct its own investigation into an expert's conduct. As officers of the Supreme Court, solicitors can face a formal procedure in which they have to show why they should not be referred to their regulatory body. It has been suggested in a recent case that expert witnesses should be subject to a similar procedure.

The circumstances in which solicitors can be made subject to such formal enquiries and the steps that can be taken by the court are set out in *R (on the application of Hamid) v Secretary of State for the Home Department* [2012] EWHC 3070 (Admin), [2012] All ER (D) 314 (Nov) as refined in 2018 by the High Court in *R (on the application of Sathivel) v Secretary of State for the Home Department* [2018] EWHC 913 (Admin), [2018] 3 All ER 79. Both were immigration cases.

In *Hamid*, a Bangladeshi national had been served with removal papers. His representations through immigration advisors were rejected. Following further unsuccessful applications, his solicitor filed a last-minute application for removal to be deferred on the day before it was due to take place. In breach of regulations, the application contained no statement of the reasons for urgency. The court decided that this was an application without merit designed simply to buy more time.

Dealing with timewasting lawyers

The judge, Sir John Thomas, took the view that late applications made with no merit were an intolerable waste of public money, a great strain on the court's resources and an abuse of a service offered by the court. Furthermore, they could amount to professional misconduct. The most vigorous action would be taken against any legal representatives who failed to comply with the rules. He established that failure to provide the information required, and in particular the lack of any explanation for the urgency claimed, would result in the solicitor from the firm responsible, together with the senior partner, being called to attend in open court. Persistent failure to follow the procedural requirements should be referred to the Solicitors Regulation Authority (SRA).

In *Sathivel*, Lady Justice Sharp followed *Hamid* and further strengthened the sanctions and procedures. The case involved an investigation into the actions of three different firms of solicitors, all of which had potentially fallen short of the required professional standards. Sharp said that when making applications, solicitors:

- had to act candidly and bring to the court's attention gaps in their evidence;
- had to avoid delaying the bringing of urgent applications; and
- should not advance grounds where they were wholly without merit with the aim of causing delay.

He said the court should make use of a 'show cause' letter. It was envisaged as a precursor to a formal reference to the SRA and should require the recipient to show cause why a referral to the relevant professional body for disciplinary proceedings should not be made.

The court issued the following guidelines:

- When a show cause letter was issued, the addressee must respond with a witness statement drafted by the person who was responsible for the case in question, and the statement of truth must be signed. To lie or deliberately mislead in such a statement might be a contempt of court.
- The statement should contain a full, candid and frank response to the questions posed in the show cause letter and to the issues set out in the court order referring the case. If there had been a recent change of lawyers, the statement must include full particulars of the circumstances giving rise to that change. Relevant documents must be annexed, and a full account of efforts made by the solicitor to obtain all relevant documents from the old solicitors must be set out. If the court concluded that the change of instruction was a device, it would consider including in any complaint to the SRA the position of the previous solicitor.
- The court would not necessarily refer the matter to the Divisional Court before deciding to pass the file to the SRA as a complaint. A complaint might be made to the SRA on receipt of the response to the show cause letter, if that was appropriate.
- The court would consider referring a case to the SRA on the first occasion that the lawyer fell below the relevant standards.

'Show cause' extended to expert witnesses

In a further development earlier this year, the procedures advocated by *Hamid* and

Sathivel have been extended to cover the conduct of expert witnesses. In *Gardiner & Theobald LLP v Jackson (Valuation Officer)* [2018] UKUT 253 (LC), the Upper Tribunal considered the extent to which conditional and other success-related fee arrangements were compatible with an expert witness's obligation to the tribunal to act independently. While it did not determine whether the approach in *Factortame Ltd v Secretary of State for the Environment, Transport and the Regions (Costs) (No 2)* [2002] EWCA Civ 932, [2003] QB 381, [2002] 4 All ER 97 should be followed by tribunals, it indicated that it was unacceptable for an expert witness, or the practice for which he worked, to work on the basis of a conditional fee arrangement without having declared that fact to the tribunal and the other parties at the outset.

Following the ruling in *Hamid*, the Upper Tribunal convened a hearing to give the expert an opportunity to make representations in response to its concerns about the accuracy of declarations made in his expert report. The tribunal ruled that where an expert had, or might have, failed to comply with a professional code of conduct or the tribunal's procedural rules, the tribunal could, exceptionally, hold a hearing to allow the expert to explain what had happened. If the expert report was found to contain declarations that were materially incorrect, or appeared to be in breach of the expert's professional code of conduct, the tribunal was likely to take that matter into account in relation to costs and refer it to the expert's professional body. Any notion that the declarations in an expert's report were a mere formality had to be dispelled.

> *"Sir David Holgate said experts owed the same duty of candour to the court as solicitors"*

Sir David Holgate said experts owed the same duty of candour to the court as solicitors. Following the example set by the High Court in *Hamid*, the Upper Tribunal would, if necessary, require them to provide written explanations for their behaviour. The *Hamid* procedure and the issuing of a show cause letter, said Sir David, provided an opportunity for the expert concerned:

- to propose an explanation for what occurred;
- to identify the lessons learnt and the actions taken; and
- to give assurances about steps that will be taken to prevent similar issues arising again.

He thought that a statement of that nature might satisfy the court in some cases without the need for a referral to a professional body.

Sir David went on to pay tribute to the great majority of experts who discharge their obligations impeccably. He said that the tribunal relied heavily on the independence, diligence, expertise and skill of the wide range of experts who appeared before it. He acknowledged that the use of the *Hamid* procedure should only be considered necessary in exceptional circumstances. However, the availability of this option does reinforce the fact that all professional representatives and experts must comply fully with their obligations. **NLJ**

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