

Amendment: 19 October 2006 – High Court Appeal Judgment

Mr Livingstone appealed to the Administrative Division of the High Court against the decision of the Adjudication Panel for England. This resulted in the decision and sanction originally imposed by the Case Tribunal being quashed by the High Court.

A copy of the Court's Judgment can be found in the same location as this decision notice, and selecting the 'High Court Judgment' document.



Notice of Decision

CASE REF:	APE 0317
RE:	Reference in relation to a possible failure to follow the Code of Conduct
RESPONDENT:	Mr Ken Livingstone. Mayor of London
RELEVANT AUTHORITY CONCERNED:	The Greater London Authority
ESO:	Mr S Kingston
<u>Case Tribunal Members:</u>	
Chairman:	Mr David Laverick
Member:	Mr Peter Norris
Member	Mr Darryl Stephenson

1. A Case Tribunal to adjudicate on the above reference sat on 13 and 14 December 2005 and 23 and 24 February 2006.
2. The reference followed the ESO's investigation of a case referred to him by the Standards Board for England. That followed a complaint that had been made that Mr Ken Livingstone, the Mayor of London, made an offensive comment to Mr Oliver Finegold, a journalist employed by *The Evening Standard*.
3. During the first day of the hearing the Case Tribunal considered and rejected (for reasons which were announced orally) a series of submissions from the Respondent that the reference to the Adjudication Panel was invalid.
4. Also during the first two days of the hearing the Case Tribunal, after considering submissions from the parties reached the conclusion that at the time of the exchange with Mr Finegold the Mayor of London, who was leaving a function at City Hall was not conducting the business of his office. This means that at the time of the exchange Mr Livingstone was not required to abide by the provision in the Code of Conduct which required him to treat others with respect. This is because paragraph 1(2) of the GLA's Code of Conduct (which follows the Model Code of

Conduct issued by the Government) provides that apart from paragraphs 4 and 5 (a) of the Code, the Code shall not have effect in relation to the activities of a member undertaken in other than an official capacity. Official capacity means when the member is conducting the business of the authority or the office to which he been elected or acting as a representative of the authority.

5. The issue which remained for determination by the Case Tribunal was to determine whether Mr Livingstone had failed to follow the provision of paragraph 4 of the GLA's Code of Conduct. This provides:

"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."

6. After hearing oral evidence and the submissions of the parties the Case Tribunal made findings of fact and thereafter began to consider submissions from the Respondent as to whether or not there had been a breach of the Code. The findings of fact are set out in an appendix to this decision.
7. The Respondent made a great many and lengthy written and oral submissions both before and during the Case Tribunal's hearings. These were primarily to the effect that the application of the Code of Conduct could involve infringement of his right to free expression (under Article 10 of the European Convention on Human Rights) and his right to be free of interference in his private life (under Article 8). He also claimed that the application of the Code constituted unlawful discrimination with those rights contrary to Article 14 of the Convention.
8. The Case Tribunal entirely accepts that the application of the Code involves an interference with the right to free expression. But Parliament had authorised such interference as the Code brought about, and, as was clear before the Case Tribunal's proceedings began, the High Court in England had established that such interference was permissible under the Convention.
9. The Case Tribunal is concerned that by referring to "any other circumstances" the Code of Conduct may involve a greater interference with the rights conveyed by Article 8 and 10 than is proportionately necessary in a democratic society to secure the purposes set out in that part of the relevant articles which refer to when there can be interference with such rights,. However the Case Tribunal is satisfied that by restricting the application of the Code to those other circumstances which are closely allied to a member's official duties, the interference with Convention rights can be restricted to that which is proportionate to what is necessary in the interests of a democratic society.
10. Subject to that, the Case Tribunal has approached the issue before it in broadly the same way as set out in the judgement of the High Court in the case of *Sanders v Kingston* by asking itself three questions in turn:
 - 10.1. Was Mr Livingstone's conduct in breach of paragraph 4 of the Code;
 - 10.2. If so, does such a finding (or the resulting imposition of a sanction) involve a prima facie breach of Article 8 or Article 10;
 - 10.3. If so, is that interference with the Convention right justified in terms of the exception provided within each Article.
11. The Case Tribunal has also considered the claim of that there has been unlawful discrimination of a kind prohibited by Article 14.

12. The exchange between the Mayor of London and a journalist which gave rise to this reference took place immediately after the mayor left a reception at City Hall and began with the Journalist asking how that evening had gone. The Mayor chose to make some comment. 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.
13. Bearing in mind that the exchange took place in a public place and that the Respondent knew that his remarks were being recorded the Case Tribunal is doubtful whether any interference with the Respondent's private life can as a matter of fact be made out. Insofar as the Code of Conduct can result in a member of a local authority having to account for what is said in such circumstances (when as the Case Tribunal found he was not "on duty") can be seen as an intrusion on his private as opposed to his public life then in the Case Tribunal's view such interference can 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.
14. The Respondent claimed that the interference with his Convention Rights as represented by the Code involved discrimination contrary to Article 14 of the Code, basing his claim that the provisions of the Code applied only to elected members of local authorities and similar bodies and did not apply to members of other bodies. As the Case Tribunal pointed out during the course of the hearing there are many examples of Codes of Conduct or Professional Rules which have the effect of exposing those bound by them to disciplinary action which may be based on conduct which has occurred in the private rather than professional life of the person concerned. The Case Tribunal was, for example, conscious of the Judicial Code of Conduct to which its own members were subject and to the Conduct expected of Solicitors.
15. Moreover a decision to seek and accept office of a kind subject to the Code of Conduct was an entirely voluntary act on the part of the Respondent. He had chosen to do that and had signed an undertaking to abide by the Code. He then, at great length, attacked the legal validity of that Code (in the sense of its consistency with the European Convention on Human Rights).
16. The Case Tribunal rejects the submission that the Mayor of London is the subject of unlawful discrimination by being expected to comply with a Code of Conduct as required by primary legislation.
17. Having so determined and applied the test of whether a reasonable onlooker in possession of relevant facts would find that he had caused damage to the reputation of his Office, the Case Tribunal has found that the Respondent did fail to follow the provisions of the Code. His treatment of the journalist was unnecessarily insensitive and offensive and he persisted with a line of comment about likening the journalist's job to that of a concentration camp guard despite being told that the journalist was Jewish and found it offensive to be asked if he was a German War criminal.
18. The Mayor argued that his right to free expression included a right to make remarks that some people may find offensive, that while some people may disagree with his remarks a reasonable onlooker would not regard the remarks as causing disrepute and that even if disrepute were caused it was to his own

personal reputation and not to the office of Mayor. The Case Tribunal can see a theoretical possibility that damage can be caused to the reputation of an individual holding an office without damage being caused to the reputation of the office itself. In practice, however, there is a very real risk that damage to the reputation of the former seeps across to cause damage to the latter. The higher the profile of the post and the more the postholder seeks to stamp his individuality on the office the harder it is to envisage circumstances where damage to his own reputation does not also cause damage to the reputation of the office. In the view of the Case Tribunal the reasonable onlooker would regard Mr Livingstone's own reputation as being diminished as a result of the exchange and having reached that view, bearing in mind Mr Livingstone's profile and the difficulty of separating his role from that of the office he holds have also concluded that the remarks have had the effect of damaging the reputation of his Office as Mayor.

19. In reaching that view the Case Tribunal rejected a submission from the Respondent that there could be no loss to the reputation of an Office or a Public Authority. The judgement on which that submission was based (*Derbyshire County Council v Times Newspapers Ltd*) was about whether the County Council could bring an action in defamation and it was held that it could not. Were the respondent to be right in his contention the effect would be that there could never be any breach of paragraph 4 of the Code. The Code needs to be interpreted in a way to give effect to the purpose stated in the legislation and not to frustrate that purpose.
20. The GLA consists of two elements: the Mayor and the Assembly. Does the fact that the Office of Mayor has been brought into disrepute mean that disrepute is thereby caused to the authority of which he is one component? The Case Tribunal is sure that there was no loss of reputation to the Assembly which was the other component of the authority. The Case Tribunal considers that the Mayor's actions had caused a risk to a loss of reputation of the authority of which he was a member but the actions of the Assembly on 14 February 2005 averted that.
21. The Case Tribunal accepts that this is not a situation when it would be appropriate to disqualify the Mayor. The Case Tribunal is however concerned that the Mayor does seem to have failed, from the outset of this case, to have appreciated that his conduct was unacceptable, was a breach of the Code and did damage to the reputation of his office. His representative is quite right in saying, as he did on 23 February, that matters should not have got as far as this: but it is the Mayor who must take responsibility for this. It was his comments that started the matter and thereafter his position seems to have become ever more entrenched.
22. The Case Tribunal noted the comments made on behalf of the Mayor that the Government had accepted the need to amend the Code to restrict the ambit of "in other circumstances" to unlawful conduct. Were such a change to be made there would have been no breach of the particular paragraph. The Case Tribunal's understanding is that there is no firm date, or indeed any firm draft wording, as to when such a change should be made. In the circumstances the Case Tribunal feel bound to deal with the matter on the basis of the legislation as it presently exists.
23. That being so the Case Tribunal considers that the appropriate sanction is for the Mayor to be suspended for a period of four weeks from 1 March. The Standard Committee of the authority will be notified accordingly. Under section 79(9) the relevant authority (which in this case is the GLA) must comply with that notice.

24. The Respondent has a right of appeal to the High Court against the above decision. Whilst parties should take their own legal advice about how to appeal, the Adjudication Panel's understanding is that a notice of appeal to the High Court should be lodged with the Administrative Division and made within in 28 days of receipt of the Case Tribunal's reasoned decision.

Mr David Laverick
Chairman

24 February 2006

Findings of Fact

1. On 14 June 2004 Mr Livingstone signed an undertaking to observe the Code of Conduct, following his re-election as Mayor of London on 10 June 2004.
2. On 8 February 2005 Mr Livingstone, in his capacity as Mayor of London, hosted a reception at City Hall to mark the twentieth anniversary of The Rt Hon Chris Smith MP being the first Member of Parliament to 'come out' as a gay man.
3. The Evening Standard had sent a photographer, Nigel Howard, and a reporter, Oliver Finegold, to cover the event. Mr Finegold had been told to attend to "write a nice piece." Mr Finegold stood outside City Hall and approached guests of the event for a comment about it. Mr Finegold knew that he would be refused access to the reception itself but had been told by a press officer that it would be fine for him to "pop along" and try to talk to guests leaving.
4. Shortly before 9pm Mr Livingstone left City Hall. Mr Finegold carried a tape recorder, which he switched on as Mr Livingstone approached.
5. The following exchange between Mr Livingstone (KL) and Mr Finegold (OF) took place:

OF Mr Livingstone. Evening Standard. How did ...

KL Oh, how awful for you.

OF How did tonight go?

KL Have you thought of having treatment?

OF How did tonight go?

KL Have you thought of having treatment?

OF Was it a good party? What did it mean to you?

KL What did you do before? Were you a German war criminal?

OF No, I'm Jewish. I wasn't a German war criminal.

KL Ah ... right

OF I'm actually quite offended by that. So, how did tonight go?

KL Well you might be, but actually you are just like a concentration camp guard. You're just doing it 'cause you're paid to, aren't you?

OF Great. I've got you on record for that. So how did tonight go?

KL It's nothing to do with you because your paper is a load of scumbags

OF How did tonight go?

KL It's reactionary bigots ...

OF I'm a journalist. I'm doing my job

KL ... and who supported fascism

OF I'm only asking for a simple comment. I'm only asking for a comment.

KL Well, work for a paper that isn't ...

OF I'm only asking for a comment.

KL ... that had a record of supporting fascism.

OF You've accused me"

6. The Case Tribunal was invited to make a finding that toward the end of that exchange the reporter's voice was raised. Having listened carefully to the tape the Case Tribunal's finding is that both parties were raising their voices toward the end of the tape, although not to the extent that either was shouting.
7. The Case Tribunal has noted that the journalist's first attempt at putting the question as to whether Mr Livingstone had enjoyed the evening was interrupted. Thereafter the same question was put a further five times without ever being answered. The Case Tribunal would not regard it as accurate to say that the question was "barked". On 4 March Mr Finegold said in answer to a question as to why he asked the question five times, "You don't get anywhere in journalism without being persistent."
8. After the words "You've accused me" there is then a gap on the tape followed after 5 seconds by a sound indistinguishable other than being a male human voice. The Case Tribunal makes no finding at all as to how or why the recording effectively ends at "You've accused me.." The Case Tribunal does not regard anything on the tape following those words as relevant to the issue of whether the remarks which had been made, and are accepted as having been made, brought the office of Mayor or the GLA into disrepute.
9. Mr Livingstone was walking away from the building as the exchange with Mr Finegold took place.
10. Mr Finegold did not himself make a complaint to the Standards Board about this exchange and nor did his newspaper. The newspaper did not itself publish a story about the matter until after it had been put in the public domain by another publication which is not part of the Evening Standard/ Daily Mail group.
11. On 14 February 2005 the London Assembly, in advance of a scheduled meeting to discuss the GLA's budget, and following the receipt of a petition debated a motion regretting Mr Livingstone's comments to Mr Finegold and calling on him to apologise. The motion was carried unanimously. Mr Livingstone was not in the chamber for the debate but, on his arrival for the budget discussion, he was invited to comment on the preceding vote. He made a statement which included the following passages;

"If I could in anything I say relieve any pain anyone feels I would not hesitate to do it, but it would require me to be a liar. I could apologise but why should I say words that are not in my heart? Therefore I cannot."

"If that is something people find they cannot accept, I am sorry, but that is how I feel after nearly a quarter of a century of their [Associated Newspapers, parent company of the *Evening Standard*] behaviour and tactics"

"In the comments I made, it simply indicated the level of loathing and disgust for the racism they [Associated Newspapers] have perpetuated and the bigotry they have encouraged for over 100 years."

12. At the conclusion of the Mayor's statement the Assembly agreed that they should adjourn for 10 minutes as a protest at the Mayor's statement.
13. On 22 February 2005 Mr Livingstone made a statement during a press conference. In the course of that statement he said;

"A week ago I said it was not my intention to apologise to the journalist from the Daily Mail group or his employers. Upon a further week of reflection in which I have read everything written in the press about this controversy and after considerable debate with many Londoners I have decided to stand by that position. There will be no apology or expression of regret to the Daily Mail group."

"To the Daily Mail group journalist I say this. You are responsible for your own actions. That you are paid by the Daily Mail group to do the job you do is not a defence for your behaviour. Pursuing me along the pavement thrusting your tape recorder at me whilst repeatedly barking the same question when I had clearly indicated I did not wish to be interviewed by you is not acceptable behaviour by you or any other journalist. Indeed a member of the public behaving in this way could find themselves arrested for a breach of peace."

"Many other journalists will confirm I have made similar comments to them over the last twenty-four years. You are the first to complain. If you feel that my comments are too harsh or robust then you are probably in the wrong job and certainly working for the wrong newspaper group."

"Whilst this journalistic technique of door stepping may be appropriate when dealing with people who do not make themselves available to the media this is not a complaint that can be levelled against myself. Every week my press conference is open to any journalist from Britain or abroad and I have never yet left a press conference before I have answered every question journalists wish to put to me. For issues that arise urgently I am invariably able to accommodate requests for information with a quote and more often than not a radio or a television interview as requested."

"What is the motive of the Mail group in whipping up this fire storm? If insulted why did the Daily Mail group journalist not get in touch and say they thought I had gone too far? If the Daily Mail group journalist had expressed regret for his behaviour on the street I would have been happy to withdraw my comments and assure him I bore him no hard feelings."

"If the editor of the Evening Standard could have explained why in five years of mayoral receptions this was the first one at which they had chosen to photograph every guest as they left, I might have been persuaded by her answer."

"In all the tens of thousands of words devoted to this story in the last two weeks no paper has been able to show that my words contravened any clause in any of the Acts of Parliament that deal with racism or anti-semitism or that they were anti-semitic or racist."

"Over the last two weeks my main concern has been that many Jewish Londoners have been disturbed by this whipped up row. I do not equate the actions of one reporter with the total abdication of responsibility shown by those who were complicit to whatever degree in the horrors of the holocaust. But I do believe that abdicating one's responsibility for one's actions by the excuse that "I am only doing my job" is the thin end of the immoral wedge that at its other extreme leads to the crimes and horrors of Auschwitz, Rwanda and Bosnia."

"I have been deeply affected by the concerns of Jewish people in particular that my comments downplayed the horror and magnitude of the holocaust. I wish to say to those Londoners that my words were not intended to cause such offence and that my view remains that the holocaust against the Jews is the greatest racial crime of the 20th century."

14. On 14 February the Director General of the Board of Deputies of British Jews made a complaint to the Standards Board for England stating that in making his comments the Respondent demonstrated a gross insensitivity and a wilful disregard for the feelings of appreciable numbers of those he represents as holder of the office of Mayor of London, including but not limited to Jews and gays and lesbians in London.
15. On 26 April in commenting on a draft report from the ESO, the Director General reiterated that the Respondent's comments and failure to apologise showed a lack of respect not only for Mr Finegold's feelings but for those of a wider constituency of Londoners whom the office of Mayor is meant to represent, thus further bringing his position into disrepute. On 25 July 2005 the Director General reiterated his Board's concern at the wider offence and distress caused by Mr Livingstone's comments and his failure to apologise for or withdraw them.
16. Mr Finegold said on 4 March 2005 that Mr Livingstone was known for having a bit of joshing with reporters from Associated Newspapers but insisted that he was offended by the question "were you a German War Criminal."
17. The Case Tribunal has noted a critique of the ESO's investigation process and draft report provided to the Head of Law at the GLA on 5 May.