No right of reply?

Dr Chris Pamplin looks at a recent ECtHR judgment that highlights the unfairness in judicial criticism of expert witnesses & offers a possible solution

IN BRIEF

- Addressing the unfairness often seen with judicial criticism of experts.
- The *Hamid* procedure.

One of the more serious sanctions an expert criticised by the court might face is a complaint being made to their professional body. Many will remember cases, such as that of Professor Roy Meadow and Dr Waney Squier (eg see 'Confronting dogma', 167 *NLJ* 7741, p19) where judicial criticism led to damaging proceedings before professional tribunals.

Unfairness of judicial criticism of experts

Given the often far-reaching effect of judicial criticism, it is, perhaps, surprising that experts subjected to it have little or no recourse to reply prior to a complaint being lodged. Their first opportunity to respond may come only once they face a duly constituted tribunal of their professional body. By that time, the damage may already have been done.

In the Upper Tribunal (Lands Chamber) decision in *Gardiner & Theobald LLP v Jackson (Valuation Officer)* [2018] *UKUT* 253 (*LC*), the tribunal convened a hearing to give the expert witness an opportunity to make representations in response to its concerns about the accuracy of declarations made in his report. The tribunal ruled that where an expert might have failed to comply with his professional code of conduct or the tribunal's procedural rules, the tribunal could, exceptionally, hold a hearing to allow him to explain what had happened and to indicate what action would be taken to prevent any repeat. If the expert report was found to contain declarations that were materially incorrect, or which appeared to be in breach of the expert's professional code of conduct, the tribunal was likely to take that matter into account as to costs and refer it to the expert's professional body.

The tribunal, in this case, made an analogy between the duties solicitors owe to the court and the duty owed by experts. Sir David Holgate referred to the decision in *R (on the application of Hamid) v Secretary of State for the Home Department* [2012] *EWHC* 3070 (*Admin*): where the court was considering reporting a solicitor to the Law Society, the court should first issue the solicitor with a letter requiring him to show cause as to why they should not do so.

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 experts to provide written explanations for their behaviour. The *Hamid* procedure and the issuing of a 'show cause' letter provided an opportunity for the expert concerned to:

- propose an explanation for what occurred;
- identify the lessons learnt, and
- give assurances about steps to be taken in the future to prevent similar issues arising.

Sir David was of the opinion that a statement of this nature might satisfy the court in some cases without the need for a referral to a professional body.

EU rides to the rescue?

If an expert is criticised in a judgment and a referral is made, or the criticism in the judgment is otherwise disseminated, without the expert being given an opportunity to respond or offer evidence refuting such criticism, does the expert have any remedy?

Sadly, the answer to that question is probably no. However, a 2021 decision of the European Court of Human Rights (ECtHR) is worth reading. In *SW v United Kingdom* (87/18) ([2021] 6 *WLUK* 605; *Times*, August 10, 2021), a social worker who had been criticised by the court made application under Arts 8 and 13 of the European Convention on Human Rights.

The applicant in the case (the social worker) was a professional witness called to give evidence before the court. Between 2007 and 2014 her services were engaged through personnel agencies. In 2012, she began working with a local authority. The same year, she was called as a professional witness in childcare proceedings concerning the alleged sexual abuse of a number of siblings. Before the proceedings ended, her agency assigned her to a different local authority.

The childcare proceedings were complex in nature but, for the purposes of the applicant's case, the relevant stage was a fact-finding hearing before the Family Court in September 2014.

In a judgment of October 2014, the Family Court judge rejected the allegations of sexual abuse. He also criticised the local authority and the professionals involved in the case. In particular, he found that: (i) the applicant was the principal instigator in a joint enterprise to obtain evidence to prove the sexual abuse allegations, irrespective of the underlying truth and the relevant professional guidelines; (ii) she had lied to the court about important aspects of the investigation; and (iii) she had subjected one of the children involved to a high level of emotional abuse in the course of their interaction.

The applicant first became aware of the adverse findings when, at the end of the hearing, the judge gave an oral judgment. After delivery but prior to the case being finalised, the Family Court judge held a series of hearings to address submissions by the applicant on some aspects of the judgment, including the decision not to grant her anonymity. As a result, some changes were made to the text of the judgment, but the adverse findings against the applicant remained, as was the decision not to grant her anonymity.

In November 2014, the Family Court judge, having indicated that all cases involving the applicant should be scrutinised as a matter of urgency, directed that the judgment be sent to the local authority to which the applicant was then assigned and advised that his findings should be shared with other local authorities where she had worked and with the relevant professional bodies.

As a direct result of the criticism, the applicant was told by her personnel agency that her assignment with the local authority had ended and she was asked to leave.

The applicant appealed, claiming that her Human Rights had been breached. The Court of Appeal found that the criticism of the applicant contained in the judgment was 'manifestly unfair to a degree which wholly failed to meet the basic requirements of fairness established under Art 8 and/or common law. In short, the case that the judge came to find proved against the applicant fell entirely outside the issues that were properly before the court in the proceedings and had been fairly litigated during the extensive hearing, the matters of potential adverse criticism had not been mentioned at all during the hearing by any party or by the judge, they had certainly never been 'put' to the applicant and the judge did not raise them even after the evidence had closed and he was hearing submissions'.

Where a court is contemplating making findings that arise outside the original focus of the case, the court should embark on a process that allows those affected to make submissions before final judgment is given. For those additional steps to be an effective counterbalance to a process that might otherwise be unfair, they need to be undertaken before the judge has reached a concluded decision on the controversial points. While not impossible, it is difficult to conceive of circumstances where the overall fairness of a hearing can be rescued by any form of process after the judge has announced the concluded decision.

However, although the Court of Appeal decision set aside the impugned findings and found her Article 8 rights had been breached, it failed to provide her with an effective remedy. It was not in dispute that she would only have been entitled to damages for misfeasance in public office if she could show that the judge had knowingly or recklessly abused his power and either intended to cause her harm or was recklessly indifferent to the probability of causing her harm.

> *"The finding of the ECtHR might be applied equally to expert witnesses who find themselves in a similar situation"*

Furthermore, the government expressly accepted that she could not have made a claim for damages under the Human Rights Act 1998 because any attempt to establish the necessary lack of good faith on the part of the judge would have been unlikely to succeed. Consequently, she was advised by counsel that a claim for compensation would have no real prospect of success.

Court of Appeal—no remedy?

On the application of the social worker, the matter came before the ECtHR. Judge Grozev (President), mindful of the judgment given by the Court of Appeal that the criticism had been 'manifestly unfair to a degree which wholly failed to meet the basic requirements of fairness established under Art 8', considered the interference with the applicant's Article 8 rights was neither in accordance with the law nor necessary in a democratic society. The case that was found to be proved against the applicant fell entirely outside the issues that were properly before the court.

Indeed, it had not been put to the applicant, nor even mentioned, during the hearing. Moreover, these procedural shortcomings were not offset by any effective counterbalancing measures. Although the applicant was able to make some submissions to the judge after she became aware of his criticism of her work, it only happened after the judge had announced his concluded decision. As such, the process was wholly incapable of protecting the right to respect for her private life.

In light of the foregoing, the judge's direction that his adverse findings be sent to the local authorities and relevant professional bodies without giving the applicant an opportunity to meet them in the course of the hearing interfered both unlawfully and disproportionately with her right to respect for her private life under Article 8 of the convention.

Article 13 of the convention requires domestic legal systems to make available an effective remedy empowering the competent national authority to address the substance of an 'arguable' complaint under the convention. Its object is to provide a means whereby individuals can obtain appropriate relief at national level for violations of their convention rights before having to set in motion the international machinery of complaint before the court. Although Article 13 does not require any particular form of remedy, contracting states being afforded a margin of discretion in conforming to their obligations under this provision, an effective remedy must be available in practice as well as in law. It must not be unjustifiably hindered by the acts or the omissions of the authorities of the respondent tate.

The ECtHR found that the judgment of the Court of Appeal did not afford the applicant appropriate and sufficient redress for her complaint under Article 8. Neither had it been suggested that any other remedy was available to the applicant that would have provided her with the opportunity of obtaining such redress.

In light of the foregoing, the ECtHR accepted that there had been a violation of the applicant's right under Article 13 because she did not have access to an effective remedy at the national level capable of addressing the substance of her Article 8 complaint and by virtue of which she could obtain appropriate relief. The UK government was ordered to pay the applicant €24,000 in non-pecuniary damages and €60,000 for costs and expenses.

Conclusion

Although the applicant in this case was a professional witness and not, strictly speaking, an expert witness, it seems that the finding of the ECtHR might be applied equally to expert witnesses who find themselves in a similar situation. At the very least, it offers an avenue worth pursuing where previously there has been none. NLJ

Dr Chris Pamplin is the editor of the *UK Register of Expert Witnesses* and can be contacted on *nlj@jspubs.com*. Website: *www.jspubs.com*.