THE ETHICAL FRAMEWORK FOR ELECTED MEMBERS – PART III OF THE LOCAL GOVERNMENT ACT 2000

JAMES MAURICI
LANDMARK CHAMBERS

Introduction – the new ethical framework and Code of Conduct

1. Part III of the Local Government Act 2000 ("the 2000 Act") established "a new ethical framework for local government": see paragraph 102 of the explanatory notes to the 2000 Act.

2. The leading case in this area is ***R (on the application of Richardson) v North Yorkshire County Council and another*** [2004] 1 W.L.R. 1920 in which the House of Lords refused the petition for appeal very recently ([2004] 1 WLR 2892, 28 October 2004). The judgment (with which Keene and Scott Baker LLJ agreed) of Simon Brown LJ (as he then was) in the Court of Appeal in ***Richardson*** contains a useful summary of the legislative framework which I will not repeat here. However, in barest outline s. 49 of the 2000 Act provides that the Secretary of State "may by order specify the principles which are to govern conduct of members". Those principles are set out in the Relevant Authorities (General Principles) Order 2001. S. 50(1) of the 2000 Act empowers the Secretary of State to "issue a model code as regards the conduct which is expected of members". By virtue of the 2000 Act relevant authorities were required to adopt a Code of Conduct that set out rules governing the behaviour of its members: see s. 51 of the 2000 Act. All elected, co-opted and independent members of local authorities, including parish councils, fire, police and National Parks authorities, are covered by such Code.

3. Each Code must include the provisions of the relevant Model Code of Conduct approved by Parliament in November 2001 in respect of England: see the Parish Councils (Model Code of Conduct) Order 2001; the Local Authorities (Model Code of Conduct) (England) Order 2001 (this contained 2 Model Codes one for those

authorities operating executive arrangements and one for those which were not); the Police Authorities (Model Code of Conduct) Order 2001; the National Park and Broads Authorities (Model Code of Conduct) (England) Order 2001 and the National Assembly for Wales in respect of Wales: see the Conduct of Members (Model Code of Conduct) (Wales) Order 2001 (as amended). (For a summary of the differences between the Model Code of Conduct in Wales and in England see Butterworth's Local Government Law at paragraph 2190).

4. Authorities can choose to add their own local rules to the Model Code if they wish, although the Standards Board for England (see below) advises against this and most have adopted the relevant Model Code without additions.

5. The new ethical framework had its origins in the Third Report of the Committee on Standards in Public Life on Standards of Conduct in Local Government (the Nolan Committee): see the explanatory notes to the 2000 Act at paragraph 107 and see further paras. 57 of Richards J's judgment in ***Richardson*** and the judgment of Simon Brown LJ in the Court of Appeal in the same case at paragraph 45. ***Richardson*** shows that references back to the Nolan Committee report can be of assistance in resolving difficulties arising from the interpretation of the Model Code: see e.g. paras. 105 – 106 of Richards J's judgment and paragraph 76 of Simon Brown LJ's judgment. (NB the background can in fact be traced back further to the Widdicombe report in 1986: see paragraph 45 of the judgment of Simon Brown LJ in ***Richardson***).

6. Authorities had until 5 May 2002 to adopt a Code of Conduct. After this date the relevant Model Code was automatically applied to those who had not adopted the Code. S. 52(1) of the 2000 Act required that members (including co-opted members) of a relevant authority at a time when the authority adopted a code under s. 51 of the 2000 Act had two months to give to the authority a written undertaking that in performing his functions they would observe the authority's Code of Conduct failing which they was to cease to be a member of the authority at the end of that period. A person becoming a member after this time "may not act in that office unless he has

given the authority a written undertaking that in performing his functions he will observe the authority's code of conduct for the time being under section 51": see s. 52(3).

7. The effect of the provisions of s. 52(1) were considered in ***R (on the application of Meredith) v Merthyr Tydfil County Borough Council*** [2002] EWHC 634 (Admin) per Elias J. There had been in that case what the learned Judge rightly called "a muddle at Merthyr Tydfil" (see paragraph 1 of the judgment). Elias J. went on "The council has got itself into a fix. It is said that all 33 councillors have automatically ceased to hold office. Each one of them by an oversight failed within the period stipulated by law to give a written undertaking that he or she would abide by a code of conduct adopted by the council. Each was unaware of the time limit. Each has since given the undertaking, but it is said that it is now too late."

8. Elias J. interpreted s. 52(1) in this way (see paragraph 47 of the judgment): "the section construed in context clearly presupposes that the member is aware of the legal obligation in the first place. The purpose of this provision is to disqualify members who are unwilling to accept the standards laid down in the code. It is true that the section does not say that the member must have positively refused to sign: mere failure to do so will suffice. But in my opinion the reason for the two month period is to give members a proper opportunity to consider their position. If they are aware of their obligations, then it may reasonably be inferred that if they fail within that period to give the undertaking this is because they are unwilling to give it. They cannot, in other words, just drag their feet and seek to avoid having to give the undertaking by simply doing nothing. In my judgment it is as though there were a deemed refusal by that date. But that is only a legitimate inference if the member appreciates the applicable time scale. In short, I consider that the section is envisaging a knowing failure to meet the legal requirement." Accordingly, in that case, the failure of the members to give the written undertaking within the two month period did not automatically bring about the termination of their membership of the council.

Richardson

9. As I have said this is the leading case on the new ethical framework contained in Part III of the 2000 Act. As well as the Court of Appeal's judgment ([2004] 1 W.L.R. 1920) it is also worth looking at Richards J's judgment at first instance [2003] EWHC 764 (Admin) which Simon Brown LJ described as "masterly, both thorough and concise, a model of clarity, impeccably laid out".

10. In ***Richardson***, the first claimant, who was a member of the defendant council, had with other local residents objected to the interested party's planning application to extend gravel and sand quarrying at a particular site. Mr Richardson was especially affected by the planning application, because his home was at one of three or four houses nearest to the quarrying site (see further below). He was not a member of the council's planning and regulatory committee, but he had sought to attend the relevant meeting in order to object to the application, both in his capacity as a representative of the local community, and in a personal capacity. He was excluded from the meeting on the grounds that he had a "prejudicial interest" in the matter under consideration within the meaning of paragraph 12(1) of the Model Code of Conduct (which had been adopted by the council pursuant to s. 51 of the 2000 Act) ("the Code"). In Mr Richardson's absence, the planning permission for the extension of quarrying was granted (with conditions) by the planning and regulatory committee, and Mr Richardson sought judicial review of the decision, inter alia, on the grounds of his exclusion from the relevant meeting.

11. Under paragraph 8 of the Code, a member must regard himself as having a "personal interest" in any matter where a decision upon it "might reasonably be regarded as affecting to a greater extent than other council tax payers, ratepayers, or inhabitants of the authority's area, the well-being or financial position of himself a relative or a friend … ". Paragraph 10(1) of the Code goes on to define "prejudicial interest" as follows: " … a member which a personal interest in a matter also has a prejudicial interest in that matter if the interest is one which a member of the public with knowledge of the relevant facts would reasonably regard as so significant that it is

likely to prejudice the member's judgment of the public interest …". By paragraph 12(1) of the Code, a member with a prejudicial interest must withdraw from the room or chamber where a meeting is being held whenever it becomes apparent that the matter in which he is interested is being considered at that meeting, unless he has obtained a dispensation from the authority's standards committee.

12. The Court of Appeal identified three issues which have implications of general importance (see paragraph 58 of Simon Brown LJ's judgment):

13. First, which "member[s]", assuming that they have a prejudicial interest in a matter, are required by paragraph 12(1) of the Code to "withdraw from the room or chamber where a meeting is being held when … the matter is being considered at that meeting"? Is this requirement imposed on all members of the authority or only on those who are members of the committee holding the relevant meeting?"

14. Second, whatever the answer to the first question, "is a member, paragraph 12 notwithstanding, entitled to attend such a meeting in his personal capacity as opposed to his representative capacity?"

15. Third, was Mr Richardson properly to be regarded as having a "prejudicial interest" in the matter of the planning application in issue?

What is the meaning of "member" in paragraph 12(1) of the Code?

16. Mr Richardson argued that paragraph 12(1) refers only to members of the relevant committee and not to members generally. Both Richards J. and the Court of Appeal rejected this interpretation based upon both the natural and ordinary meaning of the Code (see paragraph 60 of Simon Brown LJ's judgment) and an analysis of the background and the "mischief" at which the provision was aimed (see paragraph 61 of Simon Brown LJ's judgment). The Court of Appeal also rejected an argument that paragraph 12(1) thus construed "imposed an unnecessary and disproportionate restriction on members' ability to represent their constituents such as to make it

unlawful" (see paragraph 62ff) concluding (at paragraph 72) that although the narrower construction of paragraph 12 contended for by Mr Richardson would allow more scope for democratic representation within local government "it would be at the expense of public trust and confidence in the local democratic process. The government in the Model Code decided upon has chosen not to pay that price. At the end of the day it is as simple as that".

Is a member, paragraph 12 of the Code notwithstanding, entitled to attend such a meeting in his personal capacity as opposed to his representative capacity?

17. The Court of Appeal reached a different view to Richards J. on this issue and accordingly on this issue alone Richards J. judgment below should be wholly disregarded.

18. At paragraph 75 of his judgment Simon Brown LJ said this:

> "A member of the authority attending a council meeting cannot in my judgment, simply by declaring that he attends in his private capacity, thereby divest himself of his official capacity as a councillor. He is still to be regarded as conducting the business of his office. Only by resigning can he shed that role. To conclude otherwise would drive a coach and horses through paragraph 12. Realistically it would be rendered wholly ineffective. The mischief which paragraph 12 is designed to avoid is manifestly the same whether the councillor is attending the meeting in his public or purportedly private capacity. Is it seriously to be suggested that the very quality which elevates a councillor's private interest under the Code into a prejudicial interest (ie a private interest so strong that on its face it requires him to withdraw from the meeting under paragraph 12), nevertheless itself entitles him to remain in a supposedly private capacity? Surely one has only to state the proposition to reject it."

19. The logic of this reasoning is difficult to argue with. However, it can be said to put members in a disadvantageous position as compared to ordinary members of the public in terms participating in meetings which directly affect them as local residents. Of course, nothing in the Code or its interpretation in ***Richardson*** rules out the possibility of the member concerned making written representations or having his views represented at the meeting by another person as in fact happened in the ***Richardson*** case.

Was Mr Richardson properly to be regarded as having a "prejudicial interest" in the matter of the planning application in issue?

20. The most important point of general importance to arise from Simon Brown LJ's judgment on this issue is that "the initial and principal judgment on the question is for the individual councillor himself" (See paragraph 76 of the judgment). Thus the Court in examining such a matter asks itself not whether the member has in fact a prejudicial interest or not but rather could the member properly (i.e. reasonably) have reached the view he did ("there comes a point at which it would clearly be irrational and therefore unlawful for the councillor to conclude that he does not have a personal interest under paragraph 8(1) or, as the case may be, a prejudicial interest under paragraph 10(1)", see paragraph 76 of the judgment). On the facts of the case the Court of Appeal upholding Richards J's conclusions considered that such a point had been reached in Richardson's case it being "plain"/ "self evident" that he did have a prejudicial interest: see paragraph 76 of Simon Brown LJ's judgment which quotes in full the relevant parts of Richards J's judgment on this point.

21. There could be no doubt but that Mr Richardson had a "personal interest" within paragraph 8(1) of the Code, in that the decision on the planning application (i) related to an interest of which he had to give notice under paragraph 14(f), namely his home, and/or (ii) might reasonably be regarded as affecting his well-being and/or financial position to a greater extent than other relevant persons.

22. A personal interest is also a 'prejudicial interest' within paragraph 10(2) if it is "one which a member of the public with knowledge of the relevant facts would reasonably regard as so significant that it is likely to prejudice the member's judgement of the public interest". This test is similar to the test for apparent bias applied in English law: see ***Porter v Magill*** [2002] 2 AC 537.

23. On the facts as set out in paragraph 84(iii) of Richards J's judgment "Richardson's home, Ox Close House, was very close to the proposed extension of the quarry and

was one of a handful of properties liable to be most affected by the development. As it was put in paragraph 6.7.1 of the Director's report: “The properties potentially most affected by the development proposal are Ox Close House, The Bungalow, Ox Close Farm and Great Givendale. The closest properties are Ox Close House, The Bungalow and Ox Close Farm. These lie approximately 250 metres to the south west and west of the application area. Residents in these properties have expressed concern with regard to noise arising from the proposed workings …. Residents are also concerned about the impact on their views of the valley ….’”.

24. Mr Richardson relied on the statement in paragraph 118 of the Nolan report that ‘[i]f one hundred households are affected by a council decision, then most people would agree that a councillor similarly affected has no special interest which might debar him or her from speaking or voting, providing the interest is declared’. It was submitted that that was the case here and pointed to the fact there were some 400 signatories to a local petition opposing the development; Mr Richardson it was said had the same interest as his constituents, albeit to a greater degree than many (and less than some). On this Richards J. said “In my judgment, however, the next sentence of paragraph 118 of the Nolan report is more pertinent: ‘[i]f in a different decision ten households are affected, then in most circumstances a councillor might feel that taking part in a decision was inappropriate’. The present case is stronger still, since Mr Richardson's home was one of three or four properties closest to the site and potentially most affected. The owners of those properties were not merely ‘similarly affected’ as other residents of the parish, but had a greater and special interest in the outcome of the planning application”. The learned Judge continued:

> “v) Anyway, the test is not what was said in the Nolan report but what is laid down in paragraph 10(2) of the Code; and in my judgment a member of the public with knowledge of the relevant facts would reasonably have regarded Mr Richardson's personal interest as so significant that it was likely to prejudice his judgement of the public interest. I reject Mr McCracken's submission that a knowledgeable member of the public would reasonably have regarded him as simply putting forward the views of the people he represented, or making a contribution to the debate based on his perception of the public interest, rather than being influenced by the potential impact of the development on his own home. However conscientious a councillor might be in his representative role and his

concern to protect the public interest, the personal interest was a highly material additional consideration.

vi) As a further way of examining the point, though this is not necessary for my decision, I have asked myself whether, if Mr Richardson had been a member of the committee and had participated in a decision to refuse planning permission, it would have been open to the developer to object to the decision on the ground that his participation gave rise to the appearance of bias. In my view it would have been, for the very reason that a fair-minded and informed observer would have concluded that, by reason of the personal interest, there was a real possibility that the committee was biased. The test in paragraph 10(2) of the Code is not in identical terms but similar considerations underlie it."

25. At paragraph 77 of his judgment Simon Brown LJ said "Quarrel with that as Mr McCracken does, it seems to me that the judge's conclusion on this point is self-evidently correct. Assume, as the judge posited in paragraph 84(vi), that Mr Richardson had in fact been a member of the Planning Committee which had then refused planning permission by a 5:4 majority. How could it possibly have been suggested that "a member of the public with knowledge of the relevant facts [essentially those set out in paragraph 84(iii) of the judgment] would [not] reasonably have regarded [Mr Richardson's interest] as so significant that it [was] likely to prejudice [his] judgment of the public interest" (the language of paragraph 10.(1) of the Code)? Plainly it could not."

The Human Rights Act

26. At first instance Richards J. gave consideration to a number of discrete Human Rights Act arguments raised by Mr Richardson. Mr Richardson relied on the Convention both as requiring the construction of the Code for which he contended and, in the alternative, as a ground for seeking a declaration that the Code was unlawful if and in so far as it did require his exclusion from the meeting: see paragraph 90 of Richards J's judgment. These arguments were rejected at first instance and did not (ultimately) resurface in the Court of Appeal.

27. At first instance it was argued that the development affected Mr Richardson's home and that it was not consistent with his right to respect for his home under Article 8(1) to deny him the same chance to be present and to speak at the meeting as others

whose homes were affected. Under Article 6(1) an argument was raised based on a lack of equality of arms between Mr Richardson and the developer, who was (of course) allowed to be present and to speak at the meeting.

28. On Articles 6 and 8 Richards J. said this:

> "118. As to article 6 of the Convention, I accept [the Secretary of State's] submissions that, if it conferred relevant rights on Mr Richardson (which I do not need to decide), the application of the Code involved no breach of those rights. The material provisions of the Code are fully consistent with the aim of ensuring fairness and impartiality in the decision-making process - a process in which there are competing interests at stake, including those of the developer as well as those of objectors such as Mr Richardson. It was for the Secretary of State to balance those competing interests so as to achieve fairness overall; and the result is in my view well within the margin of discretionary judgment allowed to him. It was also open to the Secretary of State, and conducive to legal certainty, to adopt a general rule applicable across the broad range of decision-making processes of local authorities.
>
> 119. I do not think that R(***Adlard) v. Secretary of State for the Environment***, which held that there is no entitlement to an oral hearing at this stage of the procedure, provides in itself an answer to Mr McCracken's point that the developer had the opportunity to make oral representations (albeit for only three minutes) whereas Mr Richardson did not. For the reasons advanced by Mr Sales, however, the developer and Mr Richardson were not in the same position, the differential treatment was based on the legitimate aim of preserving public confidence in the system, and the restriction placed upon Mr Richardson was a proportionate measure. All that he was prevented from doing was attending the meeting in his capacity as a councillor. He was able to arrange for others to put forward any points he wished to make, and I have indicated that, had he wished to attend the meeting solely in his personal capacity, it would in my view have been open to him to do so.
>
> 120. As to article 8 of the Convention, essentially the same procedural issue is raised. The case put forward is that it was not consistent with Mr Richardson's right to respect for his home to deny him the same chance to be present and to speak at the meeting as others whose homes were affected. I accept Mr Sales's submission that that case must fail in the light of the conclusion I have reached on article 6. There is no article 8(1) right to a hearing. The issues concerning attendance at the meeting can come in only in the context of justification under article 8(2), most obviously as an aspect of proportionality. In that connection I refer back to the substance of the views I have expressed in relation to article 6. In my judgment any interference with article 8(1) rights arising out of the relevant provisions of the Code was plainly justified."

29. It can be seen that Richards J. reasoning for rejecting the Article 6 and 8 arguments relies in no small part on his conclusion (overturned by the Court of Appeal) that "[a]ll that he was prevented from doing was attending the meeting in his capacity as a councillor". However, even absent this element it seems to me highly unlikely that Articles 6 or 8 are infringed by the Code or its interpretation in ***Richardson***.

30. Thus to the extent that the Code can be said in another case to involve restriction on the rights conferred by Article 8(1) it seems likely that such restrictions would be found to be legitimate. The promotion of the proper functioning of the democratic system of local government and administrative planning decisions at local level in the United Kingdom is a legitimate Convention aim: see ***Vogt v Germany*** (1996) 21 EHRR 205 and ***Ahmed v UK*** (2000) 29 EHRR 1 esp. paras. 52-54 and 62-63. ***Ahmed*** concerned an unsuccessful challenge in Strasbourg against the provisions of the Local Government and Housing Act 1989 (as amended) dealing with restrictions on the political activities of officers holding "politically restricted posts".

31. No allegation of a breach of Article 10 was pursued in ***Richardson***. As to the scope for a challenge to the requirement to withdraw for a Council meeting based on Article 10, see ***Buchner and others v Austria*** Application No. 22096/93[1].

32. The application of the reasoning on the facts of this case to a case arising under the Code is perhaps not entirely easy. However, see the case of ***Murphy*** below.

[1] The applicants, all members of a community council, complained that they had not been sent in advance the community budget project for that year, even though they had insisted on this after a similar incident in the year before. They requested that the session either be adjourned or the budget item dropped from the agenda, requests which were rejected by majority. The applicants therefore withdraw from discussion of what they said was an unlawful decision on the budget project. When they tried to return to participate in the discussion of other items on the agenda the mayor did not re-admit them. The applicants argued that their rights under Articles 10 and 11 had been violated. The Commission stated that the mayor's decision not to re-admit the applicants to a particular meeting which they had chosen to leave could not be found to amount to an interference with the rights invoked in circumstances where the applicants had not alleged that before deliberately leaving the meeting they had been arbitrarily prevented from expressing their views on the agenda items nor that at a subsequent meeting they were prevented from expressing their political or other opinions.

33. What about an Article 14 argument on the basis that under the Code (as interpreted in ***Richardson***) members are in a disadvantageous position as compared to ordinary members of the public as regards participating in meetings which directly affect them as local residents? I doubt this would succeed. Whether discrimination on the grounds of being a councillor falls within the scope of Article 14 or not (and I doubt that it does) in any event it seems clear that a councillor is not in the same position as an ordinary member of the public, because of the risk that his personal status may influence the outcome of a council meeting. And it is legitimate for special provision to be made in relation to a councillor in order to protect the interests of those affected by local government decision making and also to preserve public confidence in local democratic decision-making procedures: see eg ***Ahmed v UK*** (2000) 29 EHRR 1, esp. paras. 53, 62 and 63.

Other Human Rights issues?

34. On the whole the Code only applies to members when acting in an official capacity. However, there are exceptions. The most notable being the requirement in paragraph 4 that 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. The extension of the requirement beyond a member's official capacity to private or personal behaviour may well raise issues in relation to Article 8 and 10.

35. The uncertainty as to what conduct is prohibited may also raise issues. In ***Hashman v United Kingdom*** (2000) 30 E.H.R.R. 241 two hunt saboteurs whose appeals against binding over orders and payment orders of £100 were dismissed, applied to the European Court of Human Rights, complaining that their rights to freedom of expression, as guaranteed under the European Convention on Human Rights Article 10, had been violated. It was contended that the description of his behaviour as being "contra bonos mores" was so broadly defined that it failed to comply with the requirement in Art.10(2) that any interference with freedom of expression must be "prescribed by law". The ECtHR upheld the complaint holding that the order by

which the applicants were bound over was not legally prescribed as required under Art.10(2). Any interference with the freedom of expression necessitated the utmost scrutiny, the Court disagreed with the UK Government that the definition of behaviour contra bonos mores as "wrong rather than right in the judgment of the majority of contemporary fellow citizens" contained an objective element equivalent to conduct "likely to cause annoyance".

36. The Standards Board in volume one of its Case Review points out that the Oxford English Dictionary defines “disrepute” as “a lack of good reputation or respectability; discredit” and suggests that “[a]nything which diminishes public confidence in either a members’ office of their authority, or which harms the reputation of an authority, will bring that office into disrepute”. This is a wide definition. It must be recalled that the words used in paragraph 4 of the Code refer to conduct “which could reasonably be regarded” as bringing the office or authority into disrepute. That test plainly involves an element of judgment. The Standards Board apparently see this as an objective test akin to the reasonable bystander test in the law of bias.

37. The Standards Board have made plain that criminal conduct will not always come within the scope of paragraph 4 and that paragraph 4 is not limited to criminal conduct. In the Case Review the Standards Board acknowledges that there is a need to balance the clear intention of paragraph 4 into the personal lives of members against its obligations under Article 8 saying that “there are some aspects of lifestyle and personal morality that it would be inappropriate for the Standards Board to intrude upon” and that paragraph 4 will not apply “if a member’s conduct cannot be reasonably viewed as having any bearing on the member’s performance of his or her public duty.”

38. Applied in this way the Code is unlikely to breach Article 10.

The machinery for the enforcement of the new ethical framework under the 2000 Act

39. At least as important as the substantive content of the new ethical framework in the way in which it is given teeth.

40. The position differs as regards England and Wales and I focus on England.

41. The Standards Board for England has the central role in overseeing the investigation of complaints that members have breached the code. In Wales its functions are discharged by the Commissioner for Local Administration Wales ("CLAW").

42. Any person who believes that a member has failed to comply with an authority's Code of Conduct can make a written complaint to the Standards Board. Members are under a duty to do so under the Code itself. If the Standards Board considers that such a written allegation should be investigated, it must refer the case to an ethical standards officer (ESO).

43. The Standards Board is a non-departmental public body.

44. The Standards Board has stated that it will exercise its discretion not to refer a complaint for investigation if it is: frivolous, vexatious, otherwise misconceived, discloses no substantive information that might amount to a breach of the code, or is substantially similar to a complaint that has already been considered, unless it raises new information.

45. ESOs are the investigating arm of the Standards Board with wide powers of investigation.

46. There are four possible outcomes to an ESO's investigation (see s. 59(4) of the 2000 Act):
    a. a finding that there is no evidence of any failure to comply with the code of conduct of the relevant authority concerned,

b. a finding that no action needs to be taken in respect of the matters which are the subject of the investigation,
c. a finding that the matters which are the subject of the investigation should be referred to the monitoring officer of the relevant authority concerned for local determination by the authority's own standards committee;
d. a finding that the matters which are the subject of the investigation should be referred to the Adjudication Panel for England by a Tribunal.

47. An ESO also has power under s. 60(2) of the 2000 Act to refer the matter to the local monitoring officer for investigation at the local level.

48. Where the matter is referred to the monitoring officer of the relevant authority concerned for local determination by the authority's own standards committee or to the Adjudication Panel for England by a Tribunal a number of sanctions are open including censure, suspension and disqualification.

49. The complex enforcement machinery has been drafted very much with Article 6 of the Convention in mind with the Adjudication Panels for England and Wales being separate from the Standards Board/ CLAW.

50. It seems that such proceedings would fall within the civil not the criminal limb of Article 6: see ***Porter v Magill*** (above). In ***Porter*** the House of Lords held the statutory surcharge provisions then available in relation to wilful misconduct fell within the civil not the criminal limb of Article 6. Those provisions were repealed by the 2000 Act. There exist under Part III of the Act no financial penalties or compensatory provisions for misconduct. (However, the House of Lords did suggest that a remedy allowing for financial redress might still exist at common law). In the light of ***Porter*** there can be no doubt as to the civil nature of the proceedings.

51. It seems that a challenge to the enforcement mechanisms as being in breach of Article 6 would be bound to fail. This is even more likely to be so given that there is a

statutory right of appeal to the High Court against a decision of a Case Tribunal "that a person has failed to comply with the code of conduct of the relevant authority concerned": see s. 79(15) of the 2000 Act: see ***Alconbury Developments Ltd. v. Secretary of State for the Environment, Transport and the Regions*** [2003] 2 AC 295.

52. There have not it seems been too many such appeals.

53. In ***Murphy v The Ethical Standards Officer of the Standards Board of England*** [2004] EWHC 2377 (Admin) Keith J. recently had to consider one such appeal. The case concerned Councillor Murphy's refusal to withdraw from meeting at which he had tabled a motion seeking to criticise an adverse finding against him by the Local Government Ombudsman. It was alleged that the meeting was one in which Councillor Murphy had a "personal and prejudicial interest".

54. The case provides some guidance on the scope of personal interests under the Code. As we have seen the Code provides that a Member must regard himself/herself as having a personal interest in any matter "if a decision upon it might reasonably be regarded as affecting to a greater extent than other Council Tax payers, ratepayers or inhabitants of the Authority's area, the well-being or financial position of himself/herself" (paragraph 8(1)). Keith J. endorsed the Standards Board Case Review where it says "The use of the term 'wellbeing' is a good example of the very broad drafting of [the relevant] paragraph …..'Wellbeing' can be described as a condition of contentedness, healthiness, and happiness. Anything that could be said to affect a person's quality of life, either positively or negatively, is likely to affect their wellbeing. It is not restricted to matters affecting a person's financial position. The range of personal interests is, accordingly, likely to be very broad." (see paragraph 14). The Court considered that matters going to reputation would fall within this "The context of the present case is that of a councillor who was criticised in a report prepared by the Ombudsman. His reputation is tarnished. It would be entirely natural for the councillor to want to salvage his reputation by getting his

Council to express dissatisfaction with the report. The councillor would be likely to have had a strong sense of satisfaction about the restoration of his reputation locally if the Council had expressed dissatisfaction with it. In that sense, it is likely that the councillor's sense of well-being would have been enhanced" (see paragraph 15). A challenge to a finding that the interest was prejudicial also (not surprisingly failed): see paras. 17 – 19.

55. Councillor Murphy also made various allegations of breach of the Human Rights Act: Articles 6, 8 and 10. The Article 6 and 8 allegations were fact specific and wholly misconceived. So far as the Article 10 complaint is concerned the Court said this:

> "Cllr. Murphy's argument is that if the Code prevented him from speaking about the Ombudsman's report at the meeting of the Council on 29 August 2002, his right to freedom of expression was infringed. I disagree. The exercise of one's right to freedom of expression is expressly subject to such conditions as are necessary in a democratic society and for the protection of the rights of others. There is an obvious need to protect the reputation of local authorities as one of the democratic elements of society. In that connection, there is a need to maintain public trust and confidence in the decision-making process of local authorities. The provisions of the Code which are engaged in the present case are plainly intended to ensure that that trust and confidence is not misplaced. They must, of course, go no further than is necessary for the achievement of that purpose, but it cannot seriously be gainsaid that the decision-making process of local authorities, and public confidence in it, would be substantially undermined if councillors who have an interest in the outcome of the process could remain at a meeting at which the topic in which they have an interest is to be discussed and could influence the Council's decision on the topic by speaking at the meeting on it.
>
> 27. I can see how a possible infringement of Art. 10 might arise if what amounts to an interest of such a kind as to prevent a councillor from speaking on the topic is defined too widely. But I do not think that the definition of a councillor's personal or prejudicial interest is drawn too widely in the Code. In any event, it is important to remember that Cllr. Murphy was only prevented from talking about the Ombudsman's report at a meeting of the Council. There was nothing to prevent him from talking about it on any other occasion, or from circulating his views on the Ombudsman's report to his constituents and to the other Members of the Council."

56. Interestingly although Councillor Murphy's appeal against the Tribunal's findings failed the Court allowed his appeal against the one year suspension imposed.

57. Keith J. expressed the view that the statutory regime was too new for there to be a clear picture on what the “tariff” was for different breaches and that the cases there had been were too fact sensitive to assist in what he considered an unusual case. Reluctantly the learned Judge overturned the suspension saying four months was a more appropriate sanction.

58. Finally, Human Rights issues may arise in local determinations by Standards Committees as to whether or not the press and public should be excluded. Schedule 12A of the Local Government Act 1972 was extended to add four categories of exempt information applicable only to hearings by Standards Committees following a reference from an ESO.

59. The Standards Board recommend that in general hearings should be in public. However, there is a balance to be undertaken as between the interest of the public in seeing open proceedings and the interests of Councillors where Article 8 might come into play.