

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held online, on 6 December 2021.

Panel Members: Ms Ashleigh Dunn, Chair of the Hearing Panel
Mr Michael McCormick
Mrs Tricia Stewart

The Hearing arose in respect of a Report referred by Mr Ian Bruce, the Acting Ethical Standards Commissioner (the Acting ESC), further to complaint reference LA/AC/3497 concerning an alleged contravention of the Councillors' Code of Conduct (the Code) by Councillor Alison Alphonse

The Acting ESC was represented by Dr Kirsty Hood, QC. The Respondent was represented by Mr Scott Martin, solicitor.

Referral

Following an investigation into a complaint received about the conduct of the Respondent, the Acting ESC referred a report to the Standards Commission for Scotland on 13 October 2021, in accordance with section 14(2) of the Ethical Standards in Public Life etc. (Scotland) Act 2000 (the 2000 Act).

The substance of the referral was that the Respondent had failed to comply with the provisions of the Code and, in particular, that she had contravened paragraph 3.2, which is as follows:

Relationship with other councillors and members of the public

3.2 *You must respect your colleagues and members of the public and treat them with courtesy at all times when acting as a councillor.*

Evidence Presented before and at the Hearing

Joint Statement of Facts

The Panel noted that a joint statement had been agreed between the parties and that it was not in dispute that the Respondent made an unscheduled visit to the complainer's property on 26 February 2021, during the Covid-19 pandemic, in respect of a neighbourhood dispute that had been ongoing for just over a year. The Panel noted that it was not in dispute that, during the visit, which was audio recorded by the complainer, the Respondent:

- questioned whether the complainer had permission to put down slabs on council land;
- questioned the complainer's use of CCTV, asking how he would like it if there was CCTV coverage of him;
- asked why someone would not get on with their neighbours; and
- stated that she was "aware that the police are never away from here and that's a huge cost to the public purse".

Witness Evidence

The ESC's representative led evidence from two witnesses, being the complainer and the Council's Chief Governance and Monitoring Officer, Fraser Bell.

Mr Bell advised that the Council did not have any specific rules or protocols in place to cover visits by elected members to constituents during the Covid-19 pandemic. Mr Bell noted, however, that all elected members and staff were expected to comply with the Scottish Government's Guidelines. Mr Bell confirmed that the Guidelines were published on the Council's intranet and, as such, were available to all staff and elected members.

Mr Bell advised that he was unaware of the neighbourhood dispute in question at the time of the Respondent's visit to the complainer, but later learned that the Council's Housing Team had been involved in trying to resolve matters.

Mr Bell noted that elected members have a role in assisting constituents and trying to deal with any concerns they raise. Mr Bell advised that the most common way for elected member to fulfil this role is to report the issue to the relevant council team and ask officers to investigate the matter and revert. Mr Bell noted, however, that elected members have a wide discretion, in terms of the ethical standards framework and Code, and that it was not unprecedented for a councillor to become involved in and to try to resolve a neighbourhood dispute.

The complainer advised that the dispute between him and his partner, and individuals in three other properties in the block of flats had begun some 13 to 14 months before the Respondent's visit of 26 February 2021. The complainer stated that the dispute arose as the result of homophobia on the part of the neighbours and that, since moving into the property, he and his partner had been subjected to constant abuse and threats of violence (which were the subject of ongoing legal proceedings).

The complainer advised that, during the morning of the day in question, he had become involved in a heated dispute with one of the neighbours, who lived on the same floor. The complainer advised that he had been tidying up some sawdust left after a tree on council land adjacent to the block of flats had been felled, when he had been approached by the neighbour who had started screaming at him. The complainer noted that this was despite the neighbour having been asked, in writing, by the Council's Housing Team not to approach him.

The complainer advised that the Respondent had then attended his property at around midday. The complainer confirmed that the visit was unexpected and that no warning of it had been provided. The complainer advised that he was unaware of who the Respondent was until she had introduced herself. The complainer noted that when he opened the door, he saw that the neighbour who had initiated the dispute that morning was standing in her doorway in the corridor behind the Respondent.

The complainer advised that he thought the Respondent was wearing a mask initially when he opened the door but that he recalled her speaking without it, so concluded that she must have removed it at some point during the visit. The Respondent advised that while he had been concerned about social distancing, he had not wished to step backwards into his flat as he had wanted to be near the door so he could close it if needed.

The complainer advised he had previously been in contact with another councillor and council officers about the neighbourhood dispute, but noted that due to the pandemic, this had all been either by telephone or email. The complainer advised that he understood elected members had suspended their constituency surgeries during the pandemic and explained that he was uncomfortable with the idea of the Respondent making home visits, given that doing so increased the risk of community transmission of the virus.

The complainer stated that the reason he had used his mobile telephone to make an audio recording of the Respondent's visit was both because he had been advised by the police that he should capture any abuse and also because he had concerns that the Respondent or other neighbours may not be truthful about what was said.

Turning to the conversation itself, the complainer advised that the Respondent's remarks about the CCTV were a reference to cameras he had installed to protect him and his partner and to capture, as evidence, the abuse and threats directed towards them. The complainer advised that he had spoken to both the police and the Council's Housing Team about the cameras and that he had tied a sign to the tree (that was subsequently

felled) notifying the neighbours accordingly. The complainer confirmed that after the tree had been felled, he had moved the notice and placed it on a lamppost nearby.

The complainer explained that during the visit the Respondent's comments about the slabs were a reference to spare garden edging he had recently placed around the site where the tree had been, to prevent dirt from encroaching on a path (and anyone slipping as a result). The complainer advised that he had explained his reasons for doing so to a local housing officer from the Council who had then telephoned him to advise that a complaint had been made about the edging or slabs. The officer had advised him that she did not have any difficulty with the edging but, following the Respondent's visit, had nevertheless suggested he remove them to avoid further hassle with the neighbour who had complained.

The complainer advised that while the police had visited the block of flats on a number of occasions, the purpose of their visits had been to speak to the neighbours who were subjecting him and his partner to abuse. As such, the complainer advised that the Respondent's reference to the police never being away from the property and the associated cost to the public purse had made him feel that, as a victim, he should not be contacting the police. The complainer stated that the fact that an individual who was in a position of power had made such an inference had left him feeling bullied, unprotected and belittled.

When questioned about the Respondent's claim that the purpose of her visit was to try to mediate, the complainer advised that the Respondent's apparent lack of knowledge about the abuse and the reasons why the police had attended the property had not left him with that impression. The complainer stated that the Respondent had not demonstrated any interest in his version of events and that he had concluded that the sole purpose of her visit had been to intimidate him into submission. The complainer advised that the Respondent's behaviour had caused him distress and anxiety.

Submissions made on behalf of the ESC

The ESC's representative noted that there was a dispute as to whether or not the Respondent was wearing a mask for the duration of the visit to the complainer's property and whether there had been adherence to the guidelines on social distancing in place at the time. The ESC's representative argued, however, that the Respondent's conduct in visiting the complainer during a pandemic would have caused concern, particularly as it was evident from the recording of the conversation that she had failed entirely to explain the purpose of her visit. The ESC's representative accepted that the complainer had not raised any issue with the Respondent having attended his property during the pandemic at the time, but argued this was of no significance and that it would only have made the situation more serious had he done so. The ESC's representative noted, in any event, the complainer's evidence that he had started to worry afterwards when he had realised that the Respondent may have been undertaking other home visits.

The ESC's representative noted that despite admitting that she was not aware of the full background to the dispute and was not aware of the complainer's views or concerns that, after briefly introducing herself, the Respondent had proceeded immediately to question the complainer's actions and behaviour. The ESC's representative accepted that while the Respondent's intention may have been to try to resolve the neighbourhood dispute, her reference to her having had involvement with the neighbours in the past and the presence of one of the neighbours in a doorway behind her, would have given the complainer the clear impression that she was on the neighbour's side.

The ESC's representative noted that the Respondent failed to explain why she was there or what she hoped to achieve and, instead, had effectively opened the conversation with an accusation that the complainer should not have laid the slabs. The ESC's representative noted that when the complainer confirmed that he had spoken to a housing officer about the matter, the Respondent stated that she would check this, which indicated she was not willing to believe the Respondent or accept his position. The ESC's representative

further noted that when the complainer had pointed out that a neighbour had felled the tree without permission, the Respondent had replied saying that did not matter. The ESC's representative contended that in doing so, the Respondent had created the impression, whether inadvertent or otherwise, that her position was that while the neighbour could make a change to council land without permission, the complainer could not. The ESC's representative noted that when the complainer indicated this was unfair, the Respondent did not appear to acknowledge the point. The ESC's representative argued that in returning to the issue about the slabs repeatedly and again asking whether the complainer had permission to lay them, later in the conversation, and despite him having provided the name of the housing officer to whom he had spoken, the Respondent again gave the impression that she was not willing to believe the complainer.

The ESC's representative contended that, in the context of her having failed to explain the purpose of the visit and having questioned the complainer's actions from the outset, the Respondent's actions in:

- making references to the police having attended the property and the cost of this;
- posing hypothetical questions about why the complainer used CCTV, how he would like it if there was camera recording footage of him and why he did not get on with his neighbours; and
- failing to demonstrate any empathy or understanding as to why the complainer may have called the police

all inferred that the complainer was responsible for the neighbourhood dispute and was wasting police time and public resources.

The ESC's representative noted that when the complainer explained that he had installed the CCTV to protect him and his partner and to obtain evidence to support his claims, the Respondent made no effort to empathise or to seek to understand the dispute from the complainer's point of view. The ESC's representative noted that the Respondent failed to demonstrate any awareness that the reason the complainer may have resorted to using CCTV and may have contacted the police was because he had legitimate fears and concerns.

The ESC's representative observed that while the Respondent may have had good intentions, the complainer's perception that the Respondent considered him to be at fault and that she had not come across as an independent mediator would be shared by any objective observer. The ESC's representative further observed that she would have expected the Respondent to have attended the neighbour's property to assist or comfort her, had she been motivated by concerns about the neighbour's distress, rather than seeking to confront the complainer.

The ESC's representative noted that courtesy and respect were not defined in the Code and argued, therefore, that they should be given their normal, everyday meaning.

The ESC's representative argued that the questions the Respondent put to the complainer were accusatory and confrontational, both in content and tenor, and that the Respondent had held herself out to be an ally or advocate of the neighbours. The ESC's representative argued therefore that, regardless of intent, the Respondent had failed to treat the complainer with respect and courtesy during the visit, as required by the Code.

The ESC's representative acknowledged the Respondents' right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The ESC's representative noted, however, that the Standards Commission's Advice Note for Councillors on the Application of Article 10 of the ECHR stated that councillors should be able to undertake a scrutiny role and make political points in a respectful, courteous and appropriate manner without resorting to personal attacks or being offensive and abusive.

The ESC's representative noted that, in determining whether there had been a breach of the Code, the Courts have held that it is legitimate for a Panel to take a cumulative view of the Respondent's overall conduct in

making and during the visit¹, albeit such a Panel would be required to apply the Respondent's right to freedom of expression, under Article 10 of the ECHR on the basis of each distinct factual situation².

The ESC's representative noted that although the council was involved in the neighbourhood dispute and the Respondent was acting in the capacity of an elected member, the conduct in question took place on the complainer's doorstep and concerned a private discussion with him as a member of the public. The ESC's representative noted that the Courts have held that the limits of acceptable criticism are wider with regard to politicians acting in their public capacity than in relation to private individuals. This is because the former inevitably and knowingly lay themselves open to close scrutiny of word and deed by both journalists and the public at large³. While private individuals or associations lay themselves open to scrutiny when they enter the arena of public debate, there was no suggestion, in this case, that the complainer had taken any action to put himself in the public arena. The ESC's representative argued that the matters being discussed during the conversation between the Respondent and the complainer were the complainer's specific actions in laying slabs, his use of CCTV and his contact with the police; as opposed to wider policy issues (such as how the council undertook its functions or made decisions). The ESC's representative contended that the matters did not concern matters of interest to the wider public and, as such, argued that the Respondent did not attract the enhanced protection of freedom of expression afforded under Article 10 of the ECHR.

The ESC's representative submitted that the Respondent had been disrespectful towards the complainer and, therefore, had breached paragraph 3.2 of the Code. The ESC's representative further contended that, in the circumstances, any restriction on the Respondents' right to freedom of expression that a finding of a breach of paragraph 3.2 of the Code and the imposition of a sanction would represent would be justified.

In response to questions from the Panel, the ESC's representative accepted that some of the matters being discussed during the visit concerned council land, the use of CCTV, anti-social behaviour and police time. The ESC's representative argued, however, that the crux of the discussion was a private neighbourhood dispute and the actions of the individuals involved in that, as opposed to any broader debate about what members of the public could or could not do on council land or any wider issues surrounding the use of CCTV.

Witness Evidence

The Respondent's representative led evidence from the Respondent. The Respondent advised that she had been a councillor for nearly five years and that she knew her constituents well as she had always lived in the area. The Respondent explained that her mother had also been a councillor for 18 years and that she had followed her mother's practice in being as approachable and as open to her constituents as possible, and in trying to ensure they were represented fully. The Respondent advised that she always had a large workload, in terms of constituent enquiries, and that she was in frequent contact with constituents either by telephone, email or in face to face meetings.

The Respondent advised that the block of flats in question was located in a quiet area, which experienced only very low levels of crime. The Respondent stated that she had first become aware of the neighbourhood dispute when one of the complainer's neighbours had approached her to raise concerns about the complainer having installed CCTV cameras. The Respondent advised that she was informed by the neighbours that they had welcomed the complainer and his partner to the block and had been astonished when the CCTV cameras had been erected. The Respondent stated that as the neighbours were concerned about the impact on their privacy and had advised that children who lived in and visited the block were scared of the red lights on the cameras, she had visited the block to see them for herself. The Respondent advised that when she had attended the property to look at the cameras, while accompanied by one of the Council's

¹ *R (Calver) v Adjudication Panel for Wales (2012) EWHC 1172*

² *Bunting an Applicant for Leave to Appeal Under Section 60(9) of The Local Government Act (Northern Ireland) 2014*
Neutral Citation No: [2019] NIQB 36

³ *Jerusalem v Austria (2003) 37 EHRR 25*

letting consent officers, the complainer had pulled back his curtains and asked them what they were doing in an aggressive manner.

The Respondent advised that on the morning of 26 February 2021 she had been contacted by telephone by one of the neighbours who reported that she had been engaged in a dispute with the complainer about him having laid slabs. The Respondent stated that the neighbour was “absolutely hysterical” on the call, that her voice was shaking and that she was threatening to take her own life. The Respondent advised that the neighbour in question had previously been in contact with her and had expressed concerns that she felt bullied and intimidated by the complainer and his partner and their use of CCTV. The Respondent explained that the neighbour had indicated that she suffered from mental health issues as a result of the CCTV cameras having been installed.

The Respondent advised that she had contacted the police as she was so concerned about the neighbour’s well-being and had advised them that she intended to attend the property to try to calm the situation. The Respondent stated that the police had advised that while they were intending to visit the block the next day, they would go sooner if matters escalated or further problems were reported. The Respondent advised that she had tried to telephone two of the Council’s lets and consents officers to ask them to accompany her to the property, but that she had been unable to contact them.

The Respondent stated that she would have been wearing a mask for the duration of her visit to the complainer’s property and that she would have maintained a distance as appropriate under the Covid-19 guidelines and protocols in place at the time. The Respondent confirmed that she was aware that the conversation was being recorded (audio and visual) by the complainer’s CCTV camera on the door.

The Respondent advised that her only intention had been to try to calm the situation and to act as an independent mediator. The Respondent stated that she had not intended to offend the complainer, albeit she accepted, with hindsight, that visiting his property may not have been the best way to approach matters and that she would not necessarily choose that option in future. The Respondent advised that she had been left with the impression that the visit had gone well and noted, in support of this view, that the complainer had ended the conversation by thanking her.

In response to cross-examination, the Respondent accepted it may have been more appropriate to have given the complainer advance warning of her visit, but noted that she did not have his telephone number or email address so had no other way of contacting him.

The Respondent accepted that she had only heard the neighbour’s version of events when she approached the complainer and that she did not attempt to ask him whether he had permission to lay or move the slabs. The Respondent further conceded that she had not made any attempt to ascertain why the complainer had installed the CCTV cameras, despite the expense involved and accepted that she may not have been in the best position to undertake a form of independent mediation given that she had only been party to one side of the story.

Submissions made by the Respondent’s Representative

The Respondent’s representative pointed out that the duration of the Respondent’s interaction with the complainer had been less than four minutes in total and contended that there was nothing remarkable about it, as evidenced by the audio recording. The Respondent’s representative argued that the Respondent had simply been attempting to use her position as a councillor to try to assist her constituents. The Respondent’s representative accepted that while the Respondent could have chosen not to intervene, her decision to do so was based on her concerns about the neighbour’s mental health in light of her clear and obvious distress.

The Respondent's representative noted that the Respondent had telephoned the police and had also attempted to contact council officers before attending the property.

The Panel noted that the Respondent's position, which had been accepted by the ESC, was that her intention in visiting the complainer's property had been to try to defuse what had become a very difficult situation. The Respondent advised that her practice, as a councillor, was to always try to seek to engage with her constituents to resolve matters, albeit she had conceded she had never before visited a property without giving advance notice or mediated in a dispute between neighbours.

The Respondent's representative argued that the appropriateness of the tone used by the Respondent should be considered in the context of her trying to help the neighbour, who was extremely distressed, with the aim of establishing whether the dispute could be resolved.

The Respondent's representative contended that the audio recording of the interaction between the Respondent and the complainer on the doorstep did not support a contention that the Respondent had been disrespectful or that her visit had caused the complainer any distress. The Respondent's representative pointed out that the complainer had ended the conversation by thanking the Respondent.

The Respondent's representative argued, in any event, that the Respondent's visit and the ensuing discussion concerned matters of interest to a section of the public (being the residents in the vicinity) and matters that concerned the council, such as the right to put slabbing on its land and to erect audio and visual CCTV overlooking other council properties. As such, the Respondent was entitled to the enhanced protection of freedom of expression afforded to politicians when discussing matters of public interest.

The Respondent's representative noted that even if the Respondent was not entitled to the enhanced protection, Article 10 still provided a safeguard as to her right to express ideas and opinions. Interference with this freedom was only permitted if the conduct in question was so offensive, abusive and / or unduly disruptive that a restriction was necessary to protect others. The Respondent's representative argued that in this case, when considered objectively, the conduct in question did not reach the threshold of being so offensive or shocking as to warrant a restriction on the Respondent's enhanced right to freedom of expression that a finding of breach and sanction would involve.

The Respondent's representative submitted that, having had regard to all the relevant circumstances, the Respondent's conduct had not been disrespectful and did not amount to a breach of the Code.

DECISION

The Hearing Panel considered the submissions made both in writing and orally at the Hearing. It concluded that:

1. The Councillors' Code of Conduct applied to the Respondents, Councillor Alphonse.
2. A breach of paragraph 3.2 of the Councillors' Code of Conduct could not be found.

Reasons for Decision

While the Panel acknowledged the difficulties the complainer had faced, it noted it did not have any role or remit to determine either the merits of the neighbourhood dispute itself or whether there had been any breach of the Covid-19-related social distancing and mask wearing protocols. The Panel's sole remit was to consider whether there had been any contravention of the Code by the Respondent.

In reaching its decision, the Panel took the following approach, as outlined in the Standards Commission's Advice Note on the Application of Article 10 of the European Convention on Human Rights. Firstly, it would

consider whether the facts found led it to conclude, on the balance of probabilities, that the Respondent had failed to comply with the Code. Secondly, if so, it would then consider whether such a finding in itself was, on the face of it, a breach of the Respondent's right to freedom of expression under Article 10. Thirdly, if so, the Hearing Panel would proceed to consider whether the restriction involved by the finding was justified by Article 10(2), which allows restrictions that are necessary in a democratic society (and in particular, in this case, for the protection of the reputation or rights of others).

Stage 1: Whether the Respondent's conduct amounted, on the face of it, to a breach of the Code

The Panel noted the evidence from the Council's Monitoring Officer to the effect that it was not uncommon for councillors to visit constituents, albeit such visits were usually arranged in advance. The Panel was of the view that an unexpected and unannounced visit could have caused some anxiety and acknowledged the complainer's evidence in this regard.

The Panel considered it would have been reasonable for the complainer to have perceived the Respondent, as a councillor, to be in a position of power or influence. The Panel was of the view that the conversation between the Respondent and the complainer should be considered in this context.

The Panel noted that while the Respondent had introduced herself at the beginning of the conversation, she made no attempt to explain why she was there or what she hoped to achieve. The Panel noted that despite having admitted in evidence that she was not aware of the full background to the dispute and was not aware of the complainer's views or concerns, the Respondent began the conversation by questioning his actions and behaviour. The Panel was of the view that doing so set the tenor of the conversation and, as such, the remainder of the conversation and subsequent remarks made by the Respondent should also be considered in that context.

The Panel had no reason to doubt that the Respondent was well-intentioned, but considered that the questioning of the complainer's conduct, without any attempt to understand the situation from his point of view, was not an approach that was likely to result in a resolution to the dispute, given that he would have immediately been put on the defensive. Instead, the Panel considered it would have been reasonable for the complainer to have concluded that the Respondent was acting as an ally of the neighbour and was there to criticise his actions.

Having listened to the audio recording, and considered the context of the discussion, the majority of Panel Members found that the Respondent's questions about:

- whether the complainer had permission to put down slabs on council land; and
- whether the complainer's use of CCTV was appropriate

were accusatory and confrontational and that it was reasonable for the complainer to have perceived them to be of that nature. The Panel considered that such a perception would have been strengthened by the fact that the Respondent did not accept the complainer's position that he had permission to lay the slabs and instead questioned him again about the issue later in the conversation. The Panel noted that the Respondent concluded the conversation by saying she would speak to the housing officer about the slabs. The Panel was of the view that it would have been reasonable for the complainer to have concluded, from this, that the Respondent was making it clear that she did not believe him when he said that he had sought and obtained permission. The Panel was further of the view that the perception that the Respondent was accusing the complainer of wrongdoing in respect of the installation of the CCTV cameras would have been strengthened by her asking how the complainer would like it if there was video coverage of him.

The Panel noted that the Respondent's statement as to why, if an individual lived close to others, they would not get on with their neighbours could be viewed as being rhetorical. The majority of Panel Members considered however that, on balance, and viewed both objectively and in the context of the conversation

and the other questions that were put to the complainer, it was reasonable for the complainer to have concluded that the Respondent's statement was also intended as criticism of him and an inference that he was at fault in respect of the dispute.

Similarly, the majority of Panel Members was of the view that, both viewed objectively and in context, the Respondent's references to the police having never been away from the property and the associated cost of this could reasonably be taken to be criticism of the complainer's actions in calling them or in behaving in such a manner as to require them to be called by other neighbours. The Panel noted the complainer's position that he had found this to be particularly offensive, given that he had felt compelled to call them for personal safety reasons. The Panel was of the view that councillors, as individuals in a position of power or influence, should avoid giving an impression that individuals should refrain from calling the police as and when required. The Panel noted that it would be up to the police to take action if they considered that they had been called out for spurious reasons and / or that their time had been wasted.

While it was accepted that the complainer had ended the conversation by thanking the Respondent for agreeing to speak to the police and the council's housing officer, the majority of Panel Members considered that the actions of the complainer, in being polite and ending the conversation in a civil manner, did not negate the Respondent's earlier conduct. The majority of Panel Members were of the view that it was more likely than not that the complainer was simply expressing gratitude that in agreeing to confirm the position, the Respondent had eventually accepted that he might be telling the truth after all.

For the reasons outlined above, the Panel concluded, on a majority basis, that while it may not have been the Respondent's intention, some of the comments she made to the complainer were accusatory and confrontational in nature. The Panel was of the view that the Respondent should have been more careful in her choice of words, given her position of authority and responsibility. As such, the Panel was satisfied, on balance, that when considered as a whole, the Respondent's conduct amounted, on the face of it, to a contravention of the requirement under paragraph 3.2 of the Code for councillors to treat members of the public with courtesy and respect.

The minority Panel Member had reservations about the conclusions above as they considered that the Respondent's remarks about CCTV, getting along with neighbours and the police contacts were posed simply as rhetorical questions, and as such, it was not reasonable to draw any critical inference from either the wording of the remarks or the context in which they were made. The Panel Member was of the view that the Respondent was simply seeking information from the complainer and to apply some challenge in respect of the events that were the subject of the dispute. In addition, the Panel Member placed some weight on the end of the discussion; noting that the Respondent undertook, as requested by the complainer, to speak further with the police and council regarding the history of the dispute and that the complainer had described this as 'perfect' and had thanked the Respondent.

Stage 2: Whether a finding of a contravention of the Code would be a breach of the Respondents' right to freedom of expression under Article 10 of the ECHR

The question which then arose was whether the finding that the Respondents had failed to comply with the provisions of the Code would, on the face of it, be a breach of the Respondent's right to freedom of expression under Article 10 of the ECHR. In coming to a view, the Panel considered whether the Respondent was expressing views on matters of public concern and was, therefore, entitled to the enhanced protection to freedom of expression afforded to politicians, which includes local government councillors.

The Panel noted that the Courts, in considering Article 10, had found there was no distinction between political discussion and discussions on matters of public concern⁴. The Panel noted that public interest has been defined by the Courts as relating to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention, or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community⁵.

In this case, while the Panel accepted that the Respondents' remarks had been made in the context of a private neighbourhood dispute, it found that the dispute concerned or involved what could or could not be done on council land and the use of CCTV in a neighbourhood setting.

In addition, the complaint concerned the Respondent's conduct in respect of her visit as a councillor to a constituent (the complainer) following concerns raised by another constituent about a dispute that was already the subject of engagement with police and council services and involved at least four households. In the circumstances, the Panel was of the view that, on balance, the matters under discussion were ones of public interest or concern. The Panel determined, therefore, that the Respondent would attract the enhanced protection of freedom of expression afforded to politicians, including local politicians, under Article 10.

Stage 3: Whether any restriction on the Respondent's right to freedom of expression involved by a finding of a contravention of the Code would be justified by Article 10(2) of the ECHR

The Panel then proceeded to consider whether the restriction involved by the finding that the Code had been breached was justified by Article 10(2), which allows restrictions that are necessary in a democratic society for the protection of the reputation or rights of others.

The Panel noted that it was required to undertake a balancing exercise, weighing the enhanced protection to freedom of expression enjoyed by the Respondent against any restriction imposed by the application of the Code and the imposition of any sanction. In this case, as the issues being discussed by the Respondent concerned matters of public interest or concern, the Panel noted there was limited scope under Article 10(2) for a restriction on the Respondent's right to freedom of expression.

The Panel further noted that the Courts have held that the less egregious the conduct in question, the harder it would be for a Panel, when undertaking its balancing exercise, to justifiably conclude that a restriction on an individual's right to freedom of expression is required⁶.

The Panel noted that the Courts have further held that comments in the political context (which includes matters of public concern), that amount to value judgements, are tolerated even if untrue, as long as what was expressed was said in good faith and there was some reasonable (even if incorrect) factual basis for making such comments⁷.

In this case, the Panel considered that the any comments and inferences the Respondent made in respect of the complainer's right to lay the slabs and to use CCTV and whether he was in any way to blame for the dispute or the police attendance at the property were value judgements. The Panel had no reason to doubt such value judgements had been made in good faith, even if they were, or were not, inaccurate.

⁴ *Calver, ibid*

⁵ *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland [GC], § 171*

⁶ *Calver, ibid*

⁷ *Lombardo v Malta (2009) 48 EHRR 23*

While the Panel accepted the ESC's representative's point that there was no suggestion, in this case, that the complainer had taken any action to put himself in the public arena and, as such, the limit of acceptable criticism towards him as a private individual, that could be tolerated under Article 10, was not as wide as that which would be acceptable towards other politicians. The Panel considered nevertheless that the Respondent's tone or comments were not sufficiently offensive, polemical and gratuitous as to justify a restriction on her right to freedom of expression, particularly given the finding that she had been making value judgements. As such, the Panel concluded that a breach of the Code could not be found.

The Panel nevertheless emphasised that the requirement for councillors to behave in a respectful and courteous manner towards members of the public is a fundamental requirement of the Code, as it protects the public and ensures that public confidence in the role of an elected member and the council itself is not undermined.

Date: 13 December 2021



**Ms Ashleigh Dunn
Chair of the Hearing Panel**