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The cab rank rule: English barristers in foreign courts

When the cab rank rule is no longer a defence: Matthew Happold on considerations when accepting instructions overseas

IN BRIEF

- Barristers have hit the headlines recently for taking instructions on controversial cases in foreign jurisdictions, to which the cab rank rule obliging a barrister to accept any work does not apply.
- When accepting such cases, barristers should bear in mind whether those foreign proceedings are at odds with their core duties under the Bar Standard Board's Code of Conduct, particularly in politically sensitive cases.

Recent events have put barristers' professional ethics in the spotlight and raised questions about the scope and importance of the cab rank rule. News last month that David Perry QC had accepted instructions to prosecute a number of prominent pro-democracy activities in the Hong Kong courts gave rise to extensive, often virulently expressed, criticism. Foreign secretary Dominic Rabb said that he could not understand how 'anyone of good conscience' could agree to act in such a case. Baroness Kennedy QC called Mr Perry's decision 'a source of shame'. Shadow attorney general and former lord chancellor Lord Falconer of Thoroton said if Mr Perry did not withdraw, he would not be acting consistently with UK values. Less than a week later, Mr Perry withdrew from the case.

Even more recently, Dinah Rose QC published a statement that she would not withdraw from appearing before the Privy Council on behalf of the government of the Cayman Islands to argue that the Bill of Rights in the Caymanian Constitution does not guarantee same-sex couples the right to marry. Ms Rose has received 'pressure in the form of abuse and threats', while former justice of the South African Constitutional Court Edwin Cameron accused her of 'prosecut[ing] a homophobic case to deny LGBTIQ persons in the Cayman Islands equal rights'.

Home & away

Despite claims made by some of Mr Perry's defenders, the cab rank rule did not apply to his situation. Put simply: the cab rank rule requires a barrister to accept instructions in any case in a field in which they profess to practise (having regard to their experience and seniority), subject to their availability and payment of a proper professional fee. In other words, barristers cannot choose their clients based the nature of the allegations against them or their character or reputation. The rule is said to harness self-interest to the public interest, ensuring unpopular people and causes can access legal representation by shielding barristers from criticism for taking their cases, thus maintaining access to justice and the rule of law.

The Bar Standards Board's (BSB) Code of Conduct, however, provides that the cab rank rule: 'does not apply if… accepting the instructions would require you to do any foreign work'; and foreign work covers 'legal services of whatsoever nature relating to… court or other legal proceedings taking place or contemplated to take place outside England and Wales'.

What the exception means is that, in addition to instructions to appear before the courts of foreign states, the cab rank rule does not apply to instructions to appear before arbitral tribunals or international courts, such as the European Court of Human Rights, the International Court of Justice, the International Criminal Court, and the European Court of Justice (albeit that UK lawyers lost their rights of audience before that court at the end of last year), at least if they are seated outside England and Wales. Indeed, it is commonly said that the exception was introduced to avoid barristers being obliged to appear for defendants before the International Military Tribunal at Nuremberg. Because the proceedings before the Judicial Committee of the Privy Council in which Ms Rose has been briefed are taking place in London, however, the cab rank rule applies to her case.

Considering core duties

Exclusion of the cab rank rule does not grant a licence to discriminate when deciding whether to accept foreign work, because the Code of Conduct's eighth core duty not to discriminate unlawfully against any person continues to apply. Barristers undertaking foreign work may not discriminate the grounds of race, colour, ethnic or national origin, nationality, citizenship, sex, gender reassignment, sexual orientation, marital or civil partnership status, disability, age, religion or belief, or pregnancy and maternity. In addition, barristers may not withhold their services based on the nature of the case and the conduct, opinions or beliefs of the prospective client. So although barristers are not obliged to accept foreign work, they must not discriminate when doing so.

But what if others consider the party represented immoral, the cause promoted abhorrent, or the law applied iniquitous? Nothing in the code *per se* prevents a barrister from acting, at least in the absence of other circumstances. If instructions are accepted, however, the barrister is required to comport themselves to the same standards as when appearing in the courts of England and Wales. For example, a barrister must not knowingly or recklessly mislead the court, or abuse their role as an advocate. Moreover, the circumstances that require a barrister to cease to act and return their instructions are the same as when appearing in England and Wales.

Although barristers 'must comply with any applicable rule of conduct prescribed by the law or by any national or local Bar', that obligation is subject to compliance with the code's core duties, requiring that they act honestly and with integrity and maintain their independence. In other words, although the identity of the party for which the barrister is acting does not prevent them from acting in foreign proceedings, the way those proceedings are conducted can. One would expect barristers instructed to prosecute abroad, particularly in politically sensitive cases, to keep this injunction in the forefront of their minds.

It might be argued that in some cases, acceptance of foreign work would breach the code's fifth core duty (CD5) that a barrister 'must not behave in a way which is likely to diminish the trust and confidence which the public places in you or the profession'. In addition, a barrister 'must not do anything which could reasonably be seen by the public to undermine' their honesty, integrity and independence, because conduct on a barrister's part which the public may reasonably perceive as undermining their honesty, integrity or independence is likely to diminish the trust

and confidence which the public places in them or in the profession, in breach of CD5.

Here we enter into uncharted waters. None of the examples given in the code of behaviour that might reasonably be seen as compromising a barrister's independence relate to participation in foreign proceedings. One might think that a barrister acting as prosecutor in a 'show trial', where the defendant's guilt has already been determined and the trial is conducted purely for propaganda purposes, would breach CD5. But such participation would also seem to violate other professional obligations and various other situations come to mind.

Would a barrister be acting in breach of CD5 if they agreed to seek the death penalty when prosecuting in foreign proceedings, or prosecuted conduct (such as homosexual activities) not criminal in the UK, or acted for an alleged war criminal or a state alleged to have committed genocide before an international court or tribunal? Given that the question in any case is whether there is 'sufficiently serious misconduct in the exercise of professional practice such that it can properly be described as misconduct going to fitness to practise', one can imagine the BSB and Disciplinary Tribunals taking a cautious approach.

Indeed, in her statement Ms Rose relied not so much on the cab rank rule itself (not least because she had appeared earlier on the proceedings before the Cayman Court of Appeal) as on the 'long-standing principle, essential to the maintenance of access to justice and the rule of law that a lawyer is not to be equated with their client, and is not to be subject to pressure to reject an unpopular brief'. Barristers are required to 'promote fearlessly and by all proper and lawful means' their lay client's best interests without regard to their own interests, and not to permit 'their absolute independence, integrity and freedom from external pressures to be compromised'. Returning a brief in response to external criticism might well breach these obligations.

A proper defence

The continued demand for the services of its members worldwide can be seen as a tribute to the standards of advocacy at the Bar of England and Wales. In undertaking foreign work, however, barristers cannot shelter behind the cab rank rule. In each case, they must consider whether their participation is in accordance with their professional obligations, but this need not be their only consideration, providing they do not discriminate contrary to the Code of Conduct. It is too trite to say that as professionals they cannot be criticised for the service they choose to provide. Barristers acting in controversial cases overseas need to take responsibility for their decisions and be prepared to justify them.

Perhaps two more things can be drawn from the current controversy. First, the contours of the exception to the rule for foreign work may need to be refined. It seems odd, for instance, to exclude instructions to appear before international courts and tribunals based on whether such bodies are seated in England and Wales or elsewhere. More fundamentally, it shows how little the cab rank rule—and the principles underlying it—are appreciated, even by lawyers. It will be recalled that in 2013 a Legal Services Board report declared the rule redundant and called for its abolition, albeit that the idea was successfully resisted by the BSB (see *bit.ly/3q6j1Sl*). Today, greater scrutiny of barristers' conduct, including on social media, means that defenders of the rule need to show its continued importance. If not, they may face renewed calls for its abolition. **NLJ**

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