IN THE CHANCERY COURT OF YORK

IN THE MATTER OF AN APPLICATION FOR PERMISION TO APPEAL OUT OF TIME AGAINST A DECISION OF THE BISHOP'S DISCIPLINARY TRIBUNAL FOR THE DIOCESE OF DURHAM

AND IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPEAL AGAINST A DECISION OF THE BISHOP'S DISCIPLINARY TRIBUNAL FOR THE DIOCESE OF DURHAM

Applicant **The Reverend David George Huntley**

DECISION

1. This decision is in respect of applications, received respectively on 17 and 12 May 2016, for permission to appeal out of time, and for leave to appeal, against a decision of the Bishop's Disciplinary Tribunal for the Diocese of Durham ("the Tribunal"), pronounced on 12 April 2016, with written reasoning dated 5 May 2016. The applicant is the Reverend David George Huntley, and we shall refer to him as "the Applicant", notwithstanding that he was of course the respondent to the complaint below.

2. The charge formulated by the Deputy President of Tribunals was:

> "That the conduct of the respondent, the Rev David George Huntley, was unbecoming or inappropriate to the office and work of a Clerk in Holy Orders within Section 8(1)(d) of the Clergy Discipline Measure 2003 in that, whilst vicar of St Lawrence Horsley Hill, he has had a sexual relationship outside wedlock with a member of the congregation, CG, whom he instructed and prepared for baptism in December 2014, and who then became pregnant with the respondent's child".

FACTS

3. The facts as found by the Tribunal can be summarised thus:

a. The Applicant (now aged 52) became vicar of St Lawrence, Horsley Hill, in the diocese of Durham in 2011 (having been ordained priest in 2008). He was a single man, having been divorced from his wife in 1998.

b. CG was one of the Applicant's parishioners, the mother of two children (aged 2 and 8). The relationship between CG and the father of the children broke down in or about 2013 (and it appears that CG and the father of the children never lived together).

c. In the summer of 2014 CG began to attend St Lawrence with her two children. The Applicant prepared her for baptism, leading to CG being baptised on 7 December 2014. During the autumn of 2014 CG became actively involved in the life of the church, and the Applicant began to visit her at her home in the evenings.

d. The friendship grew, culminating in kissing in an intimate manner one evening shortly after CG's baptism. The Tribunal reached no conclusion as to whether sexual intercourse took place on that occasion, merely finding that it took place on two or three occasions in January 2015, as a result of which CG became pregnant, their child being born on 27 October 2015. The Tribunal was informed that the couple remained in a committed relationship and wished to get married.

e. On 19 March 2015 the Applicant informed his archdeacon that he had been growing close to one of his parishioners and that she was now pregnant. This led to the archdeacon's complaint under the Clergy Discipline Measure 2003 ("the CDM"), dated 26 March 2015.

f. In the Applicant's Answer to the Complaint, dated 30 April 2015, he ticked the box confirming his admission of the misconduct alleged in the Complaint. Discussions about an agreed penalty under section 16(1) of the CDM did not avoid the need for a hearing, because the Applicant and his diocesan bishop differed significantly about the gravity of the conduct involved, although the misconduct was admitted. At that stage the bishop was suggesting a 2 year prohibition from exercising the functions of his Orders.

TYPE OF MISCONDUCT

4. The Tribunal recorded that from time to time in correspondence, and at the hearing, the Applicant questioned whether the conduct he admitted did constitute misconduct sufficient to justify proceedings under the CDM. On the other hand there does not appear to have been any dispute that his conduct fell within the form of misconduct described in section 8(1)(d) of the CDM:

> "conduct unbecoming or inappropriate to the office and work of a clerk in Holy Orders".

Accordingly the focus of the hearing before the Tribunal was on an assessment of the gravity of the Applicant's admitted misconduct, with a view to determination of penalty.

GRAVITY OF THE MISCONDUCT

5. The Tribunal found the misconduct to be serious because:

a. the teaching of the church is that sexual intercourse properly belongs within marriage exclusively, whereas the sexual intercourse that had occurred took place at a time when the relationship between the Applicant and CG was neither marriage nor that of a committed monogamous relationship outside marriage (paras 6.2.1-2 of the Tribunal's decision).

b. in that CG was a member of his congregation and someone he had recently prepared for baptism, his conduct ran contrary to the *Guidelines for the Professional Conduct of the Clergy* which stressed the need in pastoral care to acknowledge appropriate physical, sexual, emotional and psychological boundaries, and to avoid inappropriate touching and gestures of affection, as well as having been contrary to good sense (para 6.2.3).

c. the boundaries which should have been self-imposed by the Applicant by reason of the professional relationship between him and CG would undoubtedly apply in other secular professional settings (viz doctor and patient, teacher and pupil, lawyer and client by way of a non-exhaustive list of examples) (para 6.2.3). The need to avoid any sexual intimacy with someone over whom one has been put in a position of trust should apply absolutely to a member of the clergy upon whom there is an obligation for both professional and spiritual reasons to maintain standards of moral behaviour which are higher than those of the wider community (para 6.2.3).

d. there had been hurt to the congregation and harm to the wider community's perception of the clergy generally (para 6.2.6-7).

e. it was an aggravating feature of the misconduct that the Applicant still failed to appreciate its gravity. The Applicant rejected the concept that his standards of behaviour as someone in Holy Orders particularly with regard to sexual conduct should be much higher than those of others and that the responsibility for maintaining such standards was his and not CG's (para 6.2.10). The Applicant's failure to recognise that he could not continue his ministry at St Lawrence's was another manifestation of his failure to comprehend the gravity of what had happened and the harm and hurt done by it (para 8).

PENALTY

6. The Tribunal ordered the Applicant's removal from office as vicar of St Lawrence, and imposed a 2 year prohibition from exercising the functions of his Orders, in line with his bishop's suggested penalty at the outset (para 10).

APPLICATION FOR LEAVE TO APPEAL

7. This is the first application for leave to appeal to come before this Court or the Arches Court of Canterbury since the requirement for leave to appeal was introduced by the Clergy Discipline (Amendment) Measure 2013. It is therefore appropriate to set out section 20(1B) of the CDM, as amended:

> "Any application for leave to the appeal court under subsection (1A) –
>
> (a) shall be heard jointly by the Dean of the Arches and Auditor and one judge appointed by the president of tribunals for the purpose of those proceedings from among the persons serving on the provincial panel of the relevant province, who shall be a lay person in the case of an application by the respondent and a person in Holy Orders in the case of an application by the designated officer;
>
> (b) may, if the Dean of Arches and Auditor so directs, be determined without a hearing; and
>
> (c) shall be granted if at least one of the judges considers either that the appeal would have a real prospect of success or that there is some other compelling reason why the appeal should be heard."

8. The Auditor directed that these applications be determined without a hearing.

9. The Applicant was unrepresented at the hearing, and is again acting in person in respect of these applications. In considering his Notice of appeal we have taken this into account, and the requirement under rule 1 of the Clergy Discipline Rules 2005 ("the CD Rules") "to enable appeals in disciplinary proceedings under the Measure to be dealt with justly, in a way which is both fair to all relevant interested persons and proportionate to the nature and seriousness of the issues raised".

10. Rule 4D(2) of the CD Rules, as amended by the Clergy Discipline Appeal (Amendment) Rules 2013, provides for the "other party", in this case the designated officer, to make written representations in response to the application for leave to appeal. We have therefore had the benefit of the designated officer's representations when considering these applications.

11. The Applicant has not sought to re-open the question whether there was misconduct within section 8(1)(d) of the CDM. Indeed in the accompanying materials to his Notice of appeal, he expressly states that he "accepts that the misconduct was sufficient enough for the code of practice for clergy discipline measures 2003"; and that he "does not set back from admission of misconduct or the gravity of the situation". The Appellant seems to be seeking leave to appeal on four grounds:

a. that the proper procedures were not followed, rendering the hearing and decision unfair;

b. that there were vitiating factual errors in the Tribunal's decision;

c. breach of rights under the Human Rights Act 1998;

d. excessive penalty.

We have therefore considered whether the appeal "would have a real prospect of success" under any of these grounds.

12. <u>that the proper procedures were not followed, rendering the hearing and decision unfair</u>

12.1 Five points appear to be relied upon. First, that "the case was not allowed to be fully heard at tribunal" and that the Chair "appeared to be governed more by time than a willingness to hear the case". No further detail is given, and the designated officer's representation, which accords with our reading of the Tribunal's decision, is that the Applicant was afforded every opportunity to put his case and did not protest at any stage that he had not been given enough time.

12.2 Second, that the proceedings of the Tribunal were not recorded, and are not therefore "open to debate". Rule 45 of the CD Rules provides that "Oral evidence shall be given on oath or solemn affirmation, and shall be recorded". The rule does not specify how a record is to be taken, and the practice of Bishops' Disciplinary Tribunals is for the Chair or the registrar to make a written record of proceedings, there being no need for an auditory recording or transcript to be made, nor for the

record to be a verbatim one. The same is the position in the Faculty Jurisdiction, and indeed in this court. There has been no request for disclosure of such notes.

12.3 Third, that the designated officer displayed unprofessional conduct towards the Applicant, thereby "acting with prejudice". This complaint is unparticularised, and does not appear to have been raised at the hearing. It is of course the designated officer's role under section 18(1) of the CDM to conduct the case for the complainant.

12.4 Fourth, that CG was not present throughout the hearing (as wrongly stated in para 5.2 of the decision), but "had to step out on two occasions to see [her youngest child] and one of those occasions was for the minimum of 15-20 minutes". Since CG had no entitlement to be present throughout, was able to give evidence on oath and was allowed also to submit a short written contribution, notwithstanding that this had not been supplied in advance, it is not arguable that there was any unfairness to the Applicant; nor is there any suggestion that this matter was raised with the Tribunal at the hearing as a cause for concern.

12.5 Fifth, that the process, and in particular the Code of Practice, "was not followed correctly on many occasions". There is, however, no particularisation of this complaint. Before the Tribunal, the Applicant apparently sought to argue that the disciplinary processes brought the church into disrepute, but as the Tribunal said (para 6.2.8) "the Tribunal's jurisdiction is not to determine whether the employment processes of the Diocese have been appropriate or fair".

12.6 None of these five matters stands a realistic prospect of succeeding on appeal.

13. <u>that there were vitiating factual errors in the Tribunal's decision</u>

13.1 The Notice of appeal was accompanied by four pages of typescript, alleging misinterpretation and factual errors in the decision, which was initially sent to the Registrar of Tribunals, who showed it to the Tribunal Chair. The Applicant was then informed why and how the names of CG's children had been anonymised in the decision (one of the alleged errors) and that no changes would be made to the wording of the decision.

13.2 We have examined each allegation of error, assisted by the written representation of the designated officer, and have concluded that in most cases there is no error at all, rather a disagreement as to the interpretation to be drawn from the facts; and in the very few cases where there are arguable errors, they are immaterial to the conclusions reached in the decision, for example, whether the Applicant claimed sick pay at points during the process (as stated by the Tribunal at para 2.1 j.), or, as the Applicant now asserts, had merely sent in unacknowledged sick notes (at a time when he was in any case still receiving his stipend). As the Registrar of Tribunals pointed out in a letter to the Applicant, some of the matters raised were about the weight which the Tribunal placed on matters of evidence. It is not arguable that any of the matters raised could lead to a different outcome to these proceedings.

13.3 We also consider that there is overwhelming force in the representation of the designated officer, that the Appellant's submission is misconceived, because the Tribunal was not called upon to make findings of fact in relation to disputed oral evidence. The misconduct was admitted and the salient facts were not in dispute.

13.4 We see the force of the Applicant's contention that the Tribunal ought not to have referred in its decision to the 2015 version of the *Guidelines for the Professional Conduct of the Clergy*, since this version had not been published at the time of the Applicant's misconduct. However, as the designated officer has explained in his representation, there is no material difference between the passages from the 2015 *Guidelines* cited and relied upon in the decision (relating to the high standards of moral life to be expected of the clergy) and passages (albeit differently numbered) in the original 2003 version of the *Guidelines*. Therefore the error was not arguably material in the circumstances. This is particularly so since in his supporting materials the Applicant expressly states that (contrary to the Tribunal's view) he "fully understands that he needs to have higher standards [as someone in Holy Orders] and show a good influence on others and did admit failing this".

14. breach of rights under the Human Rights Act 1998

14.1 This claim is wholly unparticularised. Nevertheless we have considered whether there might be an arguable ground under either Article 6 (right to a fair trial) or Article 8 (right to respect for private and family life) of the European Convention on Human Rights (incorporated in Schedule 1 of the Human Rights Act 1998).

14.2 In para 12 above, we have already considered the contention that the hearing was unfair and held this not to stand a realistic prospect of succeeding. The same necessarily applies to any claim under Article 6.

14.3 If the Applicant is relying on Article 8, the contention would, we suppose, be that his private life is being interfered with by these proceedings and/or that the penalty imposed. Given the requirement of Canon C26 that a clerk in Holy Orders "shall be diligent to frame and fashion his life and that of his family according to the doctrine of Christ, and to make himself and them, as much as in him lies, wholesome examples and patterns to the flock of Christ", together with the guidance to clergy and laity contained in the House of Bishops' *Marriage: A Teaching Document* (1999) that "Sexual intercourse, as an expression of faithful intimacy, properly belongs within marriage exclusively", we do not consider it would be realistic to contend that the Applicant's exercise of his right to respect for private and family life has been unlawfully interfered with.

15. excessive penalty

15.1 In his Notice of appeal the Applicant ticked the box "I wish to appeal against findings of law or fact, or both", rather than the following box "I wish to appeal against findings of law or fact, or both, and the penalty", and, consistently, has not given any "reasons for saying that a different penalty should be imposed in respect of the finding of misconduct". Nevertheless, we consider that some of the matters he raised really constitute arguments that the penalty imposed was excessive, and we have approached the application accordingly.

15.2 It appears from the materials in support of the appeal that the Applicant no longer challenges removal from office as vicar of St Lawrence. His position is (and he asserts always has been) that "although it would be nice to continue at St Lawrence", he has always accepted that "if this was not possible [he] hoped to stay within ministry even if this meant a change in parish".

15.3 The ground of appeal seems to be that either there should have been no prohibition from exercising ministry, or that the period of prohibition should have been shorter than the 2 year prohibition imposed. Four matters appear to be relied upon. First, that no question of adultery was involved, since neither he, nor CG, was married. Accordingly, the Tribunal should not have referred (as it twice did) to this Court's decision in *Re the Reverend David Charles King* (April 2008) where, the Applicant's words, "this man had a sexual relationship with a married woman when married himself". Second, the Tribunal should not have described his relationship with CG as "not a committed monogamous relationship outside marriage" (para 6.2.2). Rather the Applicant asserts that the "relationship is one of committed relationship outside of marriage", and therefore warranted a lesser penalty on that account. Third, that the Tribunal's finding on seriousness, and the length of the prohibition, was at odds with its statement that "we are satisfied that this is not a question of an older man taking advantage of a younger woman vulnerable to his role of being in charge of her spiritual development" (para 6.2.4). Fourth, that in imposing a 2 year prohibition to run from the date of the decision, which the Tribunal said was in line with the 2 year prohibition originally suggested to the Applicant by his diocesan bishop (para 10), the Tribunal failed to take account of the fact that the bishop's penalty would have run from 1 April 2015. Given the further passage of a year, the penalty ought to have been for one, rather than two years.

15.4 We consider the first contention to be based on a misconception. The references made by the Tribunal to *King* were not made in ignorance of its facts, but with regard to principles established in that case, which the Tribunal considered relevant to the Applicant. Amongst the reasons for the 4 year prohibition imposed in *King* was the adultery involved in the misconduct. As stated in *King*, however, at para 19:

> "The subject of adultery is specifically mentioned in the Guidance on Penalties issued by the Clergy Discipline Commission in March 2006. It is suggested in section 5 that 'Removal from office and prohibition either for life or for a limited time are usually appropriate in cases of adultery.' *It does not, however, follow that sexual misconduct falling short of adultery should automatically attract a lesser penalty.* The same section 5 opens with the important words 'Sexual misconduct is usually a deliberate and damaging failure to comply with the high standards of Christian behaviour required of the clergy.'

The sentence we have italicised also appears in later revisions of section 5 of the Guidance. Since the Applicant has received a penalty very considerably less than that imposed in *King,* we cannot see that his first contention stands any prospect of succeeding.

15.5 In respect of the second matter, the Tribunal expressly described the relationship of the Applicant and CG at the time of the hearing as "a committed relationship" (para 2.1 e.), but the Tribunal was not merely entitled to find, but bound

to find, that there was no such commitment in the period December 2014-January 2015, when the misconduct here took place. This is confirmed by a written statement from the Applicant, dated 19 March 2015 and attached to the complaint, that he could not say that (at that time) he loved CG or that he wished to marry her, because the relationship was "too short". Given the combination of (a) the Applicant's position and moral obligations as a Clerk in Holy Orders and (b) the pastoral responsibilities owed to CG, we can see no realistic possibility that on appeal the misconduct would be held to be less serious on this account than it was found to be by the Tribunal. Accordingly, this part of the challenge to a 2 year prohibition stands no chance of succeeding.

15.6 There was no arguable inconsistency in respect of the third matter, nor is there any reason to suppose that the imposition of the 2 year prohibition was made without regard to the Tribunal's earlier finding in para 6.2.4 of its decision. We merely observe that, had the Tribunal regarded CG as a vulnerable adult, it might well have imposed a longer period of prohibition.

15.7 In determining the length of a prohibition, a tribunal is entitled to take into account lapse of time between the misconduct found and the date of the hearing. But we do not consider it realistic here to contend that there was here an error of law in failing to reduce the period to one of less than 2 years, merely because, had the Applicant agreed to his bishop's suggestion of an agreed 2 year penalty, that period would have begun approximately one year earlier. It was no one's fault but that of the Applicant that the bishop's suggestion was declined.

16. For these reasons we have jointly concluded that there is not a real prospect of success on appeal; nor do we consider there to be any other compelling reason why the appeal should be allowed. Permission to appeal is therefore refused.

APPLICATION FOR PERMISSION TO APPEAL OUT OF TIME

17. Rule 4A(1) of the CD Rules requires an application for leave to be made either orally to the tribunal upon imposition of the penalty, or in writing to the appellate court within 28 days of the imposition of the penalty. Since the penalty was imposed by the Tribunal on 12 April 2016, the time for making an application for leave to appeal expired on 10 May, whereas the application for leave is dated 11 May and was filed and served on 12 May, two days out of time.

18. Rule 9 provides:

> "(5) The application [for permission to appeal out of time] shall be determined jointly by the Dean and one judge appointed in accordance with section 20(1B) of the Measure, and may, if the Dean so directs, be determined without a hearing.
>
> .....
>
> (7) The appellate court may give permission to appeal out of time if at least one of the judges is satisfied that –
>
> (a) there was good reason why the party making the application did not appeal within the time allowed,

(b) there would be a real prospect of success on appeal or that there is some other compelling reason why the appeal should be heard, and

(c) the other party would not suffer significant prejudice as a result of the delay."

19. The Applicant did not receive written reasons for the Tribunal's decision until 7 May 2016, three days before time expired. He therefore had only a very limited time within which to formulate his grounds for seeking to appeal, and in those circumstances the designated officer accepts, as do we, that rule 9(7)(a) is satisfied. Nor is there, nor could there be, any suggestion that rule 9(7)(c) stand in the Applicant's way. However, for the reasons we have already given, there is not a real prospect of success on appeal or any other compelling reason why the appeal should be heard, and therefore rule 9(7)(b) is not satisfied.

CONCLUSION

20. These applications are therefore refused.

CHARLES GEORGE QC
Auditor of the Chancery Court of York

DR. WENDY YATES
Judge of the appellate court

4 August 2016