1. **SUMMARY**

This report reviews the High Court’s decision in the case of the London Mayor Ken Livingstone who was suspended by the Adjudication Panel for England for alleged breach of the Code of Conduct with the intention of raising awareness and the profile of the Ethical Framework. This raises important issues about the interpretation of the Code and a member’s right to freedom of expression as a defence to an allegation they have breached the Code.

2. **RECOMMENDATION**

Standards Committee is asked to note the case.

3. **REASON FOR DECISION**

This report updates members on developments in respect of the Code of Conduct so they can better perform their role.

4. **PROPOSAL**

4.1. The Mayor of London Ken Livingstone was suspended by the Adjudication Panel for England for comparing a Jewish newspaper reporter to a Nazi concentration camp guard. The Mayor made the alleged comments whilst leaving a reception at City Hall when the news reporter confronted him.

4.2. Mr Livingstone is bound by the Local Authorities (Model Code of Conduct) (England) Order 2001, which applies to the Greater London Authority. The Adjudication Panel for England held that Mr Livingstone had contravened paragraph 4 of the Code:
4.3. “... 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”.

4.4. Mr Livingstone appealed to the High Court. The Court’s judgement, issued on 19 October 2006, found in Mr Livingstone’s favour and the Court quashed the suspension on a number of points.

The Meaning of “official capacity”

4.5. First, the Court held the phrase in the Code “or any other circumstance” must receive a narrow construction applying only where a member was performing his functions. It stated that the circumstances should be sufficiently proximate to, or reasonably capable of being linked to or having a bearing on, the official capacity. The Court subsequently held that the circumstances of the case were such that Ken Livingstone was not acting in his official capacity or performing his mayoral functions.

4.6. This is far more limited than previous interpretations of the Code and questions whether behaviour in a members’ private life unrelated to their official capacity will now fall under the Code. A breach of the Code for activities in a member’s private life must show a direct link to their office, e.g. using the office for personal gain.

4.7. However, the argument was based on an interpretation of the Local Government Act 2000, which is to be amended under the Local Government and Public Involvement in Health Bill to close this “loophole” and so the relevance in the long term of the Livingstone decision may be limited. Although, if a member received a criminal conviction and was sentenced for three months prison sentence or more, they would automatically be disqualified from public office for five years albeit not under the Code of Conduct.

Paragraph 4 and a Member’s Private Life

4.8. The Court also narrowly interpreted paragraph 4 as it applied to a member’s private life holding there was a “real distinction between the man and the office”. In other words, actions may tarnish the reputation of a member as an individual but not their office.

Freedom of Expression

4.9. The Court also addressed how Article 10 of the European Convention on Human Rights – the right to freedom of expression – interacts with the Code of Conduct. Article 10 states:
1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder.

4.10. Therefore, any restraint on freedom of expression, by way of restriction or condition, must be proportionate and necessary in accordance with Article 10(2).

4.11. In previous cases, Article 10 had been raised as a defence to a Code of Conduct allegation. In Murphy v Ethical Standards Officer of the Standards Board for England in 2004, the Court held that the duty to declare personal and prejudicial interests did not breach Article 10 and was proportionate to the need to maintain public trust and confidence in local authority decision-making. In Sanders v Kingston, the Councillor sought to rely on Article 10 in defence to an allegation that he had brought his office into disrepute by being abusive in, amongst other things, a radio interview. The court rejected his argument on the basis that Article 10 did not protect his comments which amounted to "little more than an expression of personal anger" as opposed to the expression of a legitimate political opinion. The general position being that some restraints on freedom of expression are legitimate but restraints will need to be proportionate to the type of expression with political comments receiving the highest protection.

4.12. In the Livingstone case, the Court took the view that although Ken Livingstone’s comments were not political expressions but merely “offensive abuse of a journalist”, they were still protected by Article 10. This conclusion was in part due to the Court’s earlier finding that Mr Livingstone was acting outside of his official capacity.

5. SUMMARY

5.1. In summary, the implications of the Livingstone decision have been summarised by the Standards Board as follows;

- If a member was not acting in an official capacity the Code will only apply where they nonetheless used or sought to use their position or status thereby linking their conduct to their office.

- The use of their status must in itself be capable of being a breach of the Code.
• There will only be a breach of paragraph 4 where the image or reputation of the member’s office is damaged and not just the member's personal reputation.

5.2. The Standards Board suggest that the following factors may be relevant: where the member has put his or her private interest over and above the public interest; where a member defies important and well established rules of the authority for private gain; and, where a member engages in conduct which directly and significantly undermines the Council’s reputation as a good employer or responsible service provider.

5.3. In addition, members may raise Article 10 as a defence to a complaint under the Code of Conduct but protection will depend on the circumstances and nature of the comment.

6. IMPPLICATIONS

6.1. Financial
6.1.1. None.

6.2. Legal
6.2.1. This is a monitoring officer report.

6.3. Human Resources
6.3.1. None

6.4. Health Impact Assessment
6.4.1. None

6.5. Equality Impact Assessment
6.5.1. None required.

7. CONCLUSION

7.1. This case examines the delicate interplay between holding public office and exercising rights to freedom of expression as a private individual. It is now understood that the Code does not generally apply to Members private lives. Rather it applies in circumstances where members are performing or purporting to perform his or her functions.

Background Information