PUBLIC v. PRIVATE HEARING AND PUBLICITY

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Introduction - a public hearing

1. As a general rule the English system of the administration of justice has required that it be done in public. Most healthcare regulators' substantive proceedings have been held in public for many years: Joanna Glynn QC and David Gomez, *Fitness to Practise: Health Care Regulatory Law, Principle and Process* at para 15-026; see also *Disciplinary and Regulatory Proceedings* by Brian Harris QC and Andrew Carnes, 5th Edition, 2009 at para 11.01 which states that "the genius of our age is inimical to secrecy."

2. The principle of open justice has long been recognised. In ***Scott v. Scott*** [1913] AC 417, Lord Shaw of Dunfermline at p476 said that publicity in the administration of justice was "one of the surest guarantees of our liberties", and cited from *Bentham and Hallam* "publicity is the very soul of justice." For modern statements of the principle see ***Attorney-General v. Leveller Magazine Limited*** [1979] AC 440 at 450; ***R v. Legal Aid Board ex parte Kaim Todner*** [1999] QB 966, and Sir Jack Jacob's Hamlyn Lecture, *The Fabric of English Civil Justice* (38th Series, 1987), quoted by Lord Woolf MR in ***Hodgson v. Imperial Tobacco Limited*** [1998] 1 WLR 1056 at 1069.

3. Sir Jack Jacob, in trenchant terms, said:

> "The needs for public justice, which has now been statutorily recognised, is that it removes the possibility of arbitrariness in the administration of justice, so that in effect the public would have the opportunity of "judging the judges": by sitting in public, the judges are themselves accountable and on trial."

4. In ***Storer v. British Gas Plc*** [2000] 2 All ER 440 the Court of Appeal said that the principle was no less important in employment tribunal proceedings than in other proceedings. In that case, a coded door lock was a physical barrier to prevent access by the public to a hearing and there was no chance of a member of the public dropping in to see how the tribunal was conducted. The fact that no one had attempted to gain access did not matter. The court held that the tribunal had been sitting in private and it had no jurisdiction to do so, and accordingly its decision would be quashed and the matter remitted for re-hearing before another tribunal. This followed the decision in ***McPherson v. McPherson*** [1936] AC 177

where Lord Blanesburgh said that it was immaterial whether any member of the public was actually present or not.

Disciplinary Tribunals

5. The authors of *Disciplinary and Regulatory Proceedings* say that for good or ill, every organisation is under pressure to be as open about its affairs as is consistent with the proper discharge of its functions. Historically, the disciplinary proceedings of private organisations, such as trade associations and the professional bodies, were conducted in private on the ground that their affairs concerned no one but themselves. Most private disciplinary tribunals still keep their hearings private. This is because disciplinary proceedings are not judicial proceedings; they differ from them in many ways which may make public hearings inappropriate. Most obviously, the members of a private body, such as a club, submit voluntarily to the discipline of their peers and expect that discipline to be conducted as privately as their other affairs.

6. The disciplinary proceedings of some statutory regulators on the other hand have long been open to the public. Since the enactment of the Human Rights Act 1998, moreover, all public authorities have been compelled to offer defendants the right to public hearings of disciplinary proceedings. The legal position of non-public authorities remains unchanged, but the Human Rights Act 1998 has strengthened the existing trend towards greater openness.

7. The following professional bodies all provide for their substantive proceedings to be open to the public as a general principle: the General Medical Council, General Dental Council, Nursing and Midwifery Council, Solicitors Disciplinary Tribunal, Bar Standards Board, Institute of Chartered Accountants in England and Wales, and various other bodies such as the Architects Registration Board and the Royal College of Veterinary Surgeons. Against the trend the Police Disciplinary Tribunal is not open to the public, but there is a discretion to admit observers, and the Society of Lloyd's rules provide that at the defendant's request and at the discretion of the tribunal proceedings are open to the public.

The Human Rights Act 1998

8. Article 6(1) of the European Convention on Human Rights provides that:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

9. It is well established that disciplinary proceedings are very unlikely to be criminal proceedings for the purposes of Article 6(1) of the Convention: ***Wickramsinghe v. UK*** [1998] EHRLR 338 where the Commission stated that professional disciplinary matters are essentially matters which concern the relationship between the individual and the professional association to which he or she belongs, and do not involve the State setting up a rule of general applicability by which it expresses disapproval of, and imposes sanctions for, particular behaviour, as is generally the case with "criminal" charges.

10. However, disciplinary proceedings will very often determine civil rights and obligations, and affect the right of individuals to pursue their professional activities: ***Albert and Le Compte v. Belgium*** (1983) 5 EHRR 533 where the ECHR said that the right to practice medicine was a private right and therefore a civil right within Article 6(1). However, a decision to reprimand or fine does not amount to a determination of civil rights because the right to continue to practice is not at stake: ***R (Thompson) v. Law Society*** [2004] 1 WLR 2522; ***R v. The Securities and Futures Authority Limited, ex parte Fleurose*** [2002] EWCA Civ 2015.

Exceptions to the general rule

11. As to what are the exceptional situations where the general principle will not apply, it is useful to start with the guidance given by the House of Lords in ***Scott v. Scott*** [1913] AC 417. In that case Viscount Haldane LC at pp437-439 said:

> "the exceptions are themselves the outcome of a yet more fundamental principle that the chief objective of courts of justice must be to secure that justice is done…As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace

> this application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration…I think that to justify an order for a hearing *in camera* it must be shown that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made."

12. In the same case Earl Loreburn at p446 said that:

> "in all cases where the public has been excluded with admitted propriety the underlying principle, as it seems to me, is that the administration of justice would be rendered impracticable by their presence, whether because the case could not be effectively tried, or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the court".

13. The general principle is that an exception can only be justified if it is necessary in the interests of the proper administration of justice: ***R v. Legal Aid Board ex parte Kaim Todner*** [1999] QB 966 per Lord Woolf MR at p976H.

14. Often the rules governing procedure in relation to disciplinary proceedings expressly provide for hearings before the committee or fitness to practise panel to be held in public, but that the committee or fitness to practise panel may determine that the public shall be excluded from the proceedings or any part of the proceedings, "*where they consider that the particular circumstances of the case outweigh the public interest in holding the hearing in public*": see rule 41(2) of the General Medical Council (Fitness to Practise) Rules 2004. The GMC's rules state that the committee or panel shall sit in private where they are considering whether to make or review an interim order, or the physical of mental health of the practitioner.

15. The Solicitors (Disciplinary Proceedings) Rules 2007 state that every hearing shall be in public, but any party to an application and any person who claims to be affected by it may seek an order that the hearing or part of it be conducted in private on the grounds of "*exceptional hardship or exceptional prejudice*" to a party, a witness or any person affected by the application. The rule is directed towards anonymity of the person affected, although the Tribunal has power, of its own volition, to direct that the whole or part of the proceedings be heard in private if in the tribunal's view a hearing in public would prejudice the interests of justice.

16. Similarly, the General Dental Council and the Royal Pharmaceutical Society rules provide for all or part of a hearing to be held in private where it is strictly necessary to do so as publicity would prejudice the interests of justice, or privacy outweighs the public interest in holding the hearing in public.

17. Rules 42(4) of the Royal Pharmaceutical Society of Great Britain (Fitness to Practise and Disqualification etc) Rules 2007 provides that the health or disciplinary committee may exclude from the whole or part of any hearing any person whose conduct, in its opinion, has disrupted or is likely to disrupt the proceedings.

18. In addition to matters affecting health, or vulnerable third parties, there may be good grounds for excluding the public. In ***R (Mersey Care NHS Trust) v. Mental Health Review Tribunal*** [2005] 1 WLR 2469 the claimant, the Mersey Care NHS Trust which was responsible for Ian Brady, a convicted murderer detained at Ashworth Hospital, successfully obtained judicial review to prevent Mr Brady's statutory review hearing being held in public, following a request by Mr Brady. The Administrative Court held that in considering his request for a public hearing under the Mental Health Review Tribunal Rules 1983 a mental health review tribunal was required to take into account not only the interests of the patient but also the wider public interest; that in exercising its discretion the tribunal should consider the nature and extent of the patient's understanding about the likely impact and ramifications of the hearing being in public, the patient's safety at the hearing and any impact on the patient's condition of the security that would be required.

19. Article 8 of the European Convention on Human Rights provides that everyone has the right to respect for his private and family life, his house and his correspondence, and there shall be no interference by a public authority with the exercise of this right except as in accordance with the law and is necessary in a democratic society. A tribunal considering whether to hold a hearing in private may need to consider the provisions of Article 8 along with those in article 6.

20. Further, in ***R (Heath) v. Home Office Policy and Advisory Board for Forensic Pathology*** [2005] EWHC 1793 it was said that it was not a requirement that the procedures of disciplinary tribunals be elaborate enough to cover every matter which might arise in connection with the process; and that where there were gaps

they can be filled in by the relevant body having the responsibility to decide the issues, always having in mind that the process must be one which is capable of achieving justice and fairness between the parties in respect of the matters at issue.

Interlocutory Proceedings

21. In criminal proceedings, the Criminal Procedure Rules 2005, rule 16.11, provides that hearings relating to procedural matters preliminary or incidental to criminal proceedings in the Crown Court may be heard by a judge of the Crown Court sitting in chambers. *Archbold, Criminal Pleading Evidence & Practice,* 2009, at para 4-3 provides that there is an inherent jurisdiction to sit *in camera* if the administration of justice so requires. The question is whether a sitting in private is necessary for the administration of justice.

22. In civil proceedings the general rule is that all hearings are to be held in public. However, CPR 39.2(3) provides that a hearing, or any part of it, may be held in private if the court considers that it is necessary in the interests of justice. Rule 39.2 is not unlawful or ultra vires, nor does it breach the European Convention on Human Rights, Articles 6 or 10: see ***R (Pelling) v. Bow County Court (No 2)*** [2000] EWHC 636. The notes to *Civil Procedure* at CPR 39.2.1 state:

> "The Strasbourg institutions have generally taken the view that interlocutory hearings are not determinative of civil rights and obligations within the meaning of ECHR, Article 6(1). These hearings are therefore generally not required to be in public: *APIS v. Slovakia* (2000) 29 EHRR CD 105 (Interim Injunction), *Alsterlund v. Sweden* (1988) 56 DR 229, Ecom HR (stay of execution), *Novi Flora Sweden AB v. Sweden* (1993) 15 EHRR CD 6 (search order), *Ewing v. United Kingdom* (1998) 10 EHRR CD 141."

23. In ***R v. Legal Aid Board (ex parte Kaim Todner)*** Lord Woolfe MR at p978C-E said:

> "The nature of the proceedings is also relevant. If the application relates to an interlocutory application this is a less significant intrusion into the general rule and interfering with the public nature of the trial. Interlocutory hearings are normally of no interest to anyone other than the parties. The position can be the same in the case of financial and other family disputes. If proceedings are ex parte and involve serious allegations being made against another party who has no notice of those

allegations, the interest of justice may require non-disclosure until such a time as a party against whom the allegations are made can be heard."

24. In his Hamlyn Lecture, *The Fabric of English Civil Justice* (1987), Sir Jack Jacob recognised two prevailing exceptions to the open public system of conducting civil proceedings, namely, (1) the hearing of pre-trial proceedings "in chambers", at which only the parties and their advisers are entitled to be present and from which the public and the press are excluded, and (2) the hearing of proceedings or the trial or part thereof "*in camera*", where the court or the trial judge orders that the court should be closed be cleared and the public and press excluded.

25. In ***R (Chaudhari) v. Royal Pharmaceutical Society of Great Britain*** [2008] EWHC 3190 the practitioner had applied for disciplinary proceedings against her to be withdrawn pursuant to the provisions of Regulation 10 of the Pharmaceutical Society (Statutory Committee) Regulations 1978. The chairman of the statutory committee stated that the application should be heard in private. The practitioner sought a judicial review of that decision stating that it was unlawful and that there was a public interest and to hold the application *in camera* would be in breach of Article 6 of the ECHR. In rejecting this argument the court, while recognising the general rule that the administration of justice is required to be in public, held that the nature of the proceedings was also relevant and that it was clear that Strasbourg institutions generally have taken the view that interlocutory hearings are not determinative of civil rights and obligations, and that therefore they are not generally required to be in public.

26. It may also be necessary to hold a hearing in private where the evidence is confidential or commercially sensitive. ***Diennet v. France*** (1995) 21 EHRR 554 concerned a doctor who had been disqualified by the French *Ordre des Medicins* from practising medicine for three years for undertaking consultations by correspondence. He complained to the ECtHR that the hearings before the disciplinary bodies had not been conducted in public. The French Government argued unsuccessfully that the power of the tribunal to decide facts, possibly including medically confidential patients' information, was good reason to exclude the public. However, the court rejected the defence because there was no reason to

suppose that confidential information would be relevant in an accusation such as the appellant faced.

The need for an oral hearing

27. It has been said that at common law the duty to hear both sides of a dispute does not necessarily include a right to an oral hearing: per Lord Keith of Kinkel in ***Lonrho v. Secretary of State for Trade and Industry*** [1989] 2 All ER 609, 616.

28. In ***R v. Army Board of the Defence Council ex parte Anderson*** [1991] 3 All ER 375, the Divisional Court said, in a case concerning a complaint by a soldier of racial discrimination, that the hearing did not necessarily have to be an oral hearing with cross-examination of witnesses in all cases. However, there had to be a proper hearing of the complaint and whether an oral hearing was required depended on the subject matter and circumstances and whether there were substantial issues of fact which could not be resolved on the written evidence. Furthermore, the complainant should be shown all the material seen by the board, apart from any documents for which public interest immunity could properly be claimed, and he should be given an opportunity to respond and the board should consider his response before making its adjudication.

29. In ***R v. Solicitors Complaints Bureau ex parte Curtin*** (1994) 6 Admin LR 657 it was held that a decision on the part of an assistant director of the Bureau to impose upon a solicitor a restricted practising certificate was not procedurally unfair despite the fact that the solicitor had not been offered an oral hearing. Similarly in ***R (Thompson) v. Law Society*** [2004] 1 WLR 2522 the claimant solicitor failed in his attempts to get an oral hearing before an adjudication panel. The Court of Appeal held that in reaching its decision as to whether to accede to a request for an oral hearing, the panel or the adjudicator had to act fairly to comply with article 6(1) of the Convention; that whether there had been a breach should be answered by considering all the circumstances of the case and having regard to all the legal processes available to the claimant; and that those processes included an avenue of appeal or review and that the Administrative Court had wide powers to correct any perceived injustice.

30. So far as public authorities are concerned, whilst the right to a public hearing in Article 6(1) of the ECHR includes the right to an oral hearing, such a right may be withheld where the subject matter of the dispute is of such a nature that it is better dealt with in written proceedings. In ***Bakker v. Austria*** (2003) 39 EHRR 162 a physiotherapist was denied an oral hearing with reference to his right to work.

31. In ***R (Heather Moor and Edgecomb Limited) v. Financial Ombudsman Service*** [2008] EWCA Civ 642 the Court of Appeal confirmed that in ordering compensation the structure of the Financial Services and Markets Act 2000 was intended to operate with the minimum of formality and conferred broad discretionary powers on the Financial Ombudsman Service to determine complaints. Even though the FOS have the power to order substantial compensation payments (up to £100,000), neither the common law nor the ECHR required an oral hearing in cases where there were limited disputes of fact and where the matter could fairly be resolved on written evidence. The requirement for a public judgment could properly be fulfilled either by a request to the FOS or by the judgment of the court on a judicial review application.

32. In ***L v. Law Society*** [2008] EWCA Civ 811 the Court of Appeal considered whether an appeal against the Law Society's decision to revoke a student membership should be heard in private. The appellant was concerned about details of spent convictions being made public and argued that if the hearing was held in public it would breach his Article 6 rights. The application was refused. The convictions were relevant to an application to join a regulated profession, and part of ensuring that public confidence was maintained was that proceedings such as the instant ones were held in public.

Anonymity and protection of vulnerable witnesses

33. The anonymity of the names of patients and clients is usual practice at healthcare fitness to practise hearings and at the solicitors disciplinary tribunal where clients are often referred to by their initials. Applications may be granted for the purposes of protecting members of the public such as patients or former clients but not for the protection of the respondent from the consequences of publicity: ***Lipman Bray v. Hillhouse and Jacob*** [1987] NLJR 171 CA.

34. Provisions are freely available for the protection of vulnerable witnesses at hearings: see, for example Rule 36 of the General Medical Council (Fitness to Practise) Rules 2004, Rule 56 of the General Dental Council (Fitness to Practise) Rules 2006, and Rule 47 of the Royal Pharmaceutical Society of Great Britain (Fitness to Practise and Disqualification etc) Rules 2007.

35. These Rules provide that measures for vulnerable witnesses may include the use of video links, the use of pre-recorded evidence as the evidence-in-chief of a witness, provided always that such witness is available at the hearing for cross-examination, and questioning by the panel, and the use of interpreters, including signers and translators. Rule 36(3)(d) of the GMC's Rules also provide for the use of screens or such other measures as the committee consider necessary in the circumstances in order to prevent the identity of the witness being revealed to the press or the general public, or access to the witness by the practitioner.

36. Where the allegation against the practitioner is based on facts which are sexual in nature, the witness is an alleged victim and the practitioner is acting in person, the practitioner shall not without the written consent of the witness be allowed to cross-examine the witness in person.

37. The Judicial Studies Board direction 22a for use in the Crown Court to the jury when evidence is given after a special measures direction reads as follows:

> "In this case, the witness[es] X[Y] and [Z] gave evidence [behind a screen] [by live link] [in private] [by means of video-recorded evidence in chief] [by… (*here state the form of any other special measures direction)*]. The giving of evidence in this way is perfectly normal in cases like this. It is designed to enable the witness[es] to be more at ease when giving evidence. It is not intended to pre-judge the evidence which the witness[es] give[s]. The fact that the evidence has been so given must not in any way be considered by you as prejudicial to the accused."

38. The Criminal Evidence (Witness Anonymity) Act 2008 came into force on 21st July 2008. The common law rules relating to the anonymity of witnesses were abolished. Witness anonymity orders continue to be permissible, provided they are made in accordance with the provisions of the statute. Section 4 identifies the express pre-conditions which must be established before a witness anonymity order may be made. Section 4 provides:

"(1) This section applies where an application is made for a witness anonymity order to be made in relation to a witness in criminal proceedings.

(2) The court may make such an order only if it is satisfied that Conditions A to C below are met.

(3) Condition A is that the measures to be specified in the order are necessary – (a) in order to protect the safety of the witness or another person or to prevent any serious damage to property, or (b) in order to prevent real harm to the public interest (whether affecting the carrying on of any activities in the public interest or the safety of a person involved in carrying on such activities, or otherwise).

(4) Condition B is that, having regard to all the circumstances, the taking of those measures would be consistent with the defendant receiving a fair trial.

(5) Condition C is that it is necessary to make the order in the interests of justice by reason of the fact that it appears to the court that – (a) it is important that the witness should testify, and (b) the witness would not testify if the order were not made.

(6) In determining whether the measures to be specified in the order are necessary for the purpose mentioned in sub-section 3(a), the Court must have regard (in particular) to any reasonable fear on the part of the witness – (a) that the witness or another person would suffer death or injury, or (b) that there would be serious damage to property, if the witness were to be identified."

39. When the court is considering whether conditions A – C are met, a number of relevant and specific matters are identified for its consideration in Section 5 of the Act. Section 5(2) contains a list of considerations such as:

(a) the general right of a defendant in criminal proceedings to know the identity of the witness in the proceedings;

(b) the extent to which the credibility of the witness concerned would be a relevant factor when the weight of his or her evidence comes to be assessed;

(c) whether evidence given by the witness might be the sole or decisive evidence implicating the defendant;

(d) whether the witness's evidence could properly be tested (whether on grounds of credibility or otherwise) without his or her identity being disclosed;

(e) whether there is any reason to believe that the witness has a tendency to be dishonest, or has any motive to be dishonest in the circumstances of the case; and

(f) whether it would be reasonably practicable to protect the witness's identity by any means other than by making a witness anonymity order specifying the measures that are under consideration by the court.

40. The Court of Appeal, Criminal Division, has already had the opportunity to discuss and analyse the Criminal Evidence (Witness Anonymity) Act 2008: see ***R v. Mayers and other appeals*** [2009] 2 All ER 145; ***R v. Powar and Powar*** [2009] EWCA Crim 594.

Publicising the decision

41. It is usual practice for decisions in conduct cases before healthcare disciplinary tribunals to be announced publicly with copies of the decision, as in the case of the GMC, being distributed to the parties and the press. At the NMC the practice is to read out the decision from a laptop computer from which copies of the decision can be made available. At the SDT short reasons are given on the day with more detailed findings later. In disciplinary proceedings before the Council of the Inns of Court an extempore judgment is given followed later by a report.

42. Article 6(1) of the European Convention on Human Rights provides that "*judgment shall be pronounced publicly*". Although Article 6(1) is not qualified, the European jurisprudence makes clear that a literal approach to these words is undesirable. In ***Sutter v. Switzerland*** (1984) 6 EHRR 272, the European Court of Human Rights stated that in each case the form of publicity given to the judgment must be assessed in the light of the special features of the proceedings in question. See further ***Axen v. Federal Republic of Germany*** (1984) 6 EHRR 195 (a tribunal which deposited its judgment in a registry open to the public was held to comply with Article 6); and ***Pretto and others v. Italy*** (195) 6 EHRR 182 (Article 6 was complied with as anyone could consult or obtain a copy of the judgment).

43. In ***B and P v. United Kingdom*** [2001] 2 FLR 261, Sir Nicolas Bratza said that in spite of the unqualified nature of the requirement, Article 6(1) had to be read as a whole and there was a logical relationship between the public nature of the

proceedings and the public pronouncement of the judgment which was the result of those proceedings. If the public may be legitimately excluded from the hearing for the purpose of protecting the interests of children or the private lives of parties, the requirement that the judgment should be pronounced publicly should not be interpreted in such a way as to undermine that protection.

44. Any decision by a disciplinary tribunal hearing a conduct case to go into *camera* ought to be made publicly, but in such a way as not to undermine any private hearing.

45. In the case of a health committee or hearings before an interim orders panel the proceedings are held in private. As the authors of *Fitness to Practise: Health Care Regulatory Law* say at para 19 – 021, it would be pointless to hold proceedings in private if the committee or panel were subsequently required to announce the determination in public.

46. Finally, the reporting restrictions contained in the Contempt of Court Act 1981 and the Youth Justice and Criminal Evidence Act 1999 do not apply to hearings before disciplinary tribunals. However, as the authors of *Disciplinary and Regulatory Proceedings* say at para 11.40 the publication of disciplinary proceedings may carry a risk where there are parallel civil or criminal proceedings. To avoid the possibility of falling into contempt the tribunal may consider going into closed session.

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