SOME ASPECTS OF RECENT CASE LAW IN PROFESSIONAL DISCIPLINARY PROCEEDINGS
2008 - 2011

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INDEX

PROCEDURE

Service

1. ***Jatta v. Nursing and Midwifery Council [2009] EWCA Civ 824***

In this case a fitness to practise panel of the NMC proceeded to hear and determine disciplinary proceedings in the absence of the registrant. Notice of the proceedings had been duly and properly served by sending them to the registrant's registered address in Didcot in accordance with the Nursing & Midwifery Council (Fitness to Practise) Rules 2004, although the Council was aware the registrant was no longer living at the address and was travelling in Thailand. Posting of the notice of hearing was duly proved: it was sent by recorded delivery but was returned undelivered. A copy was also sent by first class post to the address in Didcot but the registrant was unaware of, and did not attend, the hearing before the disciplinary tribunal.

The Court of Appeal (Maurice Kay and Lloyd LJJ and Sir Simon Tuckey) held that there had been no procedural irregularity that vitiated the decision to proceed in Mr Jatta's absence. The only available address was the registrant's registered address, albeit that it was known Mr Jatta was no longer there. The panel could have adjourned and required that an email be sent to Mr Jatta at his known contact email address, but they did not do so and could not properly be criticised. Lloyd LJ said:

> "18. …it is not in dispute that the letter complied with the rules as regards the required content of the hearing, nor that it was in fact sent to his address. Posting of the letter was duly proved; it was sent recorded delivery and in that form was returned undelivered, but it seems that it was also sent first class, and that copy no doubt languished for some time at the address in Didcot.
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> 29. …what the panel has to require under rule 21(2)(a) is evidence that all reasonable efforts have been made in accordance with these rules to serve the notice of hearing on the registrant and in turn, under rule 21(2)(b), it must be satisfied that the notice of hearing has been duly served. The rules do not provide for sending anything by email; they require a notice of hearing to be served by post or other delivery service or left at a relevant address. The only available address was the registered address, albeit that it was known not to be, as it were, a useful address for Mr Jatta, since he was no longer there… They could have adjourned and

> require that an email be sent to Mr Jatta to his known contact address, which might have led, and in fact would no doubt have led, to his attending a hearing when re-fixed, but they did not do so and it does not seem to me that they can properly be criticised for that failure."

The Court of Appeal observed that it was a fair comment that the process of giving notice was followed in what could be described as a mechanical fashion, but in the absence of a notified fresh address for service the Council was bound to send notice to the only registered address it had. The registrant could have given the Council a new address and the rules did not provide for service by email.

[NOTE: The General Medical Council (Fitness to Practise) (Amendment) Rules 2009, which came into force on 7th August 2009, provide for service of notices and documents by email. Rule 40(2) provides that any notice or document required to be served upon the practitioner may be served by electronic mail to an electronic mail address that the practitioner has notified to the Registrar as an address for communications.]

2. ***Loutfi v. General Medical Council*** **[2010] EWHC 1762 (Admin)**

In this case, the Administrative Court in Manchester (Nicol J) allowed the claimant doctor's application for judicial review of a decision by the investigation committee of the General Medical Council to issue him with a warning in respect of an allegation of gross misconduct involving assault. The court remitted the matter to the GMC for fresh consideration on the basis that the committee had failed to comply with rule 34(9)(c) of the General Medical Council (Fitness to Practise) Rules 2004, with the result that the hearing had not been fair.

At the hearing before the investigating committee the GMC had not called any oral evidence about the incident, which the appellant disputed. Rule 34(9)(c) of the Fitness to Practise Rules provides that unless otherwise agreed between the parties, each party shall not less than 28 days before the date of a hearing require the other party to notify him whether or not he requires any relevant person to attend and give oral evidence in relation to the subject matter. The letter from the GMC to the appellant giving notice of the hearing did not comply with rule 34(9)(c) and the omission by the GMC to comply with this requirement was said by the claimant to be material, because he said he had expected the GMC to call witnesses whom he could question before the investigation

committee, and he was taken by surprise because that did not happen. Nicol J whilst recognising that the claimant did not ask for cross-examination of witnesses, or an adjournment to allow witnesses to be called, nevertheless found that a breach of the procedural requirements in the rules did take place, and that that breach did prejudice the claimant so as to give him a hearing which was not compliant with the rules or, for that reason, one that was fair.

3. ***R (Harrison) v. General Medical Council [2011] EWHC 1741 (Admin)***

Blake J held that the court had no power to extend time for the lodging of an appeal under section 40 of the Medical Act 1983 as amended against the determination of a fitness to practise panel and, in the alternative, even if the court had the power under CPR 3.1 it could not conclude on the facts that the interests of justice required an extension of time. On 26th February 2010, the GMC sent notice of the panel's decision that Dr Harrison's registration be erased on the basis of a finding of impairment of fitness to practise based upon a serious criminal conviction. Dr Harrison was a serving prisoner who did not attend the fitness to practise hearing. His appeal was lodged on 29th April 2010, and way beyond the period of 28 days provided for by the Act of 1983. Blake J agreed with the decision of Bean J in the case of *Mitchell v. Nursing and Midwifery Council* [2009] EWHC 1045 (Admin) where the subject matter was a question of whether the court had power to extend time in a nursing and midwifery disciplinary appeal. Following the decision of the House of Lords in *Mucelli v. Government of Albania* [2009] 1 WLR 276, Bean J held that where a primary statute lays down the time limit for an appeal, the court does not have power to extend the time beyond the period set out in the statute unless the statute gives the court power to extend.

Absence of practitioner and adjournments

4. ***Yusuf v. The Royal Pharmaceutical Society of Great Britain [2009] EWHC 867 (Admin)***

After reviewing the decision of the Court of Appeal in *R v. Hayward* [2001] QB 862, approved on appeal by the House of Lords, sub nom *R v. Jones (Anthony)* [2003] 1 AC 1, and applied to the disciplinary proceedings of professional bodies by the Privy Council in *Tait v. The Royal College of Veterinary Surgeons* [2003] UKPC 34, Munby J held that the chairman of the disciplinary committee of The Royal Pharmaceutical Society of Great

Britain had correctly identified the key issue as being, in this particular case, whether the appellant had voluntarily chosen not to attend.

At [39] Munby J said:

> "(Counsel for the Society) says that the Chairman correctly identified the key issue as being, in this particular case, whether the appellant had voluntarily chosen not to attend. I agree. Moreover, as (Counsel) points out, the Committee was properly alert to the need to exercise its discretion to proceed in the appellant's absence with the utmost caution. He submits that the Committee's decision was fair, measured and unassailable. I agree. The Committee was entitled to find, as it did, that the appellant had voluntarily chosen neither to appear nor to be represented. It then proceeded to exercise its discretion, having, in my judgment, directed itself impeccably in law. And, to repeat, it was entitled, proceeding as it said with the "utmost caution", to conclude, and for the reasons it gave, that it was proper for it to proceed in the absence of the appellant."

In short, the committee was properly alert to the need to exercise its discretion to proceed in the appellant's absence with the utmost caution. The committee's decision was fair, measured and unassailable, and the committee was entitled to find, as it did, that the appellant had voluntarily chosen neither to appear nor to be represented.

5. ***Varma v. General Medical Council [2008] EWHC 753 (Admin)***

A similar approach was taken in this case, a decision of Forbes J. The panel had properly borne in mind that it had to balance the appellant's private rights against the public interest of having serious allegations properly investigated. The appellant had been granted a couple of short stays on medical grounds but an indefinite stay had been refused on the basis that there had already been inordinate delay and the medical evidence indicated that the appellant was capable of participating in the proceedings. The panel had justifiably treated the appellant's failure to attend the hearing as a voluntary election not to be present. There was no basis on which the court could interfere with the panel's exercise of its discretion.

At [29] Forbes J said:

> "It is also important to note that, having dismissed the application for a stay, the panel gave separate consideration to whether it should proceed with the substantive hearing in the belief that Dr Varma would neither be present nor represented – a belief that turned out to be only intermittently true. As (Counsel for the GMC) observed, the panel had a broad power to do so, as provided in Rule 31 (GMC Fitness to Practise Rules 2004), which provides: "Where the practitioner is neither present nor represented at a hearing, the …panel may

nevertheless proceed to consider and determine the allegation if they are satisfied that all reasonable efforts have been made to serve the practitioner with notice of the hearing in accordance with these rules." In my judgment, the panel was clearly entitled, at that stage, to conclude that Dr Varma had "*voluntarily chosen to waive his right to be present and give evidence and be represented*" and (sic) to decide to proceed with the hearing in his absence for the reasons that it gave."

6. ***Faulkner v. Nursing and Midwifery Council [2009] EWHC 3349 (Admin)***

The Administrative Court (Cranston J) held, in dismissing the instant statutory appeal, that the respondent's Conduct and Competence Committee had not fallen into error in exercising its discretion to hear allegations made against the appellant nurse in his absence, and then to find those allegations proved, and to order a striking off. The appellant was made the subject of 6 allegations relating to his time as a staff nurse at a GP led community hospital which provided rehabilitative and remedial care for adults over the age of 50. Each of the allegations related to incidents of inappropriate behaviour: two concerned causing stress to a patient; one concerned the abuse of a patient; the other three allege that the appellant engaged in inappropriate sexually-related activity.

The hearing before the committee had been adjourned on a previous occasion due to the appellant's non-appearance. After finding the allegations proved and that the appellant's fitness to practice was impaired, and during the committee's retirement to consider sanction, the appellant surfaced to address the committee. Notwithstanding this, the committee ordered the striking off of the appellant from the register. On appeal, the appellant submitted that the exercise of discretion to proceed in his absence from flawed on two counts: first, that too much weight had been given to the fact that witnesses were presented and ready for the hearing; and secondly, the fact that on the previous occasion the committee had taken the view that the appellant would not be able to cross-examine one of the witnesses. Cranston J dismissed the appeal, holding that the appellant had not adduced any evidence either as to his medical condition or as to the reason for his not having obtained legal assistance. The appellant was aware of the hearing date but failed to make any application for an adjournment. He had voluntarily chosen not to attend.

7. ***Abdalla v. Health Professions Council [2009] EWHC 3498 (Admin)***

The appellant, a radiographer, claimed that the committee's decision to proceed in her absence was in breach of her rights under Article 6(1) of the ECHR; alternatively, it was in breach of natural justice for the committee to proceed in her absence. Sullivan J rejected this argument. The appellant did not produce any medical evidence to support the claim that she was unable to attend and the committee had satisfied itself that she had received the relevant papers and knew of the hearing date.

Sullivan J observed at [6]: "the appellant was certainly entitled – whether under Article 6(1) or as a matter of fairness or natural justice – to an opportunity to attend the hearing. But if she chose not to avail herself of that opportunity then the committee was entitled to proceed in her absence."

The court held that lack of funds to pay for legal representation would not justify any further adjournment where there was no realistic prospect that the position would change in the reasonably near future, and where the appellant could have appeared herself (her legal representatives having refused to attend as a result of lack of funds). Sullivan J said: "Thus it will be seen that the primary reason put forward by the solicitors for their not attending the hearing is the lack of funds. That would not have prevented the appellant herself from attending the hearing and explaining the position to the committee. … In summary, there was simply no good reason for her failing to attend the hearing." The court went on to state that it was in the public interest, and the interests of both parties, to resolve the allegations as soon as reasonably possible. At [16] Sullivan J said:

> "Moreover the specific allegations against the appellant related, in the main, to a period between September 2005 and October 2006. It was clearly desirable that allegations, some of which went back to some two-a-half years, should be investigated without further delay. There is a clear public interest in allegations against members of the health professions being resolved as soon as reasonably possible. In addition, of course, speedy resolution of such allegations will be very much in the interests of the individual practitioners themselves who will be able to clear their names if it is concluded that the allegations against them are not well-founded."

8. ***R (Tinsa) v. General Medical Council [2008] EWHC 1284 (Admin)***

The appellant (who had been convicted of two offences of public order and failing to surrender to bail) claimed that the proceedings should have been adjourned after the

finding of serious professional misconduct as he was suffering from mental illness which prevented him from representing himself properly, and that the panel should have obtained psychiatric report to assist with sanction. The court (Underhill J) found that no medical evidence was brought before the panel to support any claim that the appellant was suffering at the time from any mental ill-health or felt under any difficulty in defending himself, still less that he wanted an adjournment. The court acknowledged that an appeal against a decision of the panel may, however, be allowed in circumstances where subsequent evidence establishes that an appellant was not in a fit state to defend himself at a hearing, even though the evidence in question was not before the panel at the time. However, the court held that the evidence before it did not prove that the claimant had not been in a fit state to conduct his own defence. There was no basis whatever on which the panel could be said to have erred in law in failing on its own initiative to propose an adjournment to obtain medical evidence.

9. ***R (Thompson) v. General Chiropractic Council [2008] EWHC 2499 (Admin)***

The claimant challenged the decision of the committee to hold a substantive hearing when a particular expert witness, whom the claimant proposed to call, would not be available. The committee had been given a list of dates of the expert's availability. The committee had chosen the hearing date, after considering the interests of all parties and the need to avoid unnecessary delay. It took the view that the expert's evidence was not necessary as it did not go to the heart of the case.

The court granted judicial review. Lloyd Jones J analysed the issue as being one of procedural fairness of the proceedings before the committee. Whilst courts would be slow to interfere with case management decisions taken by a professional disciplinary body, this was subject to the supervisory jurisdiction of the court to ensure that the parties were given a fair hearing. The evidence of the claimant's expert witness was crucial to his defence. The court made clear that it was expressing no view as to whether the proposed defence may or may not be valid, but it seemed to the court that it was a matter which was potentially relevant and which the claimant should be permitted to ventilate at the hearing before the committee. The court rejected the committee's claim that a further short adjournment (which would have permitted the expert to attend) would have resulted in any substantial prejudice to its obligations to hear cases promptly.

10. ***R (Raheem) v. Nursing and Midwifery Council*** **[2010] EWHC 2549 (Admin)**

The Administrative Court held that there had been no proper exercise of discretion by the Conduct and Competence Committee of the respondent Nursing and Midwifery Council as to whether it had been appropriate to continue in the absence of the appellant in respect of a hearing conducted to decide whether she had been guilty of misconduct. Holman J recognised that notice of the hearing had been properly served under the 2004 Rules even though the appellant had not received the recorded delivery envelope and was unaware of the hearing. However, the legal assessor did not give any sufficient advice or direction to the Conduct and Competence Committee as to the separate exercise of discretion to proceed in the absence of the practitioner under Rule 21. He gave no guidance as to how the committee should approach that exercise of discretion. Since it was clear on authority that to continue in the absence of a practitioner must be exercised with the "utmost caution", the learned judge said this was a significant omission from the advice given by the legal assessor. Further, there was no indication from the transcript that the committee broke off or adjourned to consider the matter, and it seemed to the judge that the chairman moved very rapidly to their ruling. Holman J said it was extremely important that a committee or tribunal in question demonstrates by its language that it appreciates that the discretion to proceed in the absence of the practitioner which it is exercising is one that requires to be exercised with care and caution. In the instant case, there was a fatal procedural defect in the approach of the committee. The appeal must be allowed and the whole matter reheard by the Conduct and Competence Committee of the NMC from scratch.

11. ***Khan v. General Teaching Council for England [2010] EWHC 3404 (Admin)***

The Administrative Court (Ouseley J) dismissed the appellant's appeal against the decision of the respondent council's professional conduct committee not to adjourn a hearing into her conduct, finding that, on the facts of the instant case, the committee had not erred in refusing to the grant adjournment. The appellant allegedly used racially and inappropriate language whilst teaching at a school. The appellant's request for an adjournment of the hearing before the respondent's professional conduct committee was refused and the hearing went ahead in her absence. A prohibition order for two years

was imposed. The essence of the appellant's case was that the adjournment she sought should have been granted, and that the hearing was unfair because it relied upon the transcribed words of the students concerned whilst she did not see the original statements, nor did the professional conduct committee or the General Teaching Council.

As to the adjournment, Ouseley J said that it was necessary for the appellant to show that the refusal of an adjournment was outside the proper exercise by the PCC of its discretion, that it erred in principle, was based on irrelevant considerations or ignored relevant ones, or was a thoroughly unreasonable or unfair decision. The learned judge held that the committee was right to proceed with the hearing in the absence of the appellant, and even if there was a proper case for an adjournment, the committee did not reach a decision which could in any way be described as wrong in principle or erroneous in the exercise of its discretion. In reality, there simply was no justification for an adjournment. On the merits of the appeal, it was for the appellant to show that the decision on the facts by the professional conduct committee was wrong. If the transcripts were accurate, and there was no reason the committee had to doubt that, especially as the committee knew that the appellant's representatives had had the opportunity to check the accuracy of the statements, sight of the original statements would not reveal whether there had been collusion or not, nor would it reveal whether there had been manipulation or not. That could only be addressed by examining the circumstances in which the statements came to be taken, the period of time between the allegations being made and the statements being taken, and the nature and contents of the statements themselves. The learned judge held that both bases of appeal, namely, wrongful refusal of an adjournment and a wrong decision on the facts, were not made out at all.

Public or Private Hearing

12. ***R (Neelu Chaudhari) v. The Royal Pharmaceutical Society of Great Britain [2008] EWHC 3190 (Admin)***

In the course of disciplinary proceedings against the claimant, a registered pharmacist, the claimant applied to the chairman of the disciplinary committee sitting as a statutory committee for the inquiry to be withdrawn. This was an interlocutory application and the point at issue was whether holding the application in private would be a denial of the

claimant's rights under Article 6 of the ECHR of a public hearing. In civil proceedings the general rule is that all hearings are held in public. However, CPR 39.2(3) provides that a hearing, or any part of it, may be in private if the court considers this to be necessary in the interests of justice. The notes in *Civil Procedure* make clear that the Strasbourg institutions have generally taken the view that interlocutory hearings are not determinative of civil rights and obligations within the meaning of Article 6(1) of the ECHR. These hearings are therefore generally not required to be in public. Accordingly, the court dismissed the claimant's application for a public hearing.

13. ***L v. Law Society [2008] EWCA Civ 811***

The Master of the Rolls considered whether an appeal against the Law Society's decision to revoke the membership of a student 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 rights under Article 6. The application was refused. The general rule was that, in the absence of exceptional circumstances, appeals should be heard in public. The convictions were relevant to an application to join a regulated profession, the members of which had to be capable of being trusted implicitly. Part of ensuring that public confidence was maintained was that proceedings such as the instant one were held in public.

DRAFTING THE CHARGES

14. ***R (Wheeler) v. Assistant Commissioner House of the Metropolitan Police [2008] EWHC 439***

In this case the applicant applied for judicial review of the decision of Assistant Commissioner House to uphold the earlier decision of a disciplinary panel which found him to be in breach of the code of conduct applicable to police officers. There were two breaches of the code of conduct alleged against the applicant, one being that he failed to ensure that another officer carried out "to an acceptable standard his duty with respect to the management and supervision of investigations into allegations of child abuse"; the second charge being that the applicant "failed to ensure that investigations were carried out by the team to an acceptable standard".

In quashing the decision of the Assistant Commissioner, Stanley Burnton J criticised the vagueness of the charges, and stated that the hearings before the panel and the Assistant Commissioner would have been better focused had both charges not been in the vague terms that they were. His Lordship stated at [6]:

> "Vagueness is a ground for judicial review if it leads to unfairness in the proceedings, and the danger with a vague charge is that the parties, and in particular the respondent, do not know with some precision what is alleged against them, and therefore are not fully able to address those matters in the course of a hearing."

His Lordship stated that it is sufficient if a charge is particularised subsequent to it being first formulated, but certainly it should be sufficiently particularised well before the hearing so that the respondent to disciplinary charges knows not just what it is alleged he failed to do, but in what respects he failed, so that he can see whether or not, consistent with his other duties, he could or should have done that which it is alleged he should have done.

15. ***Sheill v. General Medical Council [2008] EWHC 2967 (Admin)***

Foskett J was critical of the phraseology of a head of charge alleging dishonesty. He said that the head of charge was unspecific about the circumstances in which it was alleged that the medical practitioner had made a false claim. When a false or dishonest claim was made, for example, in a document, it would be usual for the document to be identified in the charge, perhaps by date, but certainly by description which showed clearly the source of the allegation. That was not done in this case and no request for particulars of the charge appears to have been made, either in writing before the hearing or in some application to the panel at the outset of the hearing. His Lordship quashed the panel's findings on the dishonesty charge.

16. ***Solicitors Regulation Authority v. Sharma*** **[2010] EWHC 2022 (Admin)**

The Divisional Court (Laws LJ and Coulson J) allowed the appeal of the Solicitors Regulation Authority on sanction from the decision of the Solicitors Disciplinary Tribunal to suspend for 3 years a solicitor who had been found to be dishonest. The court held that save in exceptional circumstances, findings of dishonesty would lead to striking off, and that the SDT was plainly wrong to conclude that the circumstances of the present case were exceptional such that the usual sanctions should not be applied.

17. ***Keazor v. Law Society [2009] EWHC 267 (Admin)***

The appellant's solicitor who had been a senior partner in his firm, argued unsuccessfully that recklessness should have been specified in the charges against him. The court (Maurice K LJ and Simon J) held that although the Law Society was required to refer specifically to dishonesty in the formulation of charges, there was no such requirement for recklessness. In any event, the solicitor had been given the opportunity to deal with the issue of recklessness at the tribunal.

18. ***Richards v. Law Society [2009] EWHC 2087 (Admin)***

The Divisional Court (Sir Anthony May P and Saunders J) held that the purpose of a rule 4(2) statement under the Solicitors (Disciplinary Proceedings) Rules 1994 (now rule 5(2) under the Solicitors (Disciplinary Proceedings) Rules 2007) is to inform the solicitor fairly and in advance of the case he has to meet. The rule 4(2) statement in this case did not put the case against Mr Richards on the basis found by the tribunal, namely, that the solicitor should have seen to it that the client had financial advice. However, the case was made clear in correspondence well before the hearing and accordingly, the solicitor was given fair and due notice of the financial advice point in advance of the hearing.

The Solicitors' Handbook 2009 says that it is likely that conduct unbefitting a solicitor as a concept will fade away in relation to any act or failing after 1st July 2007, which will be covered by the Solicitors' Code of Conduct 2007 as the Code is intended to be an all-embracing scheme of regulation. Similarly, the Code of Conduct of the Bar of England and Wales, 8th Edition (2004) contains fundamental principles applicable to all barristers and detailed requirements for self-employed barristers, employed barristers, acceptance and return of instructions, conduct of work etc. Part IX provides that any failure by a barrister to comply with provisions in the Code other than certain exempted paragraphs shall constitute professional misconduct.

19. ***R (Johnson) v. Professional Conduct Committee of the Nursing and Midwifery Council [2008] EWHC 885 (Admin)***

The grounds of challenge in this case were that the charges were insufficiently particularised, which was unfair and contrary to Article 6 of the ECHR. Specifically, the Claimants relied on Article 6(3)(b) which provides that those charged with a criminal offence have the right to adequate time and facilities for the preparation of their defence. The court held that the charges must be sufficiently particularised to enable those charged to know, with reasonable clarity, the case they have to meet and to prepare a defence. The PCC had not erred in this case. Whilst a challenge based on lack of particularity was not necessarily premature when made at the opening of a hearing, a stay would be an exceptional remedy, only to be used when it was clear that a fair trial was not possible.

20. ***Hutchinson v. General Dental Council [2008] EWHC 2896 (Admin)***

Charges brought against the appellant in respect of various hygiene related matters were found proved, his fitness to practise was found to be impaired, and an order for erasure was made by the professional conduct committee. The appellant appealed on the grounds that the bringing of certain of the charges against him amounted to an abuse of process. Blair J accepted that there was a considerable degree of vagueness in the charges, but however vague the charges were in terms of timing, they were explicit in terms of the behaviour alleged and it did not render a fair hearing impossible.

In considering the merits, Blair J said that there was no documentary or other evidence supporting the allegations. It was important to take account of the possible prejudice to the practitioner caused by factors such as delay and lack of specificity when considering the merits, and looking at the totality of the evidence, the case against the appellant on these charges was a weak one. In his view, it fell below the required standard of proof on the balance of probabilities. On that basis, rather than on the basis of misdirection, the court was satisfied that the committee's findings were wrong, and must be quashed.

21. ***Roomi v. General Medical Council [2009] EWHC 2188 (Admin)***

In this case Collins J allowed an appeal by the practitioner against the finding of impairment by reason of deficient professional performance on the grounds that the finding by the panel went beyond the allegations contained in the notice of hearing. The

appellant was able to call evidence to show that he had taken steps to improve his skills, and that evidence led the committee to decide that the deficiencies identified in the notice of allegation had been remedied. But the panel justified its finding of continuing deficiency on the basis of a failure by the practitioner to carry out regular or systematic medical and clinical audits. The judge criticised the legal assessor and said that the panel ought to have been advised that it could not properly rely on this matter unless it formed part of the allegations made against the practitioner. The whole hearing was on the basis that what was in issue was the practitioner's skill, nothing else.

22. ***Chauhan v. General Medical Council [2010] EWHC 2093 (Admin)***

The Administrative Court (King J) allowed the appellant consultant's appeal against findings of dishonesty and impairment on the basis of the Fitness to Practise Panel's failure to confine itself to the proper ambit of the disciplinary charges and for importing into its conclusions prejudicial factual matters which had not been stated in the notice of hearing.

The appellant applied for the post of consultant in trauma and orthopaedic surgery at an NHS trust. He faced charges of dishonesty in relation to his experience in revision surgery and hip resurfacings and his experience to undertake a technique known as the Birmingham Hip Resurfacing. King J said that insofar as the panel at stage one of its decision process, made material findings of fact adverse to the practitioner which could themselves have been the subject of a charge of professional misconduct, which however was not within the charges as formulated, then those findings could not properly or fairly be used by the panel to support its findings and insofar as the panel so used them, then the charges as formulated and found were liable to be vitiated and set aside. In ***Cohen v. GMC*** [2008] EWHC 581 (Admin), Silber J at para 48 said that findings in relation to any particular charge at stage one "must be focused solely on the heads of the charges themselves". King J said there were examples of the panel unfairly introducing into their considerations in determining whether dishonesty had been established, evidence directed at behaviour that was not the subject matter of any charge. The learned judge rejected a submission by the respondent that it was entitled to introduce such evidence even if strictly outside the ambit of the charges, as propensity evidence i.e. of the appellant's propensity to dishonestly exaggerate the true extent of his medical experience, or that it should have been clear to the appellant during the course of the hearing that the

respondent was inviting the panel to make findings wider than those strictly related to his experience.

23. ***Thaker v. Solicitors' Regulation Authority [2011] EWHC 660 (Admin)***

T appealed against the decision of the Solicitors' Disciplinary Tribunal that he be struck off the Roll of Solicitors. The issue was the way in which the charges had been drafted and the case opened by the Solicitors' Regulation Authority. The Administrative Court (Jackson LJ and Sweeney J) allowed T's appeal and ordered a rehearing before a new panel. The first ground was that the Tribunal erred in failing to grant an adjournment at the start of the hearing. The court readily acknowledged that the question whether or not to adjourn was a matter of the discretion of the Tribunal, but said that as the opening proceeded it became clear that the case presented by the Solicitors Regulation Authority went far beyond the allegations in the rule 4 statement containing details of the allegations, and at the very least the Tribunal should have granted a period of adjournment for T to consider matters. Further, by allowing the proceedings to range far and wide, and allowing submissions and evidence beyond the identified relevant transactions, the Tribunal unwittingly caused injustice to T. Additionally there were erroneous findings of fact made by the SDT. Jackson LJ said that drawing the threads together, if a solicitor is going to be struck off the Roll for acts of dishonesty and gross recklessness, he is entitled to a fair process and a fair hearing before that decision is reached. In this case T did not receive either a fair process or a fair hearing. This occurred because of the manner in which the case against him was pleaded and presented to the Tribunal. If the rule 4 statement alleged that T knew or ought to have known certain matters, the facts giving rise to that actual or constructive knowledge should be set out, and in a complex case the Tribunal needs to have a coherent and intelligible rule 4 statement, in order to do justice between the parties.

24. ***Levy v. Solicitors Regulation Authority [2011] EWHC 740 (Admin)***

In dismissing the appellant solicitor's appeal against a decision of the Solicitors Disciplinary Tribunal suspending him from practice for nine months for breaches of the Solicitors Accounts Rules, the Administrative Court (Jackson LJ and Cranston J) said that it was imperative that a tribunal did not proceed to sanction before having announced the basis of its findings on the substantive allegations. As a general principle fairness

demands that disputed issues which can substantially affect sanction should be resolved and be resolved in a procedurally fair manner, and that parties should then be able to address the tribunal on the appropriate sanction. The tribunal should announce its findings on any matters having a bearing on sanction and then provide ample opportunity for representations to be made on behalf of the solicitor about the sanction to be imposed. In the instant case, on the facts, there was no breach of these principles. The tribunal had resolved in a procedurally fair manner the key issue affecting sentence, namely, it had discarded the dishonesty allegation. The tribunal knew about the Defendant and his background and was aware of the nature of the firm, its size and the work it undertook.

INVESTIGATING THE COMPLAINT

25. ***R (Sunaina Chaudhari) v. The Royal Pharmaceutical Society of Great Britain [2008] EWHC 3464 (Admin)***

The mother of a child who died aged 5 months brought proceedings against the Royal Pharmaceutical Society of Great Britain on the grounds of its failure to determine her complaint against its members properly as regards prescription of drugs for the baby. The complaint in question related to two matters: first, the dispensation of drugs by a retail pharmacy, and secondly, the dispensing of drugs by a hospital pharmacist when the child was an in-patient.

In dismissing the complainant's renewed application for permission to apply for judicial review, Blair J considered the statutory basis upon which the Society considers complaints made against pharmacists. These are dealt with under statutory rules and guidance which is issued to the committee and sets out the principles to be applied to ensure that the only cases which are referred to the disciplinary committee are those in which there is a real prospect of establishing misconduct which would render the person concerned unfit to remain on the register. The court had to consider both the legal framework as well as the factual framework. So far as the factual framework was concerned, in the first complaint, it was not possible to identify which of the two pharmacists on duty at the pharmacy dispensed the drug concerned, and so far as the hospital complaint was concerned it could not be concluded that the named pharmacist was responsible for dispensing the relevant prescription. A similar factual situation was

considered in *Woods v. General Medical Council* [2002] EWHC 1484 (Admin), where Burton J referred to the balancing that has to take place on these occasions and referred further to the "real prospect of success" test. He held that on that basis a decision of the GMC was not susceptible to challenge and dismissed the claim. Blair J. held that the same principle applied in this case.

26. ***R (Remedy UK Limited) v. General Medical Council*** **[2010] EWHC 1245 (Admin)**

In this case the claimant company, which was founded to represent doctors and campaigned on a wide range of medical and professional issues affecting doctors, especially appointments for junior doctors' training posts, sought to subject the Chief Medical Officer for England and the chair of the Department of Health's recruitment and selection steering group, to the General Medical Council's disciplinary processes. The claimant company applied for judicial review of the decision of the GMC not to refer allegations of misconduct to case examiners arising from a number of public investigations which had recognised that the appointments system was a deeply flawed scheme.

The Divisional Court (Elias LJ and Keith J) in dismissing the application for judicial review on the grounds that the allegations against the Chief Medical Officer and the chair of the steering group did not fall within the Medical Act 1983 section 35C(2), held that the concept of fitness to practise was not limited to clinical practice alone and could extend to other aspects of a doctor's calling. There was no reason why a doctor who was seriously deficient in research, or who engaged in teaching students in an incompetent manner, could not properly be subject to the GMC's fitness to practise procedures for those failings. However, the administrative functions being exercised by the Chief Medical Officer and the chair of the steering group could not be described as exercising functions which were part of their medical calling or sufficiently closely linked to the practice of medicine. Their essential skills were not medical. The making and implementation of government health policy was not a medical function, even where the policies in issue directly related to doctors and closely affected the medical profession. The functions being exercised by the Chief Medical Officer and the chair of the steering group were too remote from the profession of medicine to bring them within the scope of section 35C(2) of the Medical Act 1993. To fall within section 35C the conduct had

to be of a kind which justified some kind of moral censure, or involve conduct which would be considered disreputable for a doctor.

27. ***R (North Yorkshire Police Authority) v. Independent Police Complaints Commission*** **[2010] EWHC 1690 (Admin)**

North Yorkshire Police Authority applied for judicial review of the decision of the Independent Police Complaints Commission ("IPCC") upholding a complaint and determining that it related to police conduct rather than to direction and control of a police force. The police authority refused to record a complaint about the "conduct" of the Chief Constable relating to the investigation of treatment to a patient in a care home prior to her death on the grounds that the complaint related to the direction and control of a police force and was outside the scope of the IPCC.

His Honour Judge Langan QC, sitting as a judge of the High Court, in dismissing judicial review proceedings held that the word "conduct" did not carry with it the notion that the behaviour must be of a particular quality, whether good or bad and the IPCC was right to treat the complaint as one which related to the conduct of the Chief Constable. The concept of direction and control was essentially concerned with matters which are of a general nature and, on this basis, a decision by a chief officer which is confined to a particular subject falls outside the scope of direction and control. The judge rejected the "flood-gates argument" that persons dissatisfied with a decision not to commence an investigation, or within a decision after investigation that there should be no prosecution, might overload the system by making pointless requests to chief officers to have the matter reconsidered. The instant case was concerned with the recording of a complaint which was, in essence, a matter of registration. If a compliant is repetitious or an abuse of the complaints procedure, it can be disposed of on an application for dispensation to the IPCC, and the availability of the dispensation procedure mitigates any fear that the system may become clogged up.

28. ***R (Rycroft) v. Royal Pharmaceutical Society of Great Britain*** **[2010] EWHC 2832 (Admin)**

The Administrative Court refused the claimant's application for judicial review on the basis that the Society had not acted unlawfully when it reconsidered whether to refer fitness to practise allegations to its Investigating Committee. The claimant was employed

as the superintendent pharmacist for a chain of pharmacies owned by a company. The Society received a complaint alleging the company was involved in re-supplying patient-returned medication to customers. Wyn Williams J in refusing to quash the Registrar's referral of the allegation said that the episode occurred within 5 years of the referral and consequently the Registrar was bound to refer the allegation under the Rules. Rule 9 of the 2007 Rules provides that the Registrar shall not refer an allegation to a fitness to practise panel if more than 5 years have elapsed since the circumstances giving rise to the allegation, unless the Registrar considers that it is necessary for the protection of the public, or otherwise in the public interest, for the allegation to be referred. The learned judge said he had no difficulty in proceeding on the basis that the Registrar is under an implicit obligation to make a referral within a reasonable time. However, he did not accept that a failure to make a referral within a reasonable time amounts to a reason to quash the referral and stay the proceedings unless it is also established that the failure to act within a reasonable time has caused prejudice to such an extent that no fair disciplinary process is possible or that it is unfair for the process to continue. In the instant case, there was no such prejudice, and the referral was within 5 years on any view. Whether the Investigating Committee considered it ought to refer the allegation to the Disciplinary Committee remained to be seen, but the decision of the Registrar was lawful.

29. ***R (Khan) v. Independent Police Complaints Commission*** **[2010] EWHC 2339 (Admin)**

This was an application for permission to apply for judicial review of a decision of the IPCC when it decided not to recommend the institution of misconduct proceedings against a number of police officers. In an incident in June 2007 it was alleged that the claimant and others were stopped and put in the back of a police van where they were subjected to violence and racial abuse before arriving at the police station. After a trial lasting almost a month all the police officers were acquitted. In dismissing the claimant's application for judicial review, Sir Michael Harrison said that there was no dispute that the IPCC's decision was susceptible to judicial review, although as Lord Bingham said in *R v. Director of Public Prosecutions ex parte Manning* [2000] 3 WLR 603 the power to review a decision not to prosecute (which is analogous to a decision not to recommend misconduct proceedings) is one to be exercised sparingly, albeit that the standard of review should not be set too high so as to deny a citizen an effective remedy. In *R (B) v.*

Director of Public Prosecutions [2009] 1 WLR 2072, Toulson LJ described judicial review of a prosecutorial decision as a highly exceptional remedy. In effect he stated that a prosecutor can ordinarily be expected to have properly informed himself and asked himself the right questions before arriving at a decision whether or not to prosecute.

30. ***Shaikh v. (1) National Co-operative Chemists Limited and (2) Royal Pharmaceutical Society of Great Britain*** **[2010] EWHC 2602 (QB)**

Nicola Davies J dismissed the claimant's appeal from the judgment of the master ordering that the claim form as against the second defendant, Royal Pharmaceutical Society of Great Britain, be struck out and the action be dismissed. Following a complaint from the first defendant, the claimant's former employer, the Society investigated the complaint and referred it to its Investigating Committee. In essence, the claimant contended that the first defendant was wrong to refer what was a contractual matter to the Society and the Society was wrong to investigate the complaint. He began proceedings against both defendants for damages under the Protection from Harassment Act 1997. The learned judge held that there was no reasonable prospect of the claimant succeeding on his claim, and the actions of the Registrar and the Society were at all times such that they came within the exclusion provided by section 3(b) of the Protection from Harassment Act 1997. Section 3(b) provides exclusion to any alleged course of conduct if the person who has pursued it shows that it was pursued under an enactment or rule of law. The Pharmacists and Pharmacy Technicians Order 2007 gave the Registrar of the Society power to consider allegations, and the 2007 Rules included the carrying out of any appropriate investigations and the decision to refer an allegation to the Investigating Committee. Accordingly there could not be a reasonable prospect of the claimant succeeding upon any claim pursuant to the 1997 Act as against the Society.

31. ***Zia v. General Medical Council, 18th May 2011***

A hospital trust that had employed Z complained about his performance and competence to the GMC. The GMC's registrar referred Z for a performance assessment pursuant to rule 7(3) of the General Medical Council (Fitness to Practise) Rules 2004. Z refused to submit to the assessment and the registrar referred the allegations to the GMC's fitness to practise panel. The panel found the allegations proved and ordered Z's suspension from the register. Z appealed against that decision and in the High Court argued, as a preliminary issue, that the registrar's referral to the fitness to practise panel

was impermissible as contrary to the obligation to refer any allegation in the first instance to case examiners. The Court of Appeal allowed the GMC's appeal against the decision of the High Court in favour of Z on this point. The Court of Appeal held that the stated objective of the Medical Act 1983, as set out in section 1, was for the GMC to protect, promote and maintain the health and safety of the public and the purpose of the 2004 Rules was to achieve a balance between meeting that aim and regulating the procedure for investigation and resolution of allegations against medical practitioners. Whilst the majority of cases were considered by both the registrar and case examiners, there was no inflexible requirement that a matter had always to be considered by the case examiners before proceeding further. The rules enabled the registrar to carry out his own investigation and to direct a performance assessment, and because of Z's non-compliance the registrar's decision to refer the allegations directly to the panel was lawful.

32. ***R (On the application of D) v. Independent Police Complaints Commission, 24th May 2011***

D was raped in January 2005 when she was 15. F, a police officer, was assigned to the case as the sexual offences investigation trained officer. In the months leading up to the trial of D's alleged assailant D's mother asked F many times about mobile telephone records which would corroborate D's account. F confirmed each time that the call data was available. In fact it was never obtained by the police and D's alleged assailant was in consequence acquitted. Following an internal police inquiry, the IPCC undertook its own investigation into D's complaint that F had not given her the right information about the call data. The IPCC concluded that it was not possible to prove on the balance of probabilities that F had been dishonest or had failed in her duties, and there was insufficient evidence to conclude that there had been misconduct. The Administrative Court (Collins J) granted judicial review and held that F gave D and her mother inaccurate information and she should have known it was inaccurate. F failed in her duty to D and her family and it was an important factor that F knew that D was vulnerable, and was nervous about giving evidence, and might not do so if she knew that there was no corroborating telephone call evidence. There was a prima facie case that F's conduct fell well below what was required by the Police (Conduct) Regulations 2004, and the IPCC's decision not to request disciplinary action against her was bad in law. However because of the substantial lapse of time since the events in question there was no longer

any point in ordering disciplinary proceedings. Instead, a declaration that the IPCC's decision was unlawful was adequate.

33. ***Lim v. Royal Wolverhampton Hospitals NHS Trust [2011] EWHC 2178 (QB)***

Slade J held that the defendant NHS Trust would be in breach of a doctor's contract of employment by conducting a hearing about his capability without first referring the matter to a National Clinical Assessment Service panel for assessment, and the panel advising that the doctor's performance was so flawed that no action plan would have a realistic chance of success.

The claimant was a consultant anaesthetist employed by the Royal Wolverhampton Hospitals NHS Trust and the claim concerned a proposed capability and conduct hearing to be held by the defendant. The court held that a capability hearing should not be held until an assessment panel of the National Clinical Assessment Service had determined that his professional performance was so fundamentally flawed that no educational and/or organisational action plan had a realistic prospect of success. Slade J held that the defendant would not be in breach of any contractual obligation in pursuing allegations of misconduct against the claimant but that it would be in breach of contract in failing to comply with the procedure promulgated for dealing with issues of capability.

DISCLOSURE

34. ***R (Johnson) v. Professional Conduct Committee of the Nursing and Midwifery Council [2008] EWHC 885 (Admin)***

A second challenge to the PCC's decision in this case was that the NMC had not complied with its duty to gather evidence in favour of the claimants (as well as against them) and that this also breached their Article 6 ECHR rights. The claimants faced a number of charges in disciplinary proceedings relating to their management of a nursing home. The court held that there was no free-standing positive duty on those bringing disciplinary proceedings to gather evidence in favour of registrants as well as evidence against them (*Jespers v. Belgium* distinguished). The court held that whilst there was a duty to prevent inequality of arms, there was no inequality of arms on the facts of this case.

The claimants had not been at a disadvantage in obtaining evidence from documents. Whether they had been afforded adequate time and facilities for the preparation of their defence was fact specific.

35. *Financial Services Authority v. Information Commissioner [2009] EWHC 1548 (Admin)*

The appeal by the FSA raised a short but important question of construction as to the true meaning and effect of Section 348 of the Financial Services and Markets Act 2000 (FSMA). Section 348 of FSMA provides that confidential material relating to the business or other affairs of a person must not be disclosed by a primary recipient, or by any person obtaining the information directly or indirectly from a primary recipient, without the consent of a person concerned to whom the information relates. The purpose of Section 348 is to protect confidential information that has found its way into the FSA's hands.

In the instant case, Munby J. held that the names and identities of certain firms involved in the provision of selling endowment mortgages where higher charges had been applied after the policies had been taken out could only have come to the knowledge of the FSA as a result of information supplied to it by the relevant firm, and accordingly the Information Tribunal was wrong to order disclosure sought under the Freedom of Information Act 2000. Similarly, disclosure of the lists of firms investigated in relation to equity release schemes and found to have failed to explain to customers the advantages and disadvantages of such schemes would have meant disclosure of matters relating to the business or other affairs of the firms. However, disclosure of the list of firms used for the exercise generally was quite different, and did not involve disclosure of confidential information contrary to the statute.

36. *R (Amro International SA) v. Financial Services Authority [2010] 3 All ER 723*

The Financial Services Authority was entitled under the Financial Services and Markets Act 2000 to appoint investigators and to issue notices to order production of documents from a firm of accountants at the request of the United States Securities and Exchange Commission without subjecting the request to critical examination. The FSA was under

no duty to investigate or verify the information provided by an oversees regulator when deciding whether to exercise its powers.

The Court of Appeal (Sir Anthony May P, Stanley Burnton and Jackson LJJ) said that financial transactions were increasingly international and it was of the greatest importance that national financial regulators co-operated, particularly where financial fraud or misconduct was suspected. There was nothing in the Financial Services and Markets Act 2000 that required the FSA to second-guess a foreign regulator as to its own laws and procedures, or as to the genuineness or validity of its requirement or information or documents. The FSA had to, and did, consider the request when deciding whether to exercise its statutory discretion by the exercise of its investigative powers. It was clear that the FSA decided to exercise its investigative powers having considered the matters required by the Act of 2000. Accordingly, there was no error of law or principle in the FSA's decision to appoint the investigators who were appointed to assist the SEC with its ongoing civil action in New York.

37. ***Quinn Direct Insurance Limited v. Law Society [2011] 1 WLR 308 CA***

The Court of Appeal (Sir Andrew Morritt C, Rimer and Jackson LJJ) held that there was no provision or term to be implied into the statutory scheme for the regulation of solicitors, constituted by the Solicitors Act 1974, subordinate legislation and agreements made thereunder, entitling or obliging the Law Society to produce to a qualifying insurer documents emanating from a firm of solicitors into which it had intervened which were subject to the privilege of a client of the firm. Accordingly, the claimant, an insurer who had issued professional indemnity insurance to a firm of solicitors prior to its intervention, and who themselves had entered into the Qualifying Insurer's Agreement with the Law Society, was not entitled to production of documents, nor was the Law Society obliged to comply with any request in respect of the firm's client's confidential and privileged documents or information.

Following intervention by the Law Society into the firm of South Bank Solicitors on the grounds of suspected dishonesty on the part of one partner and failure to comply with the Solicitors' Accounts Rules by another partner, the claimant, Quinn Direct Insurance Limited, issued proceedings against the Law Society seeking an order to permit the claimant, as the professional indemnity insurer for the firm, to inspect and take copies of

documents for the purposes of considering whether the claimant was obliged to indemnify a partner of the firm, I. A number of claims were made by former clients of the firm and notified to the claimant, who refused to indemnify the first partner on the grounds of his fraud, and was concerned to know whether it was entitled to decline to indemnify partner I. The claimant's solicitors wrote to the intervention agent requesting access to any files which he might have in respect of a number of specific property transactions. The intervention agent refused on the grounds that the information was confidential, although the Law Society allowed the claimant access to the files relating to transactions where the client had made a claim against the firm which had been notified to the claimant, on the basis that the making of the claim constituted a waiver of client confidentiality and privilege. The Court of Appeal refused the claimant's application for an order requiring the Law Society to permit it to inspect and take copies of all documents of the firm within the Law Society's power and control on grounds that the privilege of the client was a fundamental human right. If the client consents or his privilege is impliedly waived by a claim against the solicitor the Law Society may produce such documents to the qualifying insurer.

38. ***Vaidya v. General Medical Council [2010] EWHC 2873***

In this case, the Queen's Bench Division dismissed Dr Vaidya's application to set aside a general civil restraint order made against him. In her judgment Mrs Justice Nicola Davies DBE referred to the background of Dr Viadya's numerous claims against the General Medical Council and others. In summary, since 2007 Dr Vaidya had issued proceedings in the Queen's Bench Division and the Administrative Court, in county courts and the Employment Tribunal against the GMC, named individuals who had been involved in the GMC disciplinary process against him, NHS Trusts, named doctors employed by those Trusts, the Crown Prosecution Service and Her Majesty's Court Service. The causes of action were many and varied. They included complaints of racial and sexual discrimination and harassment, harassment contrary to the Protection from Harassment Act 1997, breaches of Articles 3 and 6 of the ECHR, claims for professional negligence, libel, malicious falsehood, negligent misstatement, conspiracy to injure and claims pursuant to the Data Protection Act. Damages claimed in some proceedings exceeded £1 million, and it was of note that such damages were claimed in actions against individually named doctors.

The learned judge stated that she was satisfied that Dr Vaidya persists in issuing claims and applications which have been found to be totally without merit. It was clear that he had been warned by judges of the consequences of repeatedly issuing proceedings, but had demonstrated he was not deterred by the threat of an extended civil restraint order. In her judgment, the learned judge said that, based upon the evidence and given the history of the matter and the continuing conduct of Dr Vaidya, she did not believe that an extended civil restraint order would provide adequate protection to prospective defendants, and that a general civil restraint order was not only justified but was necessary.

ABUSE OF PROCESS

39. ***Selvarajan v. General Medical Council [2008] EWHC 182 (Admin)***

In this case the practitioner was acquitted of a criminal charge of conspiracy to defraud arising out of dishonest conduct which resulted in a loss to the primary care trust of some £150,000. The jury failed to reach a verdict and by the time of the re-trial the practitioner's co-defendant had become ill, and not guilty verdicts were entered against the practitioner and the co-defendant as a trial against the practitioner alone was thought to be unfair. In subsequent disciplinary proceedings the practitioner admitted a charge of professional misconduct but appealed against the sanction of erasure in part due to the passage of time. Blake J observed that the absence of any common law double jeopardy rule in professional misconduct proceedings was specifically noted in *R v. Statutory Committee of the Pharmaceutical Society of Great Britain* [1981] 2 All ER 805 where disciplinary proceedings had been brought in respect of conduct for which there had been an acquittal. Blake J held (contrary to the views of the GMC and the legal assessor) that delay was relevant to sanction, but nonetheless this was a very serious and sustained dishonest conduct in a professional capacity, totally undermining the trust and respect that should be accorded to medical professionals and therefore demanded a severe sanction to vindicate the standing of the profession in public esteem. Accordingly the practitioner's appeal was dismissed.

40. ***R (Sinha) v. General Medical Council [2008] EWHC 1732 (Admin); [2009] EWCA Civ 80***

In this case criminal proceedings of inappropriate sexual behaviour towards female patients had been dropped following an extensive *voire dire* during the trial. The *voire dire* focused on the conduct of the investigation by the police and the suggestion that the evidence of the complaints may have been contaminated or they may have colluded, meaning that their evidence against Dr Sinha was unreliable.

In subsequent disciplinary proceedings based on the same allegations the practitioner claimed that no subsequent investigation by the GMC could remedy the failures of, retrieve the material which had been lost, or undo the damage caused by the flawed police investigation. The panel found the allegations proved. On appeal against the finding of misconduct and the sanction of erasure, the claimant claimed that the panel failed to take into account the collusion of witnesses and contamination of evidence resulting in the dismissal of the criminal proceedings. The court (Irwin J), rejecting this claim, held that there is no strict rule of double jeopardy in relation to the dismissal of criminal proceedings in subsequent disciplinary proceedings.

Dr Sinha's renewed application to the Court of Appeal for permission to appeal was dismissed by Wall LJ on 18th February 2009. In a reserved judgment, Wall LJ said:

> "7. …criminal proceedings are designed to establish guilt or innocence by a member of the public with a view to punishment by society if the verdict is guilty, and acquittal if the verdict is not guilty. Proceedings before a professional body are designed to establish whether or not professional men and women have fallen below the standards expected of their profession; whether or not the professionals concerned should remain members of the profession concerned, and if so, on what terms.
>
> 8. A moment's thought will suffice to demonstrate that the mere fact of an acquittal in criminal proceedings cannot be the be all and end all of the matter for other purposes. Supposing, for example, that a professional man is acquitted of murder or grievous bodily harm by a jury on the direction of the judge on a purely technical and unmeritorious point. He is not guilty in the eyes of the criminal law. But that would not stop – nor should it stop – his professional body re-investigating the matter and deciding both that he had been guilty of serious professional misconduct, and that he should be disciplined according to the rule of the profession concerned. A professional body is, after all, charged with the duty to protect the public from members of the profession which fall below its standards.

9. In the present application, as I have already indicated, a judge in the crown court has found that, because of the manner in which the investigation into the applicant's conduct was handled by the police, a fair trial in the criminal court was not possible. After an extensive *voir dire* in the absence of the jury, the prosecution offered no evidence and the judge directed the jury to bring in a verdict of not guilty. So the applicant asks: "if the Crown Court judge thought I could not have a fair trial, how can my professional body conduct such a trial and find me guilty?"

10. The answer, of course, as I have already stated, is that the functions of the Crown Court and the GMC are different. The hearing before the FPP was not a second criminal trial. It was an investigation by the FPP into the applicant's professional conduct. The fact that the applicant had been acquitted in the criminal proceedings was plainly a factor in the matters they had to consider. But it was not conclusive in the applicant's favour."

41. ***Virdi v. Law Society [2009] EWHC 918 (Admin), [2010] EWCA Civ 100***

In this case the Solicitors Disciplinary Tribunal found five allegations relating to money laundering and dishonest transactions proved against the appellants' solicitor. The Tribunal gave an extempore judgment finding the appellant grossly reckless and ordering suspension from practice. Its written findings were not delivered until almost one year after conclusion of the hearing. It also emerged that the tribunal's clerk had assisted substantially in drafting the reasons, and the appeal raised issues as to the lawfulness of the part played by the clerk to the tribunal.

The Divisional Court (Scott Baker LJ and David Clarke J) considered that the delay in delivering the tribunal's written reasons was both inordinate and inexcusable. However, the court was not persuaded that the delay had caused any injustice to the appellant because he knew the decision of the tribunal when it was announced and the basic reasons for it, and his suspension still had another 20 months to run. The appellant's main ground of appeal related to the tribunal clerk. The Court heard that it was customary for the clerk to retire with the tribunal, hear its discussions and decisions and take a note. It was also customary for the clerk to have the initial responsibility for producing the written record, as he or she is the best person for ensuring that the record captured the tribunal's decisions and reasons accurately and that nothing had been overlooked.

In dismissing the appeal both the Divisional Court and the Court of Appeal (Jacob, Lloyd and Stanley Burnton LJJ) held that the important basic fact was that the tribunal gave its decision orally and outlined its reasons for it, and on the evidence the clerk took no part in the decision-making process. The order was drawn up immediately following the hearing and the appellant's suspension began to run at that point. Thereafter the tribunal was functus officio.

Stanley Burnton LJ said:

> "33. In my judgment, the procedure of the Tribunal included their withdrawing to consider their decision in private with their clerk and her role in this case. (Counsel for the appellant) submitted that the procedure of the Tribunal within the meaning of rule 31(a) is confined to the trial process. There is no basis for so limiting the rule. The procedure of the Tribunal did not come to an end when they retired to consider their decision. As was held in *Baxendale-Walker* [2006] EWHC 643, once they had announced their decisions, both on whether the appellant had been guilty of serious professional misconduct and on sanction, they were functus officio in that they could not reconsider or change those decisions; but they retained the power and the duty to provide adequate written findings. The provision of formal written findings is as much part of the procedure of the Tribunal as the trial process and the announcement of their decisions. But if I am wrong about this, I have no doubt that the Tribunal had implied power, if power was required, to permit or to invite their clerk to retire with them and to assist them in the manner she did in this case.
>
> 34. The assistance of the clerk in drafting the formal written Findings of the Tribunal occurred and occurs after the decision of the Tribunal has been given orally and its formal order filed with the Law Society. At that point the decision is effective, and the Tribunal has no power to reconsider it: *Baxendale-Walker* at paragraphs 23 to 28. If follows that what occurs subsequently cannot in general give rise to a ground of appeal against the decision."

The Court distinguished two Hong Kong Court of Appeal cases of *Au Wing Lun v. Solicitors Disciplinary Tribunal* CACV 4154/2001 and *A&B Solicitors v. Law Society of Hong Kong* CACV 269/2004 where the clerk had retired with the Tribunal and drafted its findings before it had given its decision and made its order. In those cases the Court considered that there was a grave suspicion that justice had not been done, in that it was unclear whether the reasons for the decision of the Tribunal were in fact its reasons rather than the clerk's. In *Virdi,* Stanley Burnton LJ at [39] said that the facts of those cases differed from the present, in which it was conceded that on the basis of the facts as now known, nothing untoward occurred. The Findings of the Tribunal in *Virdi* were "clearly their Findings", and "in these circumstances, it is inappropriate to consider issues

that could conceivably arise in other cases, particularly since the rules of the Tribunal now make express and specific provision on the role of the clerk".

42. ***R (Colman) v. General Medical Council; R (Hickey) v. General Medical Council*** **[2010] EWHC 1608 (Admin)**

In each of these applications for judicial review, the claimants challenged the decision of the Professional Conduct Committee of the General Medical Council that they had been guilty of serious professional misconduct, and that their respective names be erased from the register. Both applications gave rise to the same issue, namely, whether the determination of the committee was in each case rendered unlawful by virtue of apparent bias. Both claimants argued that that was the effect of the involvement of the GMC's deputy registrars in the preparation of the proceedings, in preparing a draft determination in advance of the hearing, and in retiring with the committee when it considered its determination.

Owen J refused both applications, holding that the role of the deputy registrars was not that of a prosecutor but was essentially to assemble the material on which a screening decision would be made. The draft determinations had not influenced the panel. Whilst the deputy registrars were present throughout the deliberations of the panel they played no part in the deliberations and, on the evidence, the cases could not be identified as cases where an outsider had dealings with the panel or could have influenced the panels. The deputy registrars were present as secretaries and the panels were made up of a substantial number of independent medical practitioners, and the integrity of the proceedings were subject to the further safeguard of the presence of the legal assessor who was under a specific duty to inform the panel of any irregularity in the proceedings. A fair minded and informed observer would not consider that there was a real possibility that either panel was biased.

43. ***Swanney v. General Medical Council [2008] STL 646***

In this case the Inner House of the Court of Session was asked to determine whether the GMC had locus to pursue disciplinary proceedings against a medical practitioner when the conduct complained of occurred while he was not registered with the GMC, took place outside the United Kingdom, and had already been subject to disciplinary proceedings in a different jurisdiction.

The Inner House rejected Dr Swanney's argument that conduct which took place in Canada while he was not registered with the GMC could not be dealt with in proceedings before the GMC. Section 36(1)(b) of the Medical Act 1983 states that the GMC can take proceedings against practitioners "whether while so registered or not". The Inner House noted that the whole purpose of GMC proceedings was to protect the public, and observed that: "If the contrary view [the legislation did not permit an inquiry] were accepted it would mean that a practitioner whose conduct could be regarded as serious professional misconduct in some other jurisdiction could come to the United Kingdom and practice medicine here with impunity [and] be a danger to the public. Such a result would undermine the objective of the respondents, enshrined in section 1(1A) of the 1983 Act, which provides that the main objective of the respondents is to "protect, promote and maintain the health and safety of the public.""

44. ***R (Jenkinson) v. Nursing & Midwifery Council [2009] EWHC 1111 (Admin)***

Following her conviction for causing grievous bodily harm with intent, the claimant had been found guilty of misconduct by an earlier committee of the NMC and struck off the nursing register. Her conviction was subsequently quashed by the Court of Appeal, Criminal Division, when it became clear that the expert evidence founding the conviction, namely, how the ventilator of a patient in her charge operated, was erroneous. Thereafter the claimant sought to have the committee's decision to strike her off the nursing register set aside. The subsequent committee accepted the advice of its legal assessor that it had no jurisdiction to set its original decision aside, and declined to do so.

The NMC ultimately supported the claimant's judicial review application, and sought guidance as to how it should deal with situations such as this. Cranston J, in granting the application and quashing the original decision to strike the claimant off the nursing register, said that it was unwise for the court to provide specific guidelines. However, it was plain from *Akewushola v. Secretary of State for the Home Department* [2000] 1 WLR 2295 CA and *Wade and Forsyth on Administrative Law*, 9th Edition (2004) at page 262, that the powers of the NMC were not stillborn and that in cases of accidental slips, mistakes, flaws or miscarriage of justice, it had the power to act and rectify a mistake. It was clear on the facts of the instant case that the original decision that the claimant was guilty of

misconduct, so that it was appropriate to strike her off the nursing register, was based on a mistake, namely that she was guilty of a criminal offence. Once that conviction was quashed, the subsequent finding of misconduct and sanction fell away. Accordingly, the original decision amounted to a miscarriage of justice based upon a mistake.

45. ***R (Coke-Wallis) v. Institute of Chartered Accountants in England and Wales [2009] EWCA Civ 730***

In September 2003 the appellant was convicted in Jersey of an offence contrary to the Financial Services (Jersey) Law 1998 (the conviction complaint). In April 2005 ICAEW's disciplinary tribunal dismissed a formal complaint based on the Jersey conviction in the belief that there was no corresponding offence in England and Wales. In March 2006 a second complaint (the conduct complaint) was preferred against the appellant based on the underlying facts and the appellant's contravention of directions given by the Jersey Financial Services Ombudsman. It was agreed that the conduct complaint relied on the same nexus of facts as the conviction complaint.

The Court of Appeal (Anthony May P, Arden and Jacob LJJ) held that the two complaints did not allege the same thing: the discreditable act for the purposes of the conviction complaint was the fact of the conviction; the discreditable act for the purposes of the conduct complaint was the underlying conduct. The discreditable conduct alleged in the conviction complaint was the fact of the conviction on indictment. The discreditable conduct alleged in the conduct complaint was acting contrary to the directions of the Jersey Financial Services Commission. Moreover the conviction proceedings did not proceed to an adjudication before the disciplinary committee on its merits, and there was nothing unfair, unjust or oppressive in bringing the subsequent conduct complaint, and there was a compelling public interest in doing so.

In giving the leading judgment, Sir Anthony May P at [13] said: "In my view, this appeal raises two main points: that is, first, whether by virtue of the first tribunal dismissing the conviction complaint the principles of *autrefois acquit* or *res judicata* apply to the conduct complaint; and, second, if not, whether bringing the conduct complaint was an abuse." The Court of Appeal found that the answer was "no" to each point.

46. ***R (Coke-Wallis) v. Institute of Chartered Accountants in England Wales [2011] 2 WLR 103 SC***

The Supreme Court held that the doctrine of cause of action estoppel applied to successive complaints before a professional disciplinary body; that disciplinary proceedings were civil in nature and, therefore, the principles of res judicata applied and there was no reason why cause of action estoppel should not apply to successive sets of proceedings before the institute's disciplinary committee.

The Supreme Court so held in allowing an appeal by the claimant, Piers Coke-Wallis, a chartered accountant, against the Court of Appeal who had upheld the dismissal of his application for judicial view of the decision by the disciplinary committee of the institute to refuse to dismiss a second complaint based on the same facts of a first complaint that had been dismissed on the merits. The first complaint had been dismissed by a disciplinary committee in April 2005 on the basis that the claimant's conviction in Jersey of an offence under the Financial Services (Jersey) Law 1998 did not correspond to one which was indictable in England and Wales. The institute then preferred a second complaint in March 2006 based on the facts that gave rise to the original conviction. The Supreme Court held that what had been called "the conviction complaint" and the "the conduct complaint" were not accurate descriptions. The dismissal of the first complaint against the claimant was a final decision on the merits and, in all the circumstances, all the constituent elements of cause of action estoppel were established. Since the first and second complaints relied upon the same conduct, once the first complaint was dismissed, it was contrary to the principles of res judicata to allow the institute to proceed with the second complaint.

47. ***Frankowicz v. Poland ECtHR 16th December 2008 (Application number 53025/99)***

The applicant, a gynaecologist, made critical remarks of another doctor in a medical report. He was charged with and found guilty of unethical conduct, in breach of the principle of professional solidarity, contrary to the Polish Code of Medical Ethics. He claimed that there had been an interference with his right to freedom of expression, contrary to Article 10 of the ECHR, in that he should have the right to state his opinion on the treatment received by his patient. The court held that the applicant's Article 10 rights had been violated. An absolute prohibition of any criticism between doctors was

likely to discourage doctors from providing patients with an objective opinion on their health and treatment, which could compromise the very purpose of the medical profession. The interference with the applicant's Article 10 rights was disproportionate.

HUMAN RIGHTS AND FAIRNESS

Independent Tribunal

48. ***Helow v. Secretary of State for the Home Department (Scotland) [2008] 1WLR 2416***

In this important case on apparent bias by reason of the judge's membership of a body or association, the House of Lords dismissed the appeal by Fatima Helow from the decision of the Inner House of the Court of Session dismissing her application alleging that the Lord Ordinary, Lady Cosgrove, should have recused herself on the hearing of an immigration appeal tribunal matter on the grounds that she belonged to an association of Jewish lawyers. Applying the test in *Porter v. Magill* [2002] 2 AC 357, the House of Lords held that membership of the association did not necessarily connote approval or endorsement of all material that was published in its publications, which in any event the member might not have read, and although circumstances might arise where an association's publication was so extreme that members might be expected to become aware of them and disassociate themselves by resignation if they did not wish to be thought to approve of them, the Lord Ordinary had been a member of an association whose published aims and objectives were unobjectionable and whose membership should not be assumed to share the views expressed in the material complained of.

Further, the House of Lords went on to state that it could be assumed that a judge was able to discount material which she had read and reach an impartial decision according to the law; and that, accordingly, in the absence of evidence that the Lord Ordinary had read the material complained of, or endorsed the views expressed therein, a fair-minded and informed observer would not have concluded that there was a real possibility of bias.

49. ***Fotheringham, petition [2008] CSOH 170; 2008 Scot (D) 21/12***

In this case the petitioner challenged the decision of the disciplinary committee of the Scottish Football Association on the grounds of bias because its chairman was the

secretary of a regional football association comprised of several clubs including that to which the alleged victim belonged. It was also claimed that the appeal hearing before the Scottish FA Disciplinary Tribunal was tainted by bias because the disciplinary committee appeared as a party and was represented by counsel and the president of the Scottish Football Association was a member of the appeals tribunal.

The claims of bias were rejected. Applying the test in *Porter v. Magill*, the Court of Session (Lord Pentland) found that a fair-minded and informed observer, having considered all the facts, would not conclude that there was a real possibility that the original committee was biased because its chairman was the elected secretary of the regional football association. The link between the chairman and the alleged victim's club was too weak and insubstantial to give rise to any serious doubt about his ability to act independently and objectively as chairman. The mere fact that the president of the FSA was a member of the appeals tribunal in circumstances where the disciplinary committee was represented would be insufficient to cause a fair-minded and informed observer to conclude that there was a real possibility of bias.

50. ***R (Haase) v. Independent Adjudicator [2008] EWCA Civ 1089 (Admin)***

The claimant was a serving prisoner who challenged the determination made by an Independent Adjudicator exercising jurisdiction in disciplinary proceedings in prison. He contended that the proceedings before the Independent Adjudicator were unfair, and in breach of his Convention rights under Article 6, because the prosecution lacked sufficient independence. The facts were that in October 2004, the claimant was sentenced to 14 years imprisonment. In January 2006, a prison officer at HM Prison Full Sutton acting under the Prison Governor's authority and in accordance with Prison Rules required the claimant to provide a sample or urine for the purpose of testing for the presence of a controlled drug. He refused, and was charged with disobeying a lawful order. At the subsequent disciplinary proceedings the prosecution of the claimant was essentially conducted by the reporting prison officer who had requested the original sample. The charge was found proved and the claimant was sentenced to serve 21 additional days.

Stanley Burnton J held, when dismissing the application by the claimant for judicial review, that prison disciplinary proceedings chaired by an Independent Adjudicator in

which the prosecution case was presented by a prison officer who might also be a witness were not incompatible with a right to a fair trial guaranteed by Article 6 of the ECHR. The court distinguished the case of *R v. Stow* [2005] EWCA Crim 1157, in which the appellant's conviction by a courts-martial was quashed on the ground that his trial had been unfair and did not comply with the requirements of Article 6 because the prosecution had lacked the necessary independence.

His Lordship said there was nothing in the Strasbourg authorities to indicate that the prosecutor was required to be independent. Stanley Burnton J at [44] said:

> "The offences considered by the Independent Adjudicators are at the less serious end of the spectrum of gravity. More serious offences, which may involve greater punishment than 42 additional days, are referred to the ordinary criminal courts. Courts-martial may determine far more serious offences. Disciplinary offences should be dealt with speedily. Prison officers are expected to act fairly and with integrity, and their duty to do in the context of proceedings before Independent Adjudicators is required by the Prison Disciplinary Manual Adjudications. Prisoners are entitled to legal representation. The Independent Adjudicator himself is under an express duty to act fairly and justly, and to conduct an impartial inquiry. The proceedings are inquisitorial rather than adversarial. There is provision for disclosure of the identity of witnesses and of statements. If a prisoner defendant or his legal representative considers that there is other documentation that should be disclosed, they can seek a direction from the Independent Adjudicator. These considerations, together with those referred to by the European Court, distinguish this case from the courts-martial considered in *Stow,* and lead me to conclude that fairness does not require an independent prosecutor in such cases, and that the proceedings in the present case were fair."

51. ***R (King) v. Secretary of State for Justice [2010] EWHC 2522 (Admin); [2011] 3 All ER 776***

The Administrative court held that the disciplinary proceedings carried out by the governor of the institution in which the claimant young offender was detained and which had resulted in the claimant being punished by confinement to his cell for three days had not breached his rights under Article 6(1) of the European Convention on Human Rights. The claimant appeared before the governor of the institution for an adjudication hearing in respect of a charge of failing to comply with a lawful order. Pitchford LJ (with whom Maddison J agreed) held that while the prison governor could not be said to be institutionally independent, the disinterested observe would conclude that arrangements for the resolution of the disciplinary charge of disobedience within the setting of he custodial institution was fair. On the facts of the instant case, the proceedings had

complied with the requirements of fairness under Article 6(1) of the Convention. A prisoner's rights under Articles 3 and 8 would not be engaged by disciplinary proceedings before a prison governor unless the punishment imposed reached a certain level of seriousness, and in the instant case, the interference which had taken place, namely, three days' cellular confinement, had not reached a level sufficient to constitute interference with rights under the Convention.

Giving Reasons

52. ***R (Kaftan) v. General Medical Council [2009] EWHC 3585 (Admin)***

The allegations made against the appellant, Dr Kaftan, before the panel involved aggressive or violent behaviour towards colleagues at the Accident & Emergency Department of Huddersfield Royal Infirmary, where the appellant had worked as a clinical assistant and staff grade doctor for some years. The allegations particularly concerned two incidents in respect of which the panel made separate determinations on facts, on impairment and on sanction. In dismissing the criticism of the panel's factual findings, Hickinbottom J said:

> "28. Insofar as it was suggested by (counsel for the appellant) that the reasons given by the panel on this issue were inadequate, whilst professional bodies are under a duty to give reasons, that duty does not require them to give a judgment that might be expected of a court of law. The parties must simply be able to understand why one has won and the other lost on a particular issue: *English v. Emery Reinbold and Strick* [2002] 1 WLR 2409 at page 2417; and *Phipps v. General Medical Council* [2006] EWCA Civ 297 at [85]. That does not generally require the panel to identify "why in reaching its findings of fact it ought to accept some evidence and to reject other evidence (*R (Luthra) v. General Medical Council* [2006] EWHC Admin 458 at [22], per Elias J (as he then was)). *Luthra* predated *Phipps*, but it remains good as a general proposition: subject to the caveat that it may be necessary in a particular case to elaborate to ensure a party understand why he has lost the case and hence to ensure procedural fairness to that party.
>
> 29. In this case, there can be no proper criticism of the reasons given by the panel in respect of the claim by the appellant that Dr M assaulted him and his head was banged during that assault. The appellant made clear why, on this issue, the appellant lost. They accepted the account of Dr M and rejected the appellant's account. On the evidence before them, they were entitled to come to that conclusion and were not required to give more elaborate reasons for their finding than those they gave."

53. ***Beresford v. Solicitors Regulation Authority [2009] EWHC 3155 (Admin)***

In this case, the Divisional Court (May P, Silber and David Clarke JJ) said in relation to reasons:

"43. Speaking generally, there is, in our view, no persuasive case that the Tribunal failed properly to consider factual matters which are relied on in this appeal. In the course of its lengthy findings, the Tribunal set out extensively each party's opening and closing submissions and the oral evidence. The Tribunal then made findings of fact in relation to each allegation which necessarily related back to the evidence and the submissions which they had set out.

44. (Counsel for the SRA) referred us to the Privy Council case of *Gupta v. General Medical Council* [2002] 1 WLR 1691 for the proposition that there was no general duty on the Professional Conduct Committee of the General Medical Council to give reasons for its decisions on matters of fact, especially on questions depending on the credibility of witnesses. *Gupta* was considered at some length in the judgment of Wall LJ in *Phipps v. General Medical Council* [2006] EWCA Civ 397 in the light of *English v. Emery Reinbold Strick* [2002] 1 WLR 2409. Wall LJ expressed in paragraph 85 a provisional view that paragraph 14 of *Gupta* identifies an approach which reflects current norms of judicial behaviour. In every case, every Tribunal needs to ask itself what they have decided is clear; and whether they have explained their decision and how they have reached it in such a way that the parties can understand why they have won and why they have lost. In our judgment, the findings of the Tribunal in the present case achieve that test. Such particular points as (Counsel for the appellant) makes are more in the nature of forensic textual criticism than a substantial case that the reasons for the findings are unclear."

54. ***R (Shepherd) .v. Governor of HMP Whatton [2010] EWHC 2474 (Admin)***

His Honour Judge Raynor QC allowed the claimant's application for judicial review on the basis that the defendant had not given adequate reasons for its decision to find the claimant guilty of breaching the prison rules that h was not to have contact with a child without written notification that it was approved. The claimant was serving a life sentence for rape and applied for child contact by telephone with his daughter. The charge was that he had contravened prison rules not to have contact without prior written approval. The Administrative Court held that the governor's decision was not adequately reasoned as he had not stated what the issue was, nor did e state a clear finding that he, having appreciated the issue, had found against the claimant on it.

55. ***Southall v. General Medical Council [2010] EWCA Civ 407***

In this case, the Court of Appeal (Waller, Dyson and Leveson LJJ) said that in straightforward cases, setting out the facts to be proved and finding them proved or not proved would generally be sufficient both to demonstrate the parties why they had won or lost and to explain to any appellant tribunal the facts found. In most cases, particularly those concerned with comparatively simple conflicts of factual evidence, it

would be obvious whose evidence had been rejected and why. However, when the case was not straightforward and therefore was exceptional, the position was different: see ***Gupta (Prabha) v. General Medical Council [2002] 1 WLR 1691***.

The instant case was far more complex than a simple issue of fact. The appellant was a well-known consultant paediatrician and an expert on child abuse. The appellant was instructed as an expert on behalf of a local authority to give a medical opinion concerning a child's death. Following an interview with the mother, the mother complained to the GMC that the appellant had accused her of murdering her son. That allegation, amongst others, was considered by a fitness to practise panel which found that the appellant had made that accusation. The appellant's defence was that the mother had thought that she had been accused, whereas he had merely investigated her account of her son's death, and that a child's psychologist who was present at the interview supported the appellant's account. The Court of Appeal, in allowing the appellant's appeal, said that the panel's reasons in preferring the mother's account of the interview to the appellant's was simply inadequate and did not start to do justice to the case. Although entitled to conclude that the mother was an honest and credible witness, the panel did not specifically deal with the suggestion that she perceived herself to be accused, which would be entirely understandable in the circumstances and could explain why she reported the interview in the way she did. The appellant was entitled to know why that possibility was discounted by the panel, and if they disbelieved him, he was entitled to know why. The panel should also have given some reason for their discounting the evidence of the child psychologist.

56. ***Brennan v. Health Professions Council*** **[2011] EWHC 41 (Admin)**

In this case the appellant, a physiotherapist, appealed against the decision of the Competence and Conduct Committee of the Health Professions Council that he should be struck off its register. He did not appeal against the findings of misconduct, nor against the conclusion that what he did impaired his fitness to practise. The appellant was the head physiotherapist at Harlequins RFC, and appeared before the Respondent following a disciplinary investigation instigated by the European Rugby Cup into a fake blood injury and cheating during a rugby match. The appellant admitted that he had participated in the fabrication of the blood injury and gave false evidence at the initial

investigation. The appeal committee of the ERC had banned the appellant from participating in all rugby activities for two years.

The Administrative Court (Ouseley J), in quashing the decision of the respondent's competence and conduct committee on sanction, found that the committee's decision to strike off the appellant had been legally inadequate, had failed to deal with the issues raised by the appellant and had not dealt adequately with the reasons to strike him off rather than impose an alternative sanction. The instant case was not one of public safety, the appellant was an excellent physiotherapist, and the dishonesty was not towards a patient. Ouseley J said that where the purpose of sanction is to deal with issues other than the primary one of maintaining public safety, and is instead to provide deterrence to others, to maintain confidence in the profession's reputation and standards and in its regulatory process, the reasoning is particularly important in showing that the sanction is proportionate to the misconduct and for the individual. In the instant case, the committee have not dealt adequately with the case for Mr Brennan as to why he should not be struck off. Its reasoning did not enable the informed reader to know what view the committee took of the important planks in his case. Whilst the committee went through the various sanctions, noting the comments in the respondent's Indicative Sanctions Policy about them, and the general language of the various sanctions put this case in the area in which strike off had to be considered, the factors which the submissions for the appellant addressed were also very relevant to those sanctions and to how far up the scale he should now be seen. The sanctions cannot be properly addressed without consideration of the factors to which Mr Brennan's evidence was addressed. The court quashed the decision and remitted it to the committee with a direction that it reach a reasoned decision on sanction which addressed the issues to which the judgment referred.

57. ***R (Gaunt) v. Office of Communications [2011] 1 WLR 663; [2011] EWCA Civ 692***

The claimant, a talk show host, interviewed a local authority councillor responsible for children's services about a controversial proposal to ban smokers from becoming foster parents on the grounds that passive smoking was likely to harm children. During the course of the interview the claimant became aggressive and called the councillor, among other things, "a Nazi" "a health Nazi" and "you ignorant pig". The Office of

Communications (Ofcom), the relevant regulatory authority for complaints from members of the public, found that the interview breached Ofcom's Broadcasting Code, and rejected the claimant's representations that its finding would involve a disproportionate interference with the claimant's right to freedom of expression under article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Dismissing the claim for judicial review, the Administrative Court (Sir Anthony May P, Blair J) held that the court's task was to determine whether Ofcom's finding constituted a disproportionate interference with the claimant's article 10 right to freedom of expression; that since the interview was political and controversial the claimant's freedom of expression had to be accorded a high degree of protection; but that such protection, although capable of extending to offensive expression, did not extend to gratuitously offensive insults or abuse which had no contextual content or justification, or to repeated abusive shouting which served to express no real content. In dismissing the claimant's appeal, the Court of Appeal (Lord Neuberger MR, Toulson and Etherton LJJ) said that when considering whether the interview broke Ofcom's Broadcasting Code the interview had to considered as a whole and in its context.

Legal Representation

58. ***Kulkarni v. Milton Keynes Hospital NHS Foundation Trust [2009] EWCA Civ 789***

The Court of Appeal (Sir Mark Potter P, Smith and Wilson LJJ), allowing the appeal of the claimant, Dr Kulkarni, from the refusal of Penry-Davey J, held that a hospital doctor who was subject to disciplinary proceedings brought by his employer was entitled under his contract of employment to be represented at the hearing by a lawyer instructed or employed by his medical defence organisation. The court went on to make further observations by way of obiter remarks in relation to non-medical defence members. The claimant's contract only permitted representation by a friend, partner or spouse, colleague or "representative from or retained by a trade union or defence organisation". The question whether it was lawful for the employer to restrict the employee's rights of legal representation to a person instructed by a trade union or defence organisation could be framed as a question of natural justice or breach of Article 6 rights. Had it been necessary to decide the issue, the court would have held that Article 6 was engaged where an NHS doctor faced charges which were of such gravity that, in the event they were found proved, he would be effectively barred from employment in the NHS. The court

rejected a submission that any subsequent GMC disciplinary proceedings or employment tribunal proceedings would provide sufficient protection for Dr Kulkarni.

59. ***R (Puri) v. Bradford Teaching Hospitals NHS Foundation Trust [2011] EWHC 970 (Admin)***

The claimant, P, was employed by the defendant Trust as a consultant neurologist until his dismissal following an internal disciplinary hearing on the grounds of misconduct. Essentially, the issue for the High Court on judicial review was whether Article 6 of the ECHR was engaged in the disciplinary proceedings that led to P's dismissal, and if so whether the disciplinary panel of the Trust which decided to dismiss him was independent and impartial so as to comply with Article 6. Blair J concluded that this was not a case in which the effect of the disciplinary proceedings had been to deprive P of the right to practise his profession, within or outside the NHS. Further, there were important distinctions between the present case and *Kulkarni v. Milton Keynes Hospital NHS Trust* [2009] EWCA Civ 789. The charges against Dr. Kulkarni if proved, would have constituted a criminal offence, and no such issue remotely arose in the present case. The instant case was not a case where an NHS doctor faced charges which were of such gravity that, in the event they were found proved, he would be effectively barred from employment in the NHS. Blair J went on to say that had he held that Article 6 was engaged, he would not have held compliance required a disciplinary panel comprised of persons external to the Trust. Although the disciplinary panel was chaired by the chairman of the Trust, and predominantly made up of Trust members and employees, the court concluded that the panel was not non-compliant by reason of its composition.

60. ***R (G) v. Governors of X School [2009] EWHC 504 (Admin); [2010] EWCA Civ 1***

G was employed as a music assistant at X school. As a result of alleged acts of abuse of trust with a boy aged 15 disciplinary proceedings were instigated against him. At his disciplinary hearing and at the later hearing concerning his appeal against his dismissal, the claimant requested that his solicitor represent him. The school refused permission on both occasions, stating that an employee could be represented by a colleague or trade union representative but that no other person would be permitted to attend the hearing.

At first instance, Mr Stephen Morris QC, held that the likely outcome of dismissal from employment would be a referral of the matter to the Secretary of State for Children, Schools and Families, who had the power to make a direction under Section 142 of the Education Act 2002 to prohibit a person from working with children in educational establishments. Accordingly, the claimant was entitled, by reason of his right under Article 6(1) to a fair hearing in a civil matter. The Deputy Judge said: "Given the seriousness of the nature of the allegations and the consequences of a Section 142 direction, the claimant could not fairly be expected to represent himself at the disciplinary and appeal committee hearings. Being accompanied by a colleague or trade union representative was insufficient. The claimant was entitled to a commensurately enhanced measure of procedural protection under Article 6(1), which meant entitlement to legal representation at the disciplinary and appeal committee hearings."

In dismissing the school governors' appeal, the Court of Appeal (Laws, Wilson and Goldring LJJ) said that two questions arose: (1) were the disciplinary proceedings a determinant of the claimant's right to practise his profession for the purposes of ECHR Article 6? and (2) did Article 6 require that the claimant be allowed the opportunity of legal representation in the disciplinary proceedings? The court held that where an individual was subject to two or more sets of proceedings (or two or more phases of a single proceeding), and a civil right or obligation enjoyed or owed by him would be determined in one of them, he might (not necessarily would) by force of Article 6 enjoy appropriate procedural rights in relation to any of the others if the outcome of that other would have a substantial influence or effect on the determination of the civil right or obligation. The true question was whether there was a sufficiently close nexus between those processes, and such a nexus was established if the test of substantial influence or effect was met. The outcome of the disciplinary proceedings would have a substantial effect on the outcome of the barred list procedures which would then be applied to the claimant, and his right to practise his profession would necessarily be directly at stake. Accordingly, the disciplinary proceedings were determinant of the claimant's right to practise his profession and Article 6 was engaged. Further, the level of procedural protection which the article guaranteed depended on what was at stake. Given the effect an advocate might have in the disciplinary proceedings, Article 6 required that the claimant should be afforded the opportunity to arrange for legal representation in those proceedings.

61. ***R (G) v. Governors of X School [2011] 3 WLR 237 SC(E)***

The claimant, who was employed as a teaching assistant at a primary school, faced disciplinary proceedings for having allegedly formed an inappropriate relationship with a 15-year old boy undergoing work experience at the school. The claimant requested permission of the defendant school governors for his solicitor to represent him at the hearing before the disciplinary committee of three governors. The defendants refused. The disciplinary committee summarily dismissed the claimant and at his appeal against the dismissal decision he again requested that his solicitor attend. The request was refused by the defendants on the same grounds, and the claimant's dismissal was confirmed by the appeal committee. The claimant's dismissal was referred to the Independent Safeguarding Authority (ISA) set up under the Safeguarding Vulnerable Groups Act 2006 by which the Secretary of State could determine whether an individual should be prohibited from working with children in educational establishments, and the claimant brought judicial review proceedings on he grounds that he had been denied legal representation before the school governors and the decision was likely to have a substantial effect on the decision of the ISA.

The Supreme Court, reversing the decision of the Court of Appeal and the judge at first instance, held that it was common ground the civil right with which the court was concerned was the claimant's right to practise his profession as a teaching assistant and to work with children generally. There was no doubt that this right would be directly determined by a decision of the Independent Safeguarding Authority to include him in the children's barred list. However, the disciplinary proceedings before the defendant school governors did not engage article 6.1 of the European Convention on Human Rights and Fundamental Freedoms. The test adopted by the Court of Appeal, namely that the claimant might enjoy article 6 procedural rights if the decision in the disciplinary proceedings would have a substantial influence or effect on the determination by the ISA of his civil right to practise his profession, was an appropriate test but that since the ISA was required to make its own findings of fact and bring its own independent judgment to bear at to the seriousness and significance of the allegations, and since there was no reason to hold that it would be influenced by the governors' opinion, article 6.1 did not apply to the governors' disciplinary hearings.

62. ***Yusuf v. The Royal Pharmaceutical Society of Great Britain [2009] EWHC 867 (Admin)***

The appellant complained that, even if the committee were correct in proceeding with the inquiry in his absence, it erred in failing to either examine or examine adequately a particular witness who stood to gain and whose evidence was crucial to the findings against the appellant. The court held that it was not the function of the committee to ensure that the witness was "adequately and thoroughly examined/cross-examined by the committee" although in fact the committee did ask the witness some questions and took proper and sufficient steps to ensure that the appellant's case was put to him. Munby J at [46] said:

> "The committee did all that could appropriately be expected of it. It tested to an appropriate extent the witness's account. The fact that its probing of his evidence may have been less vigorous or searching than might have been expected if the witness had been cross-examined by the appellant or by some advocate instructed on his behalf was, in the judgment of the court, neither here nor there. That was not the function of the committee. The committee had very well in mind the factors that weighed in the appellant's favour, but the simple fact is that it believed [the witness] and accepted his account, as it was entitled to. There was no unfairness in the process adopted by the committee."

63. ***Compton v. General Medical Council [2008] EWHC 2868 (Admin)***

The case for the GMC was that the claimant on four occasions applied to regional health authorities for approval under section 12(2) of the Mental Health Act 1983 (authorisation of the detention of mental health patients) without disclosing that the previous applications to other health authorities had been unsuccessful. The claimant's appeal did not concern the panel's decision to proceed in his absence, but rather the fact that in his absence his interests should have been better protected by elucidation to the panel of the weaknesses in the GMC's case. The court (Pitchford J) was concerned whether the panel was aware of its obligations to search for points favourable to the claimant, as reasonably available on the evidence, and found that this obligation had been met, so the appeal was dismissed. The court held that the panel's legal assessor's duty included a responsibility to identify points which might be of assistance to the claimant. The court noted the judgment of Rose LJ in *R v. Hayward* [2001] 1 QB 862 at paragraph 22(6) where Rose LJ was dealing with the judge's responsibility in proceeding with a criminal trial in the defendant's absence. He said:

> "6. If the judge decides that a trial should take place or continue in the absence of an unrepresented defendant, he must ensure that the trial is as fair as the circumstances permit. He must, in particular, take reasonable steps, both during the giving of evidence and in the summing up, to expose weaknesses in the prosecution case and to make such points on behalf of the defendant as the evidence permits."

With necessary adaptations for the nature of the proceedings it was agreed that these are the principles on which any tribunal considering such matters should act. They apply to a hearing before a fitness to practise panel as they do to a criminal trial. Pitchford J at [33] said:

> "The legal assessor is not a judge, he is an adviser to the panel on matters of law (see paragraph 2, the General Medical Council (Legal Assessors Rules 2004). The legal assessor's duty as a legal advisor embraces, in my judgment, the responsibility to inform the panel of the need for vigilance in circumstances such as these, namely, in the absence of the doctor identifying points which might be of assistance to him. It does not, in my judgment, embrace a need to sum up the evidence to the panel."

The court held that the legal assessor and the panel had drawn attention to documents which were favourable to the claimant, and fulfilled its obligations to question witnesses who might assist the claimant's case. The court was also satisfied that the panel was reminded that no adverse inference should be drawn from the fact that the claimant did not attend the hearing.

64. ***Ogbonna v. Nursing & Midwifery Council [2010] EWHC 272 (Admin)***

The appellant, a registered midwife, appeared in person before the fitness to practise panel and without legal representation. At the conclusion of the oral evidence, the Council made an application to read the witness statement of a witness residing in Trinidad and Tobago. She was the Council's sole witness of fact in respect of one of the charges and gave evidence in support of another charge. Mrs Justice Nicola Davies described her as an important witness. She was actually the appellant's coordinator on the day of the incident involved in the charge. In allowing the appellant's appeal, the judge said:

> "19. The admissibility of evidence pursuant to Rule 31 is governed by two principles: relevance and fairness. Relevance is made out. The evidence of the sole witness of fact was critical. That fact together with the evidence of bad feeling between the two women meant that every effort should have been made to secure Ms P's attendance. Fairness required that the appellant was entitled to test the evidence of Ms P by way of cross-examination unless good and cogent

> reasons could be given for non-attendance. It is difficult to see what those reasons could be, given that her attendance had never been sought."

The learned judge found that the Council had failed to make any effort to secure the attendance of Ms P once it learnt that she was living in Trinidad and Tobago. It made no plan for her attendance or for a video link. If the charge was not regarded as sufficiently important to warrant the attendance of the sole witness of fact, the fair course was not to proceed with that charge. The judge was also critical of the legal assessor. Part of Ms P's witness statement, which was read to the panel, included details of other incidents alleged by her against the appellant. They were irrelevant to the heads of charge and were prejudicial to the appellant. The court concluded that either the Council or the legal assessor should have sought the redaction of the irrelevant and prejudicial paragraphs from the witness statement before it was read to the panel. The judge observed that the appellant was also disadvantaged by reason of being unrepresented before the panel.

65. ***Nursing and Midwifery Council v. Ogbonna*** **[2010] EWCA Civ 1216**

The Court of Appeal, whilst allowing the NMC's appeal from the decision of Nicola Davies J ([2010] EWHC 272 (Admin)) and directing that charges 2 and 3 should be reheard afresh before a differently constituted panel of the Conduct and Competence Committee, nevertheless upheld the judge's judgment to quash charge 1 where the NMC had failed to secure the attendance of its sole key witness to that charge.

At the hearing before the Conduct and Competence Committee, the registrant opposed the reading of the witness's statement on the grounds that the evidence was roundly disputed. Rimer LJ (with whom Pill and Black LJJ agreed) said it was obvious that, in the circumstances, fairness to the registrant demanded that in principle the witness statement ought only to be admitted if the registrant had an opportunity of cross-examining the witness upon it. It should have been obvious to the NMC that it could and should have sought to make arrangements to enable such cross-examination to take place – either by flying the witness to the UK at its expense, or else by setting up a video link. The NMC had given no thought to anything like that and the Conduct and Competence Committee proceeded instead on the groundless, and mistaken, assumption that the witness had said she was unable to come to the UK. If, despite reasonable efforts, the NMC could not have arranged for the witness to be available for cross-examination, then the case for admitting her hearsay statement might well have been strong. But the NMC made no

such efforts at all. The Court of Appeal disagreed with the NMC's submission that having admitted the statement, then it was for the committee to make a careful assessment of its weight. That submission overlooked the point that the criterion of fairness was whether the statement should be admitted at all. As to the other charges, because the committee's findings on these charges may be tainted by its finding on charge 1 the Court of Appeal directed that charges 2 and 3 alone should be reheard afresh by a new panel.

66. ***R (Bonhoeffer) v. General Medical Council [2011] EWHC 1585 (Admin)***

The Administrative Court (Laws LJ and Stadlen J) observed that the case raised important issues relating to the circumstances in which hearsay evidence may be admitted in disciplinary proceedings. The claimant, an eminent consultant paediatric cardiologist, applied for judicial review of the decision of the GMC's fitness to practise panel to admit hearsay evidence of Witness A in fitness to practise proceedings against the claimant. It was alleged by the GMC that the claimant was guilty of serious sexual misconduct while undertaking work in Kenya. The evidence against the claimant in respect of the majority of the charges he faced came from a single source, Witness A, whose identity was disguised. Although Witness A indicated that he was willing and able to travel to the UK to give evidence in person in support of the allegations, the GMC decided not to call him as a witness. The GMC contended that calling Witness A would place himself at a risk of reprisals from homophobic elements in Kenya were he to be identified as having engaged in sexual activity with the claimant, and that he could be exposed to a risk of harm from those who were loyal to the claimant and who might wish to exact revenge for Witness A's participation in the fitness to practise proceedings.

The High Court quashed the decision of the fitness to practise panel to allow Witness A's evidence to be read holding that the panel's decision was irrational and a breach of the registrant's right to a fair hearing. The panel should have concluded that the general obligation of fairness imposed by the common law and Article 6 of the Convention and rule 34 of the GMC's Fitness to Practise Rules meant that it should not admit the evidence of Witness A under the hearsay provisions. Witness A was the sole witness in relation to most of the allegations and he was willing to give live evidence. The arguments for affording the claimant the opportunity to cross-examine Witness A were formidable. The claimant was an extremely eminent consultant cardiologist of International repute, the allegations against him could hardly be more serious. If proved

they would have a potentially devastating effect on his career, reputation and financial position, and insofar as the allegations involved alleged misconduct towards other victims, those victims denied that the allegations were true. At [108] Standlen J said that in disciplinary proceedings which raise serious charges amounting in effect to criminal offences, there would, if the evidence constituted a critical part of the evidence against the accused party and if there were no problems associated with securing the attendance of the accuser, need to be compelling reasons why the requirement of fairness and the right to a fair hearing did not entitle the accused party to cross-examine the accuser. At [116] Standlen J noted that of relevance also is the fact that the standard of proof in fitness to practise hearings was changed in 2008, in response to the Shipman case, from the criminal standard of being satisfied beyond reasonable doubt to the civil standard of the balance of probabilities; nor is there a requirement that the fitness to practise panel must be satisfied beyond reasonable doubt that the regulatory body was not able to adduce the evidence by calling the witness.

67. ***Gopakumar v. General Medical Council [2008] EWCA Civ 309***

The practitioner faced a charge of serious professional misconduct relating to a female patient. At the hearing he did not attack the credibility of her evidence. The doctor was represented by experienced counsel and solicitors and they had taken an informed and understandable decision not to deploy evidence relating to her history of drug use. The Court of Appeal (Sir Anthony Clarke MR, Tuckey and Jacob LJJ) said that it was too late for the practitioner to seek to rely on such matters on appeal once he realised he had lost on all other points which had been taken on his behalf. He had chosen not to attack the character of the witness based upon her medical history and drug use and it was too late for him to attempt to do so on appeal.

68. ***R (Sinha) v. General Medical Council [2008] EWHC 1732 (Admin)***

The decision of the Court of Appeal in *Gopakumar* arose for consideration in different circumstances in *Sinha*. In this case new counsel instructed on behalf of the practitioner was highly critical of previous counsel, and alleged that he should have applied for a stay of the proceedings. Irwin J said:

"55. …When considering whether or not to admit fresh evidence, the general rule is that failure to adduce evidence by the party's legal advisers provides no excuse even in this type of case.

56. In my judgment, the analogy with Dr Sinha's case is very close. The law forbids reopening a case on the basis, presumed to be true for the purpose of the argument, that there was a negligent failure to adduce what might be crucial evidence in medical disciplinary proceedings, evidence with the potential to alter the outcome of the case. If that is correct, then the court will be very slow to permit a case to be reopened when the lawyers have failed to make a coherent application for a stay.

57. In *Gopakumar* the court also touched on the duty of the legal assessor, whose duties are set out in the General Medical Council (Legal Assessors) Rules 2004. By rule 2 the legal assessor is required to advise the panel on any question of law referred to him, but he is also enjoined to intervene to advise the panel where there is a possibility of a mistake of law being made, or where he learns of any irregularity in the conduct of the proceedings. This clearly means a duty actively to take steps if the assessor considers that any procedural or legal problems of importance may be arising. For present purposes I am content to accept that such a duty might arise if an assessor felt that there was a serious abuse of process, or an evidential problem on such a scale that he felt no reasonable panel could find the charges proved and yet the appropriate arguments were not being advanced by the doctor's legal representatives. However, the circumstances would have to be very clear for a court to consider intervening on the basis that the legal adviser had not done so."

69. ***R (Dutt) v. General Medical Council [2009] EWHC 3613 (Admin)***

During the hearing of this case before the fitness to practise panel which proceeded over 14 days, Dr Dutt had counsel. After all the evidence had been heard by the panel Dr Dutt and his legal representatives parted company. Cranston J held that Dr Dutt provided no evidence of his allegations of incompetent or inadequate legal representation. When he dispensed with the assistance of his legal representatives he was given a lengthy adjournment. That adjournment involved a week-end and also two-and-a-half days of the following week. The learned judge found that he had sufficient time to prepare his submissions in relation not only to the findings of fact but also to fitness to practise and sanction. Dr Dutt in fact adduced further evidence at that latter stage, from some six witnesses, and he made submissions. There was nothing, said the judge, that in his view was procedurally unfair in the way the panel went about the hearing of this matter.

STANDARD OF PROOF

70. ***Re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening) [2008] 3 WLR 1 and Re D (Secretary of State for Northern Ireland intervening) [2008] 1 WLR 1499***

The House of Lords delivered judgment in these two cases concerning the civil standard of proof. The speeches in the two cases largely reflect the approach set out in *Re H (Minors)* [1996] AC 563 and *R (N) v. Mental Health Review Tribunal* [2006] QB 468. In particular they emphasise that there are only two standards of proof recognised by the common law, proof beyond reasonable doubt and the balance of probabilities; and that the balance of probabilities simply meant that the court or tribunal were satisfied an event occurred if it considered that, on the evidence, the occurrence of the event was more likely than not.

The decisions endorsed the conventional approach that in general the more serious the allegation the more cogent will be the evidence for which the tribunal will be looking. Thus, in some contexts a court or tribunal might have to look at the facts more critically or anxiously than in others before it can be satisfied to the requisite civil standard of a balance of probabilities, but the standard itself is finite and unvarying. Situations which might make such heightened examination necessary might be the inherent unlikelihood of the occurrence taking place, the seriousness of the allegations to be proved, or the seriousness of the consequences which could follow from acceptance of proof of the relevant fact. The inherent probabilities were simply to be taken into account, where relevant, in deciding where the truth lay. All these situations required the application of good sense and appropriately careful consideration on the part of the decision-makers, but they did not require a different standard of proof or a specially cogent standard of proof before being satisfied of the matter which had to be established.

71. ***R (Independent Police Complaints Commission) v. Assistant Commissioner Hayman [2008] EWHC 2191 (Admin)***

The two House of Lords judgments were considered by Mitting J in the context of a police disciplinary case. The Independent Police Complaints Commission directed that disciplinary proceedings be taken against an off-duty police officer who had become

involved in a fracas in Old Street, London EC1. The disciplinary proceedings came before a panel of three senior officers who found three of the four charges proved and decided that the officer should resign. He applied for a review of that decision, and in August 2006 Assistant Commissioner Hayman found the three charges which had been found to be proved against him by the panel not to be proved, so quashing their decision. The IPCC challenged that decision in judicial review proceedings. The basis of challenge was that the Assistant Commissioner had applied the wrong standard of proof in his review of the panel's decision.

At [19] Mitting J said that, in his opinion, the last sentence in paragraph 28 of Lord Carswell's speech in *Re D* laid down the true proposition of law: "(Those who have to decide such issues) do not require a different standard of proof or especially cogent standard of evidence, merely appropriately careful consideration by the tribunal before it is satisfied on the matter which has to be established." Mitting J went on to state:

> "20. Of course in disciplinary proceedings the tribunal must look with the greatest care at accusations which potentially give rise to serious consequences. But in determining whether or not they occurred, it applies a single unvarying standard, the balance of probabilities. If satisfied it is more likely than not that the facts occurred, then it must find them proved and draw appropriate conclusions as to sanction."

The judge found that the Assistant Commissioner did not apply this test to the review which he conducted. In so doing, he misdirected himself and the matter was remitted to the Commissioner of Police for the Metropolis for him to appoint another Assistant Commissioner to take the decision afresh.

72. ***Richards v. Law Society [2009] EWHC 2087 (Admin)***

One of the solicitor's grounds of appeal was that the tribunal was wrong in law to apply the civil standard of proof and they should have applied the criminal standard. A difference of view on this point lay between the Solicitors' Regulation Authority and the Law Society (professional body), and consequently the Law Society was permitted to intervene in the appeal. The Law Society maintained that the appropriate standard of proof in solicitors' disciplinary proceedings was the criminal standard. The Solicitors' Regulation Authority maintained that it should be the civil standard. The court (Sir Anthony May P and Saunders J) declined to hear argument on the point because, first, there was no significant disputed facts, and nothing therefore for the standard of proof

to bear upon; and second, because the court considered the tribunal had in effect applied the criminal standard anyway.

However, the court did observe that it was bound by the decision of the Divisional Court presided over by Lord Chief Justice Lane in *Re A Solicitor* [1993] QB 69, as considered and applied by the Privy Council in *Campbell v. Hamlet* [2005] 3 All ER 1116. Sir Anthony May P at [22] said that: "Insofar as these two authorities might arguably leave some minor room for manoeuvring in cases where the alleged misconduct does not have criminal overtones, that is better debated and decided in a case where the standard of proof makes a difference, and probably in the House of Lords."

73. ***Bradshaw v. General Medical Council*** **[2010] EWHC 1296 (Admin)**

The claimant doctor applied to terminate an order of the General Medical Council's interim orders panel to suspend his registration. The claimant, whilst employed as a medical officer by the Civil Aviation Authority ("CAA"), had been suspended on full pay pending an investigation into a number of allegations of misconduct arising out of an alleged affair between him and another employee and doctor. The CAA's disciplinary hearing held that had he not resigned during the investigation, he would have been dismissed without notice. The GMC's interim orders panel subsequently suspended his registration on the grounds that there could be impairment of his fitness to practise that posed a real risk to members of the public or could adversely affect the public interest.

His Honour Judge Roger Kaye QC, sitting as a judge of the High Court, in dismissing the application held that the panel had been correct to order the claimant's suspension. The allegations did not involve a criticism of his clinical competence and note was to be taken of his impressive academic record and positive testimonials, the potential financial and career consequences of suspension, the fact that the full hearing might not taken place for some time and the claimant's denial of the charges. An interim suspension would usually be viewed as disproportionate where allegations arose out of an alleged personal intimate relationship and there was absent any suggestion or criticism of clinical performance or abuse of patient safety. In addition, the making of interim suspension orders on public interest grounds in cases of non-clinical allegations would ordinarily expect something that would impinge more directly on members of the public, such as murder, rape or abuse of children.

However, in the instant case, the matters were serious with serious implications as to the Appellant's probity and integrity. The allegations went much further than accusation and counter-accusation against and by persons involved in an intimate relationship, and they included allegations of false accusations, fabricating and altering documents and lying to the investigator. Although the allegations involved a colleague and not a patient, a member of the public could ask whether the appellant would seek to cover up or lie or make false accusations to defend himself if a complaint was made against him by a patient. Such factors would likely undermine public confidence in a doctor's core duties and responsibilities of honesty and integrity.

74. ***Sarkodei-Gyan v. Nursing & Midwifery Council [2009] EWHC 2131 (Admin)***

The registrant appealed against the decision of the NMC's health committee finding that her fitness to practise was impaired. It was common ground that her appeal had to be allowed because of procedural irregularities in that the committee had wrongly combined the fact-finding stage with the impairment stage. The court emphasised that in a health case it was still necessary for the committee to apply the three stage process of fact-finding, impairment, and, if appropriate, sanction.

75. ***Akodu v. Solicitors Regulation Authority*** **[2009] EWHC 3588 (Admin)**

In this case the Divisional Court (Moses LJ and Tomlinson J) held that a solicitor could not be found guilty of conduct unbecoming a solicitor on the basis that, as he was a partner in a firm of solicitors, he was thus jointly and severally liable for a failing of his partner. The Solicitors Disciplinary Tribunal had found that, in a series of mortgage transactions in which the appellant solicitor's firm had acted, there had been a failure by the appellant's partner to inform the mortgagee, in regard to various properties, of a difference in purchase prices between the full purchase price and that stated on the mortgage offer. A difference in purchase prices had occurred, as the sellers of the properties had offered discounts or incentives on the properties, which were new-build developments.

The tribunal had found that the fee earner failed to inform lenders of the discounts and that, whilst he had not acted dishonestly, he had behaved in a reckless way contrary to the Solicitors Practice Rules 1990 by not acting in the interests of his lender clients. The

tribunal found that the appellant, as a partner of the firm, was jointly and severally liable for the failing of his partner and thereby guilty of conduct unbefitting a solicitor. The Divisional Court allowed the appeal, Moses LJ saying that it was not open to the tribunal to find the appellant guilty of conduct unbefitting a solicitor on the basis, and the only basis, advanced by the tribunal that he was a partner in the firm. The appellant had not been directly responsible for the fact that financial incentives had not been notified to lender clients. Some degree of personal fault was required before a solicitor can be found guilty of conduct unbefitting his profession.

76. ***Balamoody v. Nursing & Midwifery Council [2009] EWHC 3235 (Admin)***

This was a restoration case. Mr Belamoody was struck off the NMC register for matters which arose in respect of his conduct and management of a nursing home many years previously. In April 1993 he was convicted of six offences contrary to Regulation 15(3) of the Registered Homes Act 1984. Three of the offences related to his conduct and management of the Nursing Home and not more generally to his nursing practice. Those which related to patients involved small quantities of drugs. So far as was known, no patient harm was suffered in consequence. The offences were 17 years ago and he was struck off 13 years ago. He had had, prior to being struck off, some 23 years of practice as a nurse about which no other complaint had ever been made. He was accepted by the panel as being a caring individual.

In allowing the registrant's appeal against the refusal of restoration, and directing that the matter be reheard by a fresh committee, Langstaff J said that the panel had three options: they had to determine whether or not to restore Mr Belamoody to the register unconditionally; secondly, that they could restore him subject to suitable conditions of practice; or thirdly, they could reject his application. The fundamental question was whether the practitioner was safe. The question of whether a practitioner is a safe practitioner has to look at what that practitioner will do in the future. It was not difficult to see that a practitioner who was not up-to-date may not be safe because he will not practise nursing in accordance with up-to-date standards. However, this, if it was a valid observation in the case of Mr Belamoody, was a matter which was easily remedied by ensuring that as a condition of restoration to the register he would undergo or be required to undergo further training to the satisfaction of the Council.

The learned judge was critical of the panel's concentration on "insight" rather than looking at future risk. The learned judge said:

> "31. Underlying all these complaints were two questions. The first: What was it, asked the appellant, that he had to prove in order to satisfy the committee that he was a proper person to return to the register as a nurse? Secondly, a general complaint that the result of the proceedings in the context which I have set out was desperately unfair to him. The first of those he raised at the meeting itself. He asked the committee what was the meaning of "insight" in this context? It does plainly concern him and for good reason. The "lack of insight" had become familiar shorthand for being unsafe to practise. The definition given by the nursing member of the panel, the other two being a chairman and a lay person, was that she could not argue with a dictionary definition but would comment that "I would want you to be thinking not only how your actions have affected others and the full ramifications of that. That is what I would add for that".
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> 32. That was not obviously a helpful definition. It may be thought to be compounded by the observations in the decision that the panel would expect an applicant for restoration to have enough insight to appreciate what evidence would be helpful to his application. This is "insight" used in a different context and sense. It is, I think, to suggest that it is entirely up to an individual to determine what matters he should bring to prove his cases to the Tribunal. That does not seem to me to fit easily with the scheme set up by the Order. In the context of someone who is a caring person, whose offences have caused no actual harm that could be established, for whom they represent an isolated occasion though repeated twice over 10 days in the course of a long career otherwise unmarked by complaint, they were singularly unhelpful, bearing in mind the consequences of a refusal of restoration to this individual."

The learned judge concluded that since the whole point of a Conditions of Practise Order is to allow someone who given sufficient conditions would be safe but without those conditions might not be, in his view the panel could and should have considered in greater detail what might have been appropriate for the appellant. The panel did not sufficiently consider conditions of practise and whether they would meet the particular problems to which they had averted.

MISCONDUCT AND IMPAIRMENT

77. The issue of impairment has been considered in a series of recent cases: ***Cohen v. General Medical Council*** [2008] EWHC 581 (Admin), ***Zygmunt v. General Medical Council*** [2008] EWHC 2643 (Admin), ***Azzam v. General Medical Council*** [2008] EWHC 2711 (Admin), ***Cheatle v. General Medical Council*** [2009] EWHC 645

(Admin), ***Jalloh v. Nursing & Midwifery Council*** [2009] EWHC 1697 (Admin), ***Saha v. General Medical Council*** [2009] EWHC 1907 (Admin), ***Yeong v. General Medical Council*** [2009] EWHC 1923 (Admin), and ***Nicholas-Pillai v. General Medical Council*** [2009] EWHC 1048 (Admin).

78. ***Cohen v. General Medical Council [2008] EWHC 581 (Admin)***

In this case, Dr Cohen, a Consultant Anaesthetist, appealed against the decision of the GMC's fitness to practise panel that his fitness to practise was impaired and to impose conditions on his registration. The complaint which led to the practitioner's appearance before the panel was made by Mr B who underwent surgery for suspected cancer of the colon. Apart from Mr B's case, the practitioner was of good character who had been a Consultant Anaesthetist since 1980 with no previous adverse findings made against him and with many references extolling his skills and expertise. Significantly, the GMC called an expert Consultant Anaesthetist who, whilst critical of the way in which the practitioner had treated Mr B in relation to his pre- and post-operative care and assessment, and his note-taking, nevertheless did not consider that these matters were so serious as to amount to misconduct, such that the practitioner's registration might be called into question; and said that the core anaesthetic treatment of Mr B was carried out to a standard entirely in keeping with what might be expected of a Consultant Anaesthetist.

Silber J, in allowing the appeal and setting aside the conditions, held that whether the practitioner's fitness to practise was impaired was a relevant factor at stage 2, rather than at stage 3, the sanctions stage. On the facts, the errors of the practitioner were easily remediable and the panel should have concluded that his fitness to practise was not impaired.

79. ***Zygmunt v. General Medical Council [2008] EWHC 2643 (Admin)***

The appellant, a neurosurgeon, challenged the panel's finding that his fitness to practise was impaired by reason of misconduct and the imposition of a two month suspension. The allegation arose out of a wrong diagnosis made by Professor Zygmunt that the patient suffered from a tumour and not an infected abscess.

The court (Mitting J) noted that even if a panel properly finds that a practitioner has been guilty of misconduct, it may nonetheless conclude that his or her fitness to practise is not impaired. In many, perhaps the great majority of cases, the issue will not be live, but in cases in which it is, it must be separately and appropriately addressed by the panel. As to the meaning of fitness to practise, Mitting J adopted the summary of potential causes of impairment offered by Dame Janet Smith in the Fifth Shipman Inquiry Report (2004, paragraph 25.50). Dame Janet Smith considered that impairment would arise where a doctor (a) presents a risks to patients; (b) has brought the profession into disrepute; (c) has breached one of the fundamental tenets of the profession; or (d) has acted in such a way that his integrity can no longer be relied upon. Mitting J noted that Dame Janet Smith recognised that present impairment of fitness to practise can be founded on past matters. A doctor's current fitness to practise must be gauged partly by his/her past conduct of performance. It must also be judged by reference to how he/she is likely to behave or perform in the future. At [31] Mitting J said:

> "In a misconduct or deficient performance case, the task of the panel is to determine whether the fitness to practise is impaired by reason of misconduct or deficient performance. It may well be, especially in circumstances in which the practitioner does acknowledge his deficiencies and takes prompt and sufficient steps to remedy them, that there will be cases in which a practitioner is no longer any less fit to practise than colleagues with an unblemished record."

Mitting J went on to say that he agreed with Silber J in *Cohen* that when fitness to practise was being considered, the task of the panel is to take account of the misconduct of the practitioner and then to consider in the light of all the other relevant factors known to them whether his or her fitness to practise is (rather than has been) impaired. Accordingly, the judge quashed the decision of the panel on the question of fitness to practise being impaired and remitted it to the panel to re-determine in the light of the guidance given in the judgment. He added that if the panel does determine that fitness to practise is not impaired, it can of course give Professor Sigmund a warning as to his future conduct or performance which will not be free of effect.

80. ***Azzam v. General Medical Council [2008] EWHC 2711 (Admin)***

In this case the practitioner appealed against the panel's decision to impose a one month suspension. At the conclusion of the fact finding stage (stage 1) counsel for the practitioner applied to the panel to admit evidence on Dr Azzam's behalf in three broad categories: (1) testimonial evidence; (2) evidence as to Dr Azzam's training following

the incident in the case; and (3) evidence from a Dr Pitman as to Dr Azzam's current performance. The application was opposed by the GMC, but the panel acceded to the application but went on to state that it gave it "little weight".

The Court (McCombe J) held that the panel erred in deciding to give little weight to Dr Azzam's testimonial evidence going to his rehabilitation since the incident because such evidence was relevant to the issue of whether his fitness to practise was impaired at the date of the hearing. McCombe J said that it must behove a fitness to practise panel to consider facts material to the practitioner's fitness to practise looking forward and for that purpose to take into account evidence as to his present skills or lack of them and any steps taken, since the conduct criticised, to remedy any defects in skill. He accepted that some elements of reputation and character may well be matters of pure mitigation, not to be taken into account at stage 2. The line is a fine one.

81. ***Cheatle v. General Medical Council [2009] EWHC 645 (Admin)***

In *Cheatle*, Cranston J at [17] said that impairment of fitness to practise was a somewhat elusive concept. However, he considered that the four examples given by Dame Janet Smith in her fifth Shipman Report helpfully set out the reasons why a decision-maker might conclude that a registrant was unfit to practise or that his fitness to practise was impaired. The four examples were (a) that the practitioner presented a risk to patients, (b) that the practitioner had brought the profession into disrepute, (c) that the practitioner had breached one of the fundamental tenets of the profession, and (d) that the practitioner's integrity could not be relied upon.

Cranston J continued:

> "19. Whatever the meaning of impairment of fitness to practise, it is clear from the design of section 35C [of the Medical Act 1968 as amended] that a panel must engage in a two-step process. First, it must decide whether there has been misconduct, deficient professional performance or whether the other circumstances set out in the section are present. Then it must go on to determine whether, as a result, fitness to practise is impaired. Thus it may be that despite a doctor having been guilty of misconduct, for example, a Fitness to Practise Panel may decide that his or her fitness to practise is not impaired.
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> 21. There is clear authority that in determining impairment of fitness to practise at the time of the hearing regard must be had to the way the person has acted or failed to act in the past. As Sir Anthony Clarke MR put it in *Meadow v. General Medical Council* [2007] 1 WB 462:

> "In short, the purpose of [fitness to practise] proceedings is not to punish the practitioner for past misdoings but to protect the public against the acts and omissions of those who are not fit to practise. The FPP thus looks forward not back. However, in order to form a view as to the fitness of a person to practise today, it is evident that it will have to take account of the way in which the person concerned has acted or failed to act in the past" (para 32).
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> 22. In my judgment this means that the context of the doctor's behaviour must be examined. In circumstances where there is misconduct at a particular time, the issue becomes whether that misconduct, in the context of the doctor's behaviour both before the misconduct and to the present time, is such as to mean that his or her fitness to practise is impaired. The doctor's misconduct at a particular time may be so egregious that, looking forward, a panel is persuaded that the doctor is simply not fit to practise medicine without restrictions, or may be at all. On the other hand, the doctor's misconduct may be such that, seen within the context of an otherwise unblemished record, a fitness to practise panel could conclude that, looking forward, his or her fitness to practise is not impaired, despite the misconduct."

82. ***Yeong v. General Medical Council [2009] EWHC 1923 (Admin)***

In this case Dr Yeong's registration with the GMC was suspended for 12 months by reason of misconduct following a sexual relationship with a former patient. Dr Yeong obtained an expert report from an experienced psychiatrist who assessed that he did not have a psychological disposition to engage in sexual relationships with patients, the likelihood of recurrence was extremely low, and that Dr Yeong did not pose a risk to patients in his capacity practising as an obstetrician and gynaecologist. On appeal Dr Yeong contended (amongst other grounds) that the panel applied an incorrect test of impairment of fitness to practise.

Sales J, in his judgment at [31], said that the panel in its impairment decision, plainly considered that Dr Yeong did present a heightened risk of improper conduct in relation to his patients in future, and that was treated by the panel as a relevant consideration weighing in favour of the decision which it took on impairment. Sales J went on to state at [38] that:

> "The question of the possibility of a recurrence of such misconduct by Dr Yeong was a matter of the ordinary assessment of likely human behaviour, in relation to which a psychiatrist's expertise confers no special privileged insight. The assessment of risk of any particular form of future behaviour is the sort of task

> which courts and tribunals regularly perform without needing to refer to expert psychiatric evidence."

In dismissing Dr Yeong's appeal, Sales J said that "importantly the panel's view was that the general public interest in clearly marking proper standards of behaviour for doctors in respect of relationships with their patients so as to uphold public confidence in the medical profession was by far the weightiest factor pointing in favour of the finding of impairment of fitness to practise and the sanction which was imposed."

As to whether Dr Yeong's current fitness to practise was impaired, Sales J considered that *Cohen, Meadow* and *Azzam* fall to be distinguished from the present case on the basis that each of *Cohen, Meadow* and *Azzam* was concerned with misconduct by a doctor in the form of clinical errors and incompetence. Sales J accepted the submission of counsel for the GMC that:

> "Where a FTPP considers that the case is one where the misconduct consists of violating such a fundamental rule of the professional relationship between medical practitioner and patient and thereby undermining public confidence in the medical profession, a finding of impairment of fitness to practise may be justified on the grounds that it is necessary to reaffirm clear standards of professional conduct so as to maintain public confidence in the practitioner and in the profession. In such a case, the efforts made by the medical practitioner in question to address his behaviour for the future may carry very much less weight than in a case where the misconduct consists of clinical errors or incompetence."

In relation to such types of misconduct, the question of remedial action taken by the doctor to address his areas of weakness may be highly relevant to the question of whether his fitness to practise is currently (i.e. the date of consideration by the panel) impaired. But the position in relation to Dr Yeong's case, that is, improperly crossing the patient/doctor boundary by entering into a sexual relationship with a patient was different. As Sales J made clear, in the latter type of case the efforts made by the medical practitioner in question to address his behaviour for the future may carry very much less weight.

Sales J referred to the overarching function of the GMC as set out in section 1(1A) of the Medical Act 1983 to have regard to the public interest in the form of maintaining public confidence in the medical professional generally and in the individual medical practitioner when determining whether particular misconduct on the part of that medical

practitioner qualifies as misconduct which currently impairs the fitness to practise of that practitioner. The public's confidence in engaging with him and with other medical practitioners may be undermined if there is a sense that misconduct which violates a fundamental rule governing the doctor/patient relationship may be engaged in with impunity. Secondly, a firm declaration of professional standards so as to promote public confidence may be required, and efforts made by the practitioner to reduce the risk of recurrence may be of less significance than in other cases, such as those involving clinical errors or incompetence.

83. ***Jalloh v. Nursing & Midwifery Council [2009] EWHC 1697 (Admin)***

In this case, Silber J. dismissed the registrant's appeal against the finding of impairment and a conditions of practice order for 18 months. The registrant was an experienced mental health worker. The overall picture was of a series of serious mistakes by the registrant, a failure to comply on a number of occasions with proper procedures and a disregard of the interests of a vulnerable patient. This was not the case of one error, but a series of errors. Even after taking account of the mitigating factors there was a great deal of evidence which showed that because of the appellant's repeated failures her fitness to practise was impaired. The committee considered there was a risk of repetition despite the mitigating factors which included that the patient was hostile and angry, the event in question was very traumatic and was likely to cause a degree of panic, lack of practical training, the presence of a lot of equipment on the trolley which impeded resuscitation, and the registrant's unblemished record and excellent conduct both before and after the event. Silber J at [36] said:

> "I agree with the committee in reaching the decision which they did, especially as there was a risk of repetition."

At [37], Silber J went on to say that the judgment of the committee deserved respect as the body best qualified to judge what the profession expects of its members and the measures necessary to maintain high standards of professional practice and treatment. The committee consisted of three members, two of whom were nurses, one of whom had psychiatric experience, and that would be a relevant factor.

84. ***Uruakpa v. General Medical Council*** **[2010] EWHC 1202 (Admin)**

In this case, Saunders J held that it was for the GMC to decide what was the appropriate test for medical competence and not the High Court. It was not for a doctor to refuse to

take an assessment because he did not like its structure. Where a doctor had continually refused to complete an assessment to ascertain his professional performance, the GMC's fitness to practise panel had been entitled to have found his fitness to practise impaired and to have imposed the sanction of suspending his name from the medical register, given its obligation to ensure the safety of the public.

The appellant doctor appealed against a decision of the panel suspending his name from the medical register for 12 months. He had qualified as a doctor in Nigeria and Australia, came to the United Kingdom and was granted full registration by the GMC in 2003. He practised in the field of obstetrics and gynaecology and worked in a number hospitals. In 2005, his work was referred to the GMC in respect of the issues concerning the conduct of operations, performance on call, poor communication with patients and missed diagnoses. The GMC's fitness to practise panel made an interim order restricting his practice. Before the final hearing of the issue of fitness to practise, the GMC asked the appellant to undergo assessment of his professional performance. Despite having twice agreed to do so, he ultimately declined to undertake any assessment having criticised the structure of the proposed tests. The panel found that his fitness to practise was impaired and imposed the suspension.

Saunders J held that where a charge against a doctor concerned clinical work, an appellate court had to accord deference to the decision of a panel of doctors. Further, it was for the GMC to decide what was the appropriate test for medical competence and not the High Court, and it was not for a doctor to refuse to take an assessment because he did not like its structure. In the instant case, the panel had been concerned about the appellant's failure to undertake an assessment, and because of the length of time since he had practised it was not possible to decide the extent of his deficiencies. Proper assessment was needed to ascertain his skills, and given his refusal to complete the assessment process, and in the light of the panel's obligation to ensure the safety of the public, the sanction imposed was the correct one.

85. ***Saha v. General Medical Council [2009] EWHC 1907 (Admin)***

In this case, the panel held that the fitness to practise of the appellant was impaired by reason of misconduct and directed his registration to be erased. The relevant misconduct found was a failure by the appellant to co-operate fully and to provide relevant information, in breach of paragraph 30 of *Good Medical Practice*, in connection with an

investigation by the GMC into the appellant's conduct. The investigation concerned the fact that the appellant was or had been a healthcare worker who was infected with hepatitis B.

One of the issues that fell for determination was the question of separate consideration of "misconduct" and "impairment" at stage 2 of the proceedings. Mr Stephen Morris QC sitting as a Deputy High Court Judge held that there was no requirement in all cases for there to be a formal "two-stage process" in considering the issues of misconduct and impairment and no requirement that, in all cases, the reasons for a finding of impairment had to be distinct from the reasons of a finding of misconduct. The panel was required to consider whether there had been misconduct and, further, whether that misconduct was such as to impair fitness to practise, and often a finding of impairment would follow from one of misconduct. In the instant case, the panel had considered both issues and found, broadly, that one and the same facts gave rise to the misconduct and the impairment. That approach was not erroneous as a matter of law.

The learned judge said:

> "94. (Counsel for the appellant) submitted that the Panel erred in law in not applying a "two-stage process" to the issues of "misconduct" and "impairment". The decisions of this court in *Cohen, Zygmunt* and more recently, *Cheatle* [2009] EWHC 645 (Admin), impose a requirement upon an FTP panel to consider and decide separately these two issues. By contrast, in the present case (counsel for the appellant) contended that there was no such "two-stage process", that the panel never actually determined that the appellant's actions amounted to misconduct, and that the panel applied exactly the same reasoning in respect of "misconduct" and "impairment".
>
> 95. This is an argument of some substance. In the present case, the panel did not expressly identify (a) findings on "misconduct" and (b) findings on "impairment"; and the delineation between the two is not easy to identify. Moreover, the panel gave almost the same reasons for its finding of misconduct and its finding of impairment, namely, breach of *Good Medical Practice*, not in the best interests of patients and undermining public confidence in the medical profession. In the case of impairment, the panel, additionally, characterised the breach as a breach of "fundamental principles".
> 96. In my judgment, it would certainly have been better, particularly, in the light of this Court's observations in *Zygmunt* and *Cohen*, if the Panel in the present case, had clearly indicated distinct consideration of the two issues of "misconduct" and "impairment".
>
> 97. However, I accept (Counsel for the GMC's) submission that, as a matter of law, there is no requirement in *all* cases for there to be a formal "two-stage" process. The requirement under the Act is that there are two "steps"; the panel

must consider whether there has been misconduct and further whether that misconduct is such as to impair fitness to practise. As pointed out by Cranston J in *Cheatle* whilst misconduct is about the past, impairment is an assessment addressed to the future, albeit made in the context of the past misconduct.

…

99. Nor, as a matter of law, is there a requirement that, in all cases, the reasons for a finding of impairment must be distinct from the reasons for the finding of misconduct. Often a finding of impairment will follow from past misconduct, but that is not necessarily the case. As Mitting J put it in *Zygmunt* "even though the panel… finds… misconduct, it *may* conclude that fitness to practise is not impaired." After saying that in perhaps the majority of cases, the issue will not be live (i.e. in such cases, a finding of impairment will follow from the finding of misconduct), Mitting J continued, in contrast, by stating that in cases in which the issue is live, then impairment "must be separately and appropriately" addressed. It is thus necessary to distinguish between cases where misconduct is, of itself, likely to lead to a finding of impairment and cases where misconduct does not necessarily lead to a finding of impairment, because of other factors to be taken into account. Such factors usually comprise events between the date of misconduct and the date of the panel hearing, such as a one-off event of misconduct followed by the passage of substantial time, an(sic) otherwise unblemished record, or subsequent retraining. In each of *Zygmunt*, *Cohen* and *Cheatle*, the panel had failed to take into account what had happened in the period between a one-off incident of past clinical misconduct and the date of the assessment of fitness at the panel hearing."

86. In ***Nicholas-Pillai v. General Medical Council [2009] EWHC 1048 (Admin),*** the panel found that the practitioner was guilty of dishonesty in relation to note-taking and had given misleading instructions to his solicitors. Mitting J considered the extent to which the practitioner's misleading instructions to his solicitors were relevant to impairment, and said:

"[16]…[T]he panel are, in my view, clearly entitled to take into account, at the stage at which they determine whether fitness to practise is impaired, material other than the allegations which they have considered which suggest that it either is not impaired or that it is impaired.

[17] To take an instance not far removed from this case, this was an isolated act of professional dishonesty. If Dr Nicholas-Pillai had acknowledged that he had made up the notes after the event, or had inserted a date that he had no reason to believe was right after the event, and had accepted that, in so doing, he intended to mislead the patient's solicitors, then hard though it may have been to make those admissions, they would have stood to his credit, and might have tended to suggest that his fitness to practise was not as impaired as otherwise it would ordinarily be found to have been. But he did not do that.

[18] In the view of the panel, which is not disputed, he contested the critical allegations of dishonesty and intention to mislead. That was a fact which the

> panel were entitled to take into account in determining whether or not his fitness to practise was impaired, even though it did not form a separate allegation against him. Indeed, it is hard to see how it could have done. Once can envisage circumstances in which lying to a disciplinary panel may itself amount to professional misconduct such as to lead to a finding that fitness to practise is impaired and a severe sanction. In a case, for example, of alleged clinical error, where a doctor had given false evidence to the panel about it, the panel would not be entitled to treat that as a freestanding ground of impairment of fitness to practise leading to a sanction. If it found that the original clinical error which founded the allegation did not impair his fitness to practise and it was only the lies told to the panel, then that would have to be pursued in separate proceedings, with the charge made the subject of a separate allegation. But that set of circumstances is likely to be highly unusual.
>
> [19] In the ordinary case such as this, the attitude of the practitioner to the events which would give rise to the specific allegations against him is, in principle, something which can be taken into account either in his favour or against him by the panel, both at the stage when it considers whether his fitness to practise is impaired, and at the stage of determining what sanction should be imposed upon him."

In refusing permission to appeal to the Court of Appeal, [2009] EWCA Civ 1516, Lord Justice Hooper said that the fact the practitioner had given dishonest evidence must compound the original dishonesty and be a factor which a panel is entitled to take into account.

87. ***Shah v. General Pharmaceutical Council (formerly Royal Pharmaceutical Society of Great Britain) [2011] EWHC 73 (Admin)***

In this case, the Administrative Court (Wyn Williams J) dismissed the appellant's appeal against the decision to direct the respondent's registrar to remove his name from the register. The appellant was the superintendent pharmacist at a pharmacy known as Shah Pharmacy located in Enfield. As a consequence of dispensing errors a complaint was made to the respondent. A visit to the pharmacy by inspectors employed by the respondent revealed further matters of concern about practices in the pharmacy which included the supply and storage of out-of-date medicines. The appellant admitted most of the facts alleged against him. He also admitted that many of his actions had placed him in breach of Key Responsibilities 1 and 3 which provide that pharmacists should act in the interest of patients and seek to provide the best possible health care for the community, and that pharmacists should not bring the profession into disrepute or undermine public confidence in the profession.

By his grounds of appeal the appellant alleged that the statutory committee had failed to have regard to the fact that in previous decisions of the committee there was "a consistent body of jurisprudence" showing that the reputation of the profession could be vindicated by decisions to reprimand practitioners for similar offences to those facing the appellant. The appellant relied upon earlier decisions of the statutory committee reported in the Pharmaceutical Journal. Wyn Williams J said there was nothing within the reports of the cases relied upon by the appellant which suggested that they formed part of a coherent body of consistent jurisprudence. There was no suggestion in any of the cases that later cases rely upon the earlier ones, and there was no suggestion in the reports that the sanction of reprimand was imposed because that was some kind of norm in the circumstances revealed in the cases in question. The learned judge was not persuaded that the earlier cases were anything more than individual decisions essentially related to their own facts, and it seemed to him to be clear that the statutory committee was wholly justified in concluding that the significance of the previous decisions was limited in determining the appropriate sanction in the present case.

88. ***R (Vali) v. General Optical Council [2011] EWHC 310 (Admin)***

The allegation against the appellant, V, was that her fitness to practise was impaired because at a consultation with a patient in July 2005 when the appellant recorded intraocular pressure measurements which were abnormal but allegedly did not repeat the recording either immediately and/or at a different time of day, did not perform a visual field test, and did not make a referral of the patient to a medical practitioner concerning the abnormal intraocular pressure measurements. Ouseley J rejected V's arguments on the admissibility of the patient's witness statement (the patient being in Ethiopia), and the appellant's arguments on the findings of misconduct, but concluded that the finding by the fitness to practise panel on impairment could not be justified and the panel's decision should be quashed. The consultation occurred four and a half years before the hearing. The panel had positive evidence that there had been no complaints either to the General Optical Council or by those for whom the appellant cared about the way in which she dealt with patients over the period since July 2005. They also had, from a variety of sources, testimonials and support which was not consistent with somebody having so basic a failing in knowledge as the panel supposed. The appellant's career was on a good upwards trajectory, including supervision and teaching. There was also

evidence of recent acquisition of relevant skill base. The court said it was unfortunate that the committee used the language it did about the appellant's lack of insight. Absence of insight, if it means no more than that the appellant's evidence was not accepted, was an inappropriate use of the concept as a basis for a finding of impairment. The court concluded that it was hard to conceive that somebody who is a continued risk to public safety or to public confidence in the competence and standing of the profession would have progressed as the appellant had done.

89. ***Razza v. General Medical Council [2011] EWHC 790 (Admin)***

R appealed against the decision of the GMC's fitness to practise panel that his fitness to practise was impaired by his misconduct and the decision to impose upon him a sanction of 12 months' suspension. It was alleged that R conducted himself in the course of a consultation with a patient in a way which was inappropriate, sexually motivated and an abuse of his professional position. The submissions on appeal relevant to the issue of impairment were (a) this was an entirely innocent incident, (b) R's record was an unblemished one, and (c) there was no pattern of predatory behaviour which had been identified or established by the evidence adduced before the panel. In allowing R's appeal, the Administrative Court (His Honour Judge Pelling QC) criticised the panel's finding that the matters complained of stemmed from R's "underlying attitude". The reasons given by the panel did not define what that attitude was alleged to have been and, more fundamentally, failed to explain the basis for the conclusion and how it was consistent with the points made on behalf of the doctor. This was an isolated incident by a doctor with an otherwise unblemished record. The judge considered the panel was wrong to dismiss the steps taken by the doctor to now always have a chaperone present when examining women patients as being to protect himself rather than the protection of the patients. The court concluded that the panel's obligation to decide whether, and then to explain why, the doctor's current fitness was impaired by reason of his past misconduct had not been discharged correctly. In the court's view the panel did not explain, even to the modest standards imposed on tribunals in these circumstances, why they reached the conclusion that they did. That of itself would justify quashing its decision.

90. ***Council for Healthcare Regulatory Excellence v. (1) Nursing and Midwifery Council, (2) Paula Grant [2011] EWHC 927 (Admin)***

CHRE appealed against a decision of the NMC's conduct and competence committee that the second respondent, G, a registered nurse and midwife, was guilty of misconduct but that her fitness to practise was not impaired. G worked as a midwifery sister in a hospital. The charges against her included that she had, over a period of some 20 months, failed to provide assistance to a junior colleague and subjected that colleague to bullying and harassment for reporting her; failed to provide appropriate care to a patient admitted for delivery of her baby who had died in utero, and failed properly to record that a baby born at 20 weeks gestation had been born alive. The committee found that the charges were proved and amounted to misconduct. However, they found that G's attitude had improved and that she had addressed her poor performance, so that her fitness to practise was not currently impaired. In allowing CHRE's appeal, supported by the NMC, but opposed by G, the Administrative Court (Cox J) said that it was essential, when deciding whether fitness to practise was currently impaired, not to lose sight of the need to protect the public and the need to declare and uphold proper standards of conduct and behaviour so as to maintain public confidence in the profession. A panel should consider not only whether the practitioner continued to present a risk to members of the public in his or her current role, but also whether the need to uphold professional standards and public confidence in the profession would be undermined if a finding of impairment was not made. The committee in the instant case had not referred in its reasons to the importance of wider public interest considerations or to the need for substantial weight to be given to the protection of the public, the maintenance of public confidence in the profession and to the upholding of proper standards of conduct and behaviour. Nor was there anything in the reasons to suggest that they had in fact had regard to these wider considerations without making any express reference to them.

91. ***Hazelhurst and others v. Solicitors Regulation Authority [2011] EWHC 462 (Admin)***

This was an appeal by four partners in a firm of solicitors against orders of financial penalty made against each partner by the Solicitors Disciplinary Tribunal. Between February 2003 and May 2006, an employee of the firm, M, stole £101,826 from the firm's client account. The thefts were discovered by chance. Subsequent enquiries by the firm revealed wide-spread misuse of private funds. The firm immediately self-

reported the matter to the Solicitors Regulation Authority and appointed a locum to examine its files in order to identify the full nature and extent of the misuse of funds by M. All funds were repaid to the accounts by the partners within the firm. Indemnity insurance was insufficient for this purpose, and as a consequence the partners of the firm paid between £80,000-£90,000 in order to meet the liabilities. No client of the firm suffered any loss. There was no suggestion that any appellant was involved in dishonest practice. M was dismissed from employment by the firm. The case against the appellants was founded upon breaches of the Solicitors Accounts Rules and a breach of the Solicitors Practice Rules, namely a failure to supervise an employee who was discovered to be dishonest. The appellants pleaded guilty to all charges. The sanction imposed was that each appellant was to pay a penalty of £4,000 and costs. No appeal was raised as to the costs order, but the appellant relied upon two matters: (1) during the three years of the thefts, the firm's accounts were independently audited by accountants in accordance with the guidance contained in the Solicitors Accounts Rules, and the auditors discovered nothing untoward, and (2) M was a trusted employee of the firm who had worked there for eight years and until the discovery of the fraud, there was no reason to believe she was anything other than trustworthy. In allowing the appeal and quashing the orders of the financial penalties made by the SDT, and substituting a reprimand, Nicola Davies J said that, in short, the acceptance of a failure to supervise which was made primarily on the basis of a fraud carried out over a period of three years, had to be balanced against the fact that others had failed to identify any wrong-doing and that such wrong-doing was perpetuated by a member of staff whose conduct had given no cause to question her honesty. In the judge's view, the SDT had failed in their written reasons to adequately address the submissions of the appellants as to why the thefts went undiscovered for a period of three years. In failing to address the appellant's submissions, the SDT did not provide adequate reasons for their findings as to the breaches of the Rules and specifically the lack of supervision.

92. ***Karwal v. General Medical Council [2011] EWHC 826 (Admin)***

This was an appeal against a further nine months' suspension imposed by the GMC's fitness to practise panel at a review hearing. In June 2008 an earlier panel found that the appellant doctor, K, had knowingly made false representations to a professional colleague about an investment scheme so as fraudulently to reassure him that £188,000 he had

invested would be repaid. The panel suspended K from the medical register for 12 months. At a review hearing in March 2010, the panel found K's fitness to practise was still impaired and she was further suspended for nine months from the expiry of the current suspension. A key question was whether K had sufficient insight into or had fully appreciated the gravity of the original offence. The review panel had determined that K's behaviour continued to demonstrate lack of insight and a real acceptance of the original findings of dishonesty. In the Administrative Court, Rafferty J said that in her judgment the panel was not only entitled, but obliged to address K's dishonesty but also her lack of insight. The GMC's Indicative Sanctions Guidance provides that a review panel will need to satisfy itself that the doctor has fully appreciated the gravity of the offence, has not re-offended, and has maintained his or her skills or knowledge. Rafferty J said that insight – in the sense of determining whether the doctor had appreciated gravity – was inevitably an issue at a review. Dishonesty by a doctor, albeit unconnected with the practice of medicine, undermines the profession's reputation and public confidence. The appellant had always maintained her innocence of the original findings. The court was not persuaded that equating maintenance of innocence with lack of insight was the same. The panel was scrupulous to make clear that it did not see acceptance of culpability as a condition precedent for insight. The findings of the panel demonstrated its justifiable view that K had not fully appreciated the gravity of her offence, rather than that she sought to minimise it.

93. ***Daraghmeh v. General Medical Council [2011] EWHC 2080 (Admin)***

King J dismissed an appeal from findings of a review carried held to investigate whether the appellant's fitness to practise was still impaired. In November 2005 the appellant had been suspended from his post as a specialist registrar in medicine for the elderly at a number of hospitals in Scotland. He had not worked in any clinical way since 2005. At a hearing before the fitness to practise panel in February 2009, the panel had determined that the appellant's fitness to practise was impaired by reasons of deficient professional performance. The panel imposed a sanction of 12 months' suspension. At a review in February 2010, the panel found that the appellant's fitness to practise remained impaired by reason of his deficient professional performance, and imposed a number of conditions on his registration.

On appeal the appellant challenged a number of the conditions and contended that the conditions imposed by the review panel were irrational, disproportionate and impracticable; that their cumulative effect was to defeat the purpose of conditions as expressed in the GMC's Guidance, namely to enable the doctor to remedy any deficiencies in his practice; and that the conditions made it a practical impossibility for the appellant to obtain a post of employment in the United Kingdom. King J recognised that *Udom v. GMC* [2010] Med LR 37 established that it would be an error of law for a panel to impose conditions on registration which were in effect incompatible with registration. However, the panel were faced with having to balance the interests of the appellant against the need to protect patients. In the instant case, the panel was concerned with the ability of the GMC to monitor the performance of a doctor who had not practised clinically since 2005, and in the context of evidence that the assessment team themselves had debated whether the appellant was capable of returning to any sort of work. In such circumstances it was entirely open to the panel to impose stringent conditions and within the conditions which they concluded were necessary for the protection of the public, a restriction confining the appellant in the first instance to the care of the elderly, and where his work would be supervised by a named consultant. The learned judge agreed with the observations of Blake J in the case of *Abrahaem v. GMC* [2008] EWHC 183 (Admin), where at para 34(b) it was said that the best evidence of the impact of the conditions would have been the appellant's attempts to find UK employment or seeking advice from a post graduate dean or other qualified person.

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