

CONTENTS

PAGE 1	THE INDEPENDENCE OF LEGAL ASSESSORS BRIAN HARRIS QC
PAGE 2	ACHIEVING ARTICLE 6 COMPLIANCE JULIE NORRIS
PAGE 4	LEGAL UPDATE KENNETH HAMER
PAGE 8	UPDATE ON MARION SIMMONS QC ESSAY PRIZE NICOLE CURTIS

THE INDEPENDENCE OF LEGAL ASSESSORS

Many disciplinary and regulatory tribunals in this country comprise or include lay members and it is normal practice for such tribunals to have the assistance of a legal assessor. The legal assessor is not a member of the tribunal, nor is his role analogous to that of a judge with a jury. In the words of Lord Radcliffe, his task is: ‘... confined to advising on questions of law referred to him and to intervention for the purpose either of informing the committee of any irregularity in the conduct of their proceedings which comes to his knowledge, or of advising them when it appears to him that, but for such advice, there is a possibility of a mistake of law being made’ (*Fox v General Medical Council* [1960] 3 All ER 225, (1960) 124 JP 467).

The decision of the European Court of Justice in the case of *Akzo Nobel Chemicals & Akcros Chemicals v Commission & Ors (Competition)* [2010] EUECJ C-550/07 should make regulators and professional bodies re-examine the practice of regulatory and disciplinary tribunals being assisted by in-house legal assessors.

In *Akzo* the Court decided that communications between in-house counsel and internal clients were not privileged in relation to EC Commission competition

investigations. This decision is important enough in its own context, but the court’s reasoning raises important issues for regulators and professional bodies outside the context of the litigation.

The ECJ held that, in order to be protected by legal professional privilege, written communications must be exchanged with ‘an independent lawyer, that is to say one who is not bound to his client by a relationship of employment’. The requirement of independence, the court said, means the absence of any employment relationship between the lawyer and his client, so that legal professional privilege does not cover exchanges within a company or group with in-house lawyers. An in-house lawyer, despite his enrolment with a Bar or Law Society and the professional ethical obligations to which he is, as a result, subject, does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client. Consequently, an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client.

In an important passage the court observed:

‘It is true that an external lawyer is also economically dependent to some extent on his clients. If a client is not satisfied with the legal advice or defence provided by his external lawyer, the client may withdraw the instruction or, as the case may be, refrain from engaging his services in the future. It should be noted in this regard that, unlike enrolled in-house lawyers and other corporate juriconsults, external lawyers do not have any protection against dismissal. For lawyers who make their living largely from giving advice to and acting in legal proceedings on behalf of one or a small number of large clients, this may come to pose a serious threat to their independence.

‘However, for external lawyers, such a threat is and remains more of an exception and is not consistent with the typical role of a lawyer in private practice or of an independent law firm. A self-employed lawyer usually works for a large number of clients, which, in the event of a conflict of interests between his professional ethics and the aims and wishes of a client, makes it easier for him, if necessary, to withdraw his services of his own accord in order to safeguard his independence.

‘In the case of an enrolled in-house lawyer, the situation is different. As an employed person, an

enrolled in-house lawyer is typically rather than only exceptionally characterised by complete economic dependence on his employer, who alone provides him with most of his income in the form of a salary. In so far as the relevant national rules of professional ethics contain any provision at all allowing enrolled in-house lawyers to take on external instructions alongside their activities as employees of the undertaking for which they work, such instructions will generally be of only minor financial significance to them and will in no way alter their economic dependence on their employer. The degree to which enrolled in-house lawyers are economically dependent on their employer is therefore usually far greater than the degree to which external lawyers are dependent on their clients. The fact, raised by a number of the parties to the proceedings, that enrolled in-house lawyers are protected against dismissal under employment law likewise does nothing to alter their economic dependence.

‘In addition to their economic dependence on their employer, enrolled in-house lawyers usually exhibit a considerably stronger personal identification with the undertaking for which they work, as well as with its corporate policy and corporate strategy than would be true of external lawyers in relation to the business activities of their clients.’

Tribunal members, like judges, are required to be independent of the prosecutor, both at common law and, in the case of public authorities, under the European Convention on Human Rights. The test for independence was laid down authoritatively by the House of Lords in the case of *Porter v Magill and another* [2002] 1 All ER 465; [2001] UKHL 67; [2002] 2 AC 357 and does not need to be repeated here.

There seems to be little doubt that the requirement for independence applies to the tribunal’s legal adviser as much as to the tribunal members. In the case of *Clark (Procurator Fiscal, Kirkcaldy) v Kelly* [2003] UKPC DI, for example, Lord Hoffmann had to deal with the office of clerk to the justices (which bears comparison in this respect to that of a legal assessor to a tribunal). He remarked:

‘... it seems to me that the position of the clerk, whether one chooses to describe him as part of the tribunal or not, is such as to attract some requirements of independence and impartiality by virtue of art 6(1). I cannot imagine that it would be regarded as acceptable, for example, that the clerk should advise the justices when he is the father or some other close relation of the victim of the offence for which the accused is being tried. Stone’s Justices’ Manual (2002) says in relation to clerks in English magistrates’ courts that ‘[t]he test of apparent bias which applies to magistrates ... applies

also to the justices’ clerk since he is part of the judicial process in the magistrates’ court’. That seems to me in principle correct.’

Akzo presents no problems so far as concerns legal assessors in independent practice: the problem lies in the common custom of tribunals being advised by legal assessors who are in-house lawyers. The clear implication of the reasoning in *Akzo* is that such assessors cannot satisfy the test of independence from the prosecution. Regulators and professional bodies should urgently re-consider their arrangements in light of this decision.

The ECJ’s assessment of the independence of lawyers in private practice seems somewhat rose tinted and it may be questioned whether their criticism of in-house lawyers is based on evidence rather than assumptions. Some partners in City firms are so close to their clients, sometimes even embedded within their firms, that there must be a temptation to produce income to the detriment of professional independence. And in all my years of working in the regulatory field I am unaware of any suspicion of partiality on the part of an in-house legal assessor.

Brian Harris QC

ACHIEVING ARTICLE 6 COMPLIANCE - THE USE OF CIVIL SANCTIONS IN THE REGULATORY FIELD

The Law Commission has recently signalled its endorsement of the greater use by regulators of the civil sanctions introduced by Part 3 of the Regulatory Enforcement and Sanctions Act 2008. In this article, we take a brief look at the operation of these civil sanctions and ask in particular how regulators acquiring access to them may achieve convention compliance.

The Law Commission has at last taken a radical look at the relationship between regulation and the criminal law. In its latest consultation paper¹, the Commission endorses Professor Macrory’s view that reliance on the criminal law as a means of deterring regulatory non-compliance ‘may prove to be an expensive, uncertain and ineffective strategy’.² The genesis for the main part of the paper is Professor Macrory’s vision of a fair, effective and proportionate civil enforcement regime, which includes a case for ‘decriminalising certain offences...and reserving criminal sanctions for the most

¹ CP No 195 *Criminal Liability in Regulatory Contexts* (August 2010).

² CP No 195 (*Overview*) *Criminal Liability in Regulatory Contexts* (August 2010) para 1.8.

serious cases of regulatory non-compliance'.³ The Commission argues that criminal prosecutions should be a measure of last resort, reserved for serious or egregious conduct, and that in low level instances of regulatory non-compliance, greater use should be made of civil sanctions. According to the Commission:

'The introduction of [the civil sanctions in the Regulatory Enforcement and Sanctions Act 2008] creates a real opportunity for an achievable reduction in the number of criminal offences which departments and regulators used to have to rely on. It is important that a determined effort is made to use them.'⁴

The Regulatory Enforcement and Sanctions Act 2008

Whilst some regulators will already have a range of civil sanctions in their suite of enforcement powers, many do not and will be reliant on the Regulatory Enforcement and Sanctions Act 2008 (RESA) for access to them.

As the third piece of primary legislation⁵ introduced this decade by the former Labour administration under the umbrella of the 'Better Regulation' agenda⁶, Part 3 of RESA provides that a minister of the Crown⁷ may grant certain regulators⁸ the power to apply one or more of the four new civil sanctions⁹ in the event of regulatory non-compliance through the commission or likely commission of certain criminal offences (known as relevant offences).¹⁰

Whilst the so-called administrative sanctions are available to hundreds of statutory regulators, local authorities and government departments, there are a number of procedural hurdles that must be cleared

³ Richard Macrory, *Regulatory Justice, Making Sanctions Effective* (Better Regulation Executive)(Final Report, November 2006), para 1.39. A copy can be found on the Department for Business Innovation and Skills (BIS) website: (<http://www.bis.gov.uk>).

⁴ CP No 195 (*Overview*) *Criminal Liability in Regulatory Contexts*, para 1.37.

⁵ The others being the Regulatory Reform Act 2001 and the Legislative and Regulatory Reform Act 2006.

⁶ The Conservative-led coalition government has embarked upon a so-called Reducing or De-Regulation Agenda.

⁷ RESA, s 36(2) provides that where the provision relates to a Welsh ministerial matter, the Welsh ministers may make any such provision under s 36(1) by way of a statutory instrument. S 71(1) defines both ministers of the Crown and Welsh ministers as the 'relevant authority'

⁸ Either designated regulators under Sch 5 or those regulatory authorities who have an enforcement function in relation to offences specified in certain specified enactments listed in Schs 6 and 7. Regulatory function is defined in s 71.

⁹ Fixed monetary penalties, discretionary requirements, stop notices and enforcement undertakings.

¹⁰ Relevant offence is defined in RESA, s 38.

before the enabling legislation can be passed and the sanctions acquired; they do not accrue to regulators automatically.¹¹ Additionally, RESA as an enabling act, leaves much of the detail about the operation of the sanctions to the minister to determine in the order.

To date, only the Environment Agency and Natural England have been awarded the powers.¹² This speaks not of a lack of willingness on the part of regulators to take up these new sanctions, rather of the lengthy and involved process of obtaining them.

For businesses, the benefits of being subjected to a Part 3 civil penalty, as opposed to a criminal prosecution, are significant; the civil sanctions do not result in a criminal record and their imposition precludes the possibility of concurrent criminal proceedings being instituted for the same act or omission.¹³ The operation of the civil sanctions does however raise a number of fundamental questions about procedural fairness and compliance with the European Convention on Human Rights (the Convention). Two such concerns are touched on below.

Right to be heard and to examine witnesses

The civil sanctions in Part 3 are intended to be applied administratively by regulators in their enforcement capacity, as opposed to being independent judicial decisions made after the hearing of evidence and argument. Significantly, this may mean that a business that contests an alleged (criminal) offence need not be afforded the opportunity to attend a hearing and challenge the evidence against it, prior to the regulator making a determination as to its liability.

It is arguable that the specific procedural safeguards of Article 6(3) of the Convention apply to determinations resulting in the imposition of the RESA sanctions, in which case, provision must be made for a business or individual accused of a relevant offence to have the opportunity to be heard and to examine witnesses who give evidence against them, *prior* to a finding being made against them and a civil sanction imposed.

¹¹ For example: a consultation; a Hampton Implementation Review to demonstrate compliance with the Principles of Good Regulation; and possible approval by the Reducing Regulation Committee (previously the Panel for Regulatory Accountability).

¹² By virtue of the Environmental Civil Sanctions (England) Order 2010, SI 1157/2010 and the Environmental Civil Sanctions (Miscellaneous Amendments) (England) Regulations 2010.

¹³ Save in limited circumstances, eg failure to comply with a non-monetary discretionary requirement may mean that the original offence can be prosecuted in the criminal courts.

Appeal as of right

The order awarding the sanctions need not provide for an appeal as of right,¹⁴ meaning that an accused may be entirely denied the right to be heard in their defence. The Commission proposes that the right of appeal against the imposition of the civil sanctions be an unfettered one;¹⁵ a view shared by the environmental regulators already using the sanctions. The Environmental Civil Sanctions (England) Order 2010 provides that appeals against the imposition of the Part 3 sanctions may be brought on certain specified grounds, and 'for any other reason'.

It should be borne in mind that a lack of conformity with the Convention at first instance may be capable of being rectified on appeal by a body that does conform to the Convention guarantees.¹⁶ The general regulatory chamber of the First-tier Tribunal, which is likely to hear all such appeals, is such a body.

Conclusion

The move to make civil sanctions an integral part of the regulatory enforcement landscape is well underway, and if the Commission's proposals reflect the mood of the government in this area, it is a trend that is set to continue. Whilst the sanctions undoubtedly provide regulators with an effective alternative to criminal prosecutions in appropriate cases, their efficacy will be severely undermined if challenges can be brought in respect of their Convention compliance. Regulators seeking the award of the Part 3 sanctions will need to give careful consideration, at the earliest possible stage of policy development, to drafting provisions designed to protect the rights and guarantees of Article 6. The alternative may be much more costly in the long run.

Comments on all the proposals in the paper were sought by November 25, 2010.

Julie Norris is co-author with Jeremy Philips (Francis Taylor Buildings) of *The Law of Regulatory Enforcement and Sanctions: A practical guide*, Oxford University Press, date of publication, February 2011.

Julie Norris
Kingsley Napley

¹⁴ Appeals lie to the General Regulatory Chamber of the First-tier Tribunal, established under s3 of the Tribunals, Courts and Enforcement Act 2007 (c15).

¹⁵ Proposal 9.

¹⁶ *Albert Le Compte v Belgium* (1983) 5 EHRR 533, para 29; *Gautrin and Others v France* (1999) 28 EHRR 196. The courts have said that an appeal to a full court of jurisdiction 'does not purge a breach of the Convention. It prevents such a breach from occurring in the first place': *Tehrani v United Kingdom v Central Council for Nursing and Midwifery and Health Visiting* [2001] IRLR 2; [2001] Scot CS 19.

LEGAL UPDATE

- ***Butt v Solicitors Regulation Authority [2010] EWHC 1381 (Admin)***
- ***Mulla v Solicitors Regulation Authority [2010] All ER (D) 35***

In *Butt*, the Divisional Court (Elias LJ, Keith J) refused the claimant's application for judicial review of a decision to decline his application to the Roll of Solicitors, in circumstances where the claimant had falsely stated on his application form that he did not have previous criminal convictions. Elias LJ said that the onus lies firmly on an applicant who is seeking to establish that he has the character which is suitable to be a solicitor. The appropriate approach is set out in the judgment of *Sir Anthony Clarke MR in Jideofu v Law Society [2007] EWM* is 3. The Master of the Rolls endorsed submissions made on behalf of the Law Society to the following effect: (1) the test of character and suitability is a necessarily high test; (2) the character and suitability test is not concerned with punishment, reward or redemption but with whether there is a risk to the public or a risk that there may be damage to reputation of the profession; and (3) no one has the right to be admitted as a solicitor and it is for the applicant to discharge the burden of satisfying the test of character and suitability.

In *Mulla*, Kenneth Parker J allowed the appellant intending-solicitors' appeal against the decision of the SRA to refuse to issue a certificate of enrolment to him because he had received two cautions for fraud and kindred offences, where the circumstances of the case were such as to render it exceptional. The instant case was an exceptional one for various reasons including (1) the appellant had not committed the offences with a view to personal gain, had been given the credit card by its owner and had been authorised to use it by him; (2) the appellant's attitude to the offences was one of unequivocal acceptance of his dishonesty; (3) the police had not regarded the matter as serious; and (4) the outstanding references which the appellant had in his favour, and the time which had elapsed since the offences had been committed during which he had behaved in an exemplary fashion.

- ***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 five 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 five 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 five 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.

- ***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.

- ***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.

- ***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.

- ***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 LJ 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.

- ***R (King) v Secretary of State for Justice [2010] EWHC 2522 (Admin)***
- ***R (Shepherd) v Governor of HMP Whatton [2010] EWHC 2474 (Admin)***

In *King*, 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 observer would conclude that arrangements for the resolution of the disciplinary charge of disobedience within the setting of the custodial institution were 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 Article 3 and 8 of the Convention 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.

In *Shepherd*, 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 he 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 he state a clear finding that he, having appreciated the issue, had found against the claimant on it.

- *Jooste v General Medical Council [2010] EWHC 2558 (Admin)*
- *R (Royal College of Nursing) v Secretary of State [2010] EWHC 2761 (Admin)*

Both these cases relate to interim orders. In *Jooste*, Nicola Davies J held that the GMC's Interim Orders Panel had been entitled to conclude that there might be an impairment of the appellant's medical practitioner's fitness to practise which posed a real risk to members of the public and there were no grounds for terminating the suspension imposed. Further, the panel had properly investigated whether or not there had been service of the requisite notice upon the doctor and concluded on the evidence that there had been such service. The panel delayed the start of the hearing for over two hours in an effort to contact the appellant and were entitled to proceed in his absence. There was evidence before the panel which raised concerns as to whether the doctor was working, what he was doing, and whether the premises were registered with the Care Quality Commission. Such concerns were relevant to the issue of the doctor's fitness to practise and any risk which he might pose to members of the public.

In the *Royal College of Nursing* case, Wyn Williams J held that it was unlawful to deny a person the right to make representations as to why he should not be included on the children's barred list or the adults' barred list. The Safeguarding Vulnerable Groups Act 2006 created a scheme for the creation and maintenance of a statutory list of persons who were prohibited from working with children and/or vulnerable adults. The effect of being placed upon one of the lists was that a person was barred from working with either children or vulnerable adults in employment or voluntarily. An individual who was included in a barred list might appeal to the Upper Tribunal. The Royal College of Nursing was a regulated body which was concerned about the impact and potential impact of the scheme upon its members. The court ruled that the denial of the right to make representations in advance of listing was not a mere formal or technical breach. It was a denial of one of the fundamental elements of the right to a fair determination of a person's civil rights, namely, the right to be heard. However, the Upper Tribunal could put right any errors of law and any material errors of fact and, further, could do so at an oral hearing if that was necessary for the fair and just disposal of the appeal.

- *Parkinson v Nursing and Midwifery Council [2010] EWHC 1898 (Admin)*
- *Ajayi v Nursing and Midwifery Council [2010] All ER(D) 139 (Oct)*

- *Kituma v Nursing and Midwifery Council [2010] EWCA Civ 154*
- *Pugsley v General Medical Council [2010] EHC 2247 (Admin)*
- *Sharma v General Dental Council [2010] All ER(D) 121 (Nov)*

Each of these cases concerned sanction. In *Parkinson*, the Administrative Court dismissed the appellant nurse's appeal against his erasure from the register. He had acted dishonestly and had not appeared before the fitness to practise panel either personally or by his representatives. Mitting J said that a nurse found to have acted dishonestly is always going to be at a severe risk of having his or her name erased from the register. A nurse who has acted dishonestly, who does not appear before the panel either personally or by solicitors or counsel to demonstrate remorse, a realisation that the conduct criticised was dishonest, and an understanding that there will be no repetition, effectively forfeits the small chance of persuading the panel to adopt a lenient or merciful outcome and to suspend for a period rather than to direct erasure. It was impossible to conclude on the material before the court that the panel had been wrong to order erasure.

In *Ajayi*, the appellant had also been found guilty of dishonesty, and the panel had not erred in concluding that the only appropriate sanction was striking off. In *Kituma*, the committee had taken full account of the evidence on which the appellant had relied and had reached a decision properly open to it on sanction in the light of that evidence. Furthermore, the judge had given very careful thought to the issue of a conditions of practice order and had done so in reaching his ultimate conclusion that the committee's decision as to a striking offer order should be upheld. He had not been under a duty to refer the matter back to the committee.

In *Pugsley*, the Administrative Court held that the appellant medical practitioner had failed to show that the GMC had committed any error of law in finding that his fitness to practise was impaired by reason of deficient professional performance. A performance assessment had been carried out and the assessment had identified areas of deficient professional performance. There was no evidence that the panel had erred. In *Sharma*, the appellant had been found guilty of misconduct and the professional conduct committee had imposed conditions on his registration. Ouseley J held that the conditions had not been imposed as a punitive measure, but to deal with the impairments which the committee had identified. On the facts, the committee's decision on sanction had not been wrong. However, the appeal was allowed to the extent that it

related to the duration of the sanction imposed, and the length of time for which the appellant had been subject to interim sanctions pending the outcome of the instant appeal. In view of the fact that by the time of the instant hearing, the appellant had been under supervision for almost one year, and the full conditions would apply until January 2011, at which point there was to be a review. To that extent the appeal would be allowed.

Kenneth Hamer
Henderson Chambers

MARION SIMMONS QC MEMORIAL ESSAY PRIZE

The 2010/2011 Marion Simmons QC Prize was launched this autumn. This year the competition is open to postgraduate students as well as undergraduates. Entrants are invited to submit essays with the title 'Public regulation for public funds: is it time to regulate MPs like other professionals?'

The panel of judges will include leading academics in the field of regulation and members of the ARDL Committee. The first prize is £1,000 together with £250 towards books for the winner's faculty or college. The second prize is £500 (plus £150 towards books for the faculty/college) and the third prize £250 (plus £150 towards books for the faculty/college).

The competition was set up in memory of the late Marion Simmons QC, who sadly died on 2 May 2008, aged 59. Marion was a barrister, recorder, arbitrator and latterly chairman of the Competition Appeal Tribunal. Marion served on the ARDL Committee for two years and was committed in her support of young lawyers.

Entrants must be undergraduates or postgraduates in study at a recognised educational establishment in the United Kingdom. Entries must be no longer than 3,000 words and should be type-written in the English language. Essays must be submitted so as to be received by 5pm on Friday 7 January 2011 by post or e-mail to:

Nicole Curtis
Penningtons Solicitors LLP
Abacus House
33 Gutter Lane
London EC2V 8AR
nicole.curtis@penningtons.co.uk

Please check the ARDL website for full terms and conditions.

Nicole Curtis
Penningtons Solicitors LLP

REQUEST FOR COMMENTS AND CONTRIBUTORS

We would welcome any comments on the Quarterly Bulletin and would also appreciate any contributions for inclusion in future editions. Please contact any of the members of the editorial committee with your suggestions. The editorial committee is:

Nicole Curtis Penningtons Solicitors LLP
(nicole.curtis@penningtons.co.uk)

Kenneth Hamer Henderson Chambers
(khamer@hendersonchambers.co.uk)

Ivan Hare Blackstone Chambers
(ivanhare@blackstonechambers.com)