

# CONTENTS

PAGE 1	ARDL'S FIRST SCOTTISH MEETING ROBERT CARR
PAGE 3	A GUIDE TO RELYING ON GOOD CHARACTER EVIDENCE JULIE NORRIS
PAGE 5	THE REGULATORY ENFORCEMENT AND SANCTIONS ACT 2008 – IS LESS THE NEW MORE? BEN SUMMERS
PAGE 7	LEGAL UPDATE KENNETH HAMER

## **ARDL'S FIRST SCOTTISH MEETING: ADDRESSED BY LORD RODGER OF EARLSFERRY**

The first Scottish meeting of ARDL took place on 16 January 2009 when Lord Rodger of Earlsferry gave a presentation on legal developments in professional regulation at the office of Anderson Strathern in Edinburgh. There were around 60 attendees including solicitors, advocates and a significant number of regulators including representatives from the Law Society of Scotland, the Faculty of Advocates, the Scottish Legal Complaints Commission, the Scottish Social Services Council, the General Medical Council, the General Teaching Council for Scotland, the Office of the Scottish Public Services Ombudsman and the Scottish Parliamentary Standards Commissioner. The ARDL member from London, who combined the seminar with networking and cultural activities in Scotland's capital, was especially welcome. Lord Rodger spoke for around 40 minutes focusing on bias, standard of proof and decision writing. He then took questions.

On the subject of apparent bias and Article 6 compliance Lord Rodger considered the decision of

Lord Mackay of Drumadoon in *Tehrani v UKCC 2001 SC 581* which established that disciplinary proceedings resulting in the erasure of a registrant fell within the scope of Article 6 of ECHR but held that where there was a right of full appeal the determination of civil rights took place at that final stage.

Interestingly these issues are being revisited in *R (on the application of G) v The Governors of "X" School and Anor [2009] EWHC 504* where the Appeal Court will no doubt look at the extent to which an appeal could provide sufficient procedural protections in the circumstances of that case. In that context the Court will also consider whether the risk of serious and irreversible damage made a breach of Article 6 at the first stage of the process incurable, necessitating a right of legal representation and cross examination at that first stage.

Lord Rodger made reference to the definitive version of the test of bias as now found in the speech of Lord Hope of Craighead in *Porter v McGill [2002] 2 AC 357*. Lord Rodger also explored the judgement of the Australian High Court judge, Kirby J in *Johnson v Johnson (2000) 201 CLR 488* when he said that the observer is "not unduly sensitive or suspicious".

The speech of Lord Hope in the case of *Helow v Secretary of State for the Home Department [2008] 1WLR 2416* was also discussed. It was observed that notwithstanding the right of a full appeal all professional bodies would seek to reform their practices to bring them into line with the requirements of a fair hearing from the perspective of costs and public confidence including the confidence of the registrants.

Lord Rodger then turned to deal with the surprisingly vexed matter of the standard of proof. This has been an issue of considerable interest to regulators fuelled by the observations of Dame Janet Smith in the Fifth Shipman Inquiry that the appropriate standard of proof within a protective jurisdiction like a FTP panel of the GMC was the civil standard of proof, on a balance of probability. From 31 May 2008 the standard of proof applied when the GMC FTP panel is making decisions on disputed facts has been the civil standard. Until last summer the guidance which regulators applied was the flexible application of the civil standard as set out by Richards L J in the English Court of Appeal decision in

*R (N) v Mental Health Review Tribunals* [2006] QB 468 which appeared to echo the speech of Lord Nicholls of Birkenhead in the case of *In re H(Minors)(Sexual Abuse: Standard of Proof)* [1996] AC563. Lord Rodger made reference to the two decisions handed down on the same day by the House of Lords in *Re B (Children)* [2008] UK HL35 and *Re D* [2008] UK HL 33. He noted that the House of Lords had affirmed that there was only one civil standard of proof, the balance of probability. Lord Rodger emphasised the approach adopted by Baroness Hale and Lord Hoffmann and advised he had applied this approach in giving judgement in *Jugnauth v Ringadoo* [2008] UKPC 50, a Privy Council appeal from Mauritius. Lord Rodger discussed the article by Peter Mirfield in the 2009 LQR that suggested Lord Carswell had in *Re D* muddied the waters by giving a general endorsement to what Richards L J said in the *Mental Health Review Tribunal* case. Lord Rodger doubted that there was any such division of view. In any event it appears that no confusion has arisen having regard to the observations of Mitting J in the case of *R (Independent Police Complaints Commission) v Assisted Commissioner Hayman* [2008] EWHC 2191 (Admin) and Lord Uist's careful analysis of the standard of proof issue in the case of the *Petition of the Chief Constable of Fife Constabulary* [2008] CSOH 96.

From a Scottish perspective it is heartening to see Lord Uist's observations being referred to with approval at page 193 of the recently published fifth edition of "Disciplinary and Regulatory Proceedings" by Brian Harris OBE QC.

Lord Uist in considering disciplinary proceedings under the Police (Conduct)(Scotland) Regulations 1996 stated:

"The position therefore is that the standard of proof required is proof on a balance of probabilities, but common sense, not law, requires that in deciding this question regard must be had, to whatever extent appropriate, to inherent probabilities."

Lord Uist made reference to the case of *Mullan v Anderson* 1993 SLT 385 which was a five judge Scottish appeal dealing with an allegation of murder in civil proceedings. Lord Penrose observed following an analysis of the Scottish and English cases up to that date that the development of the law in the two jurisdictions had been different. He stated that the Scottish authorities established, in his opinion, that there were two standards of proof only in Scotland, proof beyond reasonable doubt and proof on a balance of probability.

The chapter in Harris explores the likely effect of *Re B* on the issue of what Lord Uist called "inherent probabilities". Harris observes:

"It is quite clear that inherent probabilities do not represent an issue of law, but they may still be relevant as something to be taken into account in deciding where the truth lies. It is not a question of applying a heightened civil standard of proof, but of asking one self whether the facts as presented to the tribunal are likely on the civil standard to have occurred or not."

It is interesting to observe that in October 2008 the NMC amended their legal advice in relation to the civil standard having regard to *Re B* and *Re D*. A revision of the GMC guidance on this issue is anticipated.

Lord Rodger then turned to the issue of the form of reasons. This is plainly a matter of considerable importance for all those involved with disciplinary tribunals. When a party loses a decision not infrequently the complaint will be that the decision was not given in an adequate form. It appears that expectations have increased over the years. Lord Rodger considered the observations of Lord Hope of Craighead in *Selvanathan v GMC* [2001] *Lloyds' RepMed* 1 where Lord Hope said:

"It is not to be expected of the committee that they should give detailed reasons for their findings of fact. A general explanation of the basis of their determination on the questions of serious professional misconduct and of penalty will be sufficient in most cases."

Lord Rodger referred to *Gupta v GMC* [2002] 1WLR 169 where the submission was that in cases which turned on an assessment of the credibility and reliability of witnesses, the disciplinary committee should explain, albeit briefly, its assessment of the various witnesses. The Privy Council did not accede to that submission. It relied on the fact that the form of the charges was itself quite detailed. Lord Rodger himself explained the position as follows:

"In this way, in cases involving issues of credibility and reliability, the structured determination of the committee dealing with the various heads of the charge, will in itself reveal much about its reasoning for reaching its decision. As the European Commission of Human Rights noted in *Wickramsinghe v UK*, the fact that the practitioner can study a transcript of the hearing, including not only the evidence but the submission on the evidence by the respective parties, further assists the practitioner in understanding not only which witnesses' evidence the committee accepted and which it rejected, but why it did so. To go further and to insist that in virtually all cases raising issues of

credibility and reliability the committee should formally indicate which witnesses it accepted and which it rejected would be to require it to perform an essentially sterile exercise.”

Lord Rodger noted that in a long and complex case or one where there is doubt as to whether the party could indeed deduce all that was required from only a very brief decision, the wiser course will be to err on the side of caution and to explain briefly which evidence the tribunal accepted and why. Like everything else in this area, much will depend on the circumstances of the individual case. The tenor of the Privy Council case law however is against insisting on over-elaboration of reasoning.

Scottish examples which illustrate this tipping point are the decision of the Inner House of the Court of Session issued on 11 February 2009 in the *Scottish Ministers v The Mental Health Tribunal for Scotland 2009 SLT 273* where the Tribunal had erred in law in failing to apply the correct tests and had failed to provide any reasons for the apparent conclusion that one of the tests had been met, and the *Petition of Laidlaw against the Parole Board for Scotland [2007] CSOH 98* where Lord McEwan observed in relation to a Board casework meeting:

“...they have to give reasons which will be readily understandable to the prisoner and his advisers. Ideally these should be short, simple and easy to follow. In a few cases they may have to find lengthier expression. I do not think that they have to be an essay or appear like a court judgment with analysis and counter analysis. The Board is busy. It has many cases and regard has to be had to these practical considerations.”

It is anticipated that ARDL will meet again in Scotland from time to time to discuss topics of collective interest within our jurisdiction. The first meeting demonstrated that there is in Scotland alive and well a broad range of specialist expertise in this field. Lord Rodger’s presentation, sprinkled with amusing personal anecdotes, literary references and 16 authorities, was quite masterful. There was even room for A E Housman, poet and Kennedy Professor of Latin at Cambridge.

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## A GUIDE TO RELYING ON GOOD CHARACTER EVIDENCE

*Three years on from the Shipman Inquiry, Julie Norris reviews five recent High Court decisions dealing with the important issue of the admissibility of good character evidence in fitness to practise proceedings.*

In her fifth report following the inquiry into the case of Harold Shipman, Dame Janet Smith expressed concerns that panels inquiring into the fitness to practise of healthcare professionals and deciding whether the conduct alleged against them amounted to serious professional misconduct, were regularly taking into account irrelevant ‘purely personal mitigation’. To what extent has the High Court sought to assuage this concern? When can practitioners now seek to rely on good character evidence in professional disciplinary proceedings?

There are essentially two types of good character evidence: ‘personal’, evidence showing that a registrant is a good person regarded highly by their friends and family in their personal life; and ‘professional’, that is evidence that tends to suggest that a registrant has a good career record and has not ‘done it before’/will not ‘do it again’. Whilst there is often some overlap between the two, the distinction is of crucial importance in terms of determining the stage at which such evidence can be adduced.

### *The law as it was: Campbell*

It was with reference to the sentiments expressed by Dame Smith that the Court in the frequently cited case of **Campbell** [2005] EWCA Civ 250 (at paragraph 33) was driven to the conclusion that, notwithstanding the rather ambiguous wording of the legislation, evidence of personal good character was not relevant at any stage of a tribunals’ determination of fitness to practise and was relevant only at the sanction stage:

“Mitigation arising from the circumstances in which the practitioner found himself or herself may be relevant to the level of culpability: once serious professional misconduct is proved, personal mitigation will be relevant to possible penalty. In our judgment, these are distinct issues, to be determined separately, on the basis of evidence relevant to them.” Per Lord Justice Judge (as he then was) at paragraph 21.

**Campbell** wasn’t without its limitations: first, it was decided on the basis of a statutory regime which did not then include the concept of ‘impairment’ (and hence did not address the adduction of character evidence at that stage); and second, determinations of impairment were not made on the basis of misconduct simpliciter

requiring instead the rather higher hurdle of ‘serious professional misconduct’ to be crossed.

With those limitations in mind, however, practitioners seeking to adduce evidence of their client’s good personal character generally had to wait until the sanction stage to do so; **Campbell** was cited as good authority for the proposition that such evidence was inadmissible before an adverse finding on the question of impairment had been returned.

Three cases decided recently in the Divisional Court, have now confirmed that good character evidence may in fact be relevant at all stages of the decision making process in fitness to practise hearings: fact-finding, misconduct and impairment.

***The fact-finding stage: Gopakumar v The General Medical Council***

The case of **Gopakumar** [2008] EWCA Civ 309 was a statutory appeal by the registrant from a decision of the GMC to strike his name from the register. Whilst not directly relevant to the registrant’s grounds of appeal, the High Court noted that in civil proceedings (as in criminal) the personal good character of a witness (and by analogy, a registrant) may be admissible if such evidence goes to either an issue in the case or to credibility (at paragraph 35).

***The misconduct stage: Donkin***

The High Court in **Donkin v The Law Society; Bryant and another v The Law Society** [2007] EWHC 414 (Admin), ruled that evidence of personal good character can be relevant to the question of dishonesty. In relation to the appellant **Bryant**, the Court considered that the testimonial evidence was, “cogent evidence of positive good character” (at paragraph 21) and as such, it was directly relevant to the question of dishonesty.

On its face, this decision appears to be at odds with the decision in **Campbell** prohibiting the use of personal good character evidence at the misconduct stage.

However, the Court looked carefully at the decision in **Campbell** and considered that the mischief at which the prohibition had been aimed was the use of personal mitigation to downgrade what would otherwise amount to serious professional misconduct to some lesser form of misconduct (see paragraph 46(iii)). As such, the Court in **Donkin** determined that in deciding whether the registrant had been dishonest (or, put another way, whether the facts amounted to a lack of competence or misconduct), evidence to show that a registrant is of good personal character can be received by the panel.

Evidence of good character may be relevant to an allegation of dishonesty at both the fact-finding stage and the misconduct stage and may be relevant to both credibility and propensity.

***The impairment stage: Cohen v General Medical Council, Zygmunt and Azzam***

In substituting the sanction imposed by the panel for a warning, the High Court in **Cohen** [2008] EWHC 581 (Admin) considered that the panel had wrongly disregarded the expert anaesthetist’s opinion that the registrant’s misconduct would have been easily remediable and the fact that the very grave consequences of his misconduct served as a salutary lesson which would serve to prevent a recurrence.

Accordingly, the registrant’s fitness to practise should not have been regarded as impaired.

The High Court considered that a panel should take into account the following factors when deciding whether fitness to practise is impaired:

- Whether the conduct which led to the charge is easily remediable;
- Whether the conduct has been remedied; and
- Whether the conduct it is likely to be repeated.

Whilst the Court did not reach a definitive position on the matter, Silber, J opined that, given the limitations referred to above, there were powerful arguments for saying that **Campbell** does not preclude a registrant from adducing evidence of good professional character at the impairment stage (at paragraph 75). It is suggested that proper consideration of the factors identified above may well entail a panel looking at any evidence of good professional character advanced by a registrant when considering the question of impairment.

The cases of **Cohen, Zygmunt v General Medical Council** [2008] EWHC 2643 (Mitting J), and **Azzam v General Medical Council** [2008] EWHC 2711 (McCombe J), now all clearly demonstrate that the task of a fitness to practise panel in deciding whether the practitioner’s fitness to practise is impaired, is to consider both the misconduct of the practitioner and the facts found proved at stage one, in the light of all the other relevant facts known to them.

***Conclusion***

Practitioners and registrants alike have welcomed this guidance on when it is permissible to adduce good character evidence and have applauded the move away from the rather simplistic and overly restrictive approach espoused in **Campbell**. Anecdotally at least,

Dame Janet Smith's concerns appear to have been allayed; practitioners are increasingly giving very careful consideration indeed to when such evidence may be used and to what end.

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## **THE REGULATORY ENFORCEMENT AND SANCTIONS ACT 2008 - IS LESS THE NEW MORE?**

### ***Introduction to the RESA***

The Act is divided into four parts. For practitioners in the field of business regulation and enforcement, it is part 3 of the RESA which is of most interest, but it is worth noting the contents of parts 1, 2 and 4 before looking more closely at part 3.

Parts 1, 3 and 4 of the Act came into force on 1 October 2008 and Part 2 came into force on 6 April 2009.

### ***Part 1: the LBRO***

Part 1 of the RESA provides that the rather Orwellian sounding Local Better Regulation Office (for England & Wales) is to be established as a statutory body (it already existed as a limited company) to promote greater adherence to principles of better regulation and coordination between local authorities. Its aim is to assist local authorities to regulate according to PACTT principles, ie regulation which is proportionate, accountable, consistent, transparent and targeted. The LBRO will also work closely with national regulators to ensure that their efforts are complementary and consistent.

### ***Part 2: Coordination of regulatory enforcement***

The RESA outlines a statutory Primary Authority Partnership Scheme spanning the UK, under which a local authority registers its responsibility for a particular business or organisation. Such responsibility requires the Primary Authority to co-ordinate any enforcement action against the regulated entity and to make and execute inspection plans where relevant.

### ***Part 4: Regulatory burdens***

Part 4 of the RESA imposes a duty upon regulators to review their functions, not to impose unnecessary burdens and to remove any such burdens wherever possible. The duty applies to Ofgem, the Office of Fair Trading, the Office of Rail Regulation, Postcomm and Ofwat. The duty can be extended to other regulators by

order if it is felt to be desirable to promote the better regulation agenda.

### ***Part 3: New civil sanctions***

Part 3 of the RESA represents a significant shift in regulatory emphasis away from prosecution as the key compliance tool, because it is expensive, time consuming and unpredictable. Instead regulators now have a more sophisticated 'toolkit' of sanctions.

Designated regulators now have an extended range of sanctions available to them, providing flexible responses to issues of non-compliance, normally dealt with in the criminal courts. These sanctions are imposed directly by the regulator without any judicial intervention

There are four categories of civil sanction:

- **Fixed Monetary Penalty (FMP):** a regulator can impose a FMP where it is satisfied beyond reasonable doubt that a relevant offence has been committed. These are low level fines calculated according to a published scale, which may differ according to type of business eg sole trader or limited company. They are intended to be used for minor regulatory non-compliance and 'will usually be capped at a maximum of £5,000'. Before imposing a FMP the regulator must serve a notice of intent setting out (i) the grounds for imposing the penalty, (ii) providing the recipient with an opportunity to make representations and to raise objections, and (iii) details of the applicable time limits. There may also be early payment discounts of the kind operated for example in parking matters. If a business accepts liability, rather than making representations or objections, they may pay a discharge payment which removes liability for the sanction and stops proceedings progressing any further. There will also be a right of appeal on the basis that the penalty was based on an error of fact, is wrong in law or is unreasonable. Unpaid fines will be enforced through the civil courts.
- **Discretionary requirements:** a package of sanctions including any combination of the following elements:
  - a Variable Monetary Penalty (VMP) to be determined by the regulator, set at a level that removes any financial advantage gained by non-compliance. A VMP can reflect the gravity of the breach and compliance history;
  - a compliance requirement which can be used to ensure that steps are taken to rectify a compliance breach eg by replacing defective

equipment, changing a process or providing training; and

- a restoration requirement which can be used to ensure a business deals with the consequences of an offence eg cleaning up a contaminated area.

Again a notice of intent must be served by the regulator and there is a right of appeal. Enforcement will be through the civil courts.

- **Stop notices:** where a business served with a notice is already carrying on an activity, the notice will prohibit the activity being carried on until any requirements specified in the notice have been complied with. A stop notice could also be issued for preventative purposes - where a business is planning to, or is about to, commence an activity. The regulator must reasonably believe, before issuing a stop notice, that the activity presents a significant risk of serious harm to human health, the environment (including animals and plants) or the financial interests of consumers and is, or is likely to be, an offence. A failure to comply with a stop notice will be a criminal offence. There will be a right of appeal and provision for compensation for wrongly imposed stop notices.
- **Enforcement undertakings:** these are agreements made between a business and a regulator whereby the business agrees to undertake specific actions eg to ensure a non-compliant activity will not recur, or payment of compensation to those affected by the breach. These undertakings may be used in cases where the business itself has brought the issue to the attention of the regulator. A regulator is not obliged to accept the offer of an undertaking from a business. A breach of an undertaking may result in an alternative sanction such as the service of a compliance notice or criminal prosecution.

While the imposition of a monetary penalty (either fixed or variable) will preclude the institution of criminal proceedings for the same offence at a later stage, non-compliance with a compliance or restoration notice may not. The provisions allow for the recovery of costs from the offending business by the regulator except in relation to fixed monetary penalties and enforcement undertakings. Regulators will be required to publish guidance in relation to their new sanctions and their enforcement policy. They are also required to publish the details of any enforcement action taken.

#### *Which regulators have been given extended powers?*

Not all regulators have been given the power to impose the civil sanctions set out above, and of those that have, the sanctions do not apply to all regulatory offences.

Rather, the RESA provides that the enhanced regulatory powers will be granted to three categories of regulators.

First, those 27 regulators listed in Schedule 5 to the RESA including the OFT, the Competition Commission, the Financial Services Authority, the Health & Safety Executive, the Information Commissioner, the Gambling Commission and the Environment Agency.

Secondly, those regulatory bodies that enforce offences contained in any Act listed in Schedule 6. Schedule 6 offences are broadly those regulatory provisions enforced by the regulators listed in Schedule 5, but the relevant Act allows other bodies to enforce its statutory objectives.

Thirdly those that enforce offences in secondary legislation made under enactments listed in Schedule 7. These provisions extended the statutory objectives yet further.

In order to use the new powers, a Minister must be satisfied that the regulator applying to do so is in compliance with the Better Regulation Executive's PACTT principles of good regulation. These principles were placed upon a statutory footing by way of the Legislative and Regulatory Reform Act 2006. Regulators will also be required to consult upon their proposals for enforcement before submitting their scheme to a Minister for approval.

#### *Conclusion*

The Bill received criticism from a number of sources, in particular from the House of Lords Constitution Committee. Criticism focused on the extent to which it is constitutionally appropriate for regulatory authorities, rather than the courts, to make determinations as to whether a person has committed a criminal offence and to impose unlimited financial penalties.

In addition there is a question mark over whether the procedural protections (which include the application of the criminal standard of proof) match up to the minimum standards of procedural fairness that a person accused of a criminal offence ought to have. There is also a potential for a lack of consistency across the UK as parts of the RESA extend to England and Wales only. Is this a missed opportunity for regulatory simplification and should not arrangements be consistent across the UK?

Whilst the extended sanctioning powers under the RESA will undoubtedly benefit some agencies, for other agencies whose sanctioning scheme is well developed (for example the FSA) they appear

somewhat redundant. Moreover, in respect of certain organisations, including the Food Standards Agency, it must be asked why, if additional powers are not required, have they been provided? Is the RESA, rather than simplifying matters, complicating them yet further?

The Government promoted the Bill on the basis that it would reduce the cost of administering regulation, rationalise inspection and enforcement agencies and at the same time efficiently tackle businesses that flout their regulatory obligations. While much of the impact of the RESA will only become apparent once it is clear how it is to be applied by individual regulators and for which particular offences, businesses would be wise to keep this new and potentially very significant piece of legislation in their sights. We may yet see the dawn of a new regulatory era.

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## LEGAL UPDATE

### ***R (Wright) v Secretary of State for Health [2009] 2 WLR 267 HL***

In this case the House of Lords allowed the appeal of the claimant care workers, and held that the provisional listing of a care worker under section 82(4)(b) of the Care Standards Act 2000, resulting in possibly irreparable damage to the person's employment or prospects of employment in the care sector, amounted to a determination of a civil right within article 6(1) of the European Convention notwithstanding it was only an interim measure; and that, given the possibility of such damage, it was necessary for the procedure of provisional listing to be fair, whereas the denial of an opportunity for care workers to answer allegations before being listed was procedurally unfair and contrary to article 6(1). Further, the listing of a person on suspicion of such serious misconduct as to indicate that he or she posed a risk to vulnerable adults could result in stigma so great as to constitute an interference with the right to respect of private life under article 8 of the Convention, which extended the right to establish and develop relationships with others, including work colleagues.

### ***Jain v Trent Strategic Health Authority [2009] 2 WLR 248 HL***

The House of Lords, in dismissing the claimants' appeal, held that the purpose of the statutory power granted to a registration authority under section 30 of

the Registered Homes Act 1984, to apply ex parte for an order for the cancellation of registration in respect of a nursing home, was the protection of residents of nursing homes. Accordingly the imposition of a tortious duty of care to the owner or others whose interests might be adversely affected by the exercise of that power could potentially inhibit the exercise of the power to the detriment of those whom it was designed to benefit.

The claimants were the proprietors of a nursing home, and on the basis of a slipshod investigation and inaccurate information, the authority, exercising the powers of the Secretary of State, made an ex parte application to a magistrate, under section 30 of the Act, for an order for the cancellation of the claimants' registration in respect of the nursing home. The claimants had been given no prior notice of the application or the grounds on which it was made and, consequently, had no opportunity of contesting the enforced closure of the home. The magistrate made the order and the home was closed.

In dismissing the appeal, and holding that a registration authority making an application under section 30 for the cancellation of the registration of a nursing home did not owe a common law duty of care to the proprietors of the home, Baroness Hale of Richmond recognised that the claimants had indeed suffered a serious injustice which deserved a remedy, and with the greatest of regret the common law of negligence did not supply one. Lord Scott of Foscote referred to the lamentable lack in the statutory procedures of reasonable safeguards for the absent respondent against whom such applications, ex parte and without notice, could be made. The House indicated that the claimants might have a sound case for contending that their rights under article 6 of, and article 1 of the First Protocol to, the European Convention had been infringed but, since the Human Rights Act 1998 was not in force at the time of the ex parte application, Convention rights could afford them no remedy under English law.

### ***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 him, 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 that “vagueness is a ground for judicial review if it leads to unfairness in the proceedings”. The danger with a vague charge is that the respondent does not know with some precision what is alleged against him, and therefore is 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 its 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.

***Sheill v General Medical Council [2008] EWHC 2967***

In this case, 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.

***R (Jenkinson) v Nursing and Midwifery Council 9 March 2009***

In this case, the claimant applied for judicial review of a decision of the Professional Conduct Committee of the NMC to strike her off the nursing register. Following her conviction for causing grievous bodily harm with intent, the claimant had been found guilty of misconduct by the committee and struck off the nursing register. Her conviction was subsequently quashed when it became clear that the expert evidence founding the conviction, namely as to 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 set aside. The 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 hers.

Cranston J, in granting the application and quashing the original decision to strike her off the nursing register, said that it was unwise for the court to provide specific guidelines, as it was clear from common law history that new and unexpected instances could arise. 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*, 9<sup>th</sup> Edition (2004) at page 262, that the powers of the NMC were not stillborn and that in cases of accidental slips, mistakes, flaws or miscarriages 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.

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**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:

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