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CONSULTATION ON THE REGULATION OF HEALTHCARE PROFESSIONALS IN THE UK AND SOCIAL WORKERS IN ENGLAND

The Law Commission has recently launched a consultation on the regulation of healthcare professionals in the UK and social workers in England. The regulatory bodies covered by the review include the General Medical Council, General Dental Council, Nursing and Midwifery Council, General Pharmaceutical Council and Health Professions Council.

The regulators operate within a wide variety of legal frameworks which have evolved on a piecemeal basis resulting in a wide range of idiosyncrasies and inconsistency. Our proposed structure would consist of a single Act of Parliament to provide the legal framework for ten regulators (as well as the Council for Healthcare Regulatory Excellence). In effect, all the existing governing statutes and orders would be repealed.

The broad aim of the proposals is to enhance the autonomy of the professional regulators in the exercise of their statutory responsibilities. This would be achieved largely by reducing the regulators' dependence on the Privy Council (and through it, the Department of Health). This would be subject to enhanced mechanisms to hold the regulators accountable, and providing Government with appropriate powers, including reserve powers in the event of significant default by a regulator.

The consultation extends to all the statutory functions of the regulators, including the investigation and adjudication of fitness to practise cases. The regulators would have broad powers to undertake investigations, which could be used for example to establish systems of screeners and mediation. All of the regulators would have the same powers to dispose of cases at the investigation stage through warnings, undertakings, voluntary erasure and advice. The statute would require each regulator to establish Fitness to Practise and Interim Order Panels. Most procedural elements of adjudication would be subject to broad rule-making powers. The main exceptions include the use of the civil rules of evidence and civil standard of proof and the definition of a vulnerable witness which would be set out in the statute. All Fitness to Practise Panels would have powers to erase from the register, suspend, issue conditions and warnings, and agree undertakings and voluntary erasure. The statutory right of appeal to the higher courts would be maintained.

The consultation ends on 31 May 2012. We emphasise that all of our proposals will be reviewed on the basis of the responses received during consultation. We encourage all readers to respond. The final report and draft Bill will be published in 2014.

The consultation documents are available at: <http://lawcommission.justice.gov.uk/consultations/1755.htm>

The Law Commission

INTERIM ORDERS IN HEALTHCARE REGULATION AND THE APPROACH OF THE ADMINISTRATIVE COURT TO DELAY

This article will consider a number of the health and social care regulators, their powers and approach to interim orders and, in particular, examine the recent approach of the Administrative Court in considering applications for extensions of such orders in the context of delay.

Many regulatory bodies have statutory powers to suspend or impose conditions on registrants at an interim stage of fitness to practise investigations.

In most cases the primary purpose of such orders is to protect members of the public in situations where there may be a risk to them from the registered professional if an order is not made. In some instances such orders are also made because it is considered to be in the interests of the registered persons to make them or because it is felt to be generally in the public interest for such orders to be made.

Given that these orders are made before a full hearing is held to consider the allegation(s) - and for some regulators can be imposed before a formal charge has even been drafted - they have the potential to be draconian in application. The implications for the practitioner concerned can be serious indeed with his or her livelihood and reputation put in jeopardy before any allegations have been proved.

Adequate safeguards are therefore necessary to protect the registrant as well as the public. Such safeguards vary to some extent between regulators but generally include: (1) a statutory right of appeal to the Administrative Court; and/or (2) a maximum duration for which an order can be made or extended by the regulator without permission from the Administrative Court.

The powers to impose interim orders are of particular importance in the regulated health and social care sector due to the close nature of the relationship registered professionals have with members of the public, including people who are particularly vulnerable.

In recent years, regulatory bodies have been faced with increasing workloads of serious cases and finite resources. Often cases are taking many months before the allegations are investigated and then heard and considered in a final conduct hearing.

That has led to regulatory committees being asked to make increasing numbers of interim orders and in due course the Administrative Court being asked to extend such interim orders for long periods. In the context of

the balance to be considered when making and maintaining interim orders this has led to a tension in the courts as between the need for regulatory bodies to protect the public and a duty to ensure timely progression of cases.

The regulators

The specific regulators that will be considered in this article are as follows:

- Nursing and Midwifery Council (NMC);
- General Medical Council (GMC);
- General Dental Council (GDC);
- General Optical Council (GOC);
- Health Professions Council (HPC);
- General Pharmaceutical Council (GPhC);
- General Chiropractic Council (GCC);
- General Osteopathic Council (GOsC)
- General Social Care Council (GSCC); and
- Care Council for Wales (CCW).

The statutory powers

NMC, GMC, GDC, GOC, HPC, GPhC

These six regulators all have very similar statutory provisions for making interim orders. All provide that at an interim order - either suspending the registrant or imposing conditions of practice - can be made by the relevant committee/panel for an eighteen-month period and thereafter that any extension of the order must be made by application to the Administrative Court.

For all six, an interim order can be imposed at any stage of the proceedings including before a charge has been formulated. A registrant who is made the subject of an interim order by any one of these regulators can make an application to the Administrative Court for a termination of the order.

The statutory test for making an interim order is essentially the same for all of these regulatory committees, namely that the committee/panel must be satisfied that making an order is: necessary for the protection of members of the public; or is otherwise in the public interest; or is in the interests of the registered person.

GCC, GOsC, GSCC and CCW

The GCC, GOsC, GSCC and CCW have slightly different statutory provisions from the other five regulators already mentioned.

All four have the power to make interim suspension orders but the GCC, GOcS and GSCC cannot make orders imposing conditions at the interim stage as the other regulators (including the CCW) can.

These four also vary from the other regulators in respect of the maximum periods for which they can make an interim order. For the GSCC and CCW, an interim order can initially be made for up to six months and thereafter it can be extended by the relevant committee for up to a maximum of two years.

The GCC and the GOcS both have two separate provisions regarding interim orders - one relating to the powers of the Investigating Committee and another for the powers of the Professional Conduct Committee and Health Committee. The maximum period of an interim order made by the Investigating Committee before a referral to the Professional Conduct Committee or Health Committee is two months. Once the case has been referred onto the Professional Conduct Committee or Health Committee there is no specified maximum period and it can be imposed up until the proceedings end (either when a final decision is made or when the appeal period ends or when an appeal against the decision is disposed of).

A registrant of the GCC or GOcS has a statutory right of appeal to the Administrative Court against an interim order made by the Professional Conduct Committee or Health Committee. There is, however, no equivalent statutory appeal against an interim order made by the Investigating Committee and therefore the only way a registrant could argue against such an order would be by way of judicial review, which would in principle involve having to show an error of law or procedure or that the decision to make the order was irrational in the *Wednesbury* sense. Given that the Investigating Committee (for both regulators) can only make an interim order for two months, the lack of statutory appeal right may in practical terms make little difference as it is likely that the Investigating Committee's interim order would have expired by the time a judicial review claim was heard unless expedition was ordered.

Registrants of the GSCC and CCW also have a statutory right of appeal against an interim order but the appeal is to the First-Tier Tribunal (Care Standards) rather than to the Administrative Court. The powers of the First-Tier Tribunal at an appeal against an interim order were set out in the case of *Sonia West v GSCC [2009] 1614.SW-SUS* as being: 'the same as those of the Preliminary Proceedings Committee making the order in that it considers the gravity of the allegations and the nature of the evidence, the risk of harm to members of the public, the wider public interest and the

prejudice to the Applicant if the order was continued. It does not make any findings of fact.' (para 6)

As for the test for making an interim order, the GSCC applies the same test as the regulators listed above but the GCC's test is narrower in that there is no scope for making an order as a result of the 'public interest' or 'interests of the registrant concerned'. It is limited to being considered as 'necessary...in order to protect members of the public'.

The increasing use of interim orders

Statistics from the regulating bodies show an increase in the use of interim orders over the past few years.

For example, according to the NMC's 'Annual Fitness to Practise Report 2010-2011' there were 542 new interim orders made in that period. This is compared to a total of 391 in 2009-2010, 252 in 2008-2009 and 199 in 2007-2008 (all figures from Fitness to Practise Annual Reports on the NMC website). Moreover, of the 542 interim orders made in the period 2010-2011, some 392 were interim suspension orders.

The statistics in the GDC's annual reports similarly show an increase in interim orders (although on a different scale from the NMC), from a total of 28 interim orders in 2007 to 43 in 2008, 61 in 2009 and 73 in 2010. In the GMC there is a general pattern of increased use of interim orders since 2008, with the annual statistics reporting a total of 358 interim orders in the 2010 period compared to 340 in 2009 and 265 in 2008. In the GDC and GMC there is far less of a disparity between the numbers of interim conditions orders and interim suspension orders than in the NMC and in some years there are more conditions orders than suspension orders made at the interim stage.

This increase in interim orders corresponds with a general increase in numbers of cases being reported to regulators - perhaps as a result of more awareness about fitness to practise issues as well as media coverage of high profile cases. In addition, regulators themselves have raised awareness of the role of fitness to practise proceedings and the potential for interim orders. For example, the NMC issued revised guidance to employers in August 2011 which specifically encouraged the making of referrals to the NMC as quickly as possible when there is any concern about risk to the public so that interim orders can be considered and made if necessary.

There has inevitably been a corresponding increase in applications to extend interim orders in the Administrative Court.

In this context, it is crucial that regulatory bodies are fully aware of the approach taken by the courts to such

matters as it is likely that they will increasingly be applying to courts for extensions or alternatively defending appeals made by registrants.

Approach of the Administrative Court to applications for extensions of interim orders and delay

The leading case on the power to extend interim orders is ***General Medical Council v Hiew [2007] EWCA Civ 369***. Although a GMC case, the courts have relied on the general approach in relation to the range of healthcare regulators who apply for extensions. In ***Hiew*** the Court of Appeal dismissed an appeal by a doctor against an order of the court below which had granted a six month extension of a suspension imposed by the GMC's interim orders panel. The case clarified the correct approach as to the function of the court in such applications.

In summary, the relevant principles set out in ***Hiew*** are as follows:

- The court has power to determine whether there should be no extension or the extension sought by the regulator or some lesser extension when considering an application.
- In deciding whether or not to make an order in the terms sought or some lesser period of interim suspension, the criteria for resolving the question of whether or not suspension should be continued at all are those which apply when the original interim order is made: namely the protection of the public, the public interest, and the practitioner's own interests.
- The onus of satisfying the court that the criteria are met falls on the regulatory body as the applicant for the extension.
- The relevant standard is the civil standard, namely on a balance of probabilities as proceedings for the extension of an interim suspension order are not criminal proceedings.
- It is not the function of the judge to make findings of primary fact about the events which have led to the suspension; rather that the function of the court is to ascertain whether the allegations made against the registrant, rather than their truth or falsity, justify the prolongation of the suspension.
- This means that the court can take into account such matters as the gravity of the allegations, the nature of the evidence, the seriousness of the risk of harm to patients, the reasons why the case has not been concluded and the prejudice to the practitioner if an interim order was continued.

In essence, the Court of Appeal stressed under the statutory scheme, the exercise in decision making as to the need for an extension is to be performed by the court as the primary decision maker.

In that regard, it was for the court alone to decide whether any extension of time is appropriate. As a matter of approach, courts will not be concerned to decide on the truth and accuracy of the allegations made. They will instead be concerned to consider whether, in the light of the allegations made, an order is necessary for the protection of the public or the practitioner concerned or is otherwise in the public interest.

Further important procedural guidance, especially in relation to the GMC, was provided in the recent case of ***General Medical Council v Kor [2011] EWHC 2825 (Admin)*** where the fundamental importance of issuing the claim form containing the application before the order to be extended had expired to ensure the court retained jurisdiction was acknowledged.

Delay

Over the past year, the majority of the interim order cases that have come before the Administrative Court have been extension applications by regulators.

Most such cases have been in respect of regulators that have the power to impose interim orders for up to eighteen months in duration. Requests to extend beyond this - already significant - period have therefore raised questions about the pace at which disciplinary proceedings are progressing when an interim order is in place.

Judicial concern about delay in the progression of proceedings is a common theme running through many of the Court's recent decisions on interim orders. In a substantial number of these cases in 2011, the Administrative Court has given warnings to regulatory bodies about delay in preparing cases.

In ***NMC v Chua [2011] EWHC 3162*** Mr Justice Kenneth Parker was asked to extend an order that had already been in force for 18 months for a further 12 months. He found that the slow progress of the case 'through the system' was a cause of 'considerable anxiety' to the court. It was not without 'some hesitation' that he granted the extension whilst expressing 'regret' at the delay. In ***NMC v Bass [2011] EWHC 3346*** Mrs Justice Dobbs DBE granted a nine month extension to an interim order made some 17 months previously but warned that 'in light of the previous delays an application for a further extension may not be considered as favourably'. In ***NMC v Pitts [2011] EWHC 2466 (Admin)*** Mr Justice Silber expressed his 'concern' about the delay, but on balance

granted an extension to an interim suspension order for a further 10 months.

Faced with such delays the courts will, even if persuaded of the need for an extension, not always extend the order for as long as the regulator would wish. In *NMC v Adina [2011] EWHC 2159 (Admin)* Mr Justice Burnett was faced with a case seeking a third extension by the court to an interim order. The application had been made under Article 31(8) of the Nursing and Midwifery Order 2001 and sought an eight month extension so that witnesses could be traced to support a case relating to serious charges. The court was only prepared to grant an extension of four months and stressed that ‘extensions of suspension orders do not follow as a matter of course’.

So too in *NMC v McKenzie [2011] EWHC 3361 (Admin)* where the regulatory body had produced statistics to the court to show just how many cases it was having to deal with to support an application for a 12 month extension. Even so, Mr Justice Burnett, as in *Adina*, was not persuaded to grant the full period sought and extended by nine months rather than 12. He encouraged the regulator ‘to deal with it as swiftly as is possible. That is necessary for the benefit of the public, for the benefit of the profession and also for the benefit of those who are subject to investigation’.

In *GMC v Gill [2011] EWHC 2645 (Admin)* the application for a 12 month extension was reduced to nine by the court when granting the extension. His Honour Judge Pelling QC noted: ‘The routine practice of the GMC of first inviting interim order panels to impose the maximum length of suspension that is available and thereafter applying to the court for the maximum period of suspension that the court is empowered to grant under the Medical Act is not an appropriate way of proceeding. Whilst on every occasion GMC’s evidence in support of the application will seek to assure the court that the applications are not made lightly, this is to be viewed in the context where routinely applications are made for the maximum period permitted by the Act’. The applied for period of 12 months was, on the evidence before him ‘wholly inappropriate’.

Further recent examples are provided in *NMC v McDaid [2011] EWHC 3503 (Admin)* where Mr Justice Foskett was only prepared to extend by four months rather than the six months requested and in *NMC v Weatherley [2011] EWHC 3627 (Admin)* where Mr Justice Keith granted only a four month extension when a six month period had been sought. In *Health Professions Council v Wisson [2011] EWHC 3579 (Admin)* Mr Justice Edwards-Stuart, faced with an application for a six month extension indicated: ‘I

consider that six months is too long. There must be some pressure on the Council to make sure that these proceedings are concluded in a shorter rather than a longer time’.

Despite such indications of judicial disquiet, the ever increasing applications by regulators to the courts for extensions are perhaps inevitably often accompanied by a history of delay. In the majority of cases where an interim order has been imposed by the regulator the allegations in question will be sufficiently serious to suggest the protection of the public is potentially at risk if a further extension is not granted by the court. Such potential risk will often tip the balance in favour of extending an interim order even where there is clear detriment to the individual registrant who may already have been suspended from or restricted in practice for over eighteen months.

But there are signs that the attitude of the court, faced with increasing numbers of such applications is changing. As a judge with considerable experience of such applications noted recently in *Kor* (5 October 2011) ‘On more than one occasion I have criticized the GMC for a failure to bring cases against practitioners before the Fitness to Practise Panel promptly’.

Regulatory bodies generally should take note. In the latter part of 2011 two cases involving extension requests were decided against the applicant regulator (in both cases the NMC) on the basis that the level of delay in progressing the proceedings was deemed to be unacceptable and it was therefore unjust to extend.

The first of these cases was *NMC v David Miller [2011] EWHC 2601* in September 2011. The NMC had imposed an eighteen month ISO on Mr Miller following an investigation commencing in 2008. The allegations were serious and related to aggressive conduct and dishonesty. The ISO was subsequently extended by the Administrative Court – once in November 2010 for an additional nine months and then again, for a short period, in August 2011 due to an error in the previous order and pending full consideration by the court. By the time it came before Blake J in September 2011, Mr Miller had been subject to the ISO for a period close to two and a half years.

In dismissing the application for a further extension in September 2011, Blake J referred to the duty pursuant to section 6 of the Human Rights Act 1998 to progress such matters with expedition and bring them to determinative conclusions as soon as reasonably practicable. He noted:

‘I bear in mind that this is a case in which a person has been suspended from exercising his profession. There is authority in this court and elsewhere that indicates

that the disciplinary proceedings are the determination of a civil right or obligation within the meaning of Article 6 of the European Convention on Human Rights, and therefore there is a duty both upon the claimant Council and on this court pursuant to section 6 of the Human Rights Act 1998 to progress such matters with expedition to ensure that, as soon as reasonably practicable, these hearings are brought to a determinative conclusion'. (para 6)

He considered the regulatory investigation had followed a 'leisurely timetable'. Despite recognition of the regulatory bodies' resource restraints, he held that it was the court's duty to ensure timely progression of cases. He stated:

'The court is cognisant of the fact that there are limited resources to pursue disciplinary matters available to the various disciplinary health bodies who exercise this application and seek extensions of time. But, against that, the court has its own duty to ensure that due expedition in the light of all reasonable circumstances is progressed.' (para 7)

The judge's view was that this was a case which reasonably should have been concluded earlier so that it was not appropriate to extend the ISO any further. A factor which clearly influenced this decision was that the regulating Council had already been warned about the slow progress at the time of the first application for extension (in November 2010). At that point, Mitting J had agreed to the extension but had done so with some reluctance.

Despite such a verbal warning, progression had continued to be slow and a hearing date was not even fixed until very close to the end of the nine month extension period. This inevitably meant that there would be a further delay before the hearing would take place (in February 2012).

In dismissing the application, Blake J referred to the previous comments from Mitting J and indicated that the Council should have taken such a warning to mean that the final disposal of the matter should be completed within the nine months extension that was granted on that occasion.

Miller represents a clear example of the court seeking to express concerns about delay and an indication that regulators cannot assume extensions will be granted, even in serious cases.

Little more than a month after the *Miller* case, on 1 November 2011, *NMC v Maceda* [2011] EWHC 3004 was heard before Mr Justice Bean. Again there had been considerable delay in progression of this case at the initial stages and an extension for three months had already been granted by the court. Despite this

extension, by the time of the hearing in November it had still not been decided whether to even formulate charges against Miss Maceda.

The ISO had been granted by the investigating committee in February 2010 and external investigating solicitors had provided a report in September 2010 concluding that there was insufficient evidence even to draft a charge on the basis of misconduct or lack of competence. However, the regulator had continued the investigation despite this. By November 2011 when the application for an extension was determined, the Council proposed further investigations and interviews of witnesses.

In dismissing the application the judge noted:

'I take into account that in February 2010 the investigating committee made an order because it considered that it was necessary to protect the public from harm. But that cannot be decisive for all time. If it were, Parliament would have given the investigating committee of the NMC and the corresponding bodies in the GMC and other regulators the power to renew such orders for an infinite period. Similarly, it is not conclusive on an application to renew made to this court, otherwise every application would be granted.' (para 11)

Much of the delay was unexplained and it was not appropriate, in the view of the court, to extend the order any further.

The danger of delay and preparing for the future

In the *Miller* case the court considered that the allegations were not sufficiently complex to warrant extending the order further than they had been already. That is not to say that the issues of conduct were not considered to be serious. It does illustrate that an applicant regulator cannot assume the seriousness of the allegations will result in an extension unless the length of time has been carefully justified.

In the *Maceda* case, although it is not apparent from the judgment what the allegations actually were, it is clear that the initially instructed investigating solicitors had reported that in their view there were no grounds for a charge of misconduct or incompetency. This clearly was a factor which the court took into account. Additionally, in that case, it was clear that Miss Maceda was now unable to work due to her own health and therefore any risk that there might have been was negated by the fact that she would not be practising in any event.

But it is significant that the judge made it clear that delay will be considered by the courts as an important element in deciding whether to extend interim orders

even where the regulatory body has determined such an extension is necessary to protect the public from harm.

Perhaps the courts are doing no more than re affirming their decision making role, as set out in *Hiew*, in the context of increasingly regular delays and scarce resources. Yet in doing so, the courts are making it abundantly clear that regulatory bodies will need to progress cases with efficiency and not assume that the court will accept their view as to necessity for an extension.

Even where the charges against a registrant are serious and there is a real potential risk to the public, it cannot be assumed that the Administrative Court will necessarily grant extensions to interim orders, especially if there has been undue delay.

As *Adina* has made clear, extensions will not be granted 'as a matter of course'. Any perception of that happening in the past has now gone. The courts will not be slow to challenge regulators who they consider 'routinely' make applications for the maximum period of extension available.

Judges faced with a growing number of such 'delay' applications are pursuing their 'duty' to progress such matters with expedition even in the many instances where the registrant does not attend and is not represented at the hearing.

There is now a real prospect that delay - without strong justification - will tip the balance in favour of the registrant's rights and extensions may not in future be granted.

Regulators will therefore need to take heed of the warnings issued by the Administrative Court to avoid the possibility of an order expiring and not being extended with the potentially serious results to both the public and the reputation of the regulatory body concerned.

It will be crucial for such applications to be supported by evidence that is not perfunctory, but which sets out carefully the narrative of events and the basis for the application. And regulators will have to be realistic about the period of extensions they seek .

Tom Cosgrove
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BOOK REVIEW

The Solicitor's Handbook 2012

The commentary in this comprehensive and user-friendly guide has been substantially expanded for the 2012 edition of *The Solicitor's Handbook*. The authors Andrew Hopper QC and Gregory Treverton-Jones QC, both experienced in the field of regulation and discipline, have rewritten the handbook and included seven additional chapters, including new chapters on the principles and Code of Conduct, the regulation of Alternative Business Structures (ABS), and entity or firm-based authorisation and regulation.

The year 2011 saw the start of 'big bang', as ABS became permissible for the first time, and the Solicitors Regulation Authority rewrote its Code of Conduct. A new form of regulation, so-called outcome-focused regulation, has replaced the prescriptive, rule-based approach in the previous Code. These changes are covered with expert commentary in *The Solicitor's Handbook 2012*. The new Code is dealt with in detail, and the reader is led through the principles, outcomes, and indicative behaviours around which the Code is built. There are new chapters dealing with compliance officers for legal practice (COLPs) and compliance officers for finance and administration (COFAs); property selling; and cross-border practice. The subject of SRA-imposed sanctions has been expanded to merit a chapter on its own. There are two chapters dealing with ABS, the first general guidance available to the profession on that subject. The authors also deal in some detail with regulation by regulators other than the SRA, as one of the interesting consequences of the Legal Services Act 2007 has been to open up competition between regulators for 'business'.

This invaluable book usefully highlights where the new regime introduces changes from the old Code of Conduct and provides practical suggestions as to how solicitors can best achieve compliance with the principles, outcomes and indicative behaviours that underpin outcome-focused regulation. Published by Law Society Publishing. Price £74.95. Copies can be obtained from all good bookshops or direct (telephone 0870 850 1422, email lawsociety@prolog.uk.com or on line at www.lawsociety.org.uk/bookshop).

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LEGAL UPDATE

- ***Bhatt v General Medical Council [2011] EWHC 783 (Admin)***

On 12 August 2010, a fitness to practise panel of the GMC found B guilty of charges against him relating to six female patients. In respect of four of the patients the panel found that B had been sexually rather than medically motivated when he intimately examined them. Langstaff J observed that a central feature was that B was tried before the crown court on seven counts alleging unlawful sexual interference with the same six patients and was acquitted by verdict of the jury on all. On appeal from the findings by the fitness to practise panel it was alleged on behalf of B that he should not have been exposed to double jeopardy before the GMC. It was also alleged that the criminal investigation was so flawed or contaminated that the evidence arising from it should not have been admitted before the panel. On the issue of abuse of process, reliance was placed by B on paragraph 46 of the judgment of *Simon Brown LJ in R (Redgrave) v Commissioner of Police for the Metropolis [2003] 1 WLR 1136*. Simon Brown LJ commended to disciplinary boards generally two particular paragraphs in the 1999 Home Office Guidance on Police Unsatisfactory Performance, Complaints and Misconduct Procedures, which state that the degree of proof required increases with the gravity of what is alleged and its potential consequences; and that where criminal proceedings have been taken for an offence arising out of the matter under investigation and those proceedings have resulted in the acquittal of the officer, that determination will be relevant to a decision on whether to discipline the officer. Langstaff J in dismissing B's appeal said that a stay for abuse is an exceptional course. It should be granted either where a doctor cannot receive a fair hearing, or where it would be unfair for the doctor to face a hearing. *Redgrave* is concerned with the latter. However, it is guidance, and even if it is still currently applicable falls short of obliging a disciplinary panel to regard it as abusive for matters upon which a professional has been acquitted in the criminal court to be revisited in the course of professional regulation. All the more does it not constitute an abuse, given that the purpose of disciplinary proceedings (regulation to maintain proper standards in the profession in the best interests of the public and the profession) is different from that served by the criminal courts. The learned judge went on to state that section 107 of the Criminal Justice Act 2003 (stopping the case where evidence is contaminated) is applicable only to criminal trials before a jury, and then only in respect of evidence of bad character as defined in the 2003 Act. It is thus not obviously applicable to disciplinary proceedings.

- ***R (Kaur) v Institute of Legal Executives Appeal Tribunal [2011] EWCA Civ 1168***

K was a student member of the Institute of Legal Executives (ILEX). In May 2007 she and other student members sat certain law and practice examinations. Following investigations and a decision by the ILEX committee, K and five other student members were charged with various disciplinary offences including cheating in two examinations. K and four others were excluded from ILEX following a hearing before the disciplinary tribunal. K appealed to ILEX's Appeal Tribunal and raised as a preliminary matter an objection to the presence on the panel of ILEX's vice-president. Judicial review was refused by Foskett J. K appealed to the Court of Appeal, and the short issue was whether the presence of an ILEX council member and director of ILEX on the disciplinary tribunal and of the council's vice-president on the appeal tribunal was in breach of the doctrines that no one may be a judge in his own cause and/or of apparent bias, requiring those decisions to be quashed. Rix LJ (with whom Sullivan and Black LJJ agreed) after reviewing the leading cases on apparent bias of *R v Bow Street Metropolitan Stipendiary Magistrate (ex parte Pinochet Ugarte)(No 2)[2000] 1 AC 119*; *Dimes v Proprietors of Grand Junction Canal (1852) 3 HL 759*; *Porter v Magill [2001] UKHL 67*, [2002] 2 AC 357 where the modern law of apparent bias was definitively stated in the speech of Lord Hope of Craighead, building on *R v Gough [1993] AC 646* and *In re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700 (CA)*, and the observations of Lord Bingham of Cornhill in *Davidson v Scottish Ministers [2004] UKHL 34*, [2004] HRLR 34, observed that the cases are concerned with ensuring that governing members of an organisation are barred from involvement in the investigation or decision-making process and ensuring the proper separation of disciplinary panels from those concerned with the overall governance of the organisation. The appeal was allowed.

- ***Holmes v Royal College of Veterinary Surgeons [2011] UKPC 48***

H contended that features of the general system operated by the College for the determination of disciplinary complaints and features of its operation specific to the instant proceedings represented deficiencies which combined to give rise to an appearance of bias against him on the part of the disciplinary committee. The Privy Council in a judgment delivered by Lord Wilson said that the Board was satisfied that the College had made strenuous attempts to ensure that its disciplinary procedures were fair and, since the coming into force of the Human Rights Act 1998, were in accordance with its

obligations to the registrant under Article 6. In particular, the College had made elaborate efforts to separate what one might regard, however loosely, as the parts of its system which contribute to the prosecution of the charge against a registrant from the parts which determine it. However, the College had found itself hamstrung by the Veterinary Surgeons Act 1966. The preference of the College, publicly announced, is that their members should not be drawn from the Council, and it had lobbied the Government, so far in vain, to support an amendment of the Act so as to preclude members of the Council from being members of either of the investigation or disciplinary committees. Lord Wilson observed that the features complained of in *Tehrani v UK Central Council for Nursing, Midwifery and Health Visiting [2001] SC 581* and *Preiss v General Dental Council [2001] 1 WLR 1926* were absent from the present case. The question was whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal in the instant case was biased: *Porter v Magill [2002] 2 AC 357*, *Helow v Secretary of State for the Home Department [2009] SC (HL) 1*. The Privy Council concluded that the fair-minded and informed observer would not conclude in the instant case that there was a real possibility that the College's Disciplinary Committee was biased against Mr Holmes.

- ***Leathley v Bar Standards Board 20 January 2012, Complaint No D 2007/120***

This was a petition to the Visitors (Burnett J, Ms Beryl Hobson and Mr John Elliott) from a disciplinary tribunal finding made against L. Issues were raised by L of bias based on, amongst other things, the Bar's disciplinary process, the payment of fees and expenses, guidance issued by the Council of the Inns of Court to tribunal members, and the training and other factual matters relating to the Visitors. In the result the appeal was dismissed. The circumstances were such that there was no basis on which the non-judicial visitors should recuse themselves, and the argument that the disciplinary tribunal was infected with bias was rejected.

- ***R (Alhy) v General Medical Council [2011] EWHC 2277 (Admin)***

Dr A challenged the decision of 21 January 2011, made by the General Medical Council's fitness to practise panel in which he was found guilty of misconduct and the panel ordered his name to be erased from the register. Dr A was also registered with the French *Ordre de National de Médecins (ODM)*, the equivalent to the GMC in France. Dr A was convicted of two offences in relation to the deaths of patients in France.

The first conviction was of non-assistance to a person in danger. This was based on Dr A's decision to delay surgery on the patient. It is not an offence known to English law. In relation to the second patient, Dr A was convicted of gross negligence manslaughter for failing to monitor the patient which delayed his diagnosis of peritonitis. He was sentenced to 12 months imprisonment, suspended, and was banned from practising as a surgeon for three years. He was not prevented from practising as a general physician. Dr A appealed the GMC's sanction of erasure on the grounds that it was more onerous than that imposed in France by the French courts and the ODM. He submitted that to impose a significantly different and more onerous sanction than that imposed by the ODM was contrary to Article 56(2) of European Directive 2005/36/EC on the recognition of professional qualifications, or in the alternative, that there was a duty of fairness on the part of the fitness to practise panel to give full and proper reasons as to why it departed from the decision or penalty imposed by the French courts and the ODM. Her Honour Judge Belcher (sitting as a High Court judge) was not persuaded by that submission. She said it seemed to her it carried the danger of requiring there to be an investigation of the penalty decision-making process in another jurisdiction, something which she was not satisfied was properly part of, or ought properly to be part of the remit of the fitness to practise panel. Their job is to assess matters in accordance with the GMC's statutory purpose and good medical practice. Their purpose in holding hearings is to establish what the facts are in a particular case, to consider whether they support a finding of misconduct or impairment to practise and, if so what the appropriate sanction should be. They plainly must be informed by the appropriate facts. Those may of course, as they did in this case, include the facts of the convictions or the underlying facts in the French jurisdiction. The learned judge did not accept a submission that it was necessary for the GMC fitness to practise panel to specify reasons for imposing a decision or sanction different to that imposed by a body or bodies in another Member State. The issue was whether the reasons given in this State are such that the doctor or others reading the decision understand what the decision against the doctor is and why the fitness to practise panel arrived at the decision they did. To require the panel to give detailed reasons for departing from the decision of another body would require investigative steps far beyond their remit. The learned judge went on to consider insight, and said there was a significant difference between maintaining innocence during the currency of a criminal process and continuing to maintain innocence after the criminal process had concluded.

- *Nagiub v General Medical Council [2011] EWHC 366 (Admin)*

N represented herself during the course of fitness to practise proceedings based on misconduct and deficient professional performance. She was suspended from the medical register for 12 months. In its determination on impairment the panel stated that it was most concerned about N's conduct throughout the hearing which had been rude, insulting, racist, abusive and, at times, bullying and intimidating. She had abused every witness who gave evidence on behalf of the GMC, the GMC legal team, the panel and the legal assessor. The panel stated that her behaviour, in her dealings with the GMC and her conduct before the panel, had consistently contradicted the principles laid down in Good Medical Practice, and the panel regarded 'this conduct most seriously'. N's notice of appeal (for which she had received some legal assistance) claimed that the panel gave undue weight to the manner in which she conducted herself before the panel when considering her medical performance and professionalism as a doctor in her day to day working life. Foskett J in dismissing N's appeal said that whilst litigants in person are not as well-versed as an established practitioner in making a strong point in cross-examination in a forceful, yet not intrinsically offensive way, nevertheless gratuitously offensive remarks are not tolerated. Leaving aside any questions of propriety, they can be distracting and irritating for a tribunal endeavouring to get to the bottom of contentious issues. In the instant case, some caution was required before expressing an observation of this kind in the way that it was and in the context that it was. The essential issue in the proceedings was how the appellant reacted in the daily workplace of medical practice. The proceedings before the panel did not constitute such a setting. That is not a defence to discourtesy and gratuitous offence; merely an observation of the obvious. The panel's conclusion that it regarded N's 'conduct most seriously', were words one might expect before the imposition of a penalty rather than a judgment of the nature under consideration. The most logical stage at which this consideration might have entered the panel's reasoning was to say that N's behaviour before the panel to some extent confirmed the views of the consultant psychiatrists in the case about her delusional disorder. Had that been said then the observations would have been unobjectionable. The question was whether the defect (as the learned judge saw it) in the process of reasoning was such as to render the whole process from that point onwards flawed. The learned judge said he was quite satisfied that it did not. There was ample other material to sustain the view that N's fitness to practise was impaired by the matters previously found.

- *Martin v General Medical Council [2011] EWHC 3204 (Admin)*

In dismissing M's appeal against the fitness to practise panel's decision on misconduct and sanction that M's name be erased from the medical register, Lang J said that in her view, in considering whether a practitioner's fitness to practise is impaired by reason of misconduct, it was helpful for a panel to consider 'Good Medical Practice' to identify what standards of behaviour are expected of registered doctors. In the instant case, the panel found that M had violated many of the duties in 'Good Medical Practice' and the supplementary guidance 'Maintaining Boundaries'. The panel concluded that M's conduct amounted to 'a serious departure from the standards of behaviour required of doctors'. The learned judge agreed. M also argued that since the three-person panel comprised two lay members, the degree of deference or respect afforded to the panel should be less, because the members were not medical specialists and a judge was just as well equipped as a lay member to make judgments about the public interest.

Lang J did not accept this submission. A fitness to practise panel is a statutory committee established under the Medical Act 1983 to perform statutory functions in relation to the fitness to practise of registered doctors. It was Parliament's intention that the primary decision-making body in relation to fitness to practise was the panel, and the court should only have an appellate function. The current fitness to practise scheme was introduced by amendment in 2004, by which time Parliament would have been aware of the requirements of Article 6 in relation to disciplinary hearings where erasure or suspension was an issue, as the Human Rights Act 1998 was then in force. The introduction of lay panel members had been approved by the Privy Council and by Parliament (see the General Medical Council (Constitution of Panels and Investigation Committee) Rules Order of Council 2004, SI 2004 No 2611). The learned judge said that in her view the introduction of lay members on to GMC panels did not justify a more interventionist role by judges, nor did it justify a departure from long-established principles on the proper approach to appeals from professional disciplinary bodies.

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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 either of the members of the editorial committee with your suggestions. The editorial committee is:

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