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## QASA: THE REGULATED V THE REGULATORS

The Administrative Court’s decision in *R (on the application of Lumsdon & ors) v Legal Services Board* [2013] EWHC 28 (Admin) is relevant to lawyers on both sides of the regulatory coin. Understandably, focus so far has been on the effect of this decision on individuals providing criminal advocacy services – and doubtless, the politically charged questions behind that focus need answering. But, as a result, there has been little analysis of what this decision has to say about the regulatory powers that formed the subject of the challenge. That is unfortunate – first, because the judgment contains useful indications on how the Court will interpret the powers of the front-line and supra legal services regulators, and second, because the approval of QASA may not be the decision’s only legacy.

### What is QASA?

The Quality Assurance Scheme for Advocates (QASA) is a scheme to “*assure the quality of advocates*” through judicial assessment in live trials. The Scheme will require any advocate engaging or wishing to engage in “*criminal advocacy*” to be accredited at one of four levels – from Magistrate Court trials upwards. If an advocate wishes to practise at a level higher than Level 1, then he must register provisionally at the level at

which he thinks he is practising, and must then be assessed by a judge during the first two trials he conducts at that level. Whenever an advocate wants to progress up a level he must also be judicially evaluated. On the basis of those evaluations the relevant regulator will consider whether the advocate is ‘Competent’ at the level in question or not.

QASA has its roots in the Clementi Review published in 2004, which made several fundamental criticisms of the legal services profession and contributed to the major overhaul of the legal services framework through the Legal Services Act 2007 (the LSA). Among other things, the LSA established the oversight regulator, the Legal Services Board (LSB) and the “*approved regulators*”, the relevant bodies here being the BSB, SRA and ILEX Professional Standards (respectively the first, second and third interested parties in the challenge). From its inception the LSB pledged to drive forwards Quality Assurance Assessment. It did so through a body comprising of the three approved regulators, the Joint Advocacy Group (JAG).

A compromise proposal was eventually agreed by the JAG and presented to the LSB, as required when an approved regulator wishes to alter its regulatory arrangements, under part 3 of Schedule 4 to the LSA.

### What was the decision and why was it challenged?

The Claimants challenged the LSB’s approval of the JAG’s application under paragraph 25 of Schedule 4 on a number of grounds: (i) that the Scheme threatens the independence of the advocate and the judiciary; (ii) that it is disproportionate and based on insufficient evidence; (iii) that it is contrary to EU law, to Article 6 of the ECHR and to the Provision of Services Regulations 2009; and (iv) that the LSB acted in excess of its powers by helping to devise the Scheme when its statutory power was simply to approve or refuse it.

The Administrative Court, while accepting that the concerns advanced were “*entirely genuine*”, concluded

that “*the scheme is lawful, does not contravene European law and falls well within the legitimate exercise of the powers of the LSB and the three regulators that submitted it to the LSB for approval*”.

**What did the decision have to say about the regulators’ powers and the Court’s power to review them?**

Perhaps the key message given by the Court in the decision is that it will be reluctant to interpret the powers given to the regulators under the LSA restrictively.

That is apparent from two notable parts of the decision. The first is in relation to the Court’s rejection of the Claimants’ submission that the LSB acted in excess of its powers. The LSB relied, in defending its involvement in the development of the Scheme, on section 4 of the LSA, which requires it to “*assist in the maintenance and development of standards in relation to the regulation by approved regulators of persons authorised by them to carry on activities which are reserved legal activities*”. The Claimants submitted that that power cannot have been intended to permit the LSB to assist in designing the details of a Scheme over which it had the final power of approval as oversight regulator. The Court, however, considered that the LSB could rely on section 4 and that there was “*no reason*” why the LSB’s involvement in iterating the Scheme was unacceptable. The indication is that despite the ostensible aims of the LSA – to create a two-tier regulatory system with a light-touch, independent oversight mechanism – the Court may be unwilling to intervene to prevent the LSB’s involvement in devising front-line regulatory arrangements.

The second indication, which can be read in light of the first, arises in the analysis of the LSB’s review of the regulators’ applications to change their regulatory arrangements. The statutory framework gives the approved regulators broad powers to amend their rules, and the Court considered that there is a “*presumption that applications by the approved regulators are to be approved unless the LSB is satisfied of one or more matters*” (original emphasis). When narrowly construed then, while the LSB is entitled under section 25 to take other matters into account, its statutory task is to approve, or refuse, the particular application made by

the approved regulator – the arm’s length oversight role. The Court, however, clearly considered the statutory task to be broader in scope. Despite that the JAG application had not considered one of the central criticisms of the scheme – the issues surrounding the independence of the advocate – the Court considered it sufficient that the LSB referred to the issue in its decision. When read together with the indication that the Court will not prevent the LSB from playing a role in devising the regulatory arrangements of the front-line regulators, the trend appears to be away from strict enforcement of the independence of the two tiers of regulators, and towards accepting the possibility of a more interactive relationship.

A similar theme emerges in the Court’s discussion of the appropriate standard of review. The Claimants submitted that the required standard was proportionality – a higher level of scrutiny than ordinary *Wednesbury* grounds. That submission relied, in part, on an argument that when compared to other regulatory legislation the LSA imposes a unique requirement that the regulators must not only act in a way that is compatible with their regulatory objectives, (which include that regulatory activities should be “*transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed*”), but must also act in the way that is “*most appropriate*” for the purpose of meeting those objectives (s. 3 LSA). The Claimants’ logic was that because the regulators had a statutory obligation to act proportionately in devising and approving the Scheme, then, for the Court to be satisfied that they were acting within their vires it would have to examine whether the Scheme itself was proportionate. It was submitted that imposing that degree of review was to be expected, given the highly sensitive constitutional context in which the LSA legislates. However, the Court considered that as the statute gives the responsibility of ensuring proportionality to the regulators, it is not for the Court to also assess the proportionality of the Scheme. That is a perhaps surprising result – and it is unclear from the decision how, or whether, the Court considered that it could ever review a decision of the regulators that was challenged on the basis of proportionality.

It remains to be seen how QASA will be operate in practice, but what we can take from the decision with some certainty is that where statutory construction

permits, the Court is likely to interpret the powers of the legal services regulators under the LSA broadly.

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## DE FACTO AUTHORITY

The decision of the Divisional Court in *R (Leathley) v Visitors to the Inns of Court* [2013] EWHC 3097 concerned the allegedly defective appointment of members of regulatory tribunals for barristers.

The claimants challenged disciplinary decisions taken by both the first instance Disciplinary Tribunal, and the appellate panel of the Visitors to the Inns of Court.

The main thrust of the claimants' case was that the Disciplinary Tribunals and the Visitor panels were not 'established by law' within the meaning of Article 6 of the European Convention on Human Rights, and Article 47 of the EU Charter of Fundamental Rights.

The claimants relied on a legal requirement that lay and barrister members of those panels be appointed from a list maintained by a third party, the Council of the Inns of Court ("COIC"). The COIC panel appointments were time-limited, and a number of persons were selected to sit on disciplinary panels after their appointment to the COIC panel had expired.

The Court dismissed the claims because there was in fact no such legal requirement. It also ruled that if there had been a defect in the appointment of the panel members, their decisions would nevertheless have been validated by the doctrine of de facto authority.

### The COIC panel

Moses LJ explained that the power to nominate members of the Disciplinary Tribunal rests solely with the President of the COIC, and the power to nominate persons to sit as Visitors rests solely with the Lord Chief Justice. There is no mention of the COIC panel in the relevant regulations (see 15, 30, 33).

A curious feature of the case was that the COIC's constitution, its Guidance for Disciplinary Tribunal Members, its Terms of Reference for members sitting on the panels, and the Memorandum of Understanding between the Chairman of the Bar Standards Board and

the President of the COIC all referred to the supposed requirement that members be appointed from the COIC panel.

Moses LJ, unsurprisingly, was critical of this contradiction between those public documents and the actual legal position, stating that whilst "*the Bar must surely be at the forefront of setting standards as to how institutions should regulate themselves... [the contradiction] provides a poor example to others*" (34) and referring to the "*dispiriting state of affairs surrounding the COIC's Appointment Body*" (41).

Nevertheless, the content of the relevant instruments provided a short answer to the claims.

### De facto authority

Of potentially wider significance was the issue of *de facto* authority upon which Paul Nicholls QC successfully relied for the Bar Standards Board as intervenor – although the decision on the point is *obiter* because lack of authority could not actually be shown.

The doctrine means that if a judge lacks *de jure* authority due to some defect in his or her appointment, he or she will nevertheless enjoy *de facto* authority if the following conditions are satisfied:

- (1) there must be some basis for the assumption of the office in question; "*colourable title*" (discussed further below).
- (2) the judge must be thought by the parties appearing in the case to have the authority to hear the case;
- (3) the judge must not know of his or her lack of authority: a "*usurper*" cannot be cloaked with *de facto* authority.

The doctrine was developed in a number of cases in which County Court judges took decisions in High Court matters for which they did not hold a ticket. For example, in *Fawdry & Co v Murfitt* [2003] 1 QB 104 a County Court judge was ticketed for the Family Division but not the Queen's Bench Division. Her colourable title was her ticket to sit in the Family Division. It made no difference that she had been asked about her authority at the start of the case and had wrongly said that she did have the required authority.

In *Leathley* the claimants argued that the *de facto* doctrine only concerns the *public* administration of

justice and does not apply in domestic non-statutory tribunals.

However, Moses LJ gave this argument short shrift, holding that the regulation of barristers “*lies at the very heart of the public administration of justice*” (43).

The Court did not discuss the question of whether the doctrine could be applied in other domestic tribunals of a less “public” kind. This argument could resurface in future because, as Paul Nicholls QC pointed out in submissions, the common-law history of the doctrine has includes its application to mere officers of state without any judicial status: see the discussion in *Adams v Adams* [1971] P 188.

### Article 47 of the Charter

A second argument by which the claimants sought to evade or disapply the *de facto* doctrine, was based on Article 47 of the EU Charter of Fundamental Rights.

In *Coppard v Customs Commissioners* [2003] QB 1248, the court confirmed the *de facto* doctrine was compatible with Article 6 ECHR: the doctrine was a common law rule which had the effect that the court was ‘established by law’ within the meaning of Article 6, notwithstanding the defective appointment of the judge.

However, Sedley LJ opined in *Coppard* that the *de facto* doctrine would not survive incorporation of Article 47 of the Charter, which requires that a tribunal be ‘previously established by law’, unlike Article 6 ECHR which requires only that a court or tribunal be ‘established by law’. *De facto* authority in his view would ‘establish’ a tribunal only at the time of the hearing, rather than ‘previously’.

Moses LJ cited *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWCA Civ 581 (at [17] and [20]) for the proposition that the Charter now has the same legal value as the EU Treaties, at least when member states are taking action within the scope of EU law.

The Charter therefore being applicable, was Sedley LJ right to predict that the word ‘previously’ would kill off the doctrine of *de facto* authority?

In the view of the Divisional Court, the draftsmen of the Charter had not intended the word ‘previously’ to change or add to the meaning of ‘established by law’. Rather, it was intended to emphasise the need to prevent *ex post facto* ratification by the Executive of decisions made by those without legal authority. As

long as a tribunal in general was established, a problem with the authority of a member of it might be cured by application of the *de facto* doctrine.

### The careless tribunal?

Moses LJ identified, but declined to decide, an intriguing potential further issue. Could reliance on *de facto* authority be barred if on the facts a tribunal ‘ought to have appreciated that they were not qualified to act’? As Moses LJ pointed out, although there is no Court of Appeal case on the point, the ECtHR has ruled that Art 6 requires a court to check that it is an impartial tribunal: *Tocono v Moldova* (32263/03 26/9/2007). *Leathley* does not decide that carelessness may preclude reliance on *de facto* authority, but some future Court of Appeal might go there. It is a case of ‘watch this space’.

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## LEGAL UPDATE

### **Gatawa v. Nursing and Midwifery Council [2013] 22nd October 2013**

At the disciplinary hearing G’s representative applied for an adjournment on the basis of a doctor’s letter stating that G was suffering from depression and anxiety and he believed that her ability to give coherent answers in cross-examination could be affected. Dismissing G’s appeal, the court said that the case turned, of course, on its own facts, and one has to look at the facts of the particular case. The distinguishing features in this case are first of all that the doctor’s letter, although of course unchallenged medical evidence, did not indicate that G was unfit to instruct anybody to represent her. It did not say she was going to be medically unfit to attend the hearing and it did not say that she lacked mental capacity. What it did say was that she may be incapable of producing coherent statements or instructions in evidence. The committee had a discretion whether to grant an adjournment. Where someone suffered from mental illness the committee had to make a value judgment based on the evidence before it. The doctor’s letter had not indicated that G was unfit to instruct anyone to represent her. The issue was one of procedural unfairness. The committee could not be criticised for refusing an adjournment.

### **Isaghehi v. Nursing and Midwifery Council [2014] EWHC 127 (Admin)**

I, a psychiatric nurse, was convicted following trial of dangerous driving and sentenced to 15 months imprisonment. He grew frustrated by another vehicle in the outside lane of the A11 road, drove too close, drove into the inside lane to overtake, when the vehicles were parallel he swore and gesticulation of the other driver, and thereafter steered twice in front of the other driver's vehicle. His vehicle made contact and both drivers lost control. By good fortune, no serious physical injuries were sustained but the incident was terrifying for the other driver and her passenger. The car in which they were travelling turned over and the passenger had to be cut out. She remained distressed for a considerable period in the aftermath of the accident. I appealed against the NMC's Conduct and Competence Committee's decision to strike him off the register. In allowing I's appeal and substituting a sanction of 12 months suspension, Turner J on reviewing the NMC's Indicative Sanctions Guidance said that this was a single incident of misconduct; however it was not fundamentally incompatible with I's continuing to be a registered nurse and the public interest could be satisfied by a less severe outcome than permanent removal from the register; there was no evidence of harmful deep-seated personality or attitudinal problems and there was no record of concerns relating to his abilities as a nurse where he was unfailingly patient and calm with his patients at all times; there was no evidence that I had been involved in any similar behaviour since the incident; and on the evidence I had insight and did not pose a significant risk of repeating his bad behaviour. Public confidence in the profession could be sustained if I was not removed from the register and the sanction of striking off was disproportionately high.

***Obukofo v. General Medical Council* [2014] EWHC 408 (Admin)**

In April 2011, O was convicted at Leicester Crown Court of three counts of sexual assault following a trial. He was sentenced to two 6 months' imprisonment, suspended for 12 months on each count to run concurrently, and a Sex Offenders Register requirement for a period of 7 years. In June 2013 a fitness to practise panel imposed a sanction on O's registration of 12 months' suspension. The legal assessor drew attention to *Council for the Regulation of Health Care Professionals v. General Dental Council and Fleishmann* [2005] EWHC 87 (Admin) where Newman J said that, as a general principle, where a practitioner has been convicted of a serious criminal offence or offences he should not be permitted to resume his practice until he has satisfactorily completed his sentence. Dismissing O's appeal Popplewell J at [58] said that the important

element of Newman J's reasoning related to the sex offender's treatment programme to which doctor Fleishmann was subject for 3 years rather than his subjection to the notification requirements of the Sex Offenders Register for 5 years. If, in this case, the panel had thought that the *Fleishmann* case required it to continue the suspension until O's criminal sentence had been completed (including the period during which he remained subject to the notification requirements of the Sex Offenders Register) that would have been an error of law. But it was clear that this was not the way in which the panel relied on the *Fleishmann* decision. It was clear that the panel exercised its judgment on the sanction which ought to be imposed independently of the element of the sentence on O that related to the Sex Offenders Register.

***Mireskandari v. Solicitors Regulation Authority* [2013] EWHC 907 (Admin)**

The SRA applied for security for costs under CPR 25.15 and costs as a condition of appeal under CPR 52.9(1)(c) in relation to the appellant's statutory appeal under section 49 of the Solicitors Act 1974. The appellant was in the United States of America, and had been declared bankrupt. The court ordered that the appellant provide security in the sum of £150,000. In addition, the SRA sought an order for payment of £206,598, representing the balance due on outstanding costs orders to be paid as a condition for pursuing the appeal. The court considered that such an order was open to the court to be made, even though there may be a statutory right of appeal. However, on the facts, to oblige the appellant to make a further payment in addition to the £150,000 for security for costs would deny him a right of appeal.

***R (Johnson and Maggs) v. Nursing and Midwifery Council (No 2)* [2013] EWHC 2140 (Admin)**

The hearing lasted 86 days spread over a period of two years and nine months. By the time the committee made its decisions, the events which were the subject of the charges were between 13 and 9 years old. The total time which elapsed from when the registrants were notified of the allegations until the conclusion of the disciplinary proceedings was over eight years. The NMC accepted – as in the circumstances it was bound to do – that the delays in the conduct of the proceedings violated the rights of the registrants under Article 6 of the European Convention for the Protection of Human Rights to a hearing within a reasonable time. When every allowance was made for the extent to which the conduct of the defence contributed to the delay, the length of time which the

disciplinary proceedings took remained disgraceful. At the conclusion of the proceedings the committee found misconduct but decided to take no further action. Held, the finding of misconduct would be quashed.

***White v. Nursing and Midwifery Council; Turner v. Nursing and Midwifery Council* 11<sup>th</sup> February 2014**

W and T, two nursing sisters working in an accident and emergency department, were subject to disciplinary proceedings, the main allegation being that they had falsified patients' records to show that they had spent less time in the department, in order to meet departmental targets. Before the committee the NMC adduced in evidence three anonymous letters. Dismissing W and T's appeals Mitting J said it was settled law that article 6(1) of the European Convention on Human Rights applied to disciplinary proceedings that might result in the removal of professional status. However, the protections of article 6(3) in criminal proceedings including the right to examine witnesses did not apply. Rule 31 of the NMC Fitness to Practise Rules 2004 provided that, upon receiving advice of the legal assessor, and subject only to the requirements of relevance and fairness, a practice committee considering an allegation could admit oral, documentary or other evidence, whether or not such evidence would be admissible in civil proceedings. Rule 31 was, however, subject to the requirements of fairness and an opportunity to test the evidence: *Ogbonna v. Nursing and Midwifery Council* [2010] EWCA Civ 1216 and *R (Bonhoeffer) v. General Medical Council* [2011] EWHC 1585 (Admin). The absence of any means of testing the anonymous hearsay evidence meant that the test of fairness could not be satisfied and the panel had erred in admitting the anonymous letters. However the panel's conclusions were not expressly based on the anonymous evidence and there was other admissible evidence to support the charges. There may be different categories of evidence which although anonymous could be fair to admit, such as hospital records as a contemporaneous note even if it was not possible to identify the author.

***R (Hill) v. Institute of Chartered Accountants in England and Wales* [2013] EWCA Civ 555; [2014] 1 WLR 86 CA**

On day 4 of the disciplinary tribunal hearing one of the panel members left early and missed one and a half hours of the claimant's cross-examination. On the resumed hearing one month later the hearing continued with the panel member. On the claimant's appeal to the Court of Appeal against the dismissal of judicial

review proceedings the court stated that if there is a hearing with live witnesses giving their evidence orally, it will normally be a breach of rules of natural justice for a member of the tribunal (in the absence of agreement) to absent himself while a witness is giving evidence and later return to participate in the decision. This would not normally be cured by the absent member reading a transcript of the evidence given in his absence, unless the evidence is comparatively uncontroversial for the reasons given by Lord Griffiths in *Ng v. The Queen* [1987] 1 WLR 1356. Such absence will be difficult (if not impossible) to justify if the evidence being given is that of the defendant or respondent to the disciplinary proceedings. However, the temporary absence of a tribunal member during the hearing was an irregularity that could be waived. Of course, the agreement must be voluntary, informed and unequivocal: *Millar v. Dickson* [2002] 1 WLR 1615, para 31. On the facts of the present case there was such an agreement. If there was an agreement to the procedure adopted, then there was no breach of the rules of natural justice at all. Two types of case should be distinguished. The first is where there has been a breach of one of the requirements of procedural fairness and the question is whether it has subsequently been waived by the person affected. The second type of case is where, at a stage in the process before there has been any breach, the decision-maker and others involved have discussed a proposed procedure and have freely and in full knowledge of the facts consented to that procedure which is then followed. In such a case the correct analysis is to not regard the situation as a breach of natural justice which has been waived.

***Amao v. Nursing and Midwifery Council* [2014] EWHC 147 (Admin)**

A, a practice nurse, faced a single allegation that on 13<sup>th</sup> July 2009 she shouted at the practice manager at the clinic where both worked, and in the course of losing her temper made threats to the practice manager. At the hearing A did not have legal assistance. She attended, gave evidence, asked questions of witnesses and made submissions. The panel found the allegations proved and impairment and imposed a striking off order. Walker J observed that where a person facing disciplinary proceedings is unrepresented, the tasks arising at the hearing for the unrepresented person, and for the legal assessor, are unlikely to be easy. The court concluded that this was a case where (1) procedural mishaps occurred during the first part of the hearing, concerned with factual matters; (2) but the effect of those mishaps was not such as to require the panel's findings of fact to be quashed in the interests of justice; (3) however, when

the panel moved on to consider misconduct, impairment and sanction, A was not given a fair opportunity to address the panel's concern that she had no insight with regard to her future professional obligations, and it followed that the decision to strike off cannot stand; and (4) the appropriate order to have been made by the panel would have been an order that A's registration be suspended for a period of one year. A had now in effect been subjected not only to a one year suspension but also to a substantial extension of that suspension.

**Kenneth Hamer  
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## **ARDL RESPONSE TO THE CONSULTATION**

The Department for Business, Innovation and Skills (BIS) has published a consultation on alternative dispute resolution for consumers  
<https://www.gov.uk/government/consultations/alternative-dispute-resolution-for-consumers>.

This follows an EU Directive requiring member states to have in place independent consumer redress systems by July 2015 for all contractual disputes between a consumer and a business. The Directive has implications for all regulators, particularly those who operate conciliation services or whose regulatory arrangements are not fully independent of the membership body.

ARDL is setting up a working party to produce a response to the consultation, which closes on 1 June. Please contact the ARDL Administrators on [ARDL@kingsleynapley.co.uk](mailto:ARDL@kingsleynapley.co.uk) as soon as possible, and preferably by Monday 31 March 2014, if you are interested in joining the working party or wish to suggest any non-members who should be invited to participate."

## **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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