

# ARDL

ASSOCIATION OF REGULATORY & DISCIPLINARY LAWYERS

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### ARDL News Report

Catriona Watt, Chair

It has been a busy year so far for ARDL with our recent AGM, the new constitution, the recent ARDL Annual Dinner at the Savoy and our range of popular seminars. We keep our website updated with news and events – it can be visited on <http://www.ardl.org.uk/>.

#### AGM

The ARDL AGM was held in April and two new committee members were elected, both working in-house with regulatory bodies and bringing this important dimension to the committee and the work of ARDL. The new committee members are John Lucarotti of the Nursing and Midwifery Council, and Sadia Zouq of

the General Optical Council. Following the AGM, Catriona Watt was re-elected as Chair; Iain Miller was elected as Vice Chair; Julie Norris as Secretary and Nick Leale as Treasurer. Sarah Ellson is our ex officio Membership Liaison officer and Kenneth Hamer is our ex officio ARDL Bulletin editor (working with Nicole Curtis on the quarterly bulletin). Joanne Harrison leads the Junior ARDL programme and Vikram Sachdeva QC chairs the Education & Seminars Sub-committee. Full details of the committee are on the ARDL website.

#### Annual Dinner

The annual dinner at The Savoy took place on Friday 20<sup>th</sup> May with almost 400 ARDL members and guests enjoying a great evening of networking and socialising. The guest speaker was Clive Coleman, Radio 4's Legal Affairs Correspondent. We are looking at ways to

extend the event to allow more of our members to be able to attend. More on that will follow in the coming few months.

### Marion Simmons Essay prize winner

This year's essay on the topic of *"What determines – and what should determine – whether an occupation is regulated by fitness to practise procedures"* was won by Clare Elliot. We were able to present Clare with her prize, a cheque for £2,000, at the annual dinner. Congratulations to Clare. Well done also to Holly Bontoft and Jeremy Balang, who were second and third respectively.

The essay competition judging panel included Professor Mary Severinatne and Professor Tony Prosser.

### Seminar programme 2016

The next in the series of ARDL seminars takes place in London on 16<sup>th</sup> June. The subject is *'Public Inquiries & Inquests'*. Our speakers are Christina Lambert QC and Jenni Richards QC and the seminar is chaired by Vikram Sachdeva QC. Please visit our website to sign up or respond to the event invitation sent to all ARDL members.

The very successful *'Test for Dishonesty in Regulatory Proceedings'* seminar which took place in London on 10 March 2016 was delivered by Paul Ozin QC and chaired by the Hon. Mr Justice Mostyn. Thank you to Herbert Smith Freehills LLP who provided the venue. This seminar is being held in Manchester on 28<sup>th</sup> June at Deans Court Chambers when Paul will be joined by Richard Coleman QC. Please see the website for further details.

Our most recent seminar was held on 19 April 2016 when Joanna Glynn QC spoke on the subject of recent and prospective changes in the regulation of health professionals. Kieran Coonan QC was in the Chair. Thank you to Nabarro LLP for providing the venue.

The 2016 programme will continue with seminars in London on the regulation of both financial and legal services and an event in Edinburgh on the standard of proof. We look forward to welcoming ARDL members to these events. Please check the ARDL website for further details of speakers, dates and locations.



## 'A Grave Thing': Determining the imposition of Fitness to Practise Procedures

Clare Elliott

### Introduction

Fitness to practise procedures have caused no small headache to professionals, their lawyers, and their regulators. Lacking a rigid definition, impairment of fitness to practise has 'the advantage of flexibility, being capable of embracing a multiplicity of problems'.<sup>1</sup> The counterbalance is that it also bears 'the disadvantages that flow from a lack of clarity and definition'.<sup>2</sup> Acts which call an individual's fitness to practise into question can vary wildly, from obvious professional incompetence to acts which are private, seemingly irrelevant to vocation, and even non-criminal.

To justify this lack of clarity, the reasons which determine whether an occupation is regulated by fitness to practise procedures must be critical. These procedures are onerous; their consequences potentially career-ending. Only the most important reasons can justify such intrusion without a strictly-defined set of rules for when these procedures will be engaged.

<sup>1</sup> *Council for Healthcare Regulatory Excellence v Nursing and Midwifery Council and Grant* [2011] EWHC 927 (Admin) 65.

<sup>2</sup> *ibid.*

At present, two key factors determine the imposition of fitness to practise procedures. The first is public protection; the second, preservation of professional reputation. While public protection is sufficiently serious to warrant these procedures, the concept of professional reputation must be reviewed. Further, where an occupation *is* subject to fitness to practise procedures, professionals and aspiring students should be unequivocally informed of the potential for such procedures to be imposed, and their possible consequences.

### The Status Quo: Determining Impairment

#### A. *Grounds for Impairment*

Fitness to practise concerns arise most prominently for health and social care professions. As this is the most fertile ground for case law most examples in this paper will be drawn from it, though other regulated professionals such as solicitors, barristers, accountants and teachers also have codes of conduct which refer to fitness to practise.

Impairment of medical professionals can be established under four grounds. These are misconduct; deficient professional performance and lack of competence; conviction, caution or determination by another regulatory body; and adverse physical or mental health.<sup>3</sup> These are governed by two overarching principles. In *Council for Healthcare Regulatory Excellence v Nursing and Midwifery Council and Grant*, the learned judge stated that

*'It is essential, when deciding whether fitness to practise is impaired, not to lose sight of the fundamental considerations . . . namely the need to protect the public and the need to declare and uphold proper standards of conduct and behavior so as to maintain public confidence in the profession.'*<sup>4</sup>

This judgment establishes public protection, and confidence in the profession, as the two essential elements to establish fitness to practise. In context, 'confidence in the profession' equates to maintaining a

positive reputation amongst the public where an occupation places its professionals in a position of trust and confidence.

The apparent third criterion here - the 'need to declare and uphold proper standards' - can be subsumed into the other two criteria. Proper standards of conduct are a means to an end; they are required '*so as to maintain public confidence*'.<sup>5</sup> Similarly, proper standards are necessary to protect the public because, without them, health and wellbeing is jeopardised. Imagine a doctor who staunchly refused to learn new, more efficient medical techniques. The problem is not her stubbornness alone, but what it means to her patients and the public. It is an unwarranted risk to the health of her patients who would benefit from the new developments; it is a sign to the public that the medical profession is uncaring, selfish, and outdated.

#### B. *Procedures*

Fitness to practise procedures are split into two stages: investigation and adjudication. These procedures are outwardly separate from, but may run alongside, criminal proceedings. Closer inspection reveals a multitude of similarities with the criminal justice system. In *Bolton v Law Society*, Sir Thomas Bingham M.R. noted that

*'There is, in some of these orders, a punitive element: a penalty may be visited on a solicitor who has fallen below the standards required of his profession in order to punish him . . . and deter any other.'*<sup>6</sup>

A tribunal may also make an example of the professional - a feature most associated with criminal law - when 'public confidence in the profession would be undermined if a finding of impairment were not made'.<sup>7</sup> Many similarities occur between fitness to practise proceedings and criminal law. Both may require an investigation into a professional's private life; both can employ criminal rules of evidence;<sup>8</sup> both can engage Article 6 concerns.<sup>9</sup>

<sup>5</sup> Emphasis added.

<sup>6</sup> [1994] 1 W.L.R. 512 [518].

<sup>7</sup> (n 1) [74].

<sup>8</sup> See ARDL, 'Response to Law Commission'

<<http://www.ardl.org.uk/wp-content/uploads/2011/06/ARDL-Law-Commission->

<sup>3</sup> Gregory Treverton-Jones QC, Alison Foster QC and Saima Hamif, *Disciplinary and Regulatory Proceedings* (8th edn, Jordan Publishing Ltd 2015) 336.

<sup>4</sup> (n 1) [71].

In *International Transport Roth GmbH and others v Secretary of State for the Home Department*, Laws LJ commented that

*'It is a grave thing for a man to be condemned for misconduct at the bar of his professional peers; graver, often, than a criminal conviction.'*<sup>10</sup>

It is not difficult to imagine how a fitness to practise tribunal might appear more disheartening, more shaming, than a criminal trial. There is something particularly intimate about a trial by one's peers. It lacks the anonymity of a lay jury or an unknown judge; the tribunal is potentially comprised of people one has worked with, or aspired to work with. They shared the same study and professional challenges. Their condemnation carries a more personal disapproval.

### C. Consequences

The consequences of these procedures may be as, or more, severe than criminal sanctions. Consider a nurse, administering treatment to a patient. They chat; jokes are exchanged. A misunderstanding leads the patient to interpret as sexual a comment made by the nurse. She feels distressed. She reports him to the police.

The police approach the nurse, who is horrified by this turn of events. He admits the comment, but not the sentiment. The police offer him a caution, making clear that this is his best option. Worried that charges would otherwise be pressed against him, he accepts it. Relief is momentary. He remembers that he is obligated to report the caution to his regulator.

The NMC takes the caution extremely seriously. They investigate the nurse. Although it is deemed unlikely that such behaviour would be repeated in the future, there is a possibility that he will be struck off or suspended.<sup>11</sup> Although the criminal consequences for

the nurse are fairly minor, the fitness to practise procedures are potentially career-ending.

The impact of these procedures should not be underestimated. Individual freedom - whether physical liberty, or freedom to follow one's chosen profession - should only be constrained where this is imperative to prevent serious harm. If there is no obvious harm to others, a professional's freedom should not normally be hindered. Imposing these procedures on the basis of protecting the public's confidence in a profession is much more volatile because it is not necessarily linked to tangible harm. It is therefore difficult to assess and often theoretical, particularly because there may be no unified public opinion on the matter. Public confidence issues should only invoke fitness to practise procedures in a minority of cases, and must be reviewed before they can justify the consequences.

### Justifying the Procedures: Public Protection

Public protection has - correctly - formed a strong basis for invoking fitness to practise procedures. It is the single most important reason for imposing such stringent requirements upon professionals.

#### A. Health and Social Care

One only needs to open a newspaper to understand the potential harm to the public: the unnecessary deaths of patients at Stafford Hospital;<sup>12</sup> the Dutch dentist who mutilated dozens of his patients.<sup>13</sup> Health and social care professionals have privileged access to some of the most vulnerable people in our society, who are often isolated and unable to speak out against poor care. Complex personal and mental health issues, as well as physical injury, render them susceptible to mistreatment.

These professionals are under considerable pressure to perform at an excellent standard while time and

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given little weight in the case of violation of the doctor-patient relationship.

<sup>12</sup> 'Stafford Hospital: Police investigate 300 "neglect" deaths' (*BBC News*, 10 June 2013) <<http://www.bbc.co.uk/news/uk-england-stoke-staffordshire-22845570>> accessed 15 May 2016.

<sup>13</sup> "'Dentist of Horror' Jacobus van Nierop on trial in France' (*BBC News*, 8 March 2016) <<http://www.bbc.co.uk/news/world-europe-35751896>> accessed 15 May 2016.

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[Response.pdf](#)> accessed 15 March 2016, particularly discussion at "Provisional Proposal 9-11".

<sup>9</sup> For example, that the proceedings should generally be held in public, or that professionals / criminal suspects should be able to have legal representation at fitness to practise tribunals / trials.

<sup>10</sup> [2002] EWCA Civ 158 [93].

<sup>11</sup> See *Yeong v General Medical Council* [2009] EWHC 1923 (Admin), where effort to reduce the risk of recurrence was

resources are scarce. However, imposing fitness to practise regulations is justified on two bases. Firstly, the potential risk to patients is so severe that they must be protected, even to the cost of the professionals. Second, because the principle of patient wellbeing is central to their roles, and thoroughly ingrained in codes of conduct and ethics. It is not an undue burden that a professional's behaviour which jeopardises public safety should induce fitness to practise procedures - it is a necessity.

## B. Other Professions

Issues of public protection become more convoluted when considering other professions. There are few instances where the risk to the public is so severe as that posed to medical patients or social care service users. However, it is ultimately accepted that public protection is still a justified basis for the imposition of fitness to practise procedures.

For legal professionals, there are numerous examples where potential harm may occur. Criminal lawyers interact with vulnerable witnesses, handle sensitive confidential material, and act in cases where a client is deprived of their liberty. The risk to the public, should this work not be performed properly, is palpable. Similarly, if a lawyer in a personal injury or medical negligence case failed to perform to the expected standard a client may risk losing sorely-needed compensation - perhaps to pay for physiotherapy or home nursing. It is argued that the subsequent effects on a client's quality of life would be comparatively debilitating to improper medical care.

For professionals whose responsibilities to their clients are primarily financial - such as accountants - public protection issues are less clear. Economic loss can certainly be damaging to clients, but it is unlikely to be as destructive to their interests - or as intimate - as a risk to their physical or mental health. However, public protection remains the best foundation for assessing the impact and severity of a professional's actions; it is also more reliable than that of professional reputation. As such, it should remain in place across fitness to practise procedures for regulated occupations.

## Public Confidence, Professional Reputation

In *Yeong v General Medical Council*, Sales J noted that

*'a finding of impairment of fitness to practise may be justified on the grounds that it is necessary to reaffirm clear standards of professional conduct so as to maintain public confidence in the practitioner and in the profession.'*<sup>14</sup>

This came in the appeal by Dr Yeong against his 12-month suspension following a sexual relationship with a former patient. The relationship occurred while she was still his patient<sup>15</sup>, and he disclosed confidential treatment information of other patients to her<sup>16</sup>. It was a clear violation of his duties as a doctor and can properly be said to diminish confidence in the medical profession.

This is not always the case. Where a professional acts in a way which is clearly unacceptable, it is usually such because it has evidently harmed a member of the public. These acts are easily dealt with under the criterion of public protection. Problems with the 'public confidence' criterion tend to arise rather where a regulator investigates *private* acts, unrelated to professional duties and far from obvious misconduct. This is particularly so when the act concerned is non-criminal<sup>17</sup>. At the forefront of these problems is the difficulty of reliably discovering what 'the public' think at all.

The public, on a literal interpretation, sustain millions of diverse opinions, concerns, and moral standards. On this basis there cannot possibly be sufficient certainty - that is, sufficient to found serious disciplinary sanctions - of what the public actually think to justify this as a criterion. Further, there is no real need to do so. Any actions which might contend to invoke anything similar to unanimous public opinion are likely to fall under the principle of protecting the public from harm; for example, a teacher sexually abusing a student, or a nurse neglecting their patients. Even Dr Yeong's case could justify suspension on grounds of public harm alone. He exploited a patient in a position of

<sup>14</sup> [2009] EWHC 1923 (Admin) [565].

<sup>15</sup> *ibid* [6].

<sup>16</sup> *ibid* [10].

<sup>17</sup> Full discussion of this topic is outside of the scope of this essay; for further detail see Rebecca Zaman, 'To the Ends of the Earth: Public Trust and Private Lives' ARDL Quarterly Bulletin (Summer 2015) <<http://www.ardl.org.uk/wp-content/uploads/2011/06/Summer-bulletin.pdf>>. accessed 10 March 2016.

vulnerability, abusing his position; he harmed other patients by disclosing their details and violating confidentiality. He diminished confidence in the profession *because* he acted harmfully to the public.

The criterion of public confidence therefore seems most relevant in cases where a professional commits a criminal act which does not directly harm anyone, but jeopardises trust in the profession. This was the case in *Sandler v GMC*<sup>18</sup>, where a doctor had committed criminal offences by signing 116 false certificates for cremation. The scale of wrongdoing was such that it was clearly a deliberate disregard for professional standards. Importantly, criminal charges were proceeding against Dr. Sandler and the offending behaviour had occurred during his clinical duties. It was not an intrusion into private or non-criminal activity, but took an appropriate role, acting as a flexible stop-gap for reprehensible professional behaviour. While this may be limited to a small minority of cases, it is usefully preserved, is to be commended, and should set the standard for employing the public confidence criterion in future procedures.

Where public confidence is considered, it should follow the approach adopted by the Privy Council in *Royal College of Veterinary Surgeons v Samuel*.<sup>19</sup> The Privy Council noted that public opinion of an offence committed by a professional may change substantially depending on whether they are informed only in broad terms, or whether they are given the detail and surrounding the offence. Analysing what the public's opinion is should not be based on an uninformed, gut reaction to the buzzword of an offence (here, theft and assault). It should be based on a detailed account of what happened, including mitigating circumstances, and unprejudiced reasoning of whether the offence in question materially bears on the professional's fitness to practise.

### Professional Training and Review

Where an occupation is regulated by fitness to practise procedures, regulators should not only oversee their professionals, but protect them by providing

appropriate training and ensuring awareness. For example, in the recent case of *Schodlok v General Medical Council*<sup>20</sup> it was held that, in appropriate cases, a series of non-serious misconduct findings could cumulatively be regarded as serious misconduct. Beats LJ emphasised that in order for this to be fair, doctors must 'be aware [that] this is a possibility'.<sup>21</sup> Regulators should ensure awareness of how misconduct is evaluated, so that professionals may correct any lax conduct before it causes harm. Regular review of an individual's practice could allow them to improve in the future.

Given that adverse mental health can be grounds for impairment, and that regulated professionals frequently suffer from mental health issues (paradoxically perpetuated by the fear of losing their jobs),<sup>22</sup> regulators should ensure awareness of any resources for support and help. While professionals might be reluctant to declare such issues to a regulator because of the risk to their careers,<sup>23</sup> knowing that they have access to help may prevent an emerging or low-level health issue from becoming a serious impediment to work. All of this helps to avoid serious procedural consequences while benefitting both the public and the professional.

Awareness of such consequences may be particularly problematic for aspiring students. Law students have no compulsory education regarding codes of conduct until their BPTC or LPC year, by which point it may be too late. In the recent case of *Thilakawardhana v The Office of the Independent Adjudicator*<sup>24</sup>, a student was declared unfit to practise after sending his friend potentially threatening messages via social media. Consequently, "an ill-advised post on social media has cost him his career"<sup>25</sup>. This paper does not question the panel's decision, but it does urge clear training for students, in the *early* stages of their studies, to promote awareness about how private activity may compromise professional fitness to practise.

<sup>20</sup> [2015] EWCA Civ 769.

<sup>21</sup> *ibid* [72].

<sup>22</sup> Kate Oxtoby, 'Doctors' Own Mental Health Issues' (2016) BMJ

<[http://careers.bmj.com/careers/advice/Doctors'\\_own\\_mental\\_health\\_issues](http://careers.bmj.com/careers/advice/Doctors'_own_mental_health_issues)> accessed 20 March 2016.

<sup>23</sup> *ibid*.

<sup>24</sup> [2015] EWHC 3285 (Admin).

<sup>25</sup> Chris Bryden and Michael Salter, 'Becoming Anti-Social: Part 1' [2016] NLJ 166.

<sup>18</sup> [2010] EWHC 1029.

<sup>19</sup> [2014] UKPC 13.

## Conclusion

Given the severity of potential consequences, only the most important reasons should determine whether an occupation is governed by fitness to practise procedures. The overriding criterion is, and should be, public protection. Although the criterion of public confidence need not be abolished, almost all fitness to practise cases can and should be based around public protection. Where public confidence is invoked, the standard for assessing public opinion should follow the approach laid down in *Royal College of Veterinary Surgeons v Samuel*.<sup>26</sup> All professions governed by these procedures should provide comprehensive training for their students and professionals, explaining how the procedures operate and what their results may be.

## The Influence of Convention Rights on Regulatory Law

Amanda Hart and Sue Sleeman of Doughty Street Chambers

### Introduction

Ever since the majority decision of the European Court of Human Rights in *Le Compte, Van Leuven and De Meyere v Belgium*<sup>27</sup> it has been clear that a decision of a professional tribunal that interferes with the practitioner's ability to practise their chosen profession amounts to a determination of civil rights and obligations, leading to the engagement of Article 6 of the Convention<sup>28</sup>. Enactment of the Human Rights Act 1998<sup>29</sup> in the UK has made discussion of Convention rights more commonplace in the domestic courts and in this article we consider how those rights have been used in regulatory and professional disciplinary proceedings over the last few years.

Article 6 is, unsurprisingly, the most commonly cited convention right in such cases, its fair trial provisions being prayed in aid over issues as diverse as admissibility of evidence, delay in prosecuting

proceedings and disclosure. Article 8<sup>30</sup> appears to be the next most frequently invoked right, although from our research this often appears to be in conjunction with another Convention right (usually Article 6) and it is sometimes difficult to assess what, in terms of material difference to the decision, it has added.

Other Convention rights that have been invoked in regulatory cases are Article 10<sup>31</sup> as well as Articles 1<sup>32</sup> and 2<sup>33</sup> of the First Protocol.

In this article we consider not just the frequency of invocation of convention rights but also the range of issues to which they are said to be relevant. We will also consider the significance, in the sense of material effect, of those rights on decisions affecting those facing regulatory proceedings. In the main we have focussed on cases decided in the last four years although we have included consideration of *Bonhoeffer*<sup>34</sup> notwithstanding its falling slightly outside that timescale, given its undisputed significance and wide application.

### Article 6: Hearsay Evidence

Many regulators have a provision under their rules to admit evidence, whether or not it would otherwise be admissible in civil proceedings. This is subject only to the two considerations of relevance and fairness. The question arose in *Ogbonna*<sup>35</sup> and then in *Bonhoeffer* whether under this provision hearsay evidence was admissible; it being argued that fairness could be addressed by a panel considering what weight, if any, to attach to untested evidence. *Ogbonna*, decided by both the HC and CA without reference to Article 6, held that the criterion of fairness under the NMC rules was relevant to whether the hearsay statement should be admitted at all. The NMC's attempt to argue that such evidence should be admitted as a matter of course was given short shrift. On the other hand both courts were careful to restrict the judgment on the facts, and not lay

<sup>26</sup> [2014] UKPC 13.

<sup>27</sup> (1982) 4 EHRR 1

<sup>28</sup> Convention for the Protection of Human Rights and Fundamental Freedoms

<sup>29</sup> In force from 2 October 2000

<sup>30</sup> Right to respect for private and family life

<sup>31</sup> Freedom of expression

<sup>32</sup> Protection of property

<sup>33</sup> Right to education

<sup>34</sup> R (on the application of Bonhoeffer) v General Medical Council [2011] EWHC 1585 Admin

<sup>35</sup> *Ogbonna v Nursing and Midwifery Council* [2010] EWHC 272 (Admin), upheld by the CA in *Ogbonna v Nursing and Midwifery Council* [2010] EWCA Civ 1216

down a more general principle regarding the admissibility of hearsay evidence.

The matter came before the courts again in *Bonhoeffer* (a GMC case). The appellant had been accused of sexual misconduct, based on the evidence of a single witness who was willing to attend the hearing but had not been called. The HC conducted a thorough review of both domestic and Article 6 authorities. In relation to Article 6 it noted that whilst Article 6(3)(d) (the right to cross-examination) only applied to criminal proceedings, nevertheless the more general right to a fair hearing and in particular the requirement of equality of arms in the sense of a fair balance between the parties, applied in principle to civil as well as criminal proceedings. The HC commented that each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-a-vis his opponent. This included being able to challenge evidence adduced by the other party. It acknowledged that there was no absolute entitlement to the right to cross-examination. However it went on to state that there would need to be "compelling reasons" for not entitling an accused to cross examine. Relevant factors included: the nature and seriousness of the allegation, the gravity and adverse consequences to the accuse party, where there was an important conflict of evidence and where there were no problems associated with securing the attendance of the accuser. Whilst this decision may well have been the same without reference to Article 6, Article 6 and associated case law provided a powerful rationale for this conclusion.

However, as two recent cases on the admissibility of hearsay evidence in disciplinary hearings demonstrate it is important to consider each case on its own facts. In particular the extent to which the hearsay statement could be said to have affected the outcome. In *Njie*<sup>36</sup> the HC held that the panel were entitled to admit the hearsay evidence as a matter of principle and that in this case it was fair to do so since initially the witness' whereabouts was unknown (although it had been discovered by the date of the hearing). There is no explanation as to why the HC reached this conclusion and arguably it is at odds with the *Bonhoeffer* judgment and that of *White* (below). The HC went on to note that

<sup>36</sup> *Njie v Nursing and Midwifery Council* [2014] EWHC 1279 (Admin)

the panel did not accept the appellant's own account as credible, and that the hearsay statement was therefore only part of the totality of the evidence on the issue. However the HC went on to state that it also decided the case against the appellant without reliance on the hearsay statements. It is the view of the author that this is the real reason for the rejection of the appeal.

A more reasoned decision is that of *White*<sup>37</sup> where the HC accepted that "in the context of disciplinary proceedings, it is difficult to conceive of circumstances in which the admission of potentially significant evidence about the attitude and conduct of a registrant which is both anonymous and hearsay will not infringe the requirement of fairness." However hearsay evidence was admissible for the much more limited purpose to explain the circumstances in which the registrants came to be investigated". In relation to whether to quash those charges where the evidence included the anonymous hearsay statements, the HC adopted the test in *Ogbonna* namely whether there was a "real risk" that the committee factored in the anonymous statement to its assessment of the credibility of the live witnesses. On the facts of the case it was clear that the panel had found a number of charges proved only on the admissible evidence of live witnesses: the hearsay statements only being referred to as additional evidence in support. Therefore the HC stated it would only quash those findings 'which depend in part on the anonymous statements'. Thus in *White*, contrary to *Njie*, where a panel had partially relied on hearsay evidence in reaching its conclusion this was considered to be unfair.

#### Article 6: Interim Orders and Evidence

In a significant judgment the CA in *Perry*<sup>38</sup> held that both Articles 6 and 8 (see later) were engaged in interim order proceedings before disciplinary tribunals. In so doing the CA quoted the ECHR decision of *Micallef v Malta*<sup>39</sup> which held that Article 6 should apply to interim proceedings where they are determinative, albeit for a limited duration, of a party's civil rights and obligations. However in the appellant's case there had been no infringement of those rights. In particular there was no requirement upon an interim order panel

<sup>37</sup> *White v Nursing and Midwifery Council / Turner v Nursing and Midwifery Council* [2014] EWHC 520 (Admin)

<sup>38</sup> *Perry v Nursing and Midwifery Council* [2013] 1 WLR 3423

<sup>39</sup> (2009) 50 EHRR 920

to consider evidence with view to determining the disputed issues. On the other hand the panel may receive and assess evidence on the effect of the interim order on the registrant, and the registrant is entitled to give evidence on this. The registrant may also give evidence, if he can, to establish that the allegation is manifestly unfounded or manifestly exaggerated.

## Article 6: Delay

*Johnson*<sup>40</sup> covered a timescale that was startling even by the all-too-frequently encountered snail's pace progress of regulatory cases. The decision of Leggat J begins with the heart-sinking (if you are the NMC) observation "The disciplinary proceedings which are the subject of this claim for judicial review could unfortunately serve as a case study for how a disciplinary case should not be conducted". The challenge did not succeed only on grounds of delay however but also the soundness of the panel's findings of misconduct. The registrants were the manager and deputy manager of a nursing home and were initially informed of the NMC proceedings some eight years before the panel gave its determination in the case. The hearing itself lasted 86 days spread over a period covering almost three years. By the time of the decision the conduct that had led to the referral had taken place between nine and 13 years earlier. At the hearing before Leggat J the NMC conceded that this timescale infringed the registrants' Article 6 right to a hearing within a reasonable time. Leggat J, while acknowledging that the complexity of the allegations and indeed the possibility that the conduct of the registrants might have contributed to the protracted timescale, referred to the degree of delay as "disgraceful". The NMC's concession at the hearing however means that no detailed analysis of the application of Article 6 rights in this context appears in the judgment.

At the other end of the delay spectrum, in *Goodwin*<sup>41</sup>, a period of just under two years was held not to infringe the registrant's right to a hearing within a reasonable time. Again the complexity of the investigation was a relevant consideration and here the alleged failings covered competency levels in nine specific areas as well as in time management, workload prioritisation and awareness of health and safety issues.

<sup>40</sup> *Johnson & Maggs v Nursing and Midwifery Council* [2013] EWHC 2140 Admin

<sup>41</sup> *Goodwin v Health and Care Professions Council* [2014] EWHC 1897 Admin

Slightly different considerations arose in *Rycroft*<sup>42</sup> which involved a delay of two years and eight months from the commencement of an investigation into an allegation of re-using and re-supplying patient returned medication to referral by the Registrar to the Investigating Committee. It is relevant to note that the investigation had initially been closed as not indicating any serious professional misconduct but had later been reopened. The key consideration was the effect of a breach of the registrant's Article 6 right to a hearing within a reasonable time. Relying on *Gibson*<sup>43</sup> the court did not accept that "the failure to make a referral within a reasonable time amounts to a reason to quash the referral and stay the proceedings unless it is also established that the failure to act within a reasonable time has caused prejudice to such an extent that no fair disciplinary process is possible or that it is unfair for the process to continue." Although there had been prejudice to the registrant in the present case (not least arising from the uncertainty and anxiety of facing proceedings) it was not such that would render a fair process no longer possible accordingly the remedy of a stay of proceedings was not available to him.

## Article 6: Appeal Time Limits

Possibly one of the most significant cases in terms of the potential for practical effect is that of *Adesina*<sup>44</sup> in which the Court of Appeal considered the time limit for bringing an appeal against a decision of a panel of the Nursing and Midwifery Council's Conduct and Competency Committee. Article 29(1) of the relevant statutory provision<sup>45</sup> requires appeals against such decisions to be brought "before the end of the period of 28 days beginning with the date on which notice of the order or decision appealed against is served on the person concerned" with no express discretion for the court to extend.

In *Adesina* it was argued that, following an extradition case<sup>46</sup> the apparently fixed time limit under Article 29(1) must be read down so as to comply with a prospective appellant's fair trial rights under Article 6.

<sup>42</sup> *R (on the application of Rycroft) v Royal Pharmaceutical Society of Great Britain* [2010] EWHC 2832 Admin

<sup>43</sup> *R (Gibson) v General Medical Council & Another* [2004] EWHC 2781 Admin

<sup>44</sup> *Adesina v NMC* [2013] EWCA Civ 818

<sup>45</sup> *Nursing and Midwifery Order 2001* SI 2002 No 253

<sup>46</sup> *Pomiechowski v Poland* [2012] UKSC 20

The CA accepted that this was the correct approach, notwithstanding the difference in the level of seriousness of the potential consequences of extradition proceedings comparative to regulatory ones. It also recognised that the approach would require a marked departure from an established body of case law<sup>47</sup>. The potential effects of the decision are however limited by the acknowledgement that any margin for discretion could only be to the minimum amount necessary to achieve compliance with the Article 6 rights. In practice this has meant that the exceptional circumstances in which an appeal under Article 29(10) would be permitted to proceed when submitted outside the statutory period have not yet (to our knowledge) been seen by the higher courts.

While *Adesina* has been followed on numerous occasions<sup>48</sup>, it seems that only once has the High Court considered that an appeal lodged outside the statutory time limit should be permitted to proceed. In *Daniels*<sup>49</sup> the appellant sought to submit an appeal against the imposition of a three year caution order some three days outside the statutory period. The HC allowed the appeal to go forward, citing as the “exceptional circumstances” the appellant’s lack of employment and lack of financial resources, and in particular her inability to pay the £235 fee to lodge the appeal. It also observed that she was represented by solicitors who were not specialists in regulatory proceedings.

Perhaps unsurprisingly the NMC appealed successfully, CA observing that this was the first occasion on which a court had allowed an appeal out of time following *Adesina*. It held that the appellant’s lack of financial resources did not amount to exceptional circumstances and noted various aspects of the case that did not mitigate in her favour, notably the absence of evidence that she had taken steps promptly within the 28 day period to instigate an appeal. There was a sting in the tail of the judgment for the NMC however, CA noted that the case against the appellant was of minimal complexity yet had progressed at a snail’s pace. It noted the apparent unfairness of the appellant’s not being

permitted three days’ grace when the NMC had dragged its feet. We shall keep an eye out for such an argument being advanced under the equality of arms provisions of Article 6.

## Article 6: Appeals

The interpretation of the *Bolton*<sup>50</sup> principles on appeals from disciplinary cases has been revisited in light of the enactment of HRA in a number of cases. In *Robinson*<sup>51</sup> this was referred to as “Bolton Plus” and, citing Jackson LJ in *Salisbury*<sup>52</sup> in which it was held that following review of the authorities *Bolton* remained good law subject to the qualification that, in applying *Bolton* principles the SDT must also take into account the rights of the solicitor under Articles 6 and 8 of the Convention. Accordingly a “very strong case” is not required before the court will interfere with a sentence imposed by the SDT. Following that qualification Jackson LJ goes on to emphasise the considerable respect that appellate courts must pay to the sentencing decisions of the SDT in light of its status as an expert and informed tribunal. In *Robinson* it was held that the tribunal had directed itself correctly in accordance with *Bolton* and its failure to refer expressly to Articles 6 and 8 was not fatal to its decision. The court did however note that future tribunals would be wise to do so.

## Article 6 Cases: Judges

In *Meyhey*<sup>53</sup> a number of barristers sought to challenge disciplinary charges that had been upheld against them. In each case they had appealed the outcome to the respondent Visitors and their appeals had been dismissed. It was argued that the Visitors had not been appointed in accordance with the applicable provisions as their membership of the relevant pool (that of the Council of the Inns of Court) had expired, accordingly they lacked eligibility to sit. It was argued that this had breached the appellants’ fair trial rights under Article 6.

<sup>47</sup> See for example *Mitchell v Nursing and Midwifery Council* [2009] EWHC 1045 Admin and *Reddy v General Medical Council* [2012] EWCA Civ 310

<sup>48</sup> See for example *Stevenson v General Optical Council* [2015] EWHC 3099 Admin, *Leeks v Health and Care Professions Council* (unreported) QBD (Admin) 14 January 2016

<sup>49</sup> *Daniels v Nursing and Midwifery Council* [2014] EWHC 3287 Admin, and [2015] EWCA Civ 225

<sup>50</sup> *Bolton v Law Society* [1994] 2 All ER 486

<sup>51</sup> *Robinson v Solicitors Regulation Authority* [2012] EWHC 3054 (Admin)

<sup>52</sup> *Law Society v Salisbury* [2008] EWCA Civ 1285

<sup>53</sup> *Mehey and Others v Visitors to the Inns of Court* [2014] EWCA Civ 1630

It was held however that the provisions did not impose an express obligation on the President and the LCJ to make appointments solely from the pool. The fact that appointments were made of individuals who, in the opinion of the LCJ or the President, were suitable to hear disciplinary charges or appeals, was sufficient to ensure compliance with Article 6.

### Article 6: Equality of Arms

A failure to disclose relevant material by a prosecuting authority can of course amount to a breach of the Article 6 fair trial requirement for equality of arms. This point was argued in *McCarthy*<sup>54</sup>, in which the appellant challenged the decision of the HC not to quash and remit the respondent's decision to dismiss his appeal against the Bar Disciplinary Tribunal's decision to disbar him. The case before the Tribunal included charges of failing to send client care letters in breach of public access rules and then having falsely created such letters after the event in response to an enquiry by the BSB. It was argued that the failure of the BSB to disclose the first statement of a key witness to those charges was in breach of the Disciplinary Hearing Rules as well as Article 6. The first statement contained inconsistencies with evidence the witness went on to give before the Tribunal and it was argued that, had it been properly disclosed, it would have served to undermine the credibility of that witness.

CA held that "the question whether a finding of non-disclosure in disciplinary proceedings calls for a rehearing is answered in the same way whether it is approached via the common law or article 6. The ultimate question is whether the proceedings as a whole were fair. The significance of an infringement of article 6, or procedural impropriety of the sort which occurred in this case, depends upon the factual circumstances." In the present case the answer to the ultimate question was affirmative, without further illumination of what, if any, effect infringement of the appellant's Article 6 rights had on that answer.

### Article 8

The Article 8 right to respect for private and family life has been argued in a number of cases, although often

its provisions are cited in tandem with other convention rights (often Article 6) and judgments do not always make clear what, if anything Article 8 considerations have added to the analysis<sup>55</sup>. Thus the CA in *Perry* states that it is prepared to proceed on the basis that Article 8 was engaged in interim order proceedings without further explanation. In so doing it appears to accept the submissions on behalf of the Appellant that an interim suspension order affected his relationship with patients and his ability to work, and resulted in a stigma that affected his private life. Nevertheless the CA concludes that the HC had already addressed the issue of proportionality. This had been without the assistance of Article 8 which the HC had concluded was not engaged<sup>56</sup>.

In *Prescott*<sup>57</sup> the claimant sought to challenge a decision of the respondent that he was required to resit the whole of the Bar Professional Training Course, rather than just the module he had twice failed (opinion writing). This was said to amount to an infringement of his Article 8 rights on the basis that the requirement was disproportionate. Article 8 rights are qualified, so interference with them by a public authority is permitted provided it is in accordance with the law and necessary for one of the reasons stated in the convention<sup>58</sup>. The HC dismissed this aspect of the claim on the grounds that Article 8 was not engaged, relying on previous authority including *Countryside Alliance*<sup>59</sup> to hold that it did not arise in the context of competency requirement for entry into (and continuance in) a particular profession. Hickinbottom J went on to confirm that, even if Article 8 were engaged, then the scheme adopted by the Bar Council would not be disproportionate and hence would not infringe its provisions.

### Article 10

<sup>55</sup> See for example *Robinson v SRA* (full citation at footnote 25)

<sup>56</sup> *Perry v Nursing and Midwifery Council* [2012] EWCA 2275 (Admin)

<sup>57</sup> *R (on the application of Prescott) v General Council of the Bar* [2015] EWHC 1919 (Admin)

<sup>58</sup> National security, public safety, economic wellbeing of the country, prevention of crime or disorder, protection of health and morals and protection of the rights and freedom of others.

<sup>59</sup> *R (on the application of Countryside Alliance) v HM Attorney General* [2007] UKHL 52

<sup>54</sup> *McCarthy v Visitors to the Inns of Court and the Bar Standards Board* [2015] EWCA Civ 12

The Article 10 right to freedom of expression is also qualified where prescribed by law and necessary on specified grounds<sup>60</sup>. In *Solicitors Regulation Authority v SDT and Spector*<sup>61</sup> the SRA challenged a decision of the Solicitors Disciplinary Tribunal to grant an anonymity order in respect of the solicitor who had been the subject of disciplinary proceedings. He had been found guilty of a single offence which had been found to be a minor matter not requiring the imposition of any sanction. It was argued that the decision infringed Article 10 in addition to the common law principle of open justice. In allowing the appeal, the court placed greater emphasis on the common law than the applicability of the convention right, stating that any departure from that principle had to be justified, particularly in the absence of competing convention rights. The court went on to observe that the case amounted to “another example of a situation where the same outcome is achieved whether viewed through the spectacles of the Convention or the common law.”

### The First Protocol

Article 1 of the First Protocol provides entitlement to the peaceful enjoyment of property<sup>62</sup> and Article 2 provides the right to education<sup>63</sup>. Both have been relied upon in regulatory cases, albeit with little success so far. Article 1 was argued to have been infringed in *Iqbal*,<sup>64</sup> in defending an application to strike out the claimant’s claim for damages for breach of his rights under Article 1 of the First Protocol as well as for misfeasance in

<sup>60</sup> National security, territorial integrity or public safety, prevention of disorder or crime, protection of health or morals, protection of reputation or rights of others, preventing disclosure of confidential information and maintaining authority and impartiality of the judiciary.

<sup>61</sup> [2016] EWHC 37 (Admin)

<sup>62</sup> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties

<sup>63</sup> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

<sup>64</sup> *Iqbal v Solicitors Regulation Authority* [2012] EWHC 4097 (QB)

public office by the SRA in conducting an investigation into aspects of the conduct of his business. The results of the investigation had been referred to an adjudicator who had found a breach of the Code of Conduct. An appeal against that finding was rejected by an Appeal Panel but subsequently upheld by another panel following remission after the claimant had brought judicial review proceedings. It was argued by the claimant that his business had been adversely affected by the pursuit of the case against him (which was ultimately not upheld) in such a way as to breach his convention rights. While it was accepted that the claimant’s interest in the business constituted a possession for the purposes of Article 1, HC held that the financial loss relied upon (the increased cost of insurance cover) did not amount to a deprivation of possessions.

In *Tarantino*<sup>65</sup> it was argued that domestic rules that limited the number of students who could be admitted to university courses to qualify in medicine and dentistry breached the provisions of Article 2 of the First Protocol. ECHR disagreed, citing *Lukach*<sup>66</sup> to support the conclusion that the provisions permitted limiting access to universities to those who applied and met the admissions requirements. There was a legitimate aim of achieving high levels of professionalism and assessment by tests was a proportionate measure to ensure an adequate standard of education in the universities.

### Conclusion

From the foregoing analysis of some recent cases it is clear that Article 6 is plainly the most commonly invoked and has undoubtedly had the most marked effect on regulatory law. It is however also the case that while convention rights are often raised and argued in proceedings, judgements frequently appear to place greater reliance on common law principles which might be said to overlap with those convention rights. This may of course be due to the courts’ greater familiarity with such principles rather than their affording greater protection than their convention counterparts. This is no doubt an area of regulatory law that will be revisited regularly in the future and its development reassessed.

<sup>65</sup> *Tarantino v Italy* [2013] 57 EHRR 26

<sup>66</sup> *Lukach v Russia* (48041/99)

## So Long(more): An end to the re-formulated *Ghosh* test for dishonesty in professional disciplinary cases?

Andrew Granville Stafford of 4 Kings Bench Walk

In *Hussain v GMC* Lord Justice Longmore suggested the objective test for dishonesty in disciplinary proceedings should reflect the standards of members of the professional rather than the general public. That suggestion was taken up with varying degrees of enthusiasm by disciplinary panels, legal advisers and the courts. **Andrew Granville Stafford** argues that the recent Court of Appeal case of *R v Hayes* has effectively ended any need to apply the Longmore formulation.

### Hussain

Since *Bryant v Law Society* [2007] EWHC 3043 it has been accepted practice for disciplinary tribunals to apply the *Ghosh* test when considering allegations of dishonesty. In *R v Ghosh* [1982] 1 QB 1053 Lord Lane CJ set out the two limb approach to the issue of dishonesty:

- ‘In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest.’

In *Hussain v GMC* [2014] EWCA Civ 2246 a doctor was charged with plagiarism and falsifying his CV. The allegations were found proved and those findings were upheld by the Court of Appeal. In the last paragraph of the judgment Lord Justice Longmore said:

- ‘I would only add that I am a little troubled about the *Ghosh* direction given by the legal assessor in this case. It would have been standard in a criminal case. But this was a professional disciplinary hearing and it seems to me that in future it would be right and proper

for the first part of the direction to be adapted to read that the panel should decide "whether according to the standard of reasonable and honest doctors [not people] what was done was dishonest". There may be a not unimportant difference between the two as shown by the decision of the judge in this very case.’

As there had been no issue on the appeal as to the correctness of the legal assessor’s advice, these words were obiter. However, it has become common (if not necessarily universal) practice for legal assessors to advise disciplinary tribunals to follow the Longmore formulation and to judge the act or omission in question against the standards of the profession in question. The courts have in some cases also accepted the Longmore approach – see *Kirschner v GDC* [2015] EWHC 1377 and *Falodi v HCPC* [2016] EWHC 328 (Admin). Mr Justice Mostyn in *Kirschner* set out the re-formulated *Ghosh* test:

- ‘The tribunal should first determine whether on the balance of probabilities, a defendant acted dishonestly by the standards of ordinary and honest members of that profession; and, if it finds that he or she did so, must go on to determine whether it is more likely than not that the defendant realised that what he or she was doing was by those standards, dishonest.’

### Dowson

One perceived difficulty with the Longmore formulation was this. Most disciplinary panels include, and usually have a majority of, lay members. How is a lay panellist to know what the profession would regard as honest? Would it be necessary in a case where dishonesty was alleged to call expert evidence to say whether fellow members of the profession would have regarded the conduct as such?

If so, how might that affect the outcome of the case? One might suppose that the standards of honesty in a profession are at least as high if not higher than those found in the public at large, given the trust and confidence we place in professionals. But would that prove to be so? Take the hypothetical example of a nurse charged with writing up her patient notes at the end of the shift but making them look like a contemporaneous record of the care she had provided. On the face of it she has created a false document, but

would she be exonerated if she called witnesses to say that in a busy NHS ward this was common practice? Or an accountant who had signed off accounts knowing they contained some misleading figures. Would he, too, avoid disciplinary sanction if he were able to call fellow accountants to give evidence that, in the real world, this happens all the time?

These difficulties were recognised by Edis J in *Dowson v GMC* [2015] EWHC. He acknowledged that the *Ghosh* test had 'perhaps' been modified as a result of Longmore LJ's observations. He pointed out, however, that in the case he was dealing with there was no evidence suggesting the standards applied by doctors differed from those of the general public. Therefore the relevant standard was the same whether it is derived from what was considered right by reasonable and honest doctors or by reasonable and honest people. What is necessary, he said, is to attribute to which ever notional group is the theoretical arbiter enough knowledge of the context and purpose of the activity involved to allow an informed judgment to be developed.

## Hayes

The Defendant in *R v Hayes* [2015] EWCA Crim 1944 was a city trader accused of LIBOR manipulation. The central issue was whether he had acted dishonestly. He ran what has been described as the 'everyone was at it' defence, relying on evidence that what he did was common practice in the banking industry and regarded as legitimate by fellow traders.

In directing the jury on the objective limb of the *Ghosh* test, the trial judge gave a very strong warning to the jury:

- 'First, was what Mr Hayes agreed to do with others dishonest by the ordinary standards of reasonable and honest people? I will say that again: Was what Mr Hayes agreed to do with others dishonest by the ordinary standards of reasonable and honest people? Not by the standards of the market in which he operated, if different. Not by the standards of his employers or colleagues, if different. Not by the standards of bankers or brokers in that market, if different, even if many, or even all regarded it as acceptable, nor by the standards of the BBA or the FXMMC, but by the standards of reasonable, honest members of society.'

The effect of this ruling, argued Mr Hayes on appeal, was to wrongly preclude the jury considering in respect of the first limb of *Ghosh* the evidence it had heard about the standards (or lack of) common in the market.

The argument was rejected by the Court of Appeal as being unsupported by any authority:

- 'Not only is there is no authority for the proposition that objective standards of honesty are to be set by a market, but such a principle would gravely affect the proper conduct of business. The history of the markets have shown that, from time to time, markets adopt patterns of behaviour which are dishonest by the standards of honest and reasonable people; in such cases, the market has simply abandoned ordinary standards of honesty. Each of the members of this court has seen such cases and the damage caused when a market determines its own standards of honesty in this way. Therefore to depart from the view that standards of honesty are determined by the standards of ordinary reasonable and honest people is not only unsupported by authority, but would undermine the maintenance of ordinary standards of honesty and integrity that are essential to the conduct of business and markets.'

## Conclusion

Absent any evidence to the contrary, there is no reason to think that the standards of honesty adopted by a particular profession differ from those of the general public (see *Dowson*). If such evidence is adduced it is, as the Court of Appeal said in *Hayes*, irrelevant to the first limb of the *Ghosh* test. The logical conclusion, therefore, is that there is no need to re-formulate the dishonesty test in the way Longmore LJ suggested.

However, the Court of Appeal in *Hayes* said that evidence as to the practice in the market was 'plainly relevant' to the subjective limb of the *Ghosh* test. It remains to be seen what effect this will have on the way respondents present their case in disciplinary tribunals.

## Legal Update

Kenneth Hamer, Henderson Chambers



*Suddock v. Nursing and Midwifery Council* [2015]  
EWHC 3612 (Admin)

The matters on which the charges against S were based allegedly took place while she was Home Manager and Matron at a nursing home in Torquay between February 1994 and October 2011. S faced a total of 17 charges of professional misconduct with a number of these charges broken down into separate sub-charges. In allowing S's appeal, Andrews J said that the panel failed to appreciate that there was evidence that strongly supported S's assertion that someone, acting in bad faith, had set out to ruin her hitherto unquestionable professional reputation and her career. The panel's approach to the question of credibility and reliability was so undermined in consequence that the court cannot, in fairness, allow its adverse findings to stand. What caused the panel to fall into error was a failure to examine the evidence in a way that a court or other legal tribunal would. In consequence of this, it placed far too much reliance on the demeanour of the witnesses. The learned judge said:

- "59. There are a number of reported cases in which warnings have been given about the dangers of a court or tribunal reaching decisions on the credibility of witnesses merely by reference to their demeanour. Experience has taught us that the way in which someone behaves while giving evidence is not a reliable indicator of whether he she is telling the truth. Whilst demeanour is not an irrelevant factor for a court or tribunal to take into account, the way in which the witness's evidence fits with any non-contentious evidence or agreed facts, and with contemporaneous documents, and the inherent probabilities and improbabilities of his or her account of events, as well as consistencies and inconsistencies (both internally, and with the evidence of others) are likely to be far more reliable indicators of where the truth lies. The decision-maker should therefore test the evidence against those yardsticks so far as is possible, before adding demeanour into the equation."

*Joint v. Financial Conduct Authority* [2015] UKUT  
636 (TCC)

J admitted that he lacked competence and capability to perform significant functions relating to the handling of client money containing insurance premiums and did not contest the partial prohibitions sought by the Authority. He accepted that his behaviour fell below the standard required when carrying out his functions as a director. He objected to the imposition of a financial penalty of £20,000 on the grounds that such an imposition would cause him serious financial hardship and that he had no significant assets other than this house in Spain. The Tribunal said that in its view a financial penalty was justified where clients' funds were put significantly at risk through a serious failure of management. Fortunately, there was in the event no detriment to clients overall and any shortfall was made up. Pursuant to DEPP 6.5B the Authority applies a five-step framework to determine the appropriate level of financial penalty. In cases such as this the five-step framework operates as follows: Step 1 disgorgement, Step 2 seriousness of the breach, Step 3 mitigating and aggravating factors, Step 4 adjustment for deterrents, and Step 5 settlement discount. During the relevant period, the gross amount of all benefits received by J was £127,831 and the penalty figure under DEPP 6.5B of the Authority's five-step framework to determine the appropriate level of financial penalty was, after step 2, a sum of 20%, namely £25,566. J acted promptly and effectively after he was made aware of the client money shortfall. This, together with the fact that J considered that he was able to rely upon his accountants (although such reliance was not reasonable), were considered sufficient mitigating circumstances to reduce the penalty figure after step 3 to £20,000. However, the Tribunal considered that there should be a greater reduction at step 3 for mitigating circumstances. Accordingly the penalty would be reduced to £10,000.

*R (Prescott) v. General Council of the Bar (University of Law, Birmingham interested party)*  
[2015] EWHC 1919 (Admin)

P, a law student who wished to become a barrister, complained that his article 8 rights were engaged by the refusal of the Bar Council to permit him to retake a discrete part of the Bar Professional Training Course but to permit him to retake the entire course again after his second failure of the relevant module. Dismissing P's claim, the High Court held that article 8 was not

engaged in this case. The instant case was about professional competence of an individual and article 8 does not arise in the context of the setting of requirements as to competence or entry into (and continuance in) a particular profession. A person has no right, under article 8 or elsewhere, to work in a particular profession. The relevant regulator is entitled (and, indeed, obliged) to set the requirements it considers necessary to maintain the standards of competency in that profession, in the public good, subject only to challenge on grounds of irrationality. In any event, the scheme adopted by the Bar Council could not be considered arguably disproportionate to the legitimate aims of the scheme i.e. to maintain standards of competency within the Bar, in the public interest.

*R (AM) v. General Medical Council* [2015] EWHC 2096 (Admin)

It was not irrational of the General Medical Council to issue guidance to the effect that a doctor who assisted suicide was at risk of disciplinary proceedings notwithstanding that he may be unlikely to be prosecuted under the DPP's prosecution policy. Article 8 was engaged as the GMC's guidance interfered with the claimant's ability to ensure that his life was brought to an end at his chosen moment and in the manner that he chose, but the guidance was justified under article 8(2). It could not be contrary to article 8 for the GMC to take as its starting point the principle that a doctor had a duty to obey the law under the Suicide Act 1961, section 2 which made it an offence intentionally to encourage or assist the suicide or attempted suicide of another person. It was equally justified for the GMC's guidance to reflect and give effect to the principle of protection of vulnerable patients. The GMC also had a duty to formulate guidance by statute and it was far better placed than the court to decide how best to protect the interests of the profession. There was no reason why the GMC should take its lead from the DPP. The purposes and objectives of criminal and professional bodies were different.

*Bedi v. General Medical Council* [2015] EWHC 2213 (Admin)

There was no breach of B's article 6 rights because he did not have legal representation for the misconduct hearing. It was plain that B was an effective advocate in his own cause, as was evidenced by the fact that on a number of important interlocutory issues, his view

prevailed over that of the GMC, even though they were legally represented. It is also fair to say that in the course of the hearing the legal assessor did, as was perfectly appropriate, intervene to assist B, which he himself at the conclusion of the hearing expressed himself grateful for. B also complained about a breach of article 8 in respect of the entering of his residence, namely hospital accommodation, to retrieve private family letters and other matters. Whilst part of the allegations of misconduct referred to what was found in B's accommodation at the hospital, the entry to his room to find patients' records did not constitute a breach of article 8.

*Montgomery v. Lankashire Health Board (General Medical Council intervening)* [2015] 2 WLR 768 (SC(Sc))

In allowing the pursuer's claim in negligence against the respondent health board on the grounds of the doctor's failure to advise her about the risk of shoulder dystocia during vaginal delivery and the alternative possibility of delivery by caesarean section, the Supreme Court approved the guidance given to doctors by the GMC in *Good Medical Practice* (2013) and *Consent: patients and doctors making decisions together* (2008). These documents referred to doctors working in partnership with patients and describe a basic model of partnership between doctor and patient. In distinguishing *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582, and departing from *Sidaway v. Board of Governors of the Bethlem Royal Hospital* and the *Maudsley Hospital* [1985] AC 871, the Supreme Court said there was a fundamental distinction between, on the one hand, the doctor's role when considering possible investigatory or treatment options and, on the other hand, the doctor's role in discussing with the patient any recommended treatment and possible alternatives, and the risks of injury which may be involved. The former role is an exercise of professional skill and judgment: what risks of injury are involved in an operation, for example, is a matter falling within the expertise of members of the medical profession. But it is a non sequitur to conclude that the question whether a risk of injury, or the availability of an alternative form of treatment, ought to be discussed with the doctor is also a matter of purely professional judgment. The doctor's advisory role cannot be regarded as solely an exercise of medical skill. Responsibility for determining the nature and extent of a person's rights rests with the courts, not with the medical profession. The doctor is

however entitled to withhold from the patient information as to a risk if he reasonably considers that its disclosure would be seriously detrimental to the patient's health. The doctor is also excused from conferring with the patient in circumstances of necessity, as for example where the patient requires treatment urgently but is unconscious or otherwise unable to make a decision: [77] – [88].