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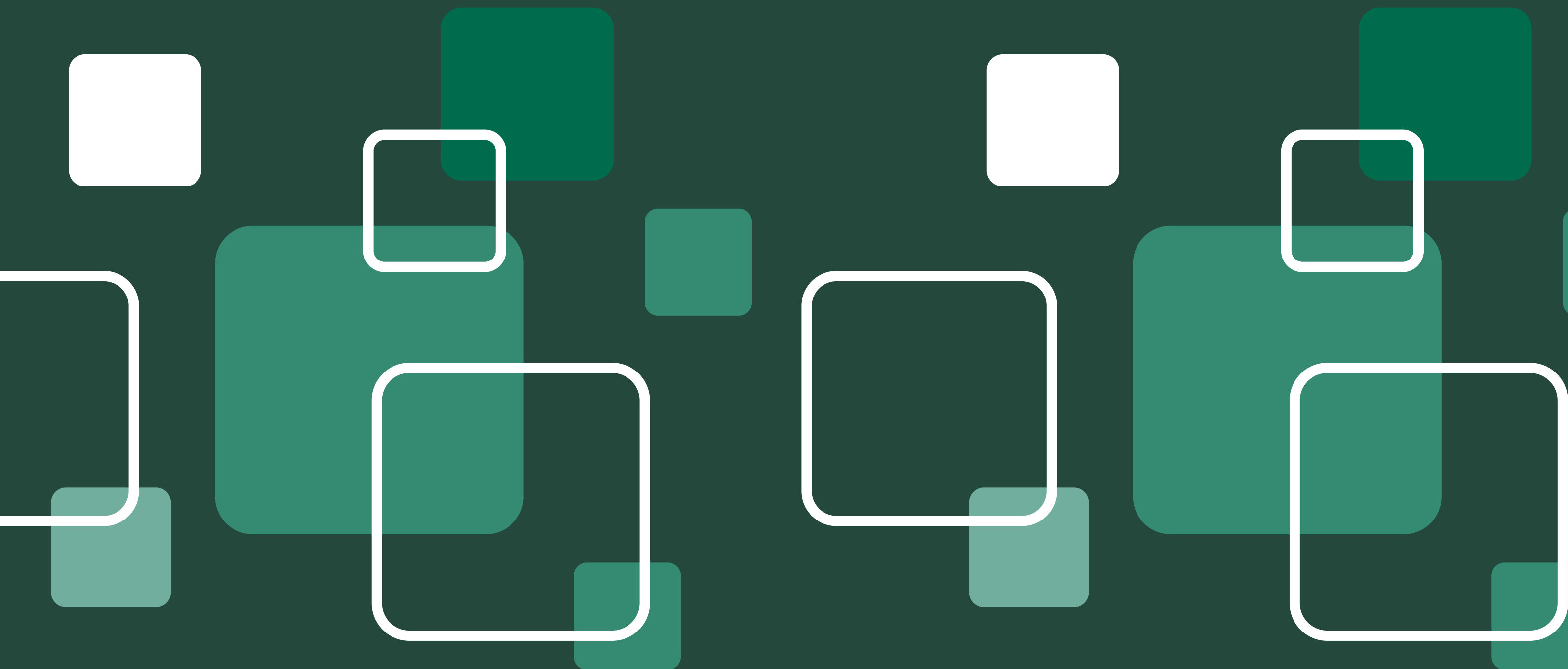
PROFESSIONAL DISCIPLINE AND REGULATORY NEWSLETTER



Volume 1

It is with great pleasure that I have taken on the role as inaugural editor of the Old Square Chambers Professional Discipline and Regulatory Newsletter. The aim is for the newsletter to identify and discuss some of the issues that we have all faced in the sector over the recent months and to signpost you to solutions and further discussion. Part of that process involves interaction with those who read this newsletter.

So please do get in touch with your views on the content, anything you would like to see covered, or any feedback or experiences you have had regarding any of the topics discussed.

As first editions of anything go, we start with a bang as Ben Collins KC discusses the pitfalls and difficulties in making statutory appeals out of time and provides clear guidance on how it can be accomplished, even when there may seem to be insurmountable obstacles.

Rachel Owusu-Agyei focusses on recent case law in particular:

- PSA v Danial [2024] EWHC 2610 (Admin); and Aga v GDC [2023] EWHC 3208 (Admin) and the highly publicised interplay between substantive orders and interim orders of suspension;

- AA v the Disclosure and Barring Service [2024] UKUT 332 (AAC) providing important guidance eon DBS decision-making following criminal acquittal;

- Abbas v SRA [2024] EWHC 2775 (Admin) regarding the threshold for exceptional circumstances and the appropriateness of striking off orders.

Christian Carr of Spencer West LLP and I look at the latest trends in stays for abuse of process, particularly at the reasons why such stays may be on the increase in spite of an often unsympathetic judicial landscape.

My thanks to all this edition’s contributors and to the whole team at OSC for their endeavour and support.

Tim Grey

Tim Grey

TIME LIMITS FOR STATUTORY APPEALS

Ben Collins KC

The regime which sets time limits for statutory appeals can be draconian in its effect.

CPR PD 52D provides (at para 3.5) that,

"Where any statute prescribes a period within which an appeal must be filed then, unless the statute otherwise provides, the appeal court may not extend that period."

It is unusual for a court to be expressly precluded from extending a filing deadline. In the professional regulatory context, the consequences can be devastating for the registrant. Members of many regulated professions benefit from statutory rights of appeal, and it might surprise many of them to know how strict the rules are.

In the medical context, the starting point is section 40(4) of the Medical Act 1983, which provides:

"A person in respect of whom an appealable decision falling within subsection (1) has been taken may, before the end of the period of 28 days beginning with the date on which notification of the decision was served under section 35E(1) above, or section 41(10) below, appeal against the decision to the relevant court."

A decision to erase a doctor's name from the register is one such appealable decision. A doctor who has lost their career, therefore, must be very wary of missing any deadline to appeal.

That is not to say, however, that there are no circumstances in which time may be extended. The requirements of Article 6 ECHR (the right to a fair trial) may make it necessary to proceed on the basis that CPR PD 52D para 3.5 does not act as an insurmountable barrier to extending time. In *Pomiechowski v District Court of Legnica, Poland* [2012] 1 WLR 1604 the Supreme Court held (per Lord Mance at para 39) that,

“the statutory provisions concerning appeals can and should all be read subject to the qualification that the court must have a discretion in exceptional circumstances to extend time for both filing and service, where such statutory provisions would otherwise operate to prevent an appeal in a manner conflicting with the right of access to an appeal process held to exist under article 6(1)…”

Pomiechowski was an extradition case, but the same approach was held to apply to professional discipline cases by the Court of Appeal in *Adesina v NMC* [2013] 1 WLR 3156, in particular given that the context – exclusion from the profession – is of great importance to an appellant (para 14). The Court held that Art 6 might require the exercise of a discretion to extend time in some statutory appeals, although the discretion would only be exercised in exceptional circumstances and where the appellant personally had done all he could to bring the appeal timeously.

How, then, will a Court determine whether the application of the (superficially mandatory) statutory time limit will conflict with the right of access to an appeal process which exists by virtue of Article 6(1) ECHR? The starting point is a passage from the judgment of the ECtHR in *Tolstoy-Milaslawsky v UK* (1995) 20 EHRR 442 (at para 59):

“The Court reiterates that the right of access to the courts secured by Article 6(1) may be subject to limitations in the form of regulation by the State. In this respect the State enjoys a certain margin of appreciation. However, the Court must be satisfied, [1] firstly, that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. [2] Secondly, a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.”

Lord Mance in *Pomiechowski* (at para 39) observed that,

“The High Court must have power in any individual case to determine whether the operation of the time limits would have this effect. If and to the extent that it would do so, it must have power to permit and hear an out of time appeal which a litigant personally has done all he can to bring and notify timeously.”

Note that the question whether a litigant has *“personally done all he can to bring and notify timeously”* is not an *“additional condition”* beyond the requirement of either (1) impairment of the very essence of the right of appeal, or (2) a disproportionate restriction on that right. Lord Mance was, *“simply identifying the type of situation in which exceptional circumstances sufficient to give rise to the discretion (or duty) may arise”* (*Stuewe v HCPC* [2023] 4 WLR 7 (CA) at para 51). Put another way, he was providing a “*description which could serve as a guide as to what, in essence, the High Court could expect to be looking for*” (*Rakoczy v GMC* [2022] EWHC 890 (Admin) per Fordham J at para 21(ii)); although each case, inevitably, will turn on its own facts (*Stuewe* at para 55).

But if the Court concludes that exceptional circumstances do exist, it will “*be under a duty to grant the extension of time*” (*Rakoczy* at para 21(ix), emphasis added).

The Court will examine the facts, therefore, to consider whether a strict application of the time limit will either (a) restrict the Appellant’s access to appeal such that the very essence of the right is impaired, or (b) restrict that access in a way which is disproportionate to the aim sought to be achieved. In answering those questions, it will be essential for the Appellant to explain how she personally did all she could to bring her appeal in time.

Cases in which Appellants have succeeded in persuading Courts to extend time are few and far between (the Appellants in *Stuewe* and *Rakoczy* were unsuccessful), but they do exist. In *Sun v GMC* [2023] EWHC 1515, Fordham J dismissed the appeal on the merits but concluded that the Court had jurisdiction to hear the appeal notwithstanding that it had been filed late. Key to his decision that it was necessary to extend time was the catalogue of misfortune suffered by the appellant doctor who, having been unexpectedly erased following an MPTS hearing at which neither party suggested that was the appropriate outcome, and while dealing with significant mental ill health, had:

- been told by her defence organisation, just nine days before the appeal deadline, that they would not assist her with her appeal;
- been told by her trade union, with three days to go, that they would not assist either, although they referred her to a barrister;
- been wrongly advised by the barrister, on the last day before the deadline, to file her appeal in the Chancery Division; and
- filed the appeal correctly with the Administrative Court within 24 hours of receiving the correct advice about filing.

On that basis, the Court was satisfied that the doctor had "*personally done all that she could – all that she reasonably could (Rakoczy §13; Stuewe §53) – to bring the appeal timeously*" (para 58); and accordingly that, "*Had I been persuaded on the substantive merits that the sanction of erasure was unjustified, I would have found it my Article 6 duty to grant an extension of time*" (para 59).

The importance of the evidence before the court cannot be overstated. Had it not been for the detailed account of her efforts to issue the claim on time, it can be seen that the appellant would not have succeeded in obtaining an extension.

Even this case, on what might be thought to be striking facts, has faced some judicial skepticism. In *Ilenotuma v Teaching Regulation Agency* [2024] EHWC 1158 (Admin) Griffiths J noted the decision in *Sun* but went on to affirm that the imposition of time limits was justified, in ECHR terms, as a proportionate means of achieving the legitimate aims of finality and certainty. Perhaps instructively, he was not persuaded on the facts. Nor was Julian Knowles J in *Akorful v Social Work England* [2024] EWHC 73 (Admin), in circumstances where there was, "*little or nothing by way of explanation from the Appellant about why she did not - or could not - comply with the time limit*".

In short – extensions of time are possible, but the circumstances in which they will be obtained are limited, and it is an absolute necessity that those representing the registrant are able to put before the court a detailed factual explanation of their actions, so as to show that they did all they reasonably could to bring the appeal in time.

Ben Collins KC

Ben Collins KC

Rachel Owusu-Agyei

AGA V GENERAL DENTAL COUNCIL [2023] EWHC 3208 (ADMIN), [2024] I.C.R. 477

Interplay between directions for suspension and orders of immediate suspension

Facts

The Claimant dentist had been arrested and charged with harassing a woman he met at a dentistry conference. In front of the Professional Conduct Committee ("PCC") of the GDC, he accepted that he had failed to report these matters to the GDC and the underlying findings of fact on his conduct.

The Claimant was suspended for 9 months. He agreed to the appropriateness of a suspension in principle, but the length of suspension and the imposition of an immediate suspension order was the subject of his appeal.

Statutory Framework

The regime for imposing a direction for suspension – including an immediate order of suspension – is governed by sections 27B, 29A and 30 of the Dentists Act 1984. They provide as follows:

- S.27B(6) states that, where a practice committee has found a dentist's fitness to practise to be impaired, they may direct that the dentist's registration be suspended "during such period not exceeding twelve months as may be specified in the direction".
- Dentists can appeal a direction for suspension under s.29 of the Act.

- S.29A defines when a direction for suspension will take effect. Where a dentist has not brought an appeal under s.29 within 28 days of the direction, the direction for suspension will take effect on the expiry of 28 days after the direction was made. Where a dentist has brought an appeal under s.29 within 28 days of the direction, the direction for suspension will take effect "on the dismissal of the appeal".

- S.30 creates the power for the practice committee to make an order of immediate suspension in circumstances where they have made a direction for suspension under s.27B(6) and "if satisfied that to do so is necessary for the protection of the public or is otherwise in the public interest, or is in the interests of that person". This immediate order lasts until the direction for suspension takes effect under s.29A, an appeal against the decision to give the direction for suspension is determined, or (following a decision on appeal to remit the case to the practice committee) the practice committee disposes of the case.

In summary, when the PCC directs any order, that order does not take effect until at least 28 days after the order was made. The GDC, and many other healthcare regulators, apply for an immediate order of suspension or conditional practice as a matter of course to cover the period between when the direction for suspension was made and when the direction for suspension takes effect.

High Court decision

The Claimant appealed the length of the suspension, seeking termination of the immediate suspension order, and appealing the GDC's interpretation and practice relating to the effect of the interaction between the immediate suspension order and the direction for suspension on the total duration of his suspension.

Ritchie J identified the central problem that where, as a consequence of the imposition of an immediate suspension order, a dentist appeals a direction for suspension, the time when the direction for suspension "takes effect" will necessarily be delayed. Therefore, the total period during which the dentist is suspended will be longer than the period of the direction for suspension.

Ritchie J construed the relevant statutory provisions, as well as relevant parts of the GDC's guidance, and found that the GDC had been wrong to interpret these statutory provisions as meaning that any direction for suspension must only begin after an immediate suspension order had expired. He found that the time spent under an immediate order for suspension must be counted towards time spent under suspension by way of a substantive direction.

Fundamentally, he found that the wording of the GDC guidance was unclear. He stated that when a suspension is directed, there is only one suspension. That includes any immediate order for suspension.

The GDC appealed this decision. The appeal was heard by the Court of Appeal on 16 January 2025. Full argument can be watched here. During the appeal, the GDC referred to its consultation on the effect of its rules (which concluded on 26 November 2024), these provisions and proposed amended guidance. The court postulated various reforms to the statute – especially on the ability to request a review of any sanction – that might ameliorate the apparent unfairness to a registrant who may be deterred from appealing by virtue of the operation of these provisions.

Judgment is awaited.

PSA V (1) GDC (2) DANIAL [2024] EWHC 2610 (ADMIN)

Interplay between directions for suspension and orders of immediate suspension

After the decision of the High Court in *Aga*, but before the Court of Appeal hearing in that case, Morris J in the High Court made a decision disapproving the decision of Ritchie J in *Aga*.

Facts

Mr Danial was accused of 4 incidents of inappropriate and sexually motivated misconduct towards two dental nurses and one receptionist. The PCC found there to have been 4 incidents between February and July 2020 of touching and inappropriate hugging.

The PCC found Mr Danial to have committed misconduct and his fitness to practice was impaired. A sanction of 5 months suspension was directed and an order for immediate suspension was also made.

The Professional Standards Authority ("PSA") appealed against the PCC's decision. It argued that the direction for 5 months' suspension was inappropriately lenient, that the PCC had failed to identify the full nature of Mr Danial's sexually motivated conduct, that the PCC had failed to recognise the seriousness of that conduct, and that erasure was the only appropriate sanction. Mr Danial cross appealed against the PCC's factual findings and stated that the direction for suspension should fall away.

High Court decision

On the substance of the PCC's decision, Morris J found that the PCC was entitled to conclude that suspension was the appropriate sanction and that the PCC's reasoning and conclusion did not contain errors of principle or fall outside the bounds of what the PCC could properly and reasonably decide. The PSA's appeal against the 5-month direction for suspension was dismissed.

During the hearing, the parties raised the point that had emerged in *Aga*. The hearing was adjourned for the court to hear full argument.

Morris J conducted a full assessment of the case law on the intersection between directions for sanctions and immediate orders pre-*Aga*. He concluded that the decision in *Ag*a was wrong, and the period of suspension under an immediate suspension order does not fall to be deducted from the period of a direction for suspension. Morris J identified seven reasons why Ritchie J was wrong to have found otherwise in *Aga*:

- The relationship between a suspension direction and an order for immediate suspension was not a question of judgment (i.e. fairness), the court's discretion or GDC standard practice. It was a matter of statutory construction.

- The words "take effect" in ss29A and 30 Dentists Act 1984 do mean "start" or "commence". There was no reason to interpret them otherwise.

- *Aga* does not consider the position when a direction for erasure is made, or comment on the significance of the distinction between a "direction" and an "order".

- Suspension directions and immediate suspension orders have different purposes.

- Any apparent unfairness should be dealt with by Parliament, and not by virtue of construing the statute in a way that is not possible.

- When considering the consequence of the decision in *Aga* if there was no appeal, s.29A (when a direction takes effect) would either have no meaning or a direction for suspension would always have a shorter duration.

The inconsistency between the two competing decisions of the High Court will be resolved by the upcoming Court of Appeal decision in *Ag*a.

AA V DISCLOSURE AND BARRING SERVICE [2024] UKUT 332 (AAC)

DBS decision making following criminal acquittal

Facts

The Appellant worked on a largely voluntary basis as an Arabic teacher at a madrassa. He was alleged to have sexually assaulted three pupils aged 8-9 years old. He was acquitted of all charges in a Crown Court trial. After his acquittal, the DBS found allegations against him proven on the balance of probabilities. An initial barring decision was only discovered by the Appellant when he subsequently applied for a different job. He was permitted to put in late representations, but the DBS decided that it was appropriate for his name to remain on the children's barred list under the Safeguarding Vulnerable Groups Act 2006. The DBS made primary findings of fact that the Appellant had sexually abused the three pupils, and secondary findings of fact including that the Appellant poses a risk of sexual and emotional harm towards children.

Pursuant to s.4(2) Safeguarding Vulnerable Groups Act 2006, an appeal against inclusion on the children's barred list may be made to the Upper Tribunal on grounds that the DBS has made a mistake on any point of law, or in any finding of fact which it has made and on which the decision in that subsection was based. The Appellant appealed against this decision on grounds that:

- The DBS' primary findings of fact were mistaken and irrational on the evidence. Therefore, the secondary findings of fact made on those flawed findings were unsustainable;

- The DBS failed to have regard to relevant exculpatory factors;

- The DBS erred procedurally by failing to obtain transcripts of the criminal proceedings before completing its judgment process;

- Continuing to include the Appellant's name on the children's barred list represented a disproportionate interference with the Appellant's Article 8 rights.

Upper Tribunal decision

The Upper Tribunal reviewed the recent authorities on mistake of fact, noting the broad definition provided in *PF v DBS* [2020] UKUT 256 (AA) that a mistake "may consist of an incorrect finding, an incomplete finding, or an omission... It also includes states of mind like intentions, motives and beliefs."

The Upper Tribunal heard oral evidence from the Appellant. Whilst it found that the Appellant's evidence was broadly consistent with his previous written representations and his case at the criminal trial, the Upper Tribunal was not persuaded that the DBS had necessarily erred in preferring the children's evidence over the Appellant's.

Nevertheless, the Upper Tribunal had significant concerns about the DBS's decision making:

- The DBS had not dealt with allegations of physical chastisement that were not explored in the criminal trial, and how that might have affected the DBS's evaluation of the credibility of the respective witnesses;

- Inherently implausible allegations of the Appellant sexually touching "nearly everybody in the class" were not explored by the DBS, including whether it affected its assessment of the witness' credibility;

- The DBS had failed to make findings about whether one of the complainants was present at the madrassa on a relevant date, and – if not – the basis on which the DBS nevertheless found that the Appellant had sexually assaulted the complainant on that day.

The Upper Tribunal found that these mistakes amounted to material errors of law. It remitted the case back to the DBS to make a fresh decision. The Appellant was not removed from the children's barred list pending the remitted decision.

ABBAS V SOLICITORS REGULATORY AUTHORITY [2024] EWHC 2775 (ADMIN)

Threshold for exceptional circumstances not met; sanction of striking off appropriate

Facts

The Appellant was practising as a solicitor. On 27 July 2017, his friend and colleague was involved in a road traffic accident in a vehicle owned by the Appellant. The following day, the Appellant instructed solicitors and pursued a fabricated claim for damages in respect of that road traffic accident, falsely claiming that he had been driving the vehicle. The Appellant went on to sign a witness statement including untrue material, provide misleading information to a medical expert (including presenting for medical examination and physiotherapy sessions) and sign a medical report confirming parts of the medical report that he knew to be untrue. After 9 months, the Appellant discontinued his involvement in the road traffic accident claim after the insurance company raised questions. He did not receive any damages. However, he admitted to wanting to gain financially from the dishonest claim.

The Appellant was found to have involved himself in making a false insurance claim for personal injury arising from the road traffic accident, in breach of principles 2 and 6 of the SRA Principles 2011.

The Solicitors Disciplinary Tribunal (“SDT”) found three allegations of dishonesty proved and ordered the Appellant be struck off from the Roll of Solicitors.

The Appellant appealed on grounds that the SDT were wrong to find that striking off was the appropriate sanction. There had been exceptional circumstances such that a sanction less than striking off was warranted. He also argued that the SDT had not assessed his credibility properly in light of his personal and family medical circumstances.

Legal framework

The High Court will only overturn a decision of the SDT if satisfied that the decision was wrong or unjust because of serious procedural or other irregularity in its proceedings (CPR Part 52). The High Court noted that it must defer to the expertise of a regulatory tribunal and recognise that the tribunal is best placed to judge credibility and reliability having heard all of the evidence.

With respect to findings of dishonesty against a solicitor, the High Court reiterated the comments of Sir Thomas Bingham MR in Bolton v The Law Society [1994] 1 WLR 512 that in cases of proven dishonest, "the Tribunal has almost invariably, no matter how strong the mitigation advanced by the solicitor, ordered that he be struck off the roll of solicitors." Whilst noted that "almost invariably" does not mean automatically, the High Court recognised that, "It will be an exceptional case in which striking off does not follow such a finding, despite the strength of any mitigation."

High Court decision

On the Appellant's behalf, it was asserted that it was the Appellant's friend who had persuaded him to begin the fraudulent insurance claim. The SDT had found some joint enterprise between the two, but had not referred to it in its findings on sanction.

McGowan J dismissed the appeal. The judge noted even if it was not the Appellant's idea originally to start the bogus claim, he had pursued and played an active part in it, all with a view to personal financial gain.

The High Court found that the SDT had carefully and properly reviewed all the circumstances. The Appellant's criticisms that the SDT had failed to consider him vulnerable were not supported by medical evidence and otherwise not credible. Further, this was not a case that engaged the "small residual category of cases where striking off would be disproportionate" (paragraph 90). The judge found that the "combination of all mitigating factors could not lower the nature, scope and extent of the dishonesty to a level where anything less than striking off would be a proportionate sanction."

Rachel Owusu-Agyei

Rachel Owusu-Agyei

STAYING FITNESS TO PRACTISE PROCEEDINGS FOR ABUSE OF PROCESS: A TURNING TIDE?

Tim Grey Old Square Chambers and Christian Carr Spencer West LLP

Recent reports suggest that those sitting on professional disciplinary panels are becoming emboldened to take the exceptional course of “staying” cases (in simple terms, barring it from proceeding any further) following errors and delays by regulators in bringing the matter to a hearing.

In this article, Christian Carr, Partner at Spencer West LLP and Tim Grey, Barrister at Old Square Chambers, explore the concept of stays for abuse of process and their application in professional disciplinary cases.

Origins of the concept

The concept of staying proceedings for abuse of process is by no means a new one and most frequently arises in the criminal courts. Although the notion of abuse of process does exist in civil proceedings, it is less a doctrine and more a nebulous concept concerned with procedural failings in bringing cases properly before the Court. The pre-occupation of the doctrine of abuse of process with the abuse of power in an imbalanced relationship is far more relevant in criminal proceedings, and to a degree professional disciplinary proceedings, where the State or the regulator have resources and powers that give them an advantage over the defendant, Registrant or Member.

The Supreme Court most recently considered the subject in *R v Maxwell* [2010] UKSC 48 case in which the Court confirmed that stays are available in two categories of case.

First, where the circumstances mean it is impossible for the accused to be tried fairly (also known as the insurmountable prejudice ground); and second, where it offends the court's sense of 'justice and propriety' to be asked to try the accused in the particular circumstances of the case. Lord Dyson gave the leading judgment in a majority decision.

He drew on well-established criminal precedents in explaining that stays granted in the second category have their foundation in the judiciary's repugnance in permitting its process to be used in the face of the executive's misuse of state power by its agents. In granting stays on this basis, the court must balance competing interests in protecting the integrity of the justice system, including whether proceeding to a trial will undermine public confidence in the criminal justice system or bring it into disrepute. As to the first category of case, where no fair trial is possible, no balancing exercise of these interests is required and a stay should be imposed.

Cases have emphasised that stays for abuse of process must be exceptional and must not become a matter of routine.

Serious delay in bringing the accused to trial causing them significant prejudice is one reason for defendants applying for stays, though the underlying reasons may take many different forms and each case turns on its own facts. The courts have emphasised that delay merely due to the complexity of a case, and without fault on either side, should never be the foundation for a stay. The powers of the courts to regulate what evidence is used at a trial, to make adjustments to the trial process itself, to counterbalance the difficulties faced by the accused, and to give directions to juries (as finders of fact and the arbiters of guilt) will all weigh in the balance when deciding whether it is appropriate to impose a stay.

The right of a defendant to a fair trial under Article 6 of the European Convention on Human Rights, enshrined in domestic law via the Human Rights Act, adds to the legal infrastructure underpinning the basis for stays.

Stays in professional disciplinary cases

The foundation of the ‘justice and propriety’ ground for a stay is, as explained above, based largely in the need to ensure the proper conduct of the State in the exercise of its powers and duties. It follows that the greater the degree of power in the hands of the ‘prosecutor’ the more scope there is to found a stay. The powers of statutory and non-statutory regulators are, necessarily, not as profound as the powers of the State, whether acting through the Police, a prosecuting authority or a Government department. The likelihood of a stay on the ‘justice and propriety’ ground in non-State regulatory proceedings is therefore extremely slim. It was that rationale that underpinned the judgment of Goldring J in the case of *Council for the Regulation of Health Care Professionals v General Medical Council and Saluja*. The case involved allegations of entrapment by a journalist of a doctor. The evidence produced by the journalist that was the basis for the GMC’s case was likely to have been inadmissible in criminal proceedings. At first instance the case was stayed for abuse of process, on the basis the evidence was illegally obtained. in lifting the stay imposed at first instance, Goldring J found that there was no state involvement in proceedings being brought by professional regulators under their governing legislation, and emphasised that these processes exist to protect the public, uphold professional standards and maintain public confidence in the profession. They are therefore different to criminal proceedings and involve different considerations when deciding whether a stay is appropriate. Stays on the second ground identified by Lord Dyson will therefore be all the more rare in such cases.

The exceptional course of staying a case in professional disciplinary proceedings was illustrated in the more recent case of *R (Clinton) v General Medical Council* [2017] EWHC 3304 (Admin) in which the High Court considered the application of the insurmountable prejudice ground.

The case concerned alleged sexually motivated behaviour on the part of a doctor. The complainants provided their original written accounts. Thereafter, and in contravention of the GMC's Rules they were wrongly provided with a GMC case examiner's decision and supporting material, including summaries of other allegations, critiques of the strengths and weaknesses of evidence and critical expert evidence. It was argued that this cross-contamination of evidence meant that the case satisfied the test of insurmountable prejudice and should be stayed. Both the Tribunal at first instance and the High Court considered that whilst there might have been a risk of prejudice in principle, the doctor had, as a matter of fact, suffered no insurmountable prejudice that could not be cured in the normal hearing process. When weighed against other considerations, it was still not appropriate to impose a stay. Applying the *Wednesbury* principles applicable in judicial reviews, the High Court found that the specialist professional panel's decision was not so perverse or unreasonable an exercise of its discretion that the court should intervene.

Notwithstanding the legal landscape outlined, it would be an error to think that stays for abuse of process in professional disciplinary proceedings are unheard of. To the contrary, in recent times they are occurring more often than might have been the case 5 years ago. This is for a number of different reasons. In most cases, it is due to attempts by regulators to reduce up-front costs and thereby the under-resourcing of up front investigations. The obvious false economy this presents is evident when cases are later stayed or for other reasons the regulator's case fails, causing far more resource to be expended to try and prop up a poorly investigated or processed investigation, which had it been properly resourced from the outset might have come to a more equitable conclusion for all involved.

In a recent unreported case, the HCPC had investigated a senior Clinical Psychologist for what amounted to alleged inappropriate comments made in the workplace to professional colleagues.

Eight years had elapsed between the alleged conduct and the hearing. Disclosure requests to the regulator, particularly for original and contemporaneous accounts from complainants, had not been substantively responded to and no original accounts had ever been provided. Initially, all the people involved, whether as complainants or identified by the complainants as being present when alleged incidents had occurred, retained anonymity until 7 years after the events, thereby denying the Registrant the ability to identify and speak to potential defence witnesses. The Registrant had therefore lost the opportunity to obtain evidence from possible witnesses. The delay in removing anonymity had meant that tracing and contacting potential witnesses who might by now have left the employment of the NHS Trust in question and expecting them to recollect a conversation seven years after the events was prejudicial to such an extent that the hearing process could not cure it. The failure to disclose the original accounts of the complainants had also caused unfairness. Whilst that could potentially be cured by adjourning the case to allow the HCPC further time to obtain that information, the delay of eight years was already manifestly excessive and it would lead to even greater prejudice to the Registrant in obtaining reliable and credible evidence. The case was therefore stayed for abuse of process and is a prime example of an investigation in which corners were cut, such that the Registrant was precluded from having a fair hearing.

The human cost for Registrants of having regulatory proceedings hanging over them for years at a time is not a factor that plays any real part in the test for abuse. However, simply having proceedings outstanding, even if they ultimately end in acquittal, can be ruinous for many.

Analysis

Whether in criminal, professional disciplinary or any other type of case, stays for abuse of process should be granted only in exceptional circumstances. However, stays are an important measure available to safeguard the accused's right to a fair hearing, but also the public's faith in systems of justice more generally.

The purpose served by professional regulators and the scheme of fitness to practise is different to those in the criminal justice system. In professional discipline proceedings, acting in the pursuit of public protection is paramount in all decisions made by regulators, their tribunals and committees. This imperative is commonly relied upon by regulators as a reason for cases continuing, notwithstanding the potential for unfairness to the registrant, and often there are good reasons to support this. However, the protection of the public, like the public interest, is multi-faceted.

A balancing exercise needs to be undertaken and in the right (if rare) circumstances, cogent countervailing arguments can be deployed to show that the guiding principle of the protection of the public is not a one way street and is not always served in allowing cases to continue.

In summary, all the circumstances of any given case are relevant to the consideration of a stay application, but the presence of the following features will weigh heavily in that decision:

- Exceptionally long delay in bringing issues to final resolution at a hearing, particularly where it can be shown that that delay has caused substantial prejudice to a defendant (relevant both at Common Law and under Art. 6 ECHR). This could be through the natural distortion of the memories of current witnesses and witnesses yet to be contacted by either party for whatever reason, the inability to trace witnesses, or the loss of documents without fault on the Registrant's/Defendant's part;

- Decisions by the prosecuting authority over the course of the proceedings that have compounded any prejudice to the registrant, be it as to disclosure, witness contamination or some other detail;

- Whether the difficulties caused to the registrant by the regulator's conduct cannot be effectively counterbalanced by pre-hearing or in-hearing procedural measures to ensure fairness; and

- Instances where evidence was acquired by the regulator in circumstances particularly prejudicial to the Registrant's human rights that would constitute prosecutorial misconduct in a criminal context.

It should not be forgotten that the protection of the public involves the pursuit of several essentially reciprocal objectives set out for most regulators in statute. These include the promotion and maintenance of the safety of the public, public confidence in the profession and the declaration and upholding of standards for their members.

To secure these objectives, regulators must act with authority in the eyes of all concerned: substantive delays, errors or unfairness in their processes undermine each objective and the authority with which they act, in the eyes of both the public and their registrant members. Maintenance of registrants' own respect for, and confidence in, their regulators is an essential precursor to the public having confidence in the profession.

Neither registrants' nor the public's confidence are promoted in instances where registrants, referrers and witnesses are left in a state of limbo for extended periods of time, or errors creating unfairness occur, whether as a result of the allocation of insufficient resources to investigations or otherwise. Nor can the regulator truly speak with authority when declaring and upholding standards to their members or ensure public safety in these instances. Confidence can be lost in fitness to practise processes whose fairness and integrity in any individual case or more broadly is undermined. Taking an holistic view of fitness to practise processes, it is clearly key to the effective discharge of the statutory functions of regulators not only for members of the public to have faith in those processes, but also the constituent members of that profession.

At present, many regulatory bodies act under particularly strained budgets, leading to obvious limitations on the resources at their disposal to progress cases with due speed and skill. Mistakes and delay causing prejudice will naturally flow from this, and so a growth in applications may result. In every case it is always worth asking the question as to whether the correct procedures have been followed and whether a fair hearing is in fact possible. Even if the answer to both is "yes" and no argument can be made for a stay, policing the process is part and parcel of the duties owed by every Registrant, member or Defendant to ensure the regulator's processes are fair, just and equitable.

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For further information on our Professional Regulatory team, please scan here.