Clayton Comments

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REGULATION AND THE HUMAN RIGHTS ACT

INTRODUCTION

1. The impact of the Human Rights Act (the HRA) on regulatory work has been significant and wide ranging. It is difficult to identify any other field of law where Article 6 has played such a large role. Article 8, on the other hand, has been invoked rather less frequently and to less effect whereas implications of the right to property under Article 1 Protocol 1 on regulatory activity has been marginal.

2. Because Convention rights have intersected with regulatory work in so many different contexts, my paper gives only a partial picture of regulatory practice and procedure. I have tried to set the Convention issues in context, but have not developed at length the general legal principles which are in play.

THE SCOPE AND APPLICATION OF ARTICLE 6

3. Article 6 of the Convention creates the right to a fair trial under the Convention and states:

> *(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*
>
> *(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*
>
> *(3) Everyone charged with a criminal offence has the following minimum rights:*
>
> *(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
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> *(b) to have adequate time and facilities for the preparation of his defence;*
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> *(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
>
> *(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
>
> *(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

4. As the House of Lords observed in ***Sadler v General Medical Council***[1] *there is no general principle of Convention jurisprudence which prevents professional self-regulation: see* ***Albert and Le Compte v Belgium***.'[2] Article 6 applies to proceedings which constitute a determination of a '*criminal charge*' or of the '*civil rights and obligation*s' of parties to proceedings. The Convention provides no definition of '*criminal charge*', '*civil rights and obligations*' or '*determinatio*n' and all these terms have been interpreted as having an '*autonomous meaning*'. The European Court of Human Rights (ECHR) has repeatedly affirmed the centrality of the rights of due process and an expansive view of Article 6 as fundamental to the consideration of these issues.[3]

1. The rights created under Article 6

5. Article 6(1)(2)(3) creates a number of specific express rights in relation to 'criminal charges' whereas the rights which arise in relation to the '*determination of civil rights and obligations*' are contained in Article 6(1). The fair trial rights guaranteed by Article 6 can usefully be divided into two categories: express and implied rights.

6. Article 6 contains the following specific express rights:
   - the right to a hearing within a reasonable time ;
   - the right to an independent and impartial tribunal established by law;
   - the right to a public hearing unless it is necessary to exclude the press and public from all or part of the trial in the interest of morals, public order, national security, to protect juveniles or private life or where publicity would prejudice the interests of justice;
   - the right to the public pronouncement of judgment; and
   - the right to minimum standards of fairness in criminal proceedings which consist of
     (i) the presumption of innocence;
     (ii) the right to information as to the accusation;
     (iii) the right to adequate time and facilities to prepare a defence;
     (iv) the right of the accused to defend himself in person or through legal assistance;
     (v) the right to examine witnesses;
     (vi) the right to assistance from an interpreter.

   These rights are 'absolute' in the sense that it will always be unfair if a person is deprived of them.

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1 [2003] 1 WLR 2259, para 77 *per* Lord Walker.
2 (1983) 5 EHRR 533 , especially at pp 541–542, para 29.
3 See eg ***Delcourt v Belgium*** (1967) 1 EHRR 387.

7. In addition, Article 6 has been interpreted as aspects of the general right to a fair hearing, the following implied rights:
    - the right of access to court;[4]
    - the right to be present at an adversarial oral hearing;[5]
    - the right to equality of arms;[6]
    - the right to remain silent and freedom from self-incrimination;[7]
    - the right to cross examination;[8]
    - the right to fair presentation of the evidence;[9]
    - the right to legal assistance;[10] and
    - the right to a reasoned judgment.[11]

8. These implied rights are subject to inherent limitations in the sense that a breach of any one of them does not always mean that there has been a violation of Article 6. The fairness of the proceedings as a whole must be considered, and it is often necessary to carry out a balancing exercise between the interests of the individual and those of society as a whole. Although the point has not been fully developed in the case law it is often helpful to consider, in each case of apparent violation, whether it is necessary and proportionate in pursuit of a legitimate aim.

(2) Criminal charges under Article 6

9. In ***Engel v Netherlands*** the ECtHR set out three criteria in order to assess whether the allegation made is in fact of a criminal nature: [12]
    - the categorization of the allegation in domestic law;
    - whether the offence applies to a specific group or is of a generally binding character;
    - the severity of the penalty attached to it.

    These criteria have been applied in many subsequent cases. As Lord Bingham emphasised in ***R(Smith v Parole Board)***, the distinguishing feature of a criminal charge is that it may lead to punishment.[13]

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4 See Clayton and Tomlinson ***The Law of Human Rights*** (2nd edn, OUP) paras 11.372 ff

5 See Clayton and Tomlinson paras 11.426ff

6 Clayton and Tomlinson paras 11.430 ff

7 Clayton and Tomlinson paras 11.435 ff

8 Clayton and Tomlinson paras 1.445

9 Clayton and Tomlinson para 11.440

10 Clayton and Tomlinson paras para 439

11 Clayton and Tomlinson para 441

12 (1976) 1 EHHR 647**;** ***Oztürk v Germany*** (1984) 6 EHRR 409; ***Campbell and Fell v United Kingdom*** (1985) 7 EHRR 165; ***Weber v Switzerland*** (1990) 12 EHRR 508.

13 [2005] 1 WLR 350

(a) The categorisation in domestic law

10. The Court of Appeal held ***in R(V) v Independent Appeal Panel for Tom Hood School***[14] a domestic classification of proceedings as non-criminal is overridden in regulatory or disciplinary cases only if, (except cases of exceptionally serious misconduct such as ***R(Smith) v Governor of HMP Belmarsh***),[15] where there is a prospective consequence of imprisonment (as in ***Engel***) or of further imprisonment (as in ***R(Napier) v Secretary of State for the Home Department***).[16]

(b) Nature of the offence

11. The second criterion involves consideration of whether or not the 'offence' applies to a specific group or is of a general binding character;[17] whether there is a punitive or deterrent element to the process;[18] whether the imposition of any penalty is dependent on a finding of culpability:[19] and how comparable procedures are classified in the Council of Europe.[20]

12. In ***Oztürk v Germany*** the regulatory offence of careless driving was found to be criminal, despite its decriminalization in German law. This was because the offence was of general application to the public.[21] The Court was apparently unconcerned that the penalty, though punitive and deterrent, was relatively modest: a fine, rather than imprisonment. The failure of Germany to provide the accused with an interpreter was held to be a violation of Article 6. Other examples of 'regulatory' offences which have been found to be 'criminal' for the purposes of Article 6 are price-fixing regulations[22] and rules governing competition for contracts.[23] The Grand Chamber remarked in ***Ezeh and Connor v United Kingdom*** that the minor nature of an offence does not, of itself, take it outside of the ambit of Article 6, and that there is nothing in the Convention to suggest that the second ***Engel*** criterion requires a certain degree of seriousness.[24]

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14 [2010] HRLR 21 para 29 *per* Wilson LJ.

15 [2009] EWHC 109 Admin

16 [2004] 1 WLR 3056

17 See eg ***Weber v Switzerland*** (1990) 12 EHRR 508 para 33; ***Benham v United Kingdom*** (1996) 22 EHRR para 56;

18 See eg ***Ozturk v Germany*** (1984) 6 EHRR para 47; ***Bedenoun v France*** (1984) 18 EHRR 54 para 47

19 See eg ***Benham v United Kingdom*** above para 56; ***Aerts v France*** (1998) 29 EHRR 50

20 See eg ***Ozturk v Germa****ny* above para 53

21 (1984) 6 EHRR 409

22 ***Deweer v Belgium*** (1980) 2 EHRR 239.

23 ***Société Stenuit v France*** (1992) 14 EHRR 509.

24 (2004) 39 EHRR 1 (GC) para 104; see for example ***Jussila v Finland*** (2007) 45 EHRR 39 (GC).

13. In general, 'disciplinary proceedings' will not be 'criminal' on the basis of this criterion because professional disciplinary matters are essentially matters concerning the relationship between professional associations and individuals rather than a law of general application.[25] Similar reasoning applies to 'regulatory proceedings'.[26] Nevertheless, the mere fact that a disciplinary offence is directed towards a particular group, such as prisoners, is only one of the 'relevant indicators' in assessing the nature of the offence, and does not render the offence prima facie disciplinary.[27]

(c) The severity of the penalty

14. In considering whether or not proceedings are 'criminal' in nature, the English courts have largely concentrated on the third of the ***Engel*** criteria: the nature of the penalty. If a measure involves a substantial penalty, such as period of imprisonment then, in general, the courts have accepted that, for Article 6 purposes, it should be classified as 'criminal'. If the object of proceedings is punitive, retributive or deterrent then it is also likely to be classified as criminal in nature.[28] If, however, proceedings are aimed at the imposition of measures which are preventative in purpose, these have, in general, been held to be 'civil'.[29]

15. The classification of disciplinary and regulatory proceedings is closely related to the types of penalty available. The Convention case law establishes that English prison disciplinary proceedings, where the penalty can be 'additional days' in prison, are criminal in nature for Article 6 purposes.[30] This has been accepted in subsequent domestic cases.[31] However, an adjudication not involving the imposition of additional days does not necessarily constitute the determination of a criminal charge;[32] and a life prisoner does not have the right to be tried by an independent adjudicator rather than by a prison governor for disciplinary offences where in the circumstances there were no consequences sufficiently serious to trigger the third ***Engel*** criterion.[33]

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[25] ***Wickramsinghe v United Kingdom*** [1998] EHRLR 338, EComm HR.

[26] See eg ***APB Ltd, APP and AEB v United Kingdom***, (1998) 25 EHRR CD 14; ***X v United Kingdom*** (1998) 25 EHRR CD 88.

[27] ***Ezeh and Connors v United Kingdom*** (2004) 39 EHRR 1 (GC) para 103

[28] ***Han v Customs and Excise Commissioners*** [2001] 1 WLR 2253 (The imposition of civil penalties pursuant to s 60(1) of the Value Added Tax Act 1994 and s 8(1) of the Finance Act 1994).

[29] S eg ***B v Chief Constable of Avon and Somerset*** [2001] 1 WLR 340 (sex offender orders); ***Gough v Chief Constable of Derbyshire*** [2002] QB 1213 (football banning orders); ***R (McCann) v Crown Court at Manchester*** [2003] 1 AC 787 (anti-social behaviour orders); ***MB v Secretary of State for Home Department*** [2008] 1 AC 440 (non-derogating control orders).

[30] See ***Ezeh and Connors v United Kingdom*** (2004) 39 EHRR 1 (42 and 7 additional days).

[31] ***Greenfield v Secretary of State for Home Department*** [2005] 1 WLR 673 (21 additional, common ground that this was a criminal charge; ***R (Napier) v Secretary of State for Home Department*** [2004] 1 WLR 3056 (35 additional days).

[32] ***Napier v Secretary of State for the Home Department*** [2004]1 WLR 3056.

[33] ***Tangney v Governor of Elmley Prison*** [2005] HRLR 1220.

16. In ***Wickramsinghe v United Kingdom*** the applicant's Article 6 complaint was rejected as inadmissible.[34] He had been disciplined in accordance with the GMC's procedure laid down by the General Medical Council and complained, that his rights under Article 6(2) and 6(3)(a)(b) & (d) had been infringed, having regard to the seriousness of the charge (indecency towards a patient) and the nature of the sanctions. The three stage test laid down in ***Engel*** was considered:

    The "offence" is thus classified as disciplinary within the domestic system. As to the nature of the offence, the Commission observes that professional disciplinary matters are essentially matters which controls the relationship between the individual and the professional association to which he or she belongs, and whose rules he or she agreed to accept. They do not involve the State setting up a rule of general applicability by which it expresses disapproval of, and imposes sanctions for, particular behaviour, as is generally the case of criminal charges. … It is true, as the applicant points out, that the facts underlying the proceedings against the applicant, namely allegations of sexual indecency, could also have been the subject of criminal charges before the criminal jurisdiction. However, it is frequently the case that the factual allegations in professional disciplinary proceedings could also be pursued in ordinary criminal proceedings: in the present context, the possibility of parallel criminal proceedings does not make the nature of the offence inherently criminal.

    Finally, the Commission must have regard to the degree of severity of the penalty risked. … Each of these sanctions [namely erasure from the register, imposing restrictions on the right to practise or suspension from practise] is essentially disciplinary and is directed to protecting the public and the reputation of the medical profession. The fact that "erasure" is likely to have far-reaching consequences for the individual concerned does not render the penalty criminal.

    It follows that the proceedings against the applicant did not determine a "criminal charge"."

17. Similarly, in ***Brown v United Kingdom*** the Law Society preferred three charges of misconduct against a solicitor.[35] The Solicitors Complaints Tribunal found the charges and fined him £10,000. The applicant claimed he was subject to a 'criminal charge' but the ECtHR said:

    *Whilst the Court accepts that the disciplinary proceedings involved the determination of civil rights and obligations …. The Court recalls that, in deciding whether an offence is to be regarded as criminal within the autonomous meaning of the Convention, the Court must adopt a three-fold test set out in the **Engel** case and have regard to the classification in domestic law, the nature of the offence itself and the nature and severity of the sentence which can be imposed …*

    the Court notes that the charges against the applicant were classified under domestic law as disciplinary offences, being examined in a tribunal without any involvement by

34 [1998] EHRLR 338

35 Application Number 38644/97

> *the police or prosecuting authorities. The Court notes that the charges faced by the applicant related to matters of professional behaviour and organisation, emphasis being given to the standards of conduct befitting a solicitor. The Court finds that the offences are of a disciplinary nature, applying only to persons of a specific, professional group rather than the general public ….*
>
> *The Court has considered whether, notwithstanding the non-criminal character of the prescribed misconduct, the nature and degree of severity of the penalty that the person concerned risked incurring — the third criterion — may bring the matter into the "criminal sphere".*

Having reviewed the amounts of the fine, and the potential sanction of committal for contempt for non-payment, the ECtHR said:

> *The Court has had regard to the purpose of the fine. A fine which is punitive and deterrent rather than compensatory, may suggest that the matter is "criminal" in nature if the penalty is sufficiently substantial … While the size of the fine in the present case is such that it must be regarded as having a punitive effect, the Court observes that the fine was imposed in respect of three serous disciplinary offences and that the level of the fine equalled the amount for which the applicant sold the practice after his brief involvement in it. Nor was there any investigation into the means of the applicant prior to the imposition of the penalty, which is a pre-requisite of any criminal fine in domestic proceedings. There was no involvement of the police or prosecuting authorities in these proceedings.*
>
> *In these circumstances, having regard in particular to the essential disciplinary context of the charges, the Court finds that the severity of the penalty was not, of itself, such as to render the charges "criminal" in nature.*

18. Police disciplinary proceedings[36] or disciplinary proceedings brought by the Securities and Futures Authority [37] are not criminal in nature. Similarly, directors' disqualification proceedings under regulatory laws are not criminal in nature.[38] Nevertheless, disciplinary proceedings against a professional may still bring into play some of the requirements of a fair trial spelled out in Article 6 (2) and (3), including the presumption of innocence.[39]

(3) Article 6, civil rights and a professional's right to practice

24. The guarantees in Article 6(1) apply to the determination of civil rights and obligations. The ECtHR has said that disciplinary proceedings do not ordinarily involve disputes over civil

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36 ***R (Whitehead) v Chief Constable of Avon & Somerset*** [2001] EWHC Admin 433.

37 ***R v Securities and Futures Authority Ltd, ex p Fleurose*** [2001] IRLR 764.

38 ***Official Receiver v Stern*** [2000] 1 WLR 2230; see also ***R v Secretary of State for Trade and Industry ex parte McCormick*** [1998] BCC 379 and ***Porter v Magill*** [2002] 2 AC 357.

39 ***Official Receiver v Stern*** above, para 35.

rights and obligations.[40] However, the right to continue in professional practice is a civil right,[41]and the ECtHR has applied Article 6(1) to disciplinary proceedings involving:

- temporarily suspending a doctor from practice[42] or preventing a doctor from running a clinic;[43]
- removing an advocate from the roll,[44] or disbarring a barrister;[45]
- a refusal to allow a person to enrol as a pupil advocate;[46]
- an application to be reinstated as an advocate after suspension;[47]
- suspending an architect from practice for a period of one year; and[48]
- disqualification proceedings under the Company Directors Disqualification Act 1986.[49]

25. However, Article 6 will not apply if the professional is not at risk of being prevented from practising[50] or if the nature of the 'proceedings' is confined to the assessment of professional ability.[51]

26. Under the HRA the following decisions have not fallen within the scope of Article 6:
    - the reprimand of a solicitor which increased his professional indemnity fee, but did not put his right to practice at risk;[52] and
    - a reprimand given by the GMC against a consultant for lying to another panel which did not otherwise affect his right to practice.[53]

27. By contrast the Court of Appeal held in ***Matu v University Hospitals Coventry and Warwickshire NHS Trust*** that a decision which might result in a legal prohibition on the carrying on of a profession would engage Article 6, but the trust's decision to dismiss the claimant from his specific job constituted the exercise of a contractual right, which did not affect his right to practise his profession. Since that decision did not itself determine any civil right, the disciplinary proceedings did not engage Article 6. [54]

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40 ***Albert and Le Compte v B****elgium* (1983) 5 EHRR 533 para 25.
41 Ibid para 28; ***Le Compte, Van Leuven and De Meyere v Belgium*** (1981) 4 EHRR 1 para 48.
42 ***Albert and Le Compte v Belgium*** above para 28.
43 ***König v Germ****any* (1978) 2 EHRR 170.
44 ***H v Belgium*** (1987) 10 EHRR 339.
45 ***Ginikanwa v United Kingdom*** (1988) 55 DR 251.
46 ***De Moor v Belgium*** (1994) 18 EHRR 372.
47 ***H v Belgium*** (1987) 10 EHRR 339.
48 ***Guchez v*** *Belgium* (1984) 40 DR 100.
49 ***Davies v United Kingdom*** (2002) 35 EHRR 29.
50 ***X v United Kingdom*** (1983) 6 EHRR 583, EComm HR (barrister reprimanded, Art 6 inapplicable).
51 ***Van Marle v Netherlands*** (1986) 8 EHRR 483.
52 ***Thompson v Law Society*** [2004] 1 WLR 2522
53 ***R v General Medical Council ex p Nicolaides*** (2001) EWHC Admin 625.
54 [2013] ICR 270

(4) The effect of Article 6 on subsequent proceedings

28. The Supreme Court decided in ***R(G) v the Governors of X School*** that the question of whether Article 6 is engaged in disciplinary proceedings depends on whether the disciplinary proceedings have a substantial influence or effect on the outcome of subsequent proceedings which are determinative of the right.[55]

(5) Curing a breach of Article 6 through a right of appeal

29. In ***Thompson v Law Society***[56] the Court of Appeal confirmed that the key point, as a matter of principle is that, where there is a determination of civil rights and obligations, the question of whether Article 6 is breached depends on s whether the process involves a court or courts having *"full jurisdiction to deal with the case as the nature of the decision requires"*.[57] There may be cases in which a public and oral hearing is required at first instance and other cases where it is not, just as there may be cases in which the potential availability of judicial review will not be sufficient to avoid a breach of article 6(1).

30. Several complaints that recourse to judicial review is insufficient to meet the requirements of Article 6(1) have been rejected:
    - where proceedings were brought following a determination by the Secretary of State that the applicant was not a fit and proper person to be the managing director of an insurance company;[58] and,
    - following a finding by the Investment Managers Regulatory Organization that the applicants were not fit and proper persons to carry on investment business.[59]
    - The Commission took the same approach to the availability of an appeal to the Privy Council from a decision of the health committee of the General Medical Council.[60]

(6) Waiver and Article 6 rights

32. An arbitration agreement will involve a waiver of at least some Article 6 rights. Such as waiver has been recognised as effective in the Convention case law: provided that is made without compulsion, is unequivocal and does not run counter to any important public

55 [2012] 1 AC 167
56 ***Thompson v Law Society*** [2004] 1 WLR 2522
57 See, generally, Clayton and Tomlinson paras 11.25 ff and 11.415
58 ***X v United Kingdom*** (1998) 25 EHRR CD 88.
59 ***APB Ltd, APP and AEB v United Kingdom*** (1998) 25 EHRR CD 141.
60 ***Stefan v United Kingdom*** (1997) 25 EHHR CD 130; ***Wickramsinghe v United Kingdom*** [1998] EHRLR 338

interest.[61] There is no basis for arguing that an arbitration arising out of a valid arbitration agreement and which is subject to the provisions of the Arbitration Act 1996 might give rise to a violation of Article 6; the parties had voluntarily or freely entered into an arbitration agreement they were to be treated as waiving their rights under Article 6.[62]

ARTICLE 6 AND THE INVESTIGATION PROCESS

(1) The 'independence' of the prosecutor

33. In ***R(Haase) v Independent Adjudicator*** the Court of Appeal held in a prison disciplinary case that Article 6(1) imposed no general requirement of prosecutorial independence and impartiality, but if, on particular facts, there was a lack of independence and impartiality which resulted in unfairness, Article 6(1) might be breached.[63]

(2) Investigations

34. Investigations undertaken by professional or regulatory bodies are not subject to Article 6 guarantees.[64]

Serious frauds and s 2 Criminal Justice Act 1967

35. The SFO have the power to require a person under investigation or any person he has reason to believe has relevant information to produce documents and to produce an explanation for them. The compulsion to attend an interview or to provide information where a person is at risk of criminal prosecution is likely to be an interference with Article 6.

36. In ***Shannon v United Kingdom*** the ECtHR held that the right to silence and the right not to incriminate oneself were generally recognised international standards which lay at the heart of the notion of a fair procedure under Article 6.[65] The underlying proceedings in the applicant's case, namely the prosecution for false accounting and conspiracy to defraud, were never pursued. However, for the right not to incriminate oneself to apply it was not necessary that allegedly incriminating evidence obtained by coercion actually be used in criminal proceedings. Indeed, the violation of the right not to incriminate oneself could occur even though no underlying proceedings were ever brought. Accordingly, it was open to the applicant to complain of an interference with his right not to incriminate himself,

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61 See ***Di Placito v Slater*** [2004] 1 WLR 1605, para 51, relying on ***Hakansson v Sweden*** (1991) 13 EHRR 1, para 66.

62 ***Stretford v Football Association*** [2007] EWCA Civ 238

63 [2009] QB 550

64 ***Fayed v United Kingdom*** (1994) 18 EHRR 393

65 (2006) 42 E.H.R.R. 31

even though no self-incriminating evidence (or reliance on a failure to provide information) had been used in other, substantive criminal proceedings. However, not all coercive measures constituted an unjustified interference with the right not to incriminate oneself. In particular, had the requirement to attend an interview been imposed on a person in respect of whom there was no suspicion and no intention to bring proceedings, the use of the coercive powers under the legislation at issue could have been regarded as compatible with the right not to incriminate oneself. The applicant, however, had not only been at risk of prosecution, but had already been charged with a crime arising out of the facts which were being examined by the financial investigators. In these circumstances, attending the interview would have involved a very real likelihood of being required to give information on matters which could subsequently arise in the criminal proceedings in which the applicant had already been charged. The security context, and in particular the special problems of investigating crime in Northern Ireland, was not sufficient to justify the application of the legislation in question.

Article 6 and the admissibility of evidence

31. It is important to appreciate that breaches of Article 6 would not render the evidence inadmissible in Strasbourg, since questions concerning the admissibility of evidence are primarily a question of domestic law.[66] The English courts have held that the exclusion of evidence under s 78 of PACE meets the requirements of Article 6.[67]

37. The English courts have taken the view that this approach is consistent with the right to a fair trial under Article 6 of the Convention. As Lord Nicholls said in ***R v Khan***:[68] the discretionary powers of the trial judge to exclude evidence march hand in hand with Article 6(1) of the European Convention on Human Rights. Both are concerned to ensure that those facing criminal charges receive a fair hearing. Accordingly, when considering the common law and statutory discretionary powers under English law, the jurisprudence on Article 6 can have a valuable role to play.

38. This approach was approved by the ECtHR in ***Khan v United Kingdom***[69] and is reflected in ***R v Loveridge, Lee and Loveridge***[70] where the Court of Appeal held that although the police had acted unlawfully and in breach of article 8 in obtaining video footage of the suspects in a magistrates' court for the purpose of comparison with closed circuit television of a robbery, the evidence could nonetheless be admitted compatibly with Article 6. The decision in ***Khan v United Kingdom*** was considered by the House of Lords in ***R v P*** [71] where it was held that the criteria for

66 ***Schenk v Switzerland*** (1988) 13 EGHRR 242 para 46

67 ***R vP*** [2002] 1 AC 146

68 [1997] AC 558, 583B-D.

69 (2001) 31 EHRR 45.

70 [2001] 2 Cr App R 29; See also: ***R v Mason*** [2002] 2 Cr App R 38, CA (covert tape recordings made in the police station in breach of Art 8 nevertheless properly admitted).

71 [2002] 1 AC 146. See also *R v Bailey* [2001] EWCA Crim 733.

determining fairness under article 6 were the same criteria that would be applied when considering an application for exclusion of evidence under section 78 of the Police and Criminal Evidence Act 1984. Lord Hobhouse pointed out that a defendant is not entitled to have unlawfully obtained evidence excluded simply because it has been so obtained. The entitlement is to challenge the admission of the evidence and have a judicial assessment of the impact of the admission of such evidence on the fairness of the proceedings.

39. The relevant factors to be taken into account include apparent breaches of the Convention or the law of a foreign country[72] and the extent to which evidence was obtained as the result of the activities of an agent provocateur.[73] Evidence from 'interviews' is likely to be excluded if the defendant has been detrimentally deprived of legal advice[74] or if the provisions of the Code of Practice relating to interviews have not been complied with.[75] The exclusionary discretion can be exercised even if there has been no bad faith.[76] The fact that evidence has been obtained by a trick[77] or by agent provocateurs[78] will not, of itself, render it inadmissible. In ***Nottingham City Council v Amin***[79] police officers had flagged down a taxi which was not licensed for use in the area and the driver picked them up and carried them to their destination for a fare. The Divisional Court accepted that the officers had 'given the defendant the opportunity' to break the law. Lord Bingham CJ considered the Convention authorities and went on to hold that the proper test was whether or not the effect of admitting the evidence was to deny the respondent a fair trial. On the facts this was not the case and the evidence was admitted. In ***Attorney-General's Reference (No 3 of 1999)***[80] Lord Hutton said that in exercising the discretion under section 78 the interests of the victim and the public must be considered as well as the interests of the defendant.

Voluntary interviews and PACE interviews

40. Article 6 is unlikely to add anything to the power of the Court to exclude evidence under s 78.

Interviews conducted on behalf of a foreign regulator pursuant to an Mutual Legal Assistance request

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72 ***R v Khan*** [1997] AC 558.

73 ***R v Smurthwaite*** [1994] 1 All ER 898.

74 **See *R v Kirk*** [1999] 4 All ER 698 (interview excluded when defendant who was being interviewed for theft was not told he was suspected of robbery and manslaughter arising out of the same incident).

75 ***R v Absalom*** (1988) 88 Cr App R 332.

76 ***R v Alladice*** (1988) 87 Cr App R 380; ***DPP v McGladrigan*** [1991] RTR 297.

77 ***R v Bailey*** [1993] 3 All ER 513 (co-accused placed in same cell and conversation 'bugged').

78 ***R v Christou*** [1992] QB 979 (Police 'shop' staffed by undercover offi cers bought stolen goods); see also ***Williams v DPP*** [1993] 3 All ER 365 (insecure unattended van containing cigarettes left in busy street, accused seen removing them); ***LB of Ealing v Woolworths*** [1995] Crim LR 58 (purchase of video by underage child acting on instructions of prosecutor); and see ***R v Maclean*** [1993] Crim LR 687.

79 [2000] 1 WLR 1071; see generally, para 21.000ff below.

80 [2001] 2 AC 91.

41. Where an interview breached the requirements of Article 6, there may be scope for contending that the product of the interview should not be made available to a foreign regulator. However, where reliance is placed on article 6 it must be shown that a person has suffered or risks suffering a flagrant denial of a fair trial in the receiving state.[81]

42. In addition, consideration should be given to *the* ***Government's Overseas Security and Justice Assistance Human Rights Guidance*** (OSJA).[82]

Code of Practice 9 and Article 6

32. A number of issues arise for consideration.

33. The first question is whether interviews under the Code are subject to Article 6 criminal at all which depends on whether the allegations are in fact of a criminal nature: [83]
    - the categorization of the allegation in domestic law;
    - whether the offence applies to a specific group or is of a generally binding character;
    - the severity of the penalty attached to it.

34. In a number of cases it has been held that proceedings relating to tax or customs penalties were criminal in nature. These have included: a penalty scheme for carriers where illegal entrants were found concealed in vehicles;[84] the system of imposition of penalties for fraudulent or negligent delivery of incorrect tax returns;[85] the imposition of civil penalties pursuant to s 60(1) of the Value Added Tax Act 1994 and s 8(1) of the Finance Act 1994.[86] However, in other cases proceedings relating to tax or customs penalties or forfeiture have been analysed as being civil in nature. Cases have included the following: proceedings for condemnation of good forfeited by Customs and Excise were not criminal proceedings[87] and proceedings before VAT Tribunal for the restoration of goods seized by customs officers.[88]

35. However, Article 6 only applies where the proceedings involved the determination of a criminal charge. This term has an autonomous meaning: what is required is official notification of allegation that an individual has committed a criminal offence.[89] It has been

81 ***R(Ullah) v Special Adjudicator*** [2004] 2 AC 323 para 24

82

83 (1976) 1 EHHR 647**;** ***Oztürk v Germany*** (1984) 6 EHRR 409; ***Campbell and Fell v United Kingdom*** (1985) 7 EHRR 165; ***Weber v Switzerland*** (1990) 12 EHRR 508.

84 ***International Transport Roth v Secretary of State for Home Department*** [2003] QB 728.

85 ***King v Walden (Inspector of Taxes*** [2001] STC 822.

86 ***Han v Customs and Excise Commissioners*** [2001] 1 WLR 2253.

87 ***Goldsmith v Commissioners of Customs and Excise*** [2001] 1 WLR 1673; ***R (Mudie) v Dover Magistrates' Court*** [2003] QB 1238.

88 *Gora v Customs and Excise Commissioners* [2004] QB 93.

89 ***Eckle v Germany*** (1983) 5 EHRR 1, para 73

held that under English procedure there will be normally be a 'charge' for Article 6 purposes when a person is charged or served with proceedings and that, ordinarily, arrest will not be sufficient but that there is no inflexible rule.[90] Interviewing a person for regulatory purposes will not ordinarily constitute a 'charge' and Article 6 will not apply at that stage.[91] A formal notification that a person is facing an investigation by the police may not be sufficient to engage Article 6.[92]

36. Para 1.1 of the Code states:

> *We will not usually tell you what our suspicions are. It is for you to decide whether to make a disclosure to us*

37. Article 6(3)(a) provides that a person charged with a criminal offence be 'informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him'. However, the HMRC are at a much earlier stage in their inquiries.

38. It may be that the procedure breaches rights under Article 6 civil and involves a dispute about civil rights; if it does, then it is arguable that para 1.1 breaches Article 6 since the House of Lords decided in ***AF No3*** that an individual subject to a control order had to be given sufficient information about the allegations against him to enable him to give effective instructions to his special advocate in relation to them.[93] In many cases the most important issue is whether the applicant has a financial stake where the action of the state is decisive.[94] However, proceedings involving tax are normally outside the scope of civil rights because they fall within the hard core of public authority prerogatives.[95]

39. Assuming that para 1.1 breaches Article 6, Lord Bingham expressed the view that, in the context of an entitlement to a fair hearing before an independent and impartial tribunal under Article 6, waiver amounted to a voluntary, informed and unequivocal election by a party not to claim the right or raise an objection.[96]

(3) Investigations, Article 8 and orders for disclosure

43. In ***General Dental Council v Rimmer*** the PCT had alleged that a dentist had retrospectively amended computer records of 16 patients, which the dentist had denied.[97] In order to investigate the allegation, the GDC wanted forensic computer examiners to copy the computer hard drives at the dentist's premises and to interrogate the hard drives for information to discover whether any of the computer records had been amended. Lloyd

90 ***A-G Reference (No 2) of*** 2001 [2004] 2 AC 72 para 28
91 Ibid
92 ***R(R) v Durham Constabulary*** [2005] 1 WLR 1184 para 12
93 [2010] 2 AC 269
94 ***Le Compte Van Leuven and De Meyere v Belgium*** (1981) 4 EHRR 1 para 45
95 **Emesa Sugar v Netherlands**, Decision 13 January 2005
96 ***Millar v Dickson*** [2002] 1 WLR 1615.
97 [2010] EWHC 1049 (Admin)

Jones J took the view that this issue raised questions of confidentiality at common law and under Article 8. A patient's dental or clinical records are protected by obligations of confidentiality. That confidentiality does not apply to anonymised records, provided that those records can no longer be used to identify individual patients. However, that was not relevant to the case before him because the hard drives could not be accessed without identifying the individual patients. Lloyd Jones J held that the Court may order confidential disclosure if sufficient justification exists. The Court must assess the competing public interests of the individual patients and the public at large in confidential records, on the one hand, and on the other, the public interest in the proper and effective pursuit of professional disciplinary proceedings. The Court has to balance these considerations; and consider whether there is a compelling public interest in the disclosure which is necessary and proportionate and whether there are effective and adequate safeguards against abuse, in particular for the patient's confidentiality and anonymity. Lloyd Jones J applied the principle set out in A ***Health Authority v X*** where Thorpe LJ had said that there is obviously a high public interest in the proper administration of professional disciplinary hearings, particularly in the field of medicine, analogous to the public interest in the due administration of criminal justice.[98]

44. In ***R(Nakash) v Metropolitan Police Service*** a doctor applied for judicial review of a decision of the police to disclose certain documents to the GMC.[99] A patient alleged that he had sexually assaulted her, he was arrested, his home was searched and he was interviewed without representation. Both the arrest and search had been unlawful because of the failure to inform the doctor of the grounds for his arrest, and the interview and the internet conversation were not relied on at his trial. Following his acquittal, the GMC requested the police file, including the material not adduced at the trial, relying on s 35 A of the Medical Act 1983 to require disclosure of information that appeared relevant to the discharge of its functions in relation to a doctor's fitness to practise. The police decided that there were no grounds to refuse that request. However, the doctor argued that given the nature of the material and the circumstances in which it had been obtained, the disclosure to the GMC would be unreasonable, disproportionate and in breach of Article 8. However, the application was refused by Cox J. Although there was no evidence that the police had carried out the careful balancing exercise required by Article 8, the court did so and found no breach of Article 8.

(4) The duty to co-operate with disciplinary investigations

45. Article 6 does not prevent public authorities from requiring regulated persons to co-operate with disciplinary inquiries. Thus, in ***Saunders v United Kingdom*** Article 6 did not operate so as to prohibit DTI inspectors from exercising their statutory rights to question individuals.[100]

98 [2010] EWCA Civ 2014 para 19
99 [2014] EWHC 3810 (Admin)
100 (1996) 23 EHRR 313

As Lord Hofffman observed in ***R v Hertfordshire County Council ex p Environmental Industries*** the jurisprudence under article 6(1) is firmly anchored to the fairness of the trial and is not concerned with extrajudicial inquiries.[101]

46. However, the use of compelled evidence in criminal proceedings was changed by Sch 3 to the Youth Justice and Criminal Evidence Act 1999 so that each relevant statutory provision has been amended to mean that:

> *in criminal proceedings in which that person is charged with an offence to which this subsection applies—*
>
> *(a) no evidence relating to the answer may be adduced, and*
>
> *(b) no question relating to it may be asked,*
>
> *by or on behalf of the prosecution, unless evidence relating to it is adduced, or a question relating to it is asked, in the proceedings by or on behalf of that person.*

THE TRIBUNAL AND ARTICLE 6

(1) The 'independence' of the Tribunal

47. Article 6(1) requires a hearing before an '*independent and impartial*' tribunal. The Grand Chambers in ***Maktouf and Damjanović v Bosnia and Herzegovina*** recently re-stated the relevant principles:[102]

> *whether a body could be considered as "independent" – notably of the executive and of the parties to the case – it has had regard to such factors as the manner of appointment of its members, the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence (see, for example,* ***Campbell and Fell v the United Kingdom****,[103] and* ***Brudnicka v Poland****).[104] The irremovability of judges by the executive during their term of office is in general considered as a corollary of their independence and thus included in the guarantees of Article 6 § 1 (see* ***Campbell and Fell****).[105] Although the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in the Court's case-law (see* ***Stafford v. the United Kingdom****)[106], appointment of judges by the executive or the legislature is permissible, provided that appointees are free from influence or pressure when carrying out their adjudicatory role (see* ***Flux v. Moldova*** **(no. 2)***).[107]*

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101 [2000] 2 AC 412 at 423

102 Judgment, 18 July 2013 para 49

103 28 June 1984, A 80 para 78.

104 ECHR 2005-II para 38

105 Above para 80

106 [GC], no. 46295/99, § 78, ECHR 2002-IV

107 no. 31001/03, 3 July 2007 para 27

48. The ways of ensuring independence can take many forms and is dependent on the nature of the regulator; they may include the following:
    - Including members of the Tribunal who drawn from outside the profession
    - Lay members should be in a majority or the independent chairman should have a casting vote.
    - Appointment of tribunal members from outside the profession.
    - Security of tenure. Note that in the Scottish sheriff's case of ***Starrs v Ruxton*** the appointment of temporary sheriffs for 12 months was insufficient to guarantee independence.[108]

(2) The 'impartiality' of the Tribunal

49. The parties to any form of dispute may challenge the tribunal on the grounds of actual or apparent bias. The starting point for challenging the appearance of bias is that '*justice should not only be done but should manifestly and undoubtedly be seen to be done*'.[109] This principle has two closely related but not identical, applications: direct interest in the matter in dispute (which I shall not address) and conduct giving rise to an appearance of bias. Article 6 has had an important impact on the legal principles which apply to apparent bias.

50. In the past, there was considerable uncertainty as to the appropriate test for ascertaining whether there was bias. In some instances it was said that the test for disqualification was whether there was a real likelihood of bias. On other occasions it was said that the appearance of bias was made out if a reasonable person acquainted with the position had reasonable grounds for suspecting bias. In ***R v Gough***, a case concerning the apparent bias of a juror, the House of Lords decided that the correct test for bias was whether there was a real danger of bias.[110]

51. Lord Phillips MR, in ***Re Medicaments and Related Classes of Goods (No. 2)*** suggested that Article 6 required a '*modest adjustment*' to the test in ***Gough***, proposing that the court should ask whether '*a fair minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased*'.[111] This *'modest adjustment*' was approved by Lord Hope in ***Porter v Magill*** and was subsequently applied by the House of Lords in ***Lawal v Northern Spirit Ltd*** where Lord Steyn summarised the proper approach as follows:[112]

> *there is now no difference between the common law test of bias and the requirements under article 6 of the Convention of an independent and impartial*

108 2000 SLT 42 approved by the Privy Council n ***Millar v Dixon*** [2002] 1 WLR 1615.
109 ***R v Sussex Justices, ex p McCarthy*** [1924] KB 256, 259
110 [1993] AC 646
111 [20001] 1 WLR 700.
112 [2003] ICR 856 para 14

tribunal, the latter being the operative requirement in the present context. The small but important shift approved in ***Porter v Magill*** *has at its core the need for 'the confidence which must be inspired by the courts in a democratic society'. Public perception of the possibility of unconscious bias is the key.*

52. As Lord Hope observed in ***Gillies v Secretary of State for Work and Pensions***, [113] The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny. The phrase "*capable of being known*" from Lord Hope's formulation holds the key. This does not signify a need to restrict the material to that which is immediately in the public domain. It acknowledges that the observer must have such information as may be necessary for an informed member of the public without any particular, specialised knowledge or experience to make a dispassionate judgment.[114] As Lord Bingham put it in the ***Prince Jefri v State of Brunei***, the requirement that the observer be informed means that he does not come to the matter as a stranger or complete outsider; he must be taken to have a reasonable working grasp of how things are usually done.[115]

53. The particular attributes of the fair-minded and informed observed were considered in detail by the House of Lords in ***Helow v Secretary of State for the Home Department***;[116] he is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument, will take the trouble to inform herself on all matters that are relevant before taking a view and will look at the issues in context.

54. In ***R(Hill) v Institute of Chartered Accountants in England and Wales*** a chartered accountant was subject to disciplinary proceedings.[117] After his cross-examination had begun, one of the members of the tribunal, following agreement by the advocate representing the claimant, absented himself. That member subsequently read the transcript of the part of the hearing which he had not attended before continuing to take part in the remainder of the hearing and the decision-making process. The tribunal decided that the claimant was guilty of unprofessional conduct and that he was to be excluded from membership. The claimant sought judicial review on the ground that the proceedings were a nullity because there had been a breach of the rules of natural justice, the disciplinary tribunal having no power to permit one of its members to depart during the hearing and then take part in the remainder of the hearing and decision-making. The Court of Appeal held that a professional disciplinary tribunal was (subject to the relevant byelaws or other rules), master of its own procedure. It would normally be a breach of the rules of natural justice for a member of such a tribunal, in the absence of agreement, to absent himself while a witness was giving

113 [2006] 1 WLR 781 at para 17 per Lord Hope

114 ***Belize Bank Limited v The Attorney General of B****elize* [2011] UKPC 36 para 39 per Lord Kerr

115 [2007] UKPC 62, para 16

116 [2008] 1 WLR 2416

117 [2014] 1 WLR 86

oral evidence and later to return to participate in the decision; and that such a breach would not normally be cured by the absent member reading a transcript of the evidence given in his absence, unless the evidence were comparatively uncontroversial. The absence would be difficult (if not impossible) to justify if the evidence was that given by the person accused in the disciplinary proceedings. However, in the circumstances of the case, there would be no breach of the rules of natural justice. The tribunal was entitled to rely on the agreement of the accountant's advocate, without having to go behind and checking that his client personally agreed with what the advocate had said. Since the claimant's agreement had been voluntary, informed and unequivocal, there had been no breach of the rules of natural justice.

55. In ***R(Leathley) v Visitors to the Inns of Court*** the Court of Appeal rejected the argument that if a Disciplinary Tribunal or Panel of Visitors is appointed from outside the pool established by the Council of the Inns of Court, it could not be independent or guaranteed to be free from outside pressure and did not comply with Article 6.[118]

56. It should be noted that
    - The fact that a tribunal member has personal knowledge of a witness will breach Article 6 if the nature and degree of their familiarity indicates a lack of impartiality.[119]
    - The disciplinary process of the General Dental Council has been held not to give the appearance of impartiality where the President of the Council acted as a preliminary screener of complaints and chaired the Professional Conduct Committee which chaired the claimant's case.[120]
    - The disciplinary procedures of the Royal College of Veterinary Surgeons did not give rise to any appearance of bias arising out of the fact that the membership of the committee dealing with the prosecution of charges and that dealing with the determination of charges was drawn from the College's governing body, in whose name any charges were brought.[121]
    - The mere fact that the tribunal has previously decided the same issue is not of itself sufficient to justify a conclusion of apparent bias. Something more is required. Judges are assumed to be trustworthy and to understand that they should approach every case with an open mind.[122]
    - The appearance of bias by even one member of a planning committee may be enough to vitiate the decision.[123]

118 [2014] EWCA Civ 1630
119 ***Pullar v United Kingdom*** (1996) 22 EHRR 391
120 ***Preiss v General Dental Council*** [2001] 1 WLR 1926
121 ***Holmes v Royal College of Veterinary Surgeons*** [2011] UKPC 48
122 ***AMEC Capital Projects Ltd v Whitefriars City Estates*** Ltd [2005] 1 All ER 723
123 ***R(Berky) v Newport City Council*** [2012] Env. LR 35;

(3) Article 6 and the legal assessor

57. In ***Clark v Kelly*** Lord Hoffman said:[124]

> *the position of the clerk, whether one chooses to describe him as part of the tribunal or not, is such as to attract some requirements of independence and impartiality by virtue of Article 6(1) . I cannot imagine that it would be regarded as acceptable, for example, that the clerk should advise the justices when he is the father or some other close relation of the victim of the offence for which the accused is being tried.* ***Stone's Justices' Manual****, 134th ed (2002) says in relation to clerks in English magistrates' courts that "The test of apparent bias which applies to magistrates ... applies also to the justices' clerk since he is part of the judicial process in the magistrates' court": see para 1-32A. That seems to me in principle correct.*

58. Nevertheless, in ***Watson v General Medical Council*** Stanley Burnton J held that fairness required that those who advise a tribunal on issues of fact, whether as its experts or as assessors, should do so openly, in the presence of the parties and in circumstances in which the parties have an opportunity to make submissions on that advice before the tribunal makes its decision.[125]

59. The Court of Appeal considered a similar issue in ***Virdi v Law Society***;[126] and held that the SDT has power, either conferred by rule 31(a) of the Solicitors (Disciplinary Proceedings) Rules 1994 1 or by implication of law ancillary to the discharge of its functions, to instruct or invite its clerk to assist it when it retires or drafts its findings and decisions. The SDT had been entitled to invite the clerk to retire with it for those purposes, and, appeared to be impartial and independent.

(4) Prejudicial pre-trial publicity

60. The impact of Article 6 was considered by the Privy Council in relation to a jury trial in ***Montgomery v HM Advocate***.[127] The Privy Council held that under Article 6 the only issue to be addressed was the right of the defendant to a fair trial, and no assessment of the weight to be given to the public interest came into the exercise. The decisive question was whether the doubts raised about the impartiality of the tribunal were objectively justified, and was not confined to the residual effect of the publicity on the minds of each juror since account had to be taken of the role which the trial judge would play in ensuring the defendants

124 [2004] 1 AC 681 para 20
125 [2006] ICR 113
126 [2010] 1 WRL 2840
127 [2003] 1 AC 641

would receive a fair trial, and in most cases the likely effect of any warnings or directions given to the jury.

61. In ***R(Mahfouz) v General Medical Council*** a cosmetic surgeon complained that four members of the Committee had seen, in newspapers published after the first day of the hearing, prejudicial material which would not otherwise have been in evidence before them which related to previous misconduct.[128] He unsuccessfully objected to the Committee continuing to hear the case. The Court of Appeal held that there were no grounds for questioning the Committee's ability to decide the case fairly on the evidence before it. Factors of importance were the length of time that had elapsed since the previous finding of serious professional misconduct, the different nature of the previous case, and the impact of seeing and hearing witnesses in relation to the instant charges. These matters had to be looked at by the Committee, putting itself in the shoes of the hypothetical fair minded observer. The underlying question was whether the proceedings were fair and seen to be fair. The issue was not bias in the normal sense but rather a consideration of the prejudicial effect of inadmissible material on an otherwise impartial tribunal. It was an important distinction as bias or apparent bias on the part of a tribunal could not be corrected. On the other hand, knowledge of prejudicial material need not be fatal and its effects had to be considered in the context of the proceedings as a whole, including the likely impact of the oral evidence and the legal advice available. The legal assessor's role was to express the objective view of the fair minded observer.

PRE-TRIAL ISSUES

(1) <u>The reasonable time requirement</u>

62. Article 6(1) requires that a hearing determining civil rights and obligations or a criminal charge must be held within a reasonable time. The reasonable time requirement is a separate guarantee and is not to be seen as part of the overriding right to a fair trial; it does not require the claimant to show he has been prejudiced by the delay.[129] It is a fundamental principle of the common law concept of natural justice that fairness of a trial must include and be reflected in the absence of any excessive or avoidable delay by the tribunal.[130] Time usually begins in civil cases when the proceedings in question were initiated.[131] When determining the reasonableness of how long the proceedings lasted, the same criteria as that used in criminal proceedings apply.[132]

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128 [2004] Lloyd's Rep Med 377

129 ***Porter v Magill*** [2002] 2 AC 357.para 109 per Lord Hope.

130 **Kwamin v Abbey National [**2004] IRLR 516 (EAT), para 4

131 ***Porter v Magill***, above para 107 per Lord Hope.

132 Ibid

63. The fact that the ECtHR decided that disqualification proceedings against a company director had breached the reasonable time requirement did not entitle the director to an order that the disqualification proceedings should be dismissed or to an order that a disqualification undertaking that he had given should be set aside.[133] Excessive delay in delivering a judgment could mean that the trial was unfair and that the judgment should be set aside: but it must be shown that the judgment is not safe and that to allow it to stand would be unfair.[134]

64. In a civil case, time usually begins to run when proceedings are instituted.[135] If, prior to the commencement of proceedings, the applicant has sought to have a right determined by an administrative decision, any delays in such decision will be taken into account.[136] However, a period of negotiation aimed at settling a potential claim is not taken into account.[137] Time will stop running when the final appeal decision has been made or the time for appealing has expired.[138] In considering the length of the proceedings, the time take for the assessment of damages[139] and costs[140] will be taken into account. Where a claimant obtains judgment then time will only stop running when the judge has been enforced.[141]

The factors to be considered

65. In the context of a criminal case Lord Bingham emphasised in ***Dyer v W***atson that the threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed;[142] unless that period is one which, on its face and without more, gives grounds for real concern it is almost certainly unnecessary to go further. Lord Bingham went on to identify three main areas as calling for particular inquiry: the complexity of the case, the conduct of the defendant and manner in which the case has been dealt with by the administrative and judicial authorities. However, it is necessary for the contracting state to explain and justify any lapse of time which appears to be excessive.

66. The reasonableness of the length of proceedings must be assessed in each case taking into account all the circumstances including:

133 ***Eastaway v Secretary of State for Trade*** [2007] UKHRR 739

134 See generally, ***Cobham v Frett*** [2001] 1 WLR 1775 at 1783–4 (PC); ***Bangs v Connex South Eastern Ltd*** [2005] 2 All ER 316 (CA).

135 See eg. ***Scopelliti v Italy*** (1993) 17 EHRR 493 para 18; ***Muti v Italy*** (1994) Series A No 281-C para 15

136 ***Schouten and Meldrum v Netherlands*** (1994) 19 EHRR 432 (delay in confirmation of a decision)

137 ***Lithgow v United Kingdom*** (1986) 8 EHRR 329, para 199.

138 ***Vocaturo v I***taly (1992) A 245-D

139 ***Silva Pontes v Portugal*** (1994) 18 EHRR 156

140 ***Robins v United Kingdom*** (1997)

141 ***Hornsby v Greece*** (1997) 24 EHRR 250

142 [2004] 1 AC 379, para 52; (and see eg ***Department of Work and Pensions v Costello*** [2006] EWHC 1156 (Admin)).

- *The complexity of the case*, including matters such as the number of witnesses,[143] the intervention of other parties,[144] the need to obtain expert evidence.[145]
- *The conduct of the applicant*.[146] Although an accused person is not required to cooperate in criminal proceedings and is entitled to make full use of his remedies, delay resulting from such conduct is not attributable to the state.[147] However, if an applicant fails to answer a warrant or flees the jurisdiction, then he cannot complain of delay to the proceedings.[148] Procedural rules that provide for the parties to take the initiative with regard to the progress of civil proceedings does not excuse the courts from ensuring compliance with the requirements of Article 6 in relation to time.[149]
- *The conduct of the relevant authorities*,[150] including matters such as delays in commencing proceedings[151] or in transferring proceedings.[152] The mere fact that the state does not comply with the time-limits which are laid down is not, in itself, contrary to Article 6.[153]
- *What is at stake for the applicant*: The personal circumstances of an applicant in a civil case may be taken into account. Thus, claims for compensation by HIV infected haemophiliacs required 'exceptional diligence' on the part of the authorities.[154] Such diligence is also called for in family cases where the custody of a child is at stake.[155]

67. Factors such as the workload of the court and a shortage of resources are not a sufficient justification for delays in a trial because Contracting States are under a duty '*to organize their legal systems so as to allow the courts to comply with the requirements of Article 6(1)*'.[156] However, the state is not liable for delays resulting from a backlog caused by an exceptional situation when reasonably prompt remedial action has been taken.[157]

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143 ***Andreucci v Italy*** (1992) Series A No 228-G.
144 ***Manieri v Italy*** (1992) Series A No 229-D.
145 ***Wemhoff v Germany*** (1968) 1 EHRR 55.
146 ***Eckle v Germany*** (1983) 5 EHRR 1) para 80.
147 ***Eckle v Germany*** above para 82
148 See, eg, ***AP v Italy***, Decision of 24 June 1996.
149 ***Scopelliti v Italy*** (1993) 17 EHRR 493 para 25; ***Unión Alimentaria Sanders SA v Spain*** (1989) 12 EHRR 24
150 ***König v Germany*** (1978) 2 EHRR 170.
151 ***Eckle v Germany*** above
152 ***Foti v Italy*** (1982) 5 EHRR 313 para 61.
153 ***G v Italy*** (1992) Series A No 228-F.
154 ***Kalashnikov v Russia*** (2003) 36 EHRR 34, para 132.
155 ***Abdoella v Netherlands*** (1992) 20 EHRR 585
156 ***Zimmerman and Steiner v Switzerland*** (1983) 6 EHRR 17 para 29; ***Muti v Italy*** (1994) Series A No 281-C para 15.
157 ***Buchholz v Germany*** (1981) 3 EHRR 597 para 51.

68. No general guidelines have been laid down for what constitutes a 'reasonable time' in either civil or criminal proceedings. It is submitted that the proper approach is to decide whether the overall delay is 'unreasonable' and then to consider whether the state is able to justify each period of delay.

69. Examples of violations on the grounds of delay in civil cases have following periods of delay:
    - three years for an administrative challenge to a planning decision;[158]
    - four years for a personal injury case;[159]
    - four years for the determination of a dispute about costs;[160] and
    - five and a half years for the determination of proceedings for the disqualification of a company director.[161]

70. In ***R(Subner) v Health Professions Council*** Kenneth Parker J held a period of 16 months between the initial hearing of a complaint about the conduct of a healthcare professional by the Health Professions Council's Conduct and Competence Committee and the final hearing at which he was struck off did not constitute an unreasonable delay in breach of Article 6.[162]

71. In ***Okeke v Nursing and Midwifery Council*** a nurse and midwife appealed against a decision of the NMC to strike her off the medical register.[163] She had been notified that allegations of lack of competence and misconduct and was subject to an interim suspension order for over four-and-a-half years until the NMC's Conduct and Competence Committee found the allegations proved. However, Leggatt J found that the reasonable time guarantee under Article 6 had been breached. However, he went on to consider the consequences of that breach and applied in ***A-G (No.2 of 2001***), where Lord Bingham said:[164]

> *If, through the action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the defendant's convention right under art 6(1). For such breach there must be afforded such remedy as may be just and appropriate (s 8(1) of the Human Rights Act 1998) or (in Convention terms) effective, just and proportionate. The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established. If the*

158 ***Alge v Aus***tria (Judgment of 22 January 2004).
159 ***Guincho v Portugal*** (1984) 7 EHRR 223.
160 ***Robins v United Kingdom*** (1997) 26 EHRR 527.
161 ***Davies v United Kingdom*** (2002) 35 EHRR 29; see also ***Eastaway v United Kingdom*** (2005) 40 EHRR 17 (which concerned a different director of the same company, in which the proceedings took eight years and 11 months).
162 [2009] EWHC 2815 (Admin);
163 [2013] EWHC 714 (Admin)
164 [2004] 2 AC 72 para 24

> *breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail. It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant.*

Leggatt J held that fairness requires that, on reconsideration of the sanction, the panel will need to take account of the unreasonable delay and the effect which that had on the appellant.

65. In ***Johnson v Nursing and Midwifery Council*** Leggatt J allowed on several grounds an appeal by two nurses who had been the manager and deputy manager of a nursing home.[165] In 2003, the NMC notified them that they were the subject of allegations of misconduct. The NMC's subsequent investigation took over two years. A hearing before the professional conduct committee started in July 2007 and finally concluded in December 2011. The committee found both nurses guilty of failing to ensure that adequate nursing records were maintained because no risk assessment or care plan in relation to residents' falls had been kept on four occasions and one nurse guilty of other charges. The disciplinary hearing had lasted 86 days spread over two years and nine months. By the time the committee made its decision, the events that were subject of the charges were between 9 and 13 years old. The total time which elapsed from when the nurses were notified of the allegations until the disciplinary proceedings' conclusion was over eight years and the NMC accepted before Leggatt J that the delays violated the nurses' rights to a hearing within a reasonable time contrary to Article 6.

(2) Disclosure

66. Article 6 can impose extensive obligations to disclose. It is noteworthy that non-disclosure in a national security context will, nevertheless, infringe the controlee's right to a fair trial of his civil rights. Thus, in ***Secretary of State for the Home Department v AF (No 3)*** the Supreme Court applying the Strasbourg jurisprudence, made it clear that non-disclosure cannot go so far as to deny a party knowledge of the essence of the case against him, at least where he is at risk of consequences as severe as those normally imposed under a control order.[166]

67. The obligation to disclose is buttressed by the principle of equality of arms. In ***Ringier Axel Springer Slovakia v Slovakia*** the ECtHR summarised the principle in these terms:[167]

> *84 …. the principle of equality of arms, one of the elements of the broader concept of a fair trial, requires each party to be given a reasonable opportunity to present his*

165 [2013] EWHC 2140 (Admin)
166 [2010] 2 AC 269
167 Judgment 4 October 2011

case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent (see, for example, ***Nideröst-Huber v. Switzerland****).*[168]

85. In addition to this requirement, the concept of a fair hearing implies the right to adversarial proceedings, according to which the parties must have the opportunity not only to be made aware of any evidence needed for their claims to succeed, but also to have knowledge of, and comment on, all evidence adduced or observations filed, with a view to influencing the court's decision. However, the right to adversarial proceedings is not absolute and its scope may vary depending on the specific features of the case in question (see, for example, ***Krčmář v the Czech Republic****,*[169] *and* ***Hudáková v Slovakia****).*[170]

86. Finally, the Court has indicated that the concrete effect of the observations in question on the judgment of the domestic court concerned is of little importance. It is for the parties to the case to judge whether or not a document calls for their comments (see ***Nideröst-Switzerland****;*[171] ***Milatová and Others v. the Czech Republic****;*[172] *and* ***Gaspari v. Slovenia****).*[173] *What is particularly at stake here is litigants' confidence in the workings of justice, which is based on the knowledge that they have had the opportunity to express their views on every document in the file (see* ***Nideröst-Huber v Switzerland****;*[174] *and* ***Asnar v. Fr****ance).*[175]

87. That said, the Court has in the past found in certain cases that the non-communication of written observations or documents in the proceedings and the impossibility for the applicant to comment on them did not constitute a violation of the right to a fair hearing. In its reasoning, the Court explained that, in the particular cases in question, granting to the applicant such rights and opportunities would have had no effect on the outcome of the proceedings as the legal approach adopted was not open to discussion (see, for example, ***Stepinska v. France****;*[176] ***Sale v France****;*[177] *and* ***Verdú Verdú v. Spain****).*[178]

(3) The right to a public hearing

168 18 February 1997, § 23, Reports of Judgments and Decisions 1997-I
169 no. 35376/97, § 40, 3 March 2000
170 Judgment, 27 April 2010 para 26
171 Above para 29
172 no. 61811/00,, ECHR 2005-V para 65
173 no. 21055/03, 21 July 2009 para 52
174 Judgment 18 February 1997, para 29
175 (no. 2), no. 12316/04, 18 October 2007 para 25
176 no. 1814/02, 15 June 2004 para 18
177 no. 39765/04, 21 March 2006 paras 18-19
178 no. 43432/02, 15 February 2007 paras 26-28

68. Article 6 confers a right to a public hearing, but there are a number of express restrictions on this right, allowing for the exclusion of the press and public '*in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice*'. The general rule that no disciplinary hearing under the Prison Rules 1999 should be heard in public was held not to breach Article 6(1); the right is not absolute and there was a distinction to be drawn between disciplinary proceedings against convicted prisoners and ordinary proceedings.[179]

69. However, a public trial will not be necessary if the accused has unequivocally waived the right in a situation in which there is no important public interest consideration which calls for the public to be present.[180] If there is a practice that hearings will not be held in public unless one of the parties expressly requests one, then a failure to make the application is deemed to be an unequivocal waiver.[181] In particular, the practice may be justified where the subject matter of the dispute does not raise issues of public importance, is highly technical and of a private nature.[182] In ***Albert & Le Compte v Belgium*** the ECtHR specifically endorsed the principle that a doctor subject to disciplinary proceedings could waive the right to a full hearing.[183]

(4) Interim orders and Article 6

70. In ***Perry v Nursing and Midwifery Council*** the Court of Appeal addressed important submissions about the impact of Article 6 on interim orders,[184] following the innovative Grand Chamber decision ***Micallef v Malta***.[185] In ***Micallef*** the Grand Chamber took a new approach to Article 6 and decided that Article 6 could apply to an interim injunction, even though an interim injunction could not '*determine*' the applicant's civil rights. As a result, a nurse argued the decision of the NMC's investigating committee to suspend his registration,

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179 ***R (Bannayne) v The Independent Adjudicator*** [2004] EWHC 1921 (Admin

180 ***Håkansson and Sturesson v Sweden*** (1990) 13 EHRR 1 para 66 (where the applicant failed to ask for a public hearing before a court which conducted itself in private unless it considered a public hearing to be 'necessary'); ***Pauger v Austria*** (1997) 25 EHRR 105 para 58; ***H v Belgium*** (1987) 10 EHRR 339 para 54 (no waiver to be implied from a failure to demand a public hearing when, as a matter of practice, the hearings were conducted in camera)

181 ***Zumtobel v Austria*** (1993) 17 EHRR 116 para 34.

182 ***Schuler-Zgraggen v Switzerland*** (1993) 16 EHRR 405 para 58 (complaint concerning lack of oral hearing to determine invalidity benefit).

183 (1983) 5 EHRR 533

184 [2013] 1 WLR 3423

185 (2009) 50 EHRR 92

which prevented his working in his profession, similarly, determined his civil right under Article 6; and affected his relationships with patients and his ability to work, interfering with his Article 8 rights. The Court of Appeal, therefore, proceeded on the basis that Articles 6 and 8 were engaged.

71. However, the Court of Appeal rejected the submission that fairness required an opportunity for the nurse to give evidence for the investigating committee, so the investigation could consider on the truth of the allegations made against him. The argument advanced was inconsistent with the statutory scheme which did not entitle the investigating committee to decide the credibility or merits of a disputed allegation- which was a matter for the substantive hearing for the conduct and competence committee.

(5) Interim orders and Article 8

72. In ***Patel v General Medical Council*** a 73 year old GP was referred to the GMC by the Metropolitan Police. He had been arrested in connection with the discharge of his duties as a school governor which had authorised substantial payments to staff to which they were allegedly not entitled.[186] Over a year later he was charged with conspiracy to defraud and with committing fraud by abuse of position. It is said that the unauthorised payments totalled approximately £1.8m and that the wrongdoing extended over the period 2003-2009. An Interim Orders Panel made an order of suspension and an application was being made to the Court to exercise to terminate the interim order, essentially because the GP was a person of exemplary character, the interim order was neither necessary nor proportionate and the public interest did not require interim suspension given that the allegations did not have any bearing upon clinical matters.

73. The GP argued that the decision to suspend amounted to an interference with Article 8,[187] and the effects of suspension are severe, since they interfered with his right to make a living, the welfare of his/her patients and the individual's reputation, the protection of which is, again, within the scope of Article 8.[188] The GMC accepted that the Panel was required to act proportionately and to balance the public interest against that of the GP. However, the GMC argued that Article 8's reach should not be overstated, referring to the Supreme Court discussion in R ***(Wright) v Secretary of State for Health*** where Baroness Hale has said "*There will be some people for whom the impact upon personal relationships is so great as to constitute an interference with the right to respect for private life and others for whom it may not*".[189] In the circumstances Eadie J decided to terminate the interim order.

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186 [2012] EWHC 3688 (Admin)

187 ***Niemietz v Germany*** (1993) 16 EHRR 97, paras 29-30***; GMC v Alt***haf [2012] EWHC 330 (Admin) para 24

188 ***Lindon v France*** (2008) 46 EHRR 35

189 [2009] 1 AC 739 paras 33-36

THE HEARING

(1) Article 6 and adjournments

74. In ***D v General Medical Council*** Bennett J considered the impact of Article 6 on an application to adjourn.[190] He closely analysed ***R v Jones*** where the House of Lords held that a judge had a discretion to begin a trial in a defendant's absence though that was to be exercised with great caution.[191] The House of Lords said that it was generally desirable that a defendant should be represented even if he had voluntarily absconded; and that the commencement of a trial in the voluntary absence of the accused did not contravene Article 6. Lord Bingham reviewed the European jurisprudence and pointed out that the ECtHR has never found a breach of Article 6 where a defendant, fully informed of a forthcoming trial, has voluntarily chosen not to attend and the trial has continued. [192] Lord Bingham also observed where an individual voluntarily chooses not to exercise a right, he cannot complain that he has lost the benefits which he might have expected to enjoy had he exercised it; and if he voluntarily chooses not to exercise his right to appear, he cannot impugn the fairness of his trial on the ground that it followed a course different from that which it would have followed had he been present and represented.[193] Bennett J went on to find that the Fitness to Practise Panel was entitled in the circumstances to refuse the adjournment.

(2) The burden of proof

75. In ***Sheldrake v DPP*** the House of Lords stated that when construing a provision under section 3 of the HRA, the task of the court, was always to assess whether a burden enacted by Parliament unjustifiably infringed the presumption of innocence, not whether a reverse burden should be imposed on a defendant. The courts should not proceed on the assumption that Parliament would not have made an exception without good reason.[194] Such an approach might give too much weight to the enactment under review and too little to the presumption of innocence and the obligation imposed by Article 6(2). The justifiability and fairness of provisions which imposed a burden of proof on a defendant in a criminal trial had to be judged in the context of each case. The Convention did not prohibit presumptions of fact or law but required that they should be kept within reasonable limits and should not be arbitrary. The substance and effect of any presumption adverse to a defendant had to be examined on all the facts and circumstances relevant to the particular provision. Material considerations would include the opportunity given to the defendant to rebut the presumption, the extent to which the subject matter of his defence was so closely conditioned by his knowledge and state of mind at the material time as to make it relatively

190 [2007] EWHC 1497 (Admin)
191 [2003] 1 AC 1
192 Above para 9
193 Above para 11
194 [2005] 1 AC 264

easy for him to discharge the burden of proof, the maintenance of the rights of the defence generally, flexibility in the application of the presumption, the retention by the court of a power to assess the evidence, the importance of what was at stake and the difficulty which a prosecutor might find in the absence of a presumption.

76. However, it should be noted that in ***Jones v Commission of Social Care Inspectorate*** the Court of Appeal considered the burden of showing whether an individual was a fit person to carry on or manage a care home; and held that the burden lay on the applicant for registration. Thomas LJ *obiter* expressed the view that:[195]

> *Bodies charged with regulation are frequently entrusted with the task of determining whether a person who seeks to hold a position of trust is a fit and proper person to hold such a position. There have been instances where the regulatory body has been uneasy as to whether the person in fact is a fit and proper person; in such cases, because the provisions of some regulatory systems have been interpreted as placing the burden of proof on the regulator, the regulatory body has felt constrained to allow such a person to occupy such a position of trust, despite its doubts. To state that outcome demonstrates the fact that in such a case there may have been a failure of the legislative scheme in seeing that, in the public interest, positions of trust are occupied by persons who are demonstrably fit and proper. The interpretation of any legislative scheme is a matter of the construction of the particular scheme.*

(3) The right to legal representation

77. Article 6(3)(c) confers a right to legal assistance, but applies only to 'criminal charges' under Article 6 and will rarely be relevant. In ***Pine v Law Society*** it was argued that the absence of any provision for legal aid or representation for a solicitor facing charges of conduct unbefitting a solicitor before the SDT breached Article 6. But the Court of Appeal held that, having regard to the nature of the allegations and to the fact that the procedure had not been complex, the tribunal hearing had not been rendered unfair due to the absence of legal representation.[196] For the purposes of Art.6(1), proceedings would be unfair only in such exceptional circumstances as where the absence of representation made the assertion of a civil claim practically impossible or where there would be obvious unfairness if a party was not represented.

78. As discussed above, the primary issue in R***(G) v Governors of X School*** was whether a determination in disciplinary proceedings effectively determined the applicant's civil rights under Article 6.[197] However, Lord Dyson went on to hold that:[198]

195 Ibid para 28
196 [2002] UKHRR 81
197 [2012] 1 AC 167
198 Ibid, para 71

if Article 6 did apply in the disciplinary proceedings, then the claimant was entitled to the enhanced procedural protection (normally associated with criminal proceedings) of the right to have legal representation at the disciplinary hearing. The more serious the allegation and the graver the consequences if the allegation is proved, the greater the need for enhanced protection: see ***Albert and Le Compte v Belgium****;*[199] ***R v Securities and Futures Authority Ltd, Ex p Fleurose****;*[200] *and* ***International Transport Roth GmbH v Secretary of State for the Home Department****.*[201]

(4) Anonymous hearsay evidence

80. ***White v Nursing and Midwifery Council*** raised the issue of principle as to whether anonymous hearsay evidence should be admitted in professional disciplinary proceedings.[202] The nurses appealed against the NMC's fitness to practise panel, which had struck them off the register. The nurses were disciplined following the Francis Inquiry, mainly because they had falsified patients' records to show that they had spent less than four hours in the department, in order to meet departmental targets. The panel heard evidence from witnesses for the Council and the nurses gave evidence and called witnesses. The council also adduced in evidence three anonymous letters. The panel admitted the letters- on the basis that since they were not the only evidence they could fairly be admitted subject to submissions about the weight to be attached to them. The panel then found some of the charges proved.

81. Mitting J held that the protections of Article 6(3) in criminal proceedings including the right to examine witnesses did not apply. The Nursing and Midwifery Council (Fitness to Practise) Rules Order of Council 2004 r.31(1) provided that, upon receiving the advice of the legal assessor, and subject only to the requirements of relevance and fairness, a practice committee considering an allegation could admit oral, documentary or other evidence, whether or not such evidence would be admissible in civil proceedings. However, Mitting J held that the apparently permissive wording was constrained by the requirements of fairness and the opportunity to test the evidence, applying ***Ogbonna v Nursing and Midwifery Council***[203] and ***R(Bonhoeffer) v General Medical Council***.[204] Mitting J took the view that the general approach to anonymous and hearsay evidence in the domestic courts and the ECtHR, relying on ***Luca v Italy***[205] and ***Al-Khawaja v United Kingdom***.[206] In the UK

199 (1983) 5 EHRR 533 , para 30
200 [2002] IRLR 297 , para 14, per Schiemann LJ
201 [2003] QB 728 , paras 38 and 148, per Simon Brown and Jonathan Parker LJJ
202 [2014] EWHC 520 (Admin
203 [2010] EWCA Civ 1216
204 [2012] IRLR 37
205 (2003) 36 EHRR 46
206 (2012) 54 EHRR 23

criminal proceedings anonymous hearsay evidence was, in principle, prohibited,[207] but that principle could not be read across directly to disciplinary proceedings. However, the underlying principles led to the conclusion that the result should be the same. Anonymous evidence could only be met with a bare denial and hearsay evidence could not be tested in cross-examination. The removal of any means of testing anonymous hearsay evidence meant that the test of fairness could not be satisfied. There were, however, different categories of evidence and it could be fair to admit hospital records as a contemporaneous note even if it was not possible to identify the author. Mitting J concluded that the panel had erred in admitting the anonymous statements and the charges based on the anonymous evidence had to be quashed.

(5) Article 8 and misconduct

82. In ***Saha v General Medical Council*** it was held that the GMC's Fitness to Practise Panel had been justified in finding that the failure of a doctor, who suffered from hepatitis B, to provide information as to his past employers was in breach of good medical practice and constituted misconduct, by reason of which his fitness to practise was impaired.[208] The panel had therefore been entitled to impose the sanction of erasure of his name from the register.

(6) Article 10 and misconduct

83. ***R(Pal) v General Medical Council*** concerned an allegation that a doctor put up a blog on her website, that enabled people to see the record of proceedings held before a committee of the British Psychological Society, about whether a particular psychologist, a member of that society, should be permitted to continue to practise under the aegis of the Society, because it was alleged that he was unfit to do so.[209] Collins J held that freedom of speech is important, but regulation of medical practitioners and professionals is clearly in accordance with the law in this country and necessary for the protection of the public. There can be no question that regulation by the GMC in circumstance such as this is proportionate and no breach of Article 10 rights.

(7) Time limits and Article 6

84. In ***R(Adesina) v Nursing and Midwifery Council*** the Court of Appeal considered an appeal against a disciplinary decision of the NMC to the High Court which had been made outside the statutory time limit of 28 days.[210] Before Hickinbottom J it had been conceded that the

207 ***R. v Ford (Kamahl***) [2010] EWCA Crim 2250
208 [2009] EWHC 1907 (Admin)
209 [2009] EWHC 1061 (Admin)
210 [2013] 1 WLR 3156

28 day time limit is absolute,[211] but after his judgment, the Supreme Court in ***Pomiechowski v Poland*** decided that in some circumstances, that apparently absolute time limits may, have to yield to the requirements of Article 6.[212] In ***Pomiechowski*** Lord Mance held that:

> *there is no reason to believe that Parliament either foresaw or intended the potential injustice which can result from absolute and inflexible time limits for appeals. It intended short and firm time limits, but can only have done so on the basis that this would in practice suffice to enable anyone wishing to appeal to do so without difficulty in time. In these circumstances, I consider 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 …, 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 in* **Tolstoy Miloslavsky**.*[213] The High Court must have the 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 … timeously*.

85. As Maurice Kay LJ observed,[214] the appellants, does not contend for a general discretion to extend time. Parliament is used to providing such discretions, often circumscribed by conditions.[215] The omission to do so on this occasion was no doubt deliberate. If Article 6 and section 3 of the HRA require Article 29(10) of the Order to be read down, it must be to the minimum extent necessary to secure Convention compliance and requires adoption of the same approach as that of Lord Mance in ***Pomiechowski***. A discretion must only arise "*in exceptional circumstances*" and where the appellant "*personally has done all he can to bring [the appeal] timeously*".[216] Maurice Kay LJ did not believe that the discretion would arise save in a very small number of cases and dismissed the appeal on the facts.

PENALTIES AND POWERS

(1) <u>The test for the appellate review, sanctions and human rights: solicitors</u>

86. An appeal is governed by CPR 52.11(3) which provides:

> *The appeal court will allow an appeal where the decision of the lower court was -*

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211 See ***Mitchell v Nursing and Midwifery Council*** [2009] EWHC 1045 (Admin) and ***Reddy v General Medical Council*** [2012] EWCA Civ

212 [2012] 1 WLR 1604

213 (1995) 20 EHRR 442

214 Above, para 15

215 (see, for example Employment Rights Act 1996, section 111(2), in relation to unfair dismissal)

216 Above, para 39

(a) *wrong; or*

(b) *unjust because of a serious procedural or other irregularity in the proceedings in the lower court*

87. In ***Bolton v Law Society*** Sir Thomas Bingham MR propounded the test, "*it would require a very strong case to interfere with sentence in such a case, because the Disciplinary Committee are the best possible people for weighing the seriousness of the professional misconduct*". [217]

88. In ***Law Society v Salsbury*** Jackson LJ reconsidered this test in the light of the HRA and said: [218]

> *From this review of authority I conclude that the statements of principle set out by the Master of the Rolls in Bolton remain good law, subject to this qualification. In applying the Bolton principles the Solicitors Disciplinary Tribunal must also take into account the rights of the solicitor under articles 6 and 8 of the Convention. It is now an overstatement to say that "a very strong case" is required before the court will interfere with the sentence imposed by the Solicitors Disciplinary Tribunal. The correct analysis is that the Solicitors Disciplinary Tribunal comprises an expert and informed tribunal, which is particularly well placed in any case to assess what measures are required to deal with defaulting solicitors and to protect the public interest. Absent any error of law, the High Court must pay considerable respect to the sentencing decisions of the tribunal. Nevertheless if the High Court, despite paying such respect, is satisfied that the sentencing decision was clearly inappropriate, then the court will interfere. It should also be noted that an appeal from the Solicitors Disciplinary Tribunal to the High Court normally proceeds by way of review; see CPR rule 52.11(1*)

89. In ***Obi v Solicitors Regulatory Authority*** Mostyn J drew attention to the recent Supreme Court decision in ***Re B (a child)***[219] in the context of care proceedings under the Children Act 1989 where the appellate test had long been that the impugned decision was "*plainly wro*ng", and pointed out that the wrongness was stressed adverbially- just as in ***Salsbury***, where the test was that the impugned decision was "*clearly inappropriate*". In ***Re B*** Lord Neuberger had stated:[220]

> *That conclusion leaves open the standard which an appellate court should apply when determining whether the trial judge was entitled to reach his conclusion on proportionality, once the appellate court is satisfied that the conclusion was based on justifiable primary facts and assessments. In my view, an appellate court should not interfere with the trial judge's conclusion on proportionality in such a case, unless it decides that that conclusion was wrong. I do not agree with the view that the*

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217 [1994] 1 WLR 512 citing the well-known pronouncement of Lord Upjohn in ***McCoan v General Medical Council*** [1964] 1 WLR 1107 who in turn cited Lord Goddard CJ ***in In re a Solicitor*** [1956] 1 WLR 1312

218 [2009] 1 WLR 1286 para 30.

219 [2013] 1 WLR 1911

220 Above, para 91

> *appellate court has to consider that judge's conclusion was "plainly" wrong on the issue of proportionality before it can be varied or reversed. As Lord Wilson says in para 44, either "plainly" adds nothing, in which case it should be abandoned as it will cause confusion, or it means that an appellate court cannot vary or reverse a judge's conclusion on proportionality of it considers it to have been "merely" wrong. Whatever view the Strasbourg court may take of such a notion, I cannot accept it, as it appears to me to undermine the role of judges in the field of human rights.*

Mostyn J therefore held that the approach was applicable in every civil case where an appeal is mounted against what is said to be a disproportionate disposal

90. Nevertheless, the Divisional Court confirmed in ***Solicitors Regulatory Authority v Sharma***[221] that, save in exceptional circumstances, a finding of dishonesty will lead to the solicitor being struck off the roll.[222] That is the normal and necessary penalty in cases of dishonesty.[223] There will be a small residual category where striking off will be a disproportionate sentence in all the circumstances.[224] In deciding whether or not a particular case falls into that category, relevant factors will include the nature, scope and extent of the dishonesty itself; whether it was momentary,[225] or other a lengthy period of time,[226] whether it was a benefit to the solicitor,[227] and whether it had an adverse effect on others.

(3) The impact of the right to possessions

89. Article 1 of the First Protocol (A1P1) states:

> *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*

87. Interferences with A1P1 comprise deprivations of property, control of use and 'other interferences'. However, an interference with peaceful enjoyment of possessions under A1P1 can be justified. The interference must:

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221 [2010] EWHC 2022 (Admin)
222 See ***Bolton v Law Society*** above and ***Salisbury v Law Society*** above
223 See ***Bultitude Law Society*** [2004] EWCA Civ 1853
224 See ***Salisbury v Law Society*** above
225 See ***Burrowes v the Law Society*** [2002] EWHC 2900 Admin
226 See ***Bultitude Law Society*** above
227 See ***Burrowes v the Law Society*** above

- be subject to conditions provided for by law;
- be for a legitimate aim; and
- strike a fair balance between the rights of the owner of the possessions and the public interest: in striking the 'fair balance' any interference with the right must be 'necessary and proportionate' to the legitimate aim pursued.

88. In ***R(Abrahaem) v General Medical C***ouncil it was not disputed that the erasure of a doctor from the medical record is a deprivation of possessions which had to be justified on the basis of proportionality test.[228]

89. In ***Whitefield v General Medical Council*** it was argued the imposition of terms on a doctor's registration constituted "property" under A1P1 since A1P1 bears a wide meaning and can include the right (or licence) to practise a profession as this is akin to a private right, and that the overall effect of the conditions imposed is to deprive him completely of his ability to practise.[229] The Privy Council decided that it was not necessary for to determine whether or not the doctor had an economic interest since it was satisfied that the conditions imposed were not sufficient to deprive him of any "property" he may have. It also held that the GMC had legitimately deemed the conditions necessary to control the use of property in accordance with the general interest.

90. In ***Holder v Law Society*** it was accepted that an intervention into a solicitor's practice intervention involved an interference with his peaceful enjoyment of his possessions.[230] However, Carnwath LJ held that such an interference was proportionate:[231]

> *The intervention procedure, now contained in the Solicitors Act 1974, is long—established (dating back to 1941, in its earliest form), and has been reviewed by the court on many occasions. As appears from the cases to which I have referred, it has been recognised as "draconian" in some respects, but necessary for the protection of the public interest; and the courts have repeatedly emphasised the "balancing exercise" which it involves. I see no material difference between this and the "fair balance" which article 1 requires. Nor do I see any reason why the Human Rights Act 1998 should be thought to have changed anything. There has long been a right of individual petition to the Strasbourg court for breaches of the Convention, but we have not been referred to any questioning of the intervention procedure under article 1. I see no arguable grounds for thinking for thinking that the margin allowed to the legislature has been crossed, particularly having regard to the deference which is properly paid to an Act of Parliament, as compared to an administrative decision:* ***see International Transport Roth GmbH v Secretary of State for the Home Department****.*[232]

228 [2004] EWHC 279 (Admin)
229 [2003] IRLR 39
230 [2003] 1 WLR 1059
231 Above, para 31
232 [2003] QB 728, 746, 765, paras 26, 83

91. In ***Malik v United Kingdom*** a general practitioner under an NHS contract who was suspended from practice but continued to be paid 90 per cent of his normal remuneration had not suffered a violation of his right to peaceful enjoyment of his possessions under P 1 A 1 where he was unable to demonstrate that he was affected by his suspension in financial terms. [233] Any loss of goodwill in his practice was of no consequence, given that it was excluded by statute from marketability.

Richard Clayton QC undertakes a wide range of advisory and litigation in public law work, judicial review, human rights and regulatory work. He is the United Kingdom's representative to the Council of Europe's advisory body on constitutional law (the Venice Commission), having been recently re-appointed until 2018, an ADRL Committee member, a Deputy High Court judge and a former Chairman of the Constitutional and Administrative Law Bar Association. Richard has a particular expertise in Article 6 criminal cases, having argued two House of Lords cases, ***R(West) v Parole Board*** and ***R(Greenfield) v Secretary of State for the Home Department***. He is the joint author of Clayton and Tomlinson ***The Law of Human Rights*** (OUP, 2nd edn, cited by the House of Lords, Supreme Court and Privy Council over 40 times) and has been an Associate Fellow at the Centre for Public Law at Cambridge University since 2001. He has appeared in many House of Lords, Supreme Court and Privy Council cases. Recent work includes ***Kennedy v Charity Commission*** (Supreme Court- freedom of information, human rights and common law rights) and an 8 day Court of Appeal constitutional challenge before the Turks and Caicos Court of Appeal (which will be heard in the Privy Council later this year).

[233] [2012] Med. LR 270