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Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **26/02/2010**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPEAL OF A DECISION OF THE CONDUCT AND COMPETENCE COMMITTEE OF THE NURSING AND MIDWIFERY COUNCIL

AND

IN THE MATTER OF ORDER 55 RULES OF THE SUPREME COURT (NORTHERN IRELAND) 1980 AND THE NURSING AND MIDWIFERY ORDER 2001 AND THE NURSING AND MIDWIFERY COUNCIL (FITNESS TO PRACTICE) RULES ORDER OF COUNCIL 2004

BETWEEN:

SUSAN COLTON

APPELLANT

- AND -

THE NURSING AND MIDWIFERY COUNCIL

RESPONDENT

TREACY J

Introduction

[1] This is an appeal, pursuant to Article 38 of the Nursing and Midwifery Order 2001 ("the 2001 Order") from the decision of the Conduct and Competence Committee ("the Committee") of the Nursing and Midwifery Council ("the

NMC") finding the appellant guilty of professional misconduct and imposing a Striking-off Order.

[2] The Notice of Appeal contains various grounds but it was agreed that the appeal in respect of the procedural grounds identified in Grounds 1 and 2 should proceed first.[1]

Background

[3] The appellant, Susan Colton, was a registered nurse until March 2006. She had been employed by Care Circle Limited and worked at the Kingsway Private Nursing Home in Dunmurry, Lisburn ("Kingsway Nursing Home").

[4] Two weeks had been set aside by the Committee to conduct a hearing into allegations of professional misconduct[2] by the appellant during the course of her employment at the said home. The two weeks set aside were the week commencing Monday 25 February and the week commencing 10 March.

[5] On 25 February 2008 an abuse of process application, grounded on delay, commenced. It had been indicated that it would be a "short one day application". [Plainly, if this timetable had been adhered to it would have left the remainder of the two weeks for hearing evidence if the abuse application were rejected]. In fact it did not conclude until 28 February 2008. [It is by no means obvious why such well trodden territory required a hearing of that length].

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[1] See Footnote 7 p12 where the grounds are sent out.

[2] The appellant was charged as follows:

That you, between July 2003 and 15 August 2005, whilst employed as a Staff Nurse at Kingsway Private Nursing Home, 299 Kingsway, Dunmurry:

1. On various dates slept whilst on night duty;
2. Inappropriately administered a non-prescribed table to Resident B secreted in a sweet;
    - (i) On an unknown date between June and August 2005, when Gillian Mason was on duty;
    - (ii) On an unknown date in mid July 2005, when Margaret Currie was on duty;
3. On an unknown date in mid July 2005, when Margaret Currie was on duty, failed to administer prescribed medication to Resident K;
4. On various unknown dates failed to administer medication to Residents appropriately:
    - (i) By instructing Care Assistants to give medication;
    - (ii) By instructing Care Assistants to secrete medication in residents' food and drink;
5. On an unknown date shouted at Resident B "if you don't stop buzzing and stay in bed I'll remove the buzzer from you" or by using words to that effect;
6. On an unknown date in mid July 2005 falsified Resident K's records by recording the administration of medication to Resident K which was administered to Resident B

AND in the light of the above, your fitness to practice is impaired by reason of misconduct.

[6] During the four days which it took for the abuse of process application the appellant attended with her Counsel and Solicitor as she had done for all previous hearings.

[7] On 28 February 2008 the Committee concluded that there was no breach of Article 6 and rejected the abuse of process application. Notwithstanding that the application had been grounded on delay the appellant sought to vacate the dates set aside for the second week of the hearing commencing on Monday 10 March 2008 because she intended to challenge the Committee's decision by way of judicial review.

[8] In response to the submission of Mr Neill Millard (the NMC solicitor) that his understanding was that judicial review should be dealt with at the *conclusion* of any proceedings, Mr O'Brien, Counsel for the appellant, submitted by reference to the promptness requirement contained in Order 53 RSC that she had *"**no other option** but to challenge these proceedings and challenge them now"*. [3] As a matter of law that submission was fundamentally unsound but its advancement may have betrayed an eagerness to electively avoid a hearing on the facts. [4]

[9] Mr O'Brien was certainly pessimistic about the prospects for the hearing on 10 March going ahead in any event. In a curiously worded submission he is recorded in the transcript of 28 February as having submitted that:

> **"… as sure as the head is on my body *I know* that we will be stymied procedurally from continuing on that date. I would be being dishonest if I were not to look each of you in the eye frankly and saying (sic) the chances of us doing real business on 10 March are becoming rapidly remote".**

[10] After the submissions and advice from Mr Ranaghan, the legal assessor, the Committee adjourned to consider the application. They rejected it *holding* that the case remained listed as planned, that there was adequate time to allow the application for the judicial review to be made before 10 March 2008 and that the panel would abide by any ruling of the High Court. They concluded by saying that unless they heard differently that they would resume at 10.00am or whatever time Mr O'Brien was available on 10 March.

[3] See transcript, 28 February p15

[4] See, for example, the decision of Weatherup J in ***O'Connor & Broderick* [2005] NIQB 40** and Judicial Review in Northern Ireland by Gordon Anthony at paras2.34-2.36

[11] A letter was faxed to the Committee late on the afternoon of Friday 7 March. It was also emailed to the Committee shortly after 5.00pm on that date. The letter, so far as material, states as follows:

> **"… These (judicial review) proceedings will be filed not later than Monday 10 March 2008. … We will be … applying for interim relief and if granted *this* will stay the NMC's substantive proceedings. You will be aware that the panel intends to reconvene from 10 to 14 March 2008. In the interests of justice it should be apparent to the NMC panel that they should not reconvene as proposed and the matter should not proceed until the conclusion of the judicial review to the High Court. The applicant *will be* attending with her solicitor *and* Junior and Senior Counsel in the High Court on Monday *and* Tuesday 11 March 2008 *and onwards.* She cannot and will not be in attendance before the Competence and Conduct Committee on those dates. I would be grateful if you would take this as official notification that our client will not be in a position to participate any further in the proceedings before the NMC panel as listed next week.**
>
> **If you have any further proposals to make in this matter, I await hearing from you."**

In my view, the contents of this letter betokened an intention to contumaciously and electively defy the decision of the Committee given on the 28th. This also chimes with Counsel's comments referred to at para.9 above.

[12] The hearing resumed on Monday 10 March 2008 at 11.40am. The reason for the delay was because the Committee had noticed that the appellant and her representatives were not present. The faxed letter was then discussed and Mr Millard pointed out that the issues raised were issues that had been addressed at the last hearing on 28 February. The transcript records his submissions as follows:

> **"… The fact of the matter is that I have had witnesses on standby all last week causing great difficulty to the care home business concerned. My witnesses have attended again today. In fact, one of**

my witnesses was in great difficulty and cancelled a consultation with a consultant over a medical difficulty she suffers. The longer this drags on, the more difficult it becomes for me to present my case fairly and the more reluctant the witnesses become to be involved in the proceedings, and fairness suffers that way. … You made a determination at the end of the last hearing to refuse the defence application and to adjourn proceedings to commence today. In my view the defence have *voluntarily absented* themselves from the proceedings. That letter confirms that indication. To my knowledge there are no proceedings before the High Court, there is no application for judicial review before the High Court. In effect, the defence have voluntarily absented themselves from the proceedings. In fact they have not even had the common decency to send anyone to attend and make that application on their behalf for a further adjournment of the proceedings. … I am aware that you are possibly considering adjourning the proceedings today to allow the defence a chance to attend tomorrow and making representations. … In view of that indication I am reluctant to apply to proceed even though all my instincts tell me to proceed and the defence have had every chance to attend and this Committee have been nothing but fair to them. They have chosen to voluntarily absent themselves; they are aware of the decision. Quite frankly, they have, in effect, said that they completely disagree with your decision to adjourn the proceedings and they are going to do what they want, regardless of what the findings of this panel are. That is, in effect, in my view what they have done. You have indicated you are going to proceed, they have disagreed with that and they have decided they are going to no longer participate. … My witnesses are willing to attend tomorrow, I could conclude my case fairly swiftly in two days, as far as I am concerned … In view of the time listing, although I have a strong objection to it, who am I not to allow one final opportunity to attend for proceedings to start tomorrow and all fairness to be given to them. I am not going to oppose that

> **because, in effect, if they do not attend tomorrow I can conclude calling my witnesses in two days."**

[13] The Committee then concluded that in the interests of fairness they would resume the following morning at 9.30am and intended to open the case to hear the evidence against the appellant. The decision of the Committee was communicated to the appellant's solicitor by email from Clare Stringfellow (Case Officer) on the same date timed at 12.48pm.

[14] By email of the same date timed 16.37 the appellant's solicitor wrote to Ms Stringfellow in the following terms:

> **"Further to your previous correspondence we can confirm that papers have been lodged with the High Court for leave to judicial review and a stay of proceedings. The application has been provisionally listed for tomorrow (Tuesday) 10.00am. We have *just* been notified by the Court Office. We will be appearing in relation to this application with Counsel, tomorrow 11 March 2008. We renew our application that this matter to not proceed in any fashion before this tribunal before a determination has been made available from the High Court. …"**

[15] On the same date Ms Stringfellow replied by email timed 17.21 indicating that she would pass the email on to the Committee who would decide whether to proceed or not. When the hearing resumed at 9.30am on Tuesday 11 March 2008 neither the appellant nor her legal representatives were present. The email was discussed and Mr Millard pointed out that two of his three witnesses who were listed to attend were present and that the third was parking her car. He then went on to observe that this was now *day seven* of the proceedings, that the proceedings had *not* been stayed but merely adjourned and that the Committee had indicated their *intention* to proceed yesterday. He invited them to continue with the proceedings submitting that the defence had not had the courtesy of sending anyone to deal with the matter and to make representations. He observed that what happens in the High Court was not of importance "at this point". This presumably being a reference to the fact that it would become of importance <u>if</u> leave were granted in which eventuality it was clear the Committee would have adjourned.

[16] The Chair of the Committee also sought legal advice from the legal assessor who pointed out "there has been no application made by the defence for an adjournment of these proceedings today". That must be construed as a

reference to there being no application in the conventional manner by way of oral legal representations. The Committee cannot of course have overlooked the email that had been sent the previous day especially since that had been discussed shortly before he had been invited to provide legal advice to the Committee. He also told the panel that it was their duty to balance the need to protect the public against the needs of the appellant for a fair hearing and that the panel could take into account the fact of the proceedings before the High Court. He urged the panel to carefully deliberate in private and pointed out that this was an important issue.

[17] The panel did withdraw and considered the legal advice on how they should proceed and on resuming at 11.00am they decided that the hearing would proceed and the reasons for that decision were:

> **"The registrant's representatives were informed on 28 February 2008 that these proceedings would resume at 10.00am on 10 March 2008. No representation was made by the registrant or her legal team to the panel as to their position. However, the panel was advised that an email was sent to Ms Clare Stringfellow, Case Manager at the NMC, to inform her that no representation from the registrant would be present on 10 March. The panel agreed to adjourn the hearing until 9.30am on 11 March. We note the registrant's legal representatives acknowledged this fact in written correspondence. No representation from the registrant appeared at 9.30am on 11 March. No formal application for an adjournment has been made. In all the circumstances, the panel has decided to continue in the registrant's absence in the interests of justice and the protection of the public. The registrant's legal team has been informed of this decision."**

The Committee then commenced to hear evidence from the relevant witnesses in the case.

[18] On 11 March Senior Counsel for the appellant, John O'Hara QC moved the application for leave to judicial review. According to the Court records the application commenced at 11.10am and concluded at 11.50am with the Judge reserving his ruling until the following morning, 12 March. The Court has been furnished with a copy of the judgment of Weatherup J delivered on 12 March. From para.1 of the judgment it appears that there was a challenge to three different decisions one of which was the Committee's refusal to adjourn the

substantive hearing. At para.18 of his ruling he concluded that there was not an arguable case in respect of the challenge to the Committee's decision refusing the abuse of process application. At para.19 he held that the refusal to adjourn the hearing "obviously follows from the decision that there was not an abuse of process and as I am upholding the first decision there is *no basis on which to interfere with the progress of the substantive hearing".*

[19] The hearing proceeded on 11 March 2008 in the absence of the appellant and her legal representatives and heard witnesses in support of the allegations of professional misconduct. The hearing resumed on 12 March 2008 and again the appellant did not attend and was not represented and further evidence was called during the course of the proceedings on that date.

[20] The Committee sat on 13 March 2008 when again the appellant did not attend but on this occasion Mr O'Brien appeared in rather unorthodox circumstances. At the commencement of the resumed hearing Mr Millard informed the Committee that he didn't wish to call any more witnesses and formally *closed the case*. The legal assessor then addressed the Committee in relation to the burden and standard of proof and other legal matters that they were required to consider and the panel withdrew to consider the facts. They sat in camera from 9.40am until 10.54am. At this point Mr O'Brien, who was then present, thanked the Committee for, as he put it, "giving me audience in these unusual circumstances". He indicated to the Committee that when the result of the judicial review had been given to the appellant on the previous day his instructing solicitors were so concerned about the appellant's reaction that they immediately arranged for her to be seen by a GP. A copy of a report from the appellant's GP, Dr Murty, was furnished to the Committee. Having referred to the contents of the medical report and the mental condition of the appellant, Counsel continued in respect of his renewed application to adjourn as follows:

> **"… And another strand in this whole feature is that throughout the abuse of process application you may recall that her solicitors were trying to get the grant of legal aid … and that application, we were told, day after day was on the Minister's desk and there it remains. Again, those instructing me *yesterday* were making repeated and in my view to try to get this whole thing expedited and *where it granted we would be immediately back seeking to representing her interests before the NMC."*[5]** [sic]

[5] See transcript, 13 March p4 Line 22 et seq

In seeking to have the case adjourned Mr O'Brien submitted that the appellant was

> **"not in a position *now* through mental ill-health to give instructions to her solicitors as to whether or not she wishes to call any witnesses as to any of the stages with which she must engage in and even if she were in a position to give instructions whether she is in a position to because of her funding situation so, logically, until her health issue is resolved *and* legal aid issue is resolved, there is real procedural unfairness in continuing."[6]**

He then submitted that they hadn't heard anything from the appellant because by virtue of her ill-health it was claimed she hadn't been in a position to present her case "these last days".

[21] At p14 of the transcript for that day's proceedings Counsel stated, "on a procedural point I have a [unspecified] speaking engagement at shortly after lunchtime and I have a [unspecified] meeting to attend before then." This is difficult to understand since this was day three of the second week of a two-week listing. In any event the Committee received detailed submissions from the parties and legal advice from the legal assessor and retired to consider its decision. The advice that the legal assessor gave the Committee was as follows:

> **"My advice … is that [the Committee] have three options: firstly accede to the application and adjourn the hearing now. Secondly, continue with their deliberations as to the finding of facts and adjourn at that stage, thirdly, to dismiss the application and continue through to the ends of this process whether this be at the facts stage or later. Throughout the deliberations, the panel must consider the content of the letter from Dr Murty and the potential effect their decision may have on the registrant. This is an extremely sensitive and difficult decision. My advice however to the panel is to chose a second option – that is to continue with their deliberations as to the finding of facts. If they find that none of the facts are proved then the proceedings will come to a natural end. If they find that some or all of the facts are proved I would**

[6] See transcript, 13 March p10

> **advise that they adjourn at this point. My reasons for this are as follows: the proceedings have reached a stage where there is no further opportunity for the registrant to make representations as to the facts. The committee has heard all of the evidence in relation to the facts that it's going to. I do not feel that any prejudice will be caused to the registrant if the panel finishes their deliberations on the facts. Secondly, I am conscious if the panel were to adjourn the case without deciding on the facts that this case would go into a state of limbo which could not be right or beneficial for either the interests of the registrant or indeed the public. Thirdly, if the panel, after deliberation, find some or all of the facts proved, the proceedings come to a point where the registrant must be allowed to make appropriate submissions, representations and indeed call witnesses etc. I would advise the panel that, given the content of Dr Murty's letter, it would be unsafe to proceed further once this juncture is reached. I accept the panel are faced with an extremely difficult decision but they must make that decision based on the need to balance the interests of the registrant and to protect the public …"**

[22] It appears that the Committee accepted this advice because when they returned after their deliberations they indicated that they had decided not to accede to the application "at this stage" of the proceedings and that they would reach their decision on the facts and depending on those findings would reconsider the application for a postponement at that stage. The Committee then retired again for a considerable period of time and returned and made their findings in respect of the disciplinary charges. Charges 1, 2(ii), 3, 4(i), 5 and 6 were all proven. [See Footnote 1 on p2 of this Judgment]. Charges 2(i) and 4(ii) were not proven.

[23] The proceedings in relation to sanction were postponed and the tribunal reconvened on 18 November 2008 for the purposes of deciding, now that the facts had been established, whether the appellant's fitness to practice was impaired by reason of the misconduct found. At the resumption of the substantive hearing to deal with "fitness to practice" and "sanction" Mr O'Brien informed the Committee that the appellant was now able to give instructions and he then mounted an application that the proceedings should be reconvened *de novo* in front of a differently constituted committee. The Committee, after having

received detailed submissions and advice from the legal assessor, stated as follows:

> **"In the view of the panel there are two strands to the submissions relating to the registrant namely health matters and funding. These matters have all been considered, as they must, in the light of the European Convention … and in particular Article 6. With regard to the matters relating to the registrant's health, the panel has heard references throughout these proceedings to the stress and the effect it has had on her health. The panel was informed that prior to 13 March 2008 these references were *all* related to the effect of the delay following the initial referral of this matter. The *first time* the panel received evidence that the registrant's health had deteriorated to such a degree that she could not give instructions to her solicitors was on 13 March 2008. This occurred whilst the panel was considering its decision on the finding of fact. Counsel made an application to stop the proceedings given the registrant's acute mental health state on 13 March. This was supported by a letter dated 12 March by Dr Murty … The panel then decided to continue its deliberations on the facts. If they found none of the facts proved, then the proceedings would have come to a natural end. The panel made its findings on the facts, but indicated that proceedings should stop at that point because they were at a stage where the registrant could provide evidence to the panel on her fitness to practice on grounds of impairment.**
>
> **Therefore, at no stage *prior* to the finding of facts did the panel receive evidence that the registrant could *not* give evidence *or* instruct her legal representative. Indeed it is apparent that on 28 February 2008 that the registrant was able to give instructions to her representatives to institute judicial review proceedings in the High Court. The argument presented is that due to a change in the registrant's health status that she is now capable of giving evidence and that she should now be allowed to do so before a newly constituted panel rehearing all the evidence. … Witnesses for the NMC were**

> **tested at length by the panel. The panel placed no obstacle on the registrant's ability to give evidence or to call witnesses at the appropriate point in the proceedings. ... In all the circumstances the panel are of the view that to proceed with the hearing the registrant's rights as enshrined in Article 6 would not be breached."**

Issues

[24] The appellant's challenge is to the decisions of the Committee to proceed in her absence and that of her legal representatives and to have made findings of fact and determinations based on those findings in those circumstances. The second ground of challenge relates to the decision of the Committee arising from its deliberations in November when it refused to set aside its findings and recommence *de novo* before another committee. In my view the viability of this latter ground depends on the view taken by the Court in relation to the correctness of the Committee's decision to proceed in her absence in March 2008[7].

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[7] Grounds 1 and 2 were expressed in the following terms:

1. The Appellant contends that the Conduct & Competence Committee of the Nursing & Midwifery Council acted in breach of her rights pursuant to section 6 of the Human Rights Act 1998 and Article 6 and Article 1 of the First Protocol of the European Convention on Human Rights and Fundamental Freedoms as provided by the first Schedule to the Human Rights Act 1998 when it found certain charges against her to be proven despite the fact that when it found such facts the Conduct & Competence Committee was aware;

(i) Having received medical evidence as to same, the Appellant was in extreme mental ill health and was too unwell to participate in the proceedings; and

(ii) That the Appellant was insolvent and did not have the financial means to engage legal representation to contest the charges against her by way of cross-examination of the witnesses who gave evidence in support of the charges against her; and

(iii) The Appellant sought a stay of the proceedings before the Conduct & Competence Committee until the outcome of her application for leave to bring a Judicial Review of the Committee's decision that there had not been an abuse of process in convening the Committee; and

(iv) That it proceeded to make findings of fact that certain charges against the Appellant were proved, despite the fact that that the Appellant and her legal representative were absent when such findings were made.

2. The Appellant contends that the Conduct & Competence Committee of the Nursing & Midwifery Council acted in breach of her rights pursuant to section 6 of the Human Rights Act 1998 and Article 6 and Article 1 of the First Protocol of the European Convention on Human Rights and Fundamental Freedoms as provided by the first Schedule to the Human Rights Act 1998 when it determined;

(v) Having received medical evidence adduced on 18 November 2008 that the Appellant was now well enough to engage in the proceedings, and having been informed that the Appellant had secured funding to contest the charges against her, denied the Appellant's applications;

(a) That it should set aside its primary findings of fact and recuse itself; and

The Nursing and Midwifery Council (Fitness to Practice) Rules 2004 ("the 2004 Rules")

[25] Applications for adjournments are governed by Rule 32 of the 2004 Rules which provide as follows:

> *Postponements and adjournments*
>
> **32. - (1) The Chair of the Practice Committee may, of her own motion, or upon the application of a party, postpone any hearing of which notice has been given under these Rules before the hearing begins.**
>
> **(2) A Practice Committee considering an allegation may, of its own motion or upon the application of a party, adjourn the proceedings at any stage, provided that -**
>
> **(a) no injustice is caused to the parties; and (b) the decision is made after hearing representations from the parties (where present) and taking advice from the legal assessor.**
>
> **(3) Where the proceedings have been adjourned, the Practice Committee shall, as soon as practicable, notify the parties of the date, time and venue of the resumed hearing.**
>
> **(4) In considering whether or not to grant a request for postponement or adjournment, the Chair or Practice Committee shall, amongst other matters, have regard to -**
>
> **(a) the public interest in the expeditious disposal of the case;**

(b) That it should remit the matter to a freshly-constituted Conduct & Competence Committee.

(vi) Having received medical evidence on 18 November 2008 that the Appellant was then well enough to engage in the proceedings, the Competence & Conduct Committee failed to give sufficient consideration to all the medical evidence in determining that the Appellant's case should not be referred to the Health Committee of the Nursing & Midwifery Council, pursuant to Rule 14 of the Nursing & Midwifery Council (Fitness to Practise) Rules Order of Council 2004.

(b) the potential inconvenience caused to a party or any witnesses to be called by that party; and (c) fairness to the registrant.

[26] Although the Court was referred to a large body of authorities most were fact specific applications of general principles that are not in doubt. The clearest exposition of the requirements of fairness, which I am prepared to accept as being apposite in the present context, is the decision in ***R v Jones*** **[2002] UKHL 5 (20 February 2002).**

[27] Lord Bingham in ***Jones*** stated as follows in respect of proceeding in the absence of the Defendant who in that case had absconded:

> **" 6. For very many years the law of England and Wales has recognised the right of a defendant to attend his trial and, in trials on indictment, has imposed an obligation on him to do so. The presence of the defendant has been treated as a very important feature of an effective jury trial. But for many years problems have arisen in cases where, although the defendant is present at the beginning of the trial, it cannot (or cannot conveniently or respectably) be continued to the end in his presence. This may be because of genuine but intermittent illness of the defendant (as in *R v Abrahams* (1895) 21 VLR 343 and *R v Howson* (1981) 74 Cr App R 172); or misbehaviour (as in *R v Berry* (1897) 104 LT Jo 110 and *R v Browne* (1906) 70 JP 472); or because the defendant has voluntarily absconded (as in *R v Jones (Robert) (No 2)* [1972] 1 WLR 887 and *R v Shaw (Elvis)* [1980] 1 WLR 1526). In all these cases the court has been recognised as having a discretion, to be exercised in all the particular circumstances of the case, whether to continue the trial or to order that the jury be discharged with a view to a further trial being held at a later date. The existence of such a discretion is well-established, and is not challenged on behalf of the appellant in this appeal. But it is of course a discretion to be exercised with great caution and with close regard to the overall fairness of the proceedings; a defendant afflicted by involuntary illness or incapacity will have much stronger grounds for resisting the continuance of the**

trial than one who has voluntarily chosen to abscond.

...

13. ... the discretion to commence a trial in the absence of a defendant should be exercised with the utmost care and caution. If the absence of the defendant is attributable to involuntary illness or incapacity it would very rarely, if ever, be right to exercise the discretion in favour of commencing the trial, at any rate unless the defendant is represented and asks that the trial should begin.."

The Parties Submissions

[28] It is common case, and the respondent accepts, that Article 6 rights are engaged by the disciplinary proceedings and that Article 1 of the Protocol arguably applies to the range of potential sanctions that can follow disciplinary proceedings. The central issue is whether, in the circumstances of this case, those rights were breached. The respondent's principal contention is that by deliberately failing to attend the resumed hearing on 10-12 March the appellant *elected* not to exercise the rights she would otherwise have been afforded.

[29] The appellant, on the other hand, maintains that the decisions made did infringe her Article 6 and Article 1 rights by reason of the matters referred to in Grounds 1 and 2 of the Notice of Appeal.[8]

Conclusions

[30] Ground 1 of the Notice of Appeal contended that the Committee violated the appellant's rights when it found the charges proven when it was aware (i) that she was too unwell to participate in the proceedings; (ii) did not have the financial means to engage legal representation to cross-examine witnesses; (iii) had sought a stay pending the outcome of her judicial review proceedings; and (iv) had made findings of fact when she and her legal representatives were absent.

[31] As to the medical evidence which is relied upon in this case it is quite clear that it provides no justification for the failure of the appellant and her legal representatives to attend on those days on which the evidence was being given namely 10 – 12 March. *The first time* that her mental condition was raised as a

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[8]See Footnote 7, p12

ground to justify postponing the proceedings was on 13 March *consequent* upon the judgment of Mr Justice Weatherup dismissing her application for judicial review (in which the appellant and her legal representatives appear to have reposed so much faith). It has to be remembered that at the stage at which the appellant chose to be represented by Junior Counsel on 13 March for the purposes of moving a further postponement application, *all of the evidence had already been heard* and the panel had *commenced their deliberations*. If similar conduct had been engaged in by a defendant and his or her legal representatives in a criminal context when, for example, the jury had retired to consider their verdict, I regard it as virtually inconceivable that it could be credibly argued that fairness would require discharge of the jury and the recommencement of the proceedings *de novo*. In fact, having concluded their deliberations on the findings the Committee did then postpone the fitness to practice and sanction proceedings to a date in November by which stage the appellant had apparently recovered sufficiently well to allow her and her legal representatives to be in attendance.

[32] As far as the appellant's financial means are concerned I do not consider that there is any merit in this ground. The appellant's representatives had agreed to appear pro bono[9] (although they were hoping to source legal aid funding). They had committed themselves to a two week hearing. It was fortuitous that this was not two weeks back to back – which is what the appellant's Counsel would have preferred. Had the abuse application only lasted a day or less as originally envisaged the Committee would have been straight into evidence. Contrary to what Mr O'Brien had submitted[10] to the Committee such stay applications, when rejected in the criminal context, do *not* lead to the recusal of the Court nor do they hinder the continuance of the proceedings. Once the legal representatives had committed themselves to the two week hearing they were professionally obliged to continue and therefore *ordinarily* it would be assumed any absence was *on instruction*.

[33] As far as the absence of the appellant is concerned it is clear that this was *elective*. It is self evident that had this election not been made the matters of which she complains would not have arisen. The appellant's legal representatives were aware at the time the letter of 7 March was sent that there was **no** listing of the case on Monday 10 March. I do not therefore understand why the Committee was told otherwise nor is it clear why the letter contemplates a leave hearing of two days "and onwards". At most any leave hearing, in respect of the issue being canvassed, was not likely to take more than a couple of hours. Moreover, such a leave hearing would not have required the presence of

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[9]E.g. see transcript, 13 March p3 Line 16
[10] See transcript, 28 February p6

the appellant or of Junior Counsel who had been representing the appellant before the Committee. In fact, it was Senior Counsel, Mr John O'Hara QC, who moved the leave hearing on the morning of Tuesday 11 March 2008. The Court records indicate that the leave hearing lasted 40 minutes. Judgment was reserved until the following day, 12 March. There would have been no need for any Counsel, let alone both Senior and Junior, to be in attendance for the judgment. Therefore between 10 - 12 March (during which all the evidence was called) the appellant elected to be absent thereby denying herself the safeguards to which she is entitled.

[34] The judicial review was not listed on Monday 10 March and therefore the appellant and her legal representatives could (and should) have been in attendance before the Committee. They were professionally obliged to be at the resumed part-heard proceedings and they had, in fact, no good or any reason for not being present. Furthermore, contrary to the contentions of the appellant's Counsel, I do not accept that Monday 10 March was required for preparatory work in respect of the judicial review/leave application. The only basis upon which the appellant's legal representatives could have been relieved of their professional obligations to her would have been if she had **instructed** them not to attend on her behalf at the hearing. But if those instructions had been given *in consequence of the legal advice* that the appellant had received then this court must be told of that fact. On the facts as they now appear any absence on the part of the appellant on the relevant dates appears to have been elective.

[35] It has not been suggested by anyone that the appellant's legal representatives *advised* the appellant to take the course of being absent. Indeed, had that been the case, it would have been their duty to inform the Court that that was the basis for the appellant's non-attendance. If (erroneous) legal advice had been the reason for her non-attendance it might well have a bearing, as a matter of overall fairness, on the Court's decision on this aspect of the appeal. Accordingly, it is vital for the Court to know whether the *election* was as a result of or despite the legal advice the appellant had received. There are transcript references which suggest the latter but I have a lurking doubt about the substantive reality from the appellant's point of view. This can only be clarified, as a matter of fairness, by the receipt of evidence from the appellant.

[36] An application to stay was made on 28 February. Submissions from both parties were received and considered. Legal advice was received and considered. The Committee retired to consider the material and ruled against the application and made it explicitly clear that the hearing would continue on 10 March. The Committee were bound to have been significantly influenced in reaching their decision by the inevitable adverse impact of significant further delay which would have been occasioned if the postponement application had been granted.

Moreover, at the time the application to postpone was made no application for leave had been mounted or more significantly *granted*. As subsequent events have amply demonstrated, the judicial review was devoid of merit since it failed to cross the very modest threshold of arguability applied by the Court at the leave stage. Importantly, the judicial review challenge sought, amongst other things, to impugn the Committee's refusal to adjourn the substantive hearing on 10 March. It must be remembered that leave was refused on that ground for the reasons which I have already set out above.

[37] Until the matters which are concerning the Court are clarified it will not be possible to definitively rule on Grounds 1 and 2. Accordingly, I will invite further submissions and evidence from the parties on this issue in light of the Court's observations.