Neutral Citation Number: [2016] EWHC 1015 (Admin)

Case No CO/6595/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/05/16

Before :

MR JUSTICE HICKINBOTTOM

Between :

THE QUEEN on the application of
THE BRITISH MEDICAL ASSOCIATION

Claimant

and

THE GENERAL MEDICAL COUNCIL

Respondent

and

THE SECRETARY OF STATE FOR HEALTH

Interested Party

(Transcript of the Handed Down Judgment of
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Mark Sutton QC and **Betsan Criddle** (instructed by **Capital Law LLP**) for the **Claimant**
Ivan Hare (instructed by **Principal Legal Adviser, GMC Legal**) for the **Respondent**
The Interested Party neither appeared nor was represented.

Hearing date: 14 April 2016

Judgment
As Approved by the Court

Mr Justice Hickinbottom :

Introduction

1. The Claimant ("the BMA") is the professional association and registered trade union for doctors in the United Kingdom, with a membership of about 170,000 doctors and medical students. The regulation of the profession is, however, not part of the BMA's function, but the responsibility of the Defendant ("the GMC"). As part of that role, the GMC investigates and, through tribunals organised by a GMC committee, deliberates and adjudicates upon complaints concerning doctors' fitness to practise.

2. In this claim, the BMA seeks to challenge the legality of rules governing the procedure of such panels as from 31 December 2015, as set out in the schedule to the General Medical Council (Legal Assessors and Legally Qualified Persons) Rules Order of Council 2015 (SI 2015 No 1958) ("the 2015 Assessors Rules"). The claim focuses particularly upon paragraph 6(b) of those Rules, which provides that, after the tribunal has begun deliberating, when a legally qualified tribunal chair advises other the panel members on any question of law, he need not do so in the presence of the parties, but may simply include the advice that has been given in the tribunal decision. That can be compared with advice given to a tribunal by a legal assessor, who is not part of the decision-making panel, which must be given or repeated in the presence of parties who are present at the hearing, thus giving those parties an opportunity to make submissions upon it before the tribunal reaches a determination. The BMA contends that paragraph 6(b) of the Rules breaches the requirements of natural justice and/or the right to a fair trial under article 6 of the European Convention on Human Rights ("article 6"), and is irrational in differentiating between advice given by a legally qualified chair and that given by a legal assessor.

3. On 21 January 2016, Lang J directed that the application for permission to proceed be listed on an expedited and rolled-up basis, so that, if permission were granted, the substantive hearing would immediately follow. I should say at the outset that, having heard full submissions, I grant permission to proceed.

4. At the hearing before me, Mark Sutton QC and Betsan Criddle of Counsel appeared for the BMA, and Ivan Hare of Counsel for the GMC. I thank them all for their helpful contribution to the debate.

The Legal Background

5. The Medical Act 1983 ("the 1983 Act") charges the GMC with various functions relating to medical practitioners, including keeping a register of all those who practise medicine in the United Kingdom (section 2 and Part IV) and investigating allegations that a registered doctor's fitness to practise is impaired (Part V).

6. Until this year, such investigations were conducted under the General Medical Council (Fitness to Practise) Rules Order of Council 2004 (SI 2004 No 2608) ("the 2004 Fitness to Practise Order"). Under that Order, where an allegation was made that a registered medical practitioner's fitness to practise was impaired, having given the practitioner an opportunity to respond to the allegation, case examiners were required to decide whether to refer the matter to a Fitness to Practise Panel ("FPP") for adjudication and determination. Where a referral was made, the FPP would adopt

a staged process, by which, having considered the relevant evidence, it would (i) make findings of fact, (ii) on the basis of the facts found, determine whether the doctor was guilty of misconduct or deficient professional performance such that his current fitness to practise as a doctor was impaired, (iii) if a finding of impairment was made, determine the appropriate sanction (available sanctions including making the doctor's registration subject to a condition, or suspending or erasing him from the register), and (iv) determine whether any sanction should take effect immediately or be suspended. Pending a substantive decision on a case, an FPP or a differently constituted panel (an Interim Orders Panel ("IOP")) had the power to make registration conditional or suspend the doctor from the register for up to 18 months, if satisfied that such an interim measure was necessary for the protection of members of the public or otherwise in the public interest. From 2012, FPPs and IOPs were administered by the Medical Practitioners Tribunal Service ("MPTS"), an operationally distinct arm of the GMC.

7. An FPP or IOP had to be composed of three members, including a chair (General Medical Council (Constitution of Panels and Investigation Committee) Rules Order of Council 2004 (SI 2004 No 2611) ("the 2004 Constitution Order")). At least one of the panel was required to be medical, and at least one lay (i.e. non-medical). Those provisions were materially replicated in the General Medical Council (Constitution of Panels, Tribunals and Investigation Committee) Rules Order of Council 2015 (SI 2015 No 1965), which are current.

8. In the 2004 Constitution Order, there was no requirement for any member of the panel to be legally qualified, although being a lawyer did not disentitle an individual from being a panel member and, in practice, some members were legally qualified.

9. In any event, paragraph 7 of schedule 4 to the 1983 Act required the appointment of a legal assessor to advise the panel on questions of law arising in any particular case, in the following terms:

> "(1) For the purposes of advising
>
> …
>
> (b) an [IOP]; or
>
> (c) [an FPP],
>
> on questions of law arising in proceedings before them, there shall in all such proceedings be an assessor to the Panel who shall be appointed by the [GMC] and shall be [a professional lawyer of 10 years' standing].
>
> …
>
> (3) The [GMC] may make rules as to the functions of assessors appointed under this paragraph, including without prejudice to the generality of the powers to make such rules, the function of advising on the drafting of decisions.

(4) Rules made under this paragraph in connection with proceedings before… an [IOP] or [an FPP] may in particular contain such provisions as appear to the Lord Chancellor or the Secretary of State expedient for –

(a) securing that where an assessor advises… a Panel on any question of law as to evidence, procedure or any other matter specified in the rules, he shall either –

(i) so advise in the presence of every party, or person representing a party, to the proceedings who appears at the proceedings, or

(ii) inform every such party or person of the advice that he has tendered, if the advice is tendered after… the Panel have begun their deliberations;

(b) securing that every such party or person shall be informed if in any case… the Panel do not accept the advice of the assessor on any such question…"

10. The General Medical Council (Legal Assessors) Rules 2004 (SI 2004 No 2625) ("the 2004 Assessors Rules") were made pursuant to the power contained in paragraph 7(3) and (4). In respect of advice from legal assessors, those Rules provided as follows:

"**Functions of legal assessors**

2. Legal assessors shall have the following functions –

(a) advising… the Panel on questions of law arising in proceedings before them, and in particular a legal assessor shall, in such proceedings –

(i) advise… the Panel on any question of law that is referred to him by… the Panel, and

(ii) intervene to advise… the Panel on an issue of law where it appears to him that, without his intervention, there is the possibility of a mistake of law being made, and

(iii) intervene to advise… the Panel of any irregularity in the conduct of the proceedings which comes to his knowledge; and

(b) advising on the drafting of decisions of… a Panel (notwithstanding that legal assessors will not themselves be parties to those decisions).

Attendance of legal assessors

3. In all proceedings in which a legal assessor must… be appointed, the… Panel conducting those proceedings shall not hold any meeting or hearing in respect of those proceedings in the absence of the legal assessor appointed in those proceedings.

Advice of legal assessors tendered at hearings

4. – (1) Any advice tendered by a legal assessor on a question of law at a hearing shall, subject to paragraph (2), be tendered in the presence of every party, or person representing a party, in attendance at the hearing.

(2) Where … a Panel –

(a) has begun to deliberate on its decision; and

(b) considers that it would be prejudicial to the discharge of its functions for the advice of the legal assessor to be tendered in the presence of the parties or their representatives,

the advice may be tendered in the absence of the parties or their representatives.

(3) Where advice is tendered in the absence of the parties or their representatives in accordance with paragraph (2), the legal assessor who tendered that advice shall –

(a) as soon as practicable after the completion of the deliberations inform each of the parties (or their representatives) in attendance at the hearing of the advice he gave, together with any question which led to that advice; and

(b) subsequently record those matters in writing and give a copy to those parties or their representatives.

(4) Copies of written advice made for the purposes of paragraph (3) shall be available, on application, to every party to the proceedings who does not attend, and is not represented at, the hearing to which the advice relates."

11. It seems to be common ground between the parties that, in practice, if the legal assessor gave additional advice to the panel at a hearing during its private deliberations, that advice would be repeated in open session in the presence of the parties who had attended and those parties given an opportunity to make submissions upon it prior to the panel making a decision.

12. Therefore, before the introduction of the 2015 Assessors Rules:

i) It was obligatory for a legal assessor to be appointed to every GMC disciplinary panel, whether an FPP or an IOP.

ii) The legal assessor was not part of the panel, in the sense that he played no part in the decision-making process; but had the function of advising the decision-making panel on matters of law and procedure.

iii) Any such advice had to be tendered in the presence of the parties and their representatives in attendance, unless the panel had retired to deliberate in camera (i.e. in private) and it considered it would be prejudicial to the discharge of its functions to tender the advice in that way. In that event, the assessor was required to inform the parties in attendance of the advice given, as soon as practicable after completion of the deliberations. In practice, the assessor would repeat the advice in open session as soon as he sensibly could, and the parties would be given an opportunity to comment upon it before the panel made its determination.

iv) Consequently, in practice, parties who appeared at a hearing always had an opportunity to comment upon – and, if appropriate, challenge – any advice given by the legal assessor before it was adopted by the panel.

13. That practice was founded upon well-established law.

14. It is well-settled that, although not formally judicial bodies, GMC disciplinary panels – FPPs and IOPs, and their predecessors or successors – exercise a judicial function, in respect of which the requirement for a fair hearing is protected by both article 6 of the ECHR (see, e.g., Le Compte, Van Leuven and de Meyere v Belgium (1982) 4 EHRR 1) and the common law.

15. The role of a legal assessor to a GMC disciplinary panel was specifically considered by the Privy Council (the relevant appellate body from decisions of the then Professional Conduct Committee of the GMC) in Nwabueze v General Medical Council [2000] 1 WLR 1760. It had been long-established that the role of such a legal assessor was restricted to advising on questions of law, and he played no part in the decision-making process (see, e.g., Fox v General Medical Council [1960] 1 WLR 1017 at 1021 per Lord Radcliffe; confirmed in paragraph 2(b) of the 2004 Assessors Rules, quoted at paragraph 10 above). In Nwabueze, the legal assessor gave advice to the panel whilst it was deliberating in private, and the assessor later told the parties what that advice was; but the parties were not given an opportunity to comment upon it before the panel chair announced that certain charges had been proved. The Privy Council held that common law fairness required not only that parties should be informed of advice given, but also afforded an opportunity to comment upon that advice enabling the panel to consider those comments before announcing its determination. However, there was no infringement of the right to a fair hearing in that case because, although such an opportunity had not been afforded, there was no material defect in the advice that the legal assessor had in fact given. In giving the judgment of the Privy Council, Lord Hope said (pages 1775C-1776D):

> "… [T]heir Lordships consider that the principle which lies behind the requirement that the parties should be informed of the assessor's advice to the Committee is that of fairness, and

> that fairness requires that the parties should be afforded an opportunity to comment on that advice and that the Committee should have an opportunity to consider their comments before announcing their determination. The transcript of the proceedings indicates that the Chairman regarded the legal assessor's statement about the legal advice which he had tendered to the Committee while they were deliberating in camera as a mere formality, as the Committee had already arrived at their determination which he was about to announce. This was a misconception, as the reason why the legal assessor's advice to the Committee must be given or made known to the parties afterwards in public is so that the parties may have an opportunity of correcting it or of asking for it to be supplemented as the circumstances may require. In this respect the requirements of the common law would appear to be at one with those of article 6 of the Convention, by which the Professional Conduct Committee will be bound when the Human Rights Act 1998 comes into force….
>
> The question whether there is any substance in this part of Mr Foskett's argument must however depend on whether there were any material defects in the advice which the legal assessor gave to the Committee which could properly have been made the subject of comment or criticism….
>
> Their Lordships were unable to find any points of substance in these criticisms or to detect any material defect in the advice regarding either head of charge which it would be reasonable to expect the assessor to have corrected if they had been drawn to his attention after he had made his statement. This ground of appeal also must be rejected."

16. That passage emphasises two important things. First, the requirements of the common law and article 6 in this area are substantially similar. Second, fairness of process is necessarily fact-specific and focused on outcome – in other words, in a particular case, the court must assess whether the process adopted was, in the circumstances of that case, unfair. That latter proposition is not only a well-established general principle of public law, it has been consistently applied in this specific field in (e.g.) Fox, where Lord Radcliffe (at page 1023) referred to a procedural deficiency that might lead to a disciplinary tribunal panel decision being quashed in terms of "some defect in the conduct of the inquiry… that may fairly be thought to have been of sufficient significance to the result to invalidate the committee's decision".

17. In the context of legal advice to a tribunal, Mr Sutton also relied upon Clark v Kelly [2003] UKPC D1; [2004] 1 AC 681, another Privy Council case but of a very different sort. The question raised in the case was whether the Scottish district court (which, similar to the magistrates' court in England and Wales, is a criminal court comprising lay justices advised, often in private, by a legally qualified clerk) satisfied the requirements of article 6. The matter had been referred to the Privy Council by the Lord Advocate under paragraph 33 of schedule 6 to the Scotland Act 1998 as

raising a devolution issue. Their Lordships relied upon different analyses of the relationship of the clerk and the justices. Lord Bingham (at [6]) did not consider it would be helpful to consider whether the clerk was or was not part of the tribunal in the district court. Lord Hoffmann (at [21]) considered that, for the purposes of article 6, the clerk was part of the tribunal; and Lord Rodger (at [91]) also considered that the clerk should be regarded "as a court officer and as an integral part of the district court…". However, Lord Hope, with whom Lord Hutton agreed (see [72]), proceeded on the basis that the clerk was not a member of the tribunal, as he did not sit on it in any judicial capacity (see [53]). Mr Sutton submitted, with some force, that Lord Hope's observations on the role of the clerk are therefore relevant in the context of GMC legal assessors, who also give advice from a position outside the decision-making tribunal.

18. Lord Hope said (at [64]-[68]):

> "64. … [T]he role which the clerk plays when giving legal advice to the justice in private is part of the ordinary functioning of the court, as the clerk functions on the same side of the court as the justice who must decide the case. But I am less confident that an analogy can be drawn between the giving and receiving of that legal advice and the discussions which take place in private among judges about a decision which they have yet to take. Judges engage in these discussions to exchange views and test opinions, not to obtain legal advice. Unlike the judges, however, the lay justices are not legally qualified. The provision of legal advice by the clerk is a step in the proceedings which does not occur in a hearing which is conducted before judges (by 'judges' I mean all judicial officers who are legally qualified, including sheriffs and stipendiary magistrates). All matters of law, practice and procedure can be debated with the judges directly. But a party to proceedings in the district court cannot participate in the giving of legal advice to the justice unless he is made aware of the advice that is being given to the justice by the clerk. It is that aspect of the matter which seems to me to engage the accused's right under article 6(1) to a fair and public hearing.
>
> 65. In my opinion a balance must be struck between the rights of the accused and the requirements of the court when it is seeking to administer justice. The rule of law lies at the heart of the Convention, and it is not its purpose to impede any further than is necessary the way in which an independent and impartial court goes about its business in order to achieve a result which complies with the law. It is obviously of prime importance that the justice, who has to take all the decisions, should understand the legal advice which the clerk is offering to him. The giving and understanding of that advice would be unduly inhibited if the entire conversation had to be carried out in public so that the accused could follow every word that was being spoken, and every question asked, on either side. The

fact that the conversation takes place in private, and even in the retiring room if the justice thinks that this would be appropriate, is not in itself objectionable. What is objectionable is depriving the accused of his right to know what is going on during his trial, and in particular his right to know what legal advice is being given to the justice so that he can have the opportunity of commenting on it.

66. …

67. In Clark v Kelly 2001 JC 16 [the determination being appealed] at [24], Lord Milligan, delivering the opinion of the High Court of Justiciary, said that the court found nothing objectionable in the practice of private communications between the clerk as legal assessor and the justice provided that care was taken not only to confine such communications to the provision of legal advice but also to recognise and raise in open court any matter upon which the defence, or indeed the prosecution, might reasonably wish to make material comment. I agree with these observations. But I have more difficulty with the advice which he gave when he said in the immediately preceding passage in his opinion that the court was concerned to ensure that the following matters were raised in open court:

> '(1) The content of any advice on the law given privately by the clerk to the justice which the clerk, or indeed the justice, perceives as possibly controversial; (2) observation by the clerk that some authority has been cited, or submission made, which is inaccurate as to the current position in law; and (3) more generally, any matter which the clerk, or indeed the justice, perceives could be the object of relevant submission by one or other or both of the defence and the prosecution.'

It respectfully seems to me that this wording is unduly complicated, and that it leaves too much to what the clerk or the justice perceives as controversial or as likely to be the object of submission by the parties. The parties may quite legitimately have different views as to whether the advice which is being given by the clerk is controversial or in need of correction. I would favour a simpler and more precise formula which was capable of being applied uniformly by every court.

68. In Practice Direction (Justices: Clerk to Court) [2000] 1 WLR 1886, which was issued by Lord Woolf CJ on 2 October 2000 on the coming into force of the Human Rights Act 1998, the following guidance is given to justices' clerks and authorised legal advisers in England and Wales…:

> '8. At any time, justices are entitled to receive advice to assist them in discharging their responsibilities. If they

> are in any doubt as to the evidence which has been given, they should seek the aid of their legal adviser, referring to his/her notes as appropriate. This should ordinarily be done in open court. Where the justices request their adviser to join them in the retiring room, this request should be made in the presence of the parties in court. Any legal advice given to the justices other than in open court should be clearly stated to be provisional and the adviser should subsequently repeat the substance of the advice in open court and give the parties an opportunity to make any representations they wish on that provisional advice. The legal adviser should then state in open court whether the provisional advice is confirmed or if it is varied the nature of the variation.'
>
> Mr Macaulay said that he saw no difficulty in applying this guidance in Scotland. It is also consistent with the guidance which the Board gave to the Professional Conduct Committee of the General Medical Council which, like the district courts, is composed of lay members who are advised by a legal assessor on matters of law, in Nwabueze…".

19. In late 2014, the Secretary of State for Health formally consulted on proposed changes to the process in GMC disciplinary proceedings. The Secretary of State's response to the submissions made, published on 16 January 2015, proposed that the GMC should have a discretion to dispense with a legal assessor where the panel chair was legally qualified. However, it was also proposed that the main changes would include:

> "Introducing a rule making power to require the parties to be informed of certain advice provided by a legally qualified chair to the other tribunal members, including while they are considering issues in private, in line with that applicable to legal assessors."

20. On 19 March 2015, the General Medical Council (Fitness to Practise and Over-arching Objective) and the Professional Standards Authority for Health and Social Care (References to Court) Order 2015 (SI 2015 No 794) ("the 2015 Fitness to Practise Order") was approved by Parliament, the relevant provisions (including article 8(6), which inserts a new paragraph 1(4E) into schedule 4 of the 1983 Act: see paragraph 21(iv) below) coming into force on 3 August 2015 and the whole Order coming into force by 31 December 2015.

21. The 2015 Fitness to Practise Order did not affect wholesale changes to the procedure in the 2004 Fitness to Practise Order as set out above. However, the 2015 Order made a number of significant amendments relevant to this claim, for example:

    i) By article 7 of the Order, an overriding objective for the procedural rules is adopted by the insertion of a new paragraph (1A) into schedule 4 to the 1983 Act, as follows:

> "The overriding objective of the General Council in making rules under [schedule 4] with respect to the procedure to be followed in proceedings before [an MPT] or an [IOT]… is to secure that the Tribunal… deals with cases fairly and justly."

ii) Nomenclature changed: the FPP was reconstituted as "the Medical Practitioners Tribunal", and the IOP became "the Interim Orders Tribunal" (article 3 of the Order, inserting a new paragraph 19G into schedule 1 to the 1983 Act). The MPTS remained as the administrative service, but now established as a committee of the GMC (article 2 of the Order, inserting a new paragraph 19F into schedule 1 to the 1983 Act).

iii) Article 13(3) of the Order amends the provision for the appointment of legal assessors, by inserting a new paragraph (1B) into schedule 4 of the 1983 Act, as follows:

> "(1B) The MPTS must appoint a person as an assessor to [an MPT] or an [IOT] for the purpose of advising the Tribunal on questions of law arising in proceedings before them –
>
> (a) if the chair of the Tribunal is not a legally qualified person, or
>
> (b) in any other case where they consider it appropriate to do so."

Thus, if the chair is legally qualified, it is no longer necessary for a legal assessor to be appointed.

iv) By article 8(6) of the Order, a new paragraph 1(4E) is inserted into schedule 4 to the 1983 Act, as follows:

> "Rules made under [paragraph 1 of schedule 4] in connection with any proceedings before [an MPT] or an [IOT] may contain such provisions as appear to the General Council expedient for securing that, where the chair of the Tribunal is a legally qualified person and the chair advises the Tribunal on any question of law as to evidence, procedure or any other matter specified in the rules, the chair shall either –
>
> (a) so advise in the presence of every party, or person representing a party, to the proceedings who appears at the proceedings, or
>
> (b) inform every such party or person of the advice that the chair has tendered, if the advice is tendered after the Tribunal have begun their deliberations,

> whether by including the advice in the Tribunal's decision or by some other means."

Furthermore, earlier, article 57(3)(b) of the Medical Act 1983 (Amendment) and Miscellaneous Amendments Order 2006 (SI 2006 No 1914) had amended paragraph 7(4) of schedule 4 to the 1983 Act is amended, so that the references to the Lord Chancellor and Secretary of State are replaced by references to the General Council of the GMC, i.e. the GMC has control over the procedural rule making function.

22. Parallel to these changes, on 20 May 2015, the GMC itself issued a public consultation document, "Reforming our fitness to practise investigation and adjudication process: a public consultation on changes to our rule". Question 3 upon which views were sought was as follows:

> "We propose that where legally qualified chairs advise the panel on a question of law they will do so either in the presence of the parties or, where the parties are not present, they will include their advice in their decision. Do you agree?"

23. Attached to the consultation document were draft rules, including, as paragraph 6:

> "Where, in proceedings before a Tribunal, a legal assessor has not yet been appointed…, and the Chair as a legally qualified person advises the Tribunal on any questions of law as to evidence or procedure, the Chair shall –
>
> (a) so advise in the presence of the parties, or person representing a party, in attendance at the hearing; or
>
> (b) if the advice is tendered after the Tribunal has begun to deliberate on any decision [during the course of the proceedings], include the advice so given in the Tribunal decision"

24. In its consultation response, the BMA opposed the proposal that, if the parties were not present, the advice from a legally qualified chair would simply be set out in the tribunal decision, on the basis that it departed from the then-current position whereby all advice was made known to the doctor – and an opportunity given to enable him to make submissions on that advice – prior to his case being determined. RadcliffesLeBrasseur (a firm of solicitors who regularly represent doctors before panels) also objected to the proposal, considering that a failure to give a doctor an opportunity to comment on advice given would render the hearing "fundamentally unfair".

25. In September 2015, following closure of the consultation period, the GMC published its response to the views received and its recommendations. In respect of question 3, it said:

> "A large majority of respondents (79%) agreed that where legally qualified chairs advise the panel in camera (not in the presence of the parties) they should include their advice in the

written decision. Two respondents thought legally qualified chairs should not give advice at all. In relation to advice given in private, three thought no advice should be given, one that the decision should include the reasons for the advice and four that there should be an opportunity to challenge the advice.

Recommendation: We will consider amending the Rules to include, where advice is given after a panel has begun to deliberate, a discretion for the panel to return to open session where the legally qualified chair can give advice in the presence of the parties and invite submissions from them"

26. On 1 December 2015, the 2015 Assessors Rules were made and laid before Parliament the following day in exercise of the GMC's powers under paragraphs 1(4E), 7(3) and 7(4) of schedule 4 to the 1983 Act. They revoked the 2004 Assessors Rules.

27. So far as material to this claim, the 2015 Assessors Rules provide, as follows:

"**Functions of legal assessors**

2 – (1) The functions of a legal assessor are to advise –

(a) … a Tribunal on questions of law as to evidence or procedure arising in proceedings before them: in particular a legal assessor shall, in such proceedings –

(i) advise… the Tribunal on any question of law as to evidence or procedure that is referred to the assessor by… the Tribunal, and

(ii) intervene to advise… the Tribunal on an issue of law as to evidence or procedure where it appears to the assessor that, without the assessor's intervention, there is the possibility of a mistake of law being made, and

(iii) intervene to advise… the Tribunal of any irregularity in the conduct of the proceedings which comes to the assessor's knowledge; and

(b) on the drafting of decisions of …a Tribunal (notwithstanding that legal assessors will not themselves be parties to those decisions).

Attendance of legal assessors

3. – (1) In any proceedings where a legal assessor is appointed… the… Panel or Tribunal conducting those proceedings must not hold any meeting or hearing in respect of them unless the appointed legal assessor is present.

(2) …

Advice of legal assessors tendered at hearings

4. – (1) Any advice given at a hearing by a legal assessor on a question of law as to evidence or procedure must be given in the presence of every party, or person representing a party, in attendance at the hearing.

This is subject to paragraph (2).

(2) The advice may be tendered in the absence of the parties or their representatives where… a Tribunal -

(a) has begun to deliberate on its decision; and

(b) it considers that it would be prejudicial to the discharge of its functions for that advice to be tendered in the presence of the parties or their representatives.

(3) Where advice is tendered in the absence of the parties or their representatives in accordance with paragraph (2), the legal assessor who tendered that advice must –

(a) as soon as practicable after the completion of the deliberations inform each of the parties (or their representatives) in attendance at the hearing of the advice tendered, together with any question which led to that advice; and

(b) subsequently record those matters in writing and give a copy to those parties or their representatives.

(4) A party to the proceedings who does not attend, and is not represented at, the hearing to which the advice referred to in paragraph (3) applies must, upon that party's application, be provided with a copy of that advice.

…

Advice of legally qualified persons

6. Where, at hearing [sic] of a Tribunal, a legal assessor has not been appointed under paragraph 7(1B) of schedule 4 to the Act, and the Chair as a legally qualified person advises the Tribunal on any question of law as to evidence or procedure, the Chair shall –

(a) so advise in the presence of every party, or person representing a party, in attendance at the hearing; or

> (b) if the advice is tendered after the Tribunal has begun to deliberate on any decision during the course of the proceedings, include the advice so given in the Tribunal decision, unless the Chair considers it necessary to advise in the presence of every party, or person representing a party, in attendance at the hearing."

28. Therefore, after the introduction of the 2015 Assessors Rules (i.e. as from 1 January 2016):

    i) The functions and role of legal assessors remain essentially the same.

    ii) However, where there is a legally qualified chair, it is not necessary for a legal assessor to be appointed to either an MPT or an IOT. Unlike a legal assessor, a legal chair is a member of the decision-making tribunal.

    iii) The only reference in the 2015 Assessors Rules to advice tendered by a legal chair is found in paragraph 6. Where advice is tendered after the tribunal has begun deliberating, the default position is that that advice is simply included in the tribunal's decision (so that the parties will not have an opportunity to comment upon that advice before the tribunal makes its determination); but, as a result of paragraph 6(b), where the chair "considers it necessary" for the advice to be given in the presence of every party in attendance, then the advice may be so given (so that the parties will then have an opportunity to comment upon that advice before the tribunal makes its determination).

29. It is paragraph 6(b) of the 2015 Assessors Rules which the BMA now seeks to challenge. The parties in attendance at a hearing will of course know what advice has been given – because it must be included in the decision – so there is no question of the principle of transparency being infringed. However, paragraph 6(b) allows tribunal members to receive legal advice in private deliberations at a hearing without the parties in attendance having any opportunity to comment upon or challenge that advice prior to the tribunal making its determination. It is that lack of opportunity which, it is said, makes the disciplinary process unfair by robbing the party of a proper opportunity to engage in the hearing.

30. As a result, it is submitted by Mr Sutton on behalf of the Claimant that paragraph 6(b) is unlawful as being in breach of article 6 and the common law right to procedural fairness, and (because advice from legal assessors still attracts such opportunity) irrational.

The Grounds of Challenge

31. Whilst there are formally three grounds of challenge, Mr Sutton readily accepted that the common law requirement for fairness did not add anything of substance to the requirements of article 6 in the sense that, if the article 6 claim failed, then the parallel common law ground was also bound to fail. That concession, of course, reflects the comments of Lord Hope in Nwabueze at [37] (quoted at paragraph 15 above), to the effect that the scope of the requirements are essentially similar. Mr Sutton also accepted that the irrationality argument was based upon the proposition that paragraph 6(b) of the 2015 Assessors Rules was in breach of article 6 whilst the provisions for

the giving of advice by legal assessors were not. The issue upon which this claim turns is therefore whether paragraph 6(b) breaches article 6.

32. Mr Sutton contends that it does. He submitted that, where an MPT (or IOT) has a legally qualified chair, that person has two roles. First, he is a decision-making member of the tribunal and, as such, with the other panellists, he is responsible for determining issues before the tribunal, including questions of law and procedure. However, second, he is the legal advisor to the tribunal and, as such, has the function of formally advising the tribunal of matters of law and procedure. The roles are discrete; and, when a legally qualified chair performs the latter, he undertakes exactly the same role as a legal assessor, subject to the same jurisprudence and constraints. Therefore, when he advises the tribunal deliberating in private, in accordance with cases such as Nwabueze, the parties in attendance must be given an opportunity to comment upon – and, if appropriate, challenge – the advice given.

33. This duality of function and role is (Mr Sutton submitted) recognised in a number of documents.

i) As set out in paragraph 19 above, following consultation but prior to the introduction of legally qualified chairs, in January 2015, the Secretary of State indicated that a "main change" proposed was:

> "Introducing a rule making power to require the parties to be informed of certain advice provided by a legally qualified chair to the other tribunal members, including while they are considering issues in private, *in line with that applicable to legal assessors*." (emphasis added).

Where a legal assessor advises in private, he can only do so on the basis that the parties are given an opportunity to comment on that advice before the panel comes to any determination. Thus, Mr Sutton submitted, the Secretary of State appears to have envisaged the same provision in respect of advice given by a legally qualified chair in camera.

ii) Mr Sutton submitted that, when it consulted on procedural rule changes in 2015, the GMC's own consultation document proceeded on the basis that, although it was proposed that parties who failed to attend a hearing may not be given an opportunity to respond to legal advice given by a legal chair, parties in attendance at a hearing would always be given such an opportunity (see paragraph 22 above).

iii) In the training materials for new legally qualified chairs, under the heading "Advising the tribunal", one bullet point said:

> "You should either be carrying out a function as a legally qualified chair OR as a decision making chair. These are separate roles, carried out by the same person." (emphasis in the original).

On the following page, another said:

> "Always be clear in your own mind about which of your 'hats' you are wearing: advisor or decision maker."

iv) From 4 January 2016, the MPTS website said that legally qualified chairs would be required to advise "their fellow tribunal members on questions of law as to evidence and procedure". It continued:

> "This will include providing advice in camera and repeating that advice in open session so that you or your representative, and the GMC's representative, can make submissions in response to it. The tribunal can accept or reject the advice."

34. Mr Sutton argued that Nwabueze and Clark v Kelly are also strongly supportive of his contention as to the duality of legally qualified chairs. Paragraph 6 of the 2015 Assessors Rules refers to the circumstances in which a legally qualified chair "advises the Tribunal on any question of law", i.e. advises the other panellists. In Clark v Kelly (see paragraph 18 above), Lord Hope stressed that, whilst legally qualified judges might properly exchange views and test legal opinions confidentially in private (because a party can debate the law directly with the judges, in open court), where a legally qualified individual gives advice to non-lawyers (e.g. where a district court or magistrates' court clerk gives advice to lay justices), a party can only properly take part in the proceedings if he is given an opportunity to comment upon that advice before a decision is taken. That (Mr Sutton submitted) is the position with a legally qualified chair giving legal advice to his co-panellists.

Discussion

35. Ably as they were put, I am unpersuaded by Mr Sutton's submissions, for the following reasons.

36. Mr Sutton did not suggest that, as a general proposition, where a tribunal performing judicial functions is comprised of legally qualified and non-legally qualified members, to ensure a fair hearing it is necessary that all legal opinions and advice given by a legally qualified member to those not legally qualified must be shared with the parties, who must then be given an opportunity to comment upon them prior to the tribunal coming to a decision. Nor could he. Such tribunals, established by primary or secondary legislation, passed or endorsed by Parliament, are common-place. I was given several examples of tribunals where that is not the practice (e.g. Employment Tribunals, and various chambers of the First-tier Tribunal). A Crown Court comprising a county court judge and lay magistrates is another example. The members of such tribunals jointly and collectively exercise the judicial function. Therefore, where a tribunal includes a legally qualified individual as a full decision-making member of its constitution, that person is able to give a view on the law to the other members, without advising the parties of that view – subject to the usual constraints that apply to any person exercising a judicial function (e.g. the requirement to give reasons for a decision, including material propositions of law; and the requirement to give parties an appropriate opportunity to comment upon any material proposition of law). It cannot be suggested that hearings before such tribunals are necessarily rendered unfair and in breach of article 6 simply because a

legal member gives a legal opinion or advice to other members of the tribunal in private.

37. The issue in this case is thus whether the relevant provisions establish MPTs and IOTs as tribunals with those characteristics, or a different creature.

38. Mr Sutton does not seek to challenge the primary legislation that underlies the provision challenged, i.e. paragraph 6(b) of the 2015 Assessors Rules. He accepts that paragraph 1(4E) of schedule 4 to the 1983 Act (inserted by article 8(6) of the 2015 Fitness to Practise Order) gives a wide rule-making power that cannot be said to mandate or require the GMC to make rules in breach of article 6. Nor did he contend that, leaving the requirement to comply with article 6 aside for one moment, paragraph 6(b) of the 2015 Assessors Rules was ultra vires, as falling outside the scope of the power given to the GMC as the rule-making body by paragraph 1(4E) of schedule 4. Those concessions were properly made.

39. However, Mr Sutton submitted that the circumstances catered for in paragraph 6(b) – that advice be shared by its inclusion in the decision only – "may have been intended as sufficient compliance with the obligations of a fair and article 6 compliant hearing in the event [i.e. only in the event] of a party <u>not being present</u>, such that the legally qualified chair is unable to satisfy the procedural requirement that advice be shared in advance of the decision being made" (paragraph 5.6 of his skeleton: emphasis in the original). However, with respect, that cannot be the case. The reference in paragraph 6(b) to "such party or person" is clearly a reference to "every party, or person representing a party, to the proceedings *who appears at the hearing*" in paragraph 6(a) (emphasis added). It can refer to nothing else. In paragraph 6(b), circumstances are clearly envisaged in which, where a legally qualified chair gives legal advice to his co-panellists in private but with the parties in attendance at the hearing, those parties will not be given an opportunity to comment upon that advice before a decision is made. Indeed, that appears to be the default position as envisaged in the statute (i.e. paragraph 1(4E) of schedule 4), as the only particular manner of informing the parties of such advice expressly given there is by way of simply setting out the advice in the decision itself.

40. That default position is mirrored in paragraph 6(b) of the 2015 Assessors Rules. However, under that rule, that default position does not apply where the legally qualified chair "considers it necessary to advise in the presence of every party, or person representing a party, in attendance at the hearing". Mr Sutton referred to that as a "discretion" exercisable by the legally qualified chair: but, in my view, it is better described as an exercise of judgment on his part. The chair has to decide whether it is necessary to give the parties an opportunity to comment upon the advice that he has given, prior to the tribunal coming to a decision. If he considers it necessary so to do, then he must afford that opportunity. It would of course be necessary if it would be procedurally unfair not to give the parties such an opportunity, e.g. if it concerns a relevant point of law upon which no submissions have been made and which is (or may be) controversial and material (an example used in paragraph 6(l) of the MPTS Guidance for Tribunal Chairs). That merely reflects the principle of general application that no court or tribunal can decide a case on the basis of a material proposition of law upon which the parties have been given no opportunity to comment and challenge. Therefore, in my respectful view, the express caveat in paragraph 6(b), whilst no doubt a useful reminder to legally qualified chairs, is strictly

unnecessary: because, by virtue of section 6 of the Human Rights Act 1998 (and, in any event, under the common law rules of fair procedure), as a body exercising public functions, the tribunal is bound to conduct itself to ensure the hearing is fair in the sense of complying with article 6 (and those common law rules); and, if it is necessary for the parties to be given an opportunity to comment upon a particular matter to render the proceedings fair, then such an opportunity must be given. The caveat therefore expresses that which is already implicit.

41. Insofar as the legally qualified chair is regarded as a member of the decision-making panel, it seems to me that all of that is trite law. However, Mr Sutton submitted that that is not the only role that such a chair has: because he has the distinct and separate role of advising the panel. Therefore, in respect of a legal point that arises at a hearing, he has (i) the role of advising the other panellists, and (ii) the role of determining that legal point with his other panellists. When he is performing that first role, then all of the jurisprudence applying to legal assessors and others who advise non-legal members of tribunals and panels applies.

42. In support of the contention that a legally qualified chair has two such distinct roles, Mr Sutton relied heavily upon the terms of paragraph 6 of the 2015 Assessors Rules, which refer to the legally qualified chair, not merely discussing and debating legal points with his co-panellists, but "advising" the tribunal (see paragraph 27 above). However, I do not consider that such a fine linguistic point has any substantial force.

43. In this context, the case of In re Chien Sing-Shou [1967] 1 WLR 1155 is informative. It concerned the Hong Kong Architects' Disciplinary Board which, by section 5 of the Buildings Ordinance 1955, comprised five members: three architects, the Building Authority or his representative, and "a legal adviser". The appellant contended that any advice on matters of law by the legal adviser should have been given in the presence of the parties; and a failure to follow such a procedure was a breach of common law natural justice.

44. However, the Privy Council concluded that, as the legal adviser was a full member of the board, if, during the deliberation of the board, he gave legal advice to the other members of the board on matters relating to the proceedings, then he stood in the same position as one of the architect members who gave a view on some matter of architectural opinion. In neither case was the member required to disclose to the parties the advice or opinion he had given in the private deliberations; unless, for example, some new point of law arose during the course of the deliberations, in respect of which it would be procedurally unfair to proceed without giving the parties an opportunity to comment. Lord Morris of Borth-y-Gest, giving the judgment of the Privy Council, emphasised that:

> "At all times, however, the legal adviser occupies the position of being a full member of a body charged with the duty of acting judicially in making due enquiry."

The case illustrates that, where a legal member of a tribunal expresses a view on the law to other members, he can properly be described as "advising" those other members, without engaging the jurisprudence of legal assessors, because the member is a full member of the tribunal who participates fully in the decision-making process

and thus attracting all of the jurisprudence that attaches to judges and other legal members who exercise full judicial function within a mixed tribunal.

45. Of course, where there is a legally qualified chair, the non-legal members may look to him to advise on matters of law which arise. That is one reason why he is there. It is the reason why there is no requirement or need for a tribunal with a legal chair also to have a legal assessor. In that sense, a legally qualified chair does have the same function as a legal assessor.

46. However, that does not mean that he has an identical role or is necessarily subject to the same regime, i.e. the same way of doing things. Usually, where the legally qualified person is a full member of the tribunal, whilst no doubt giving legal advice to the other members, he will occupy a different role from a legal assessor who stands outside the decision-making tribunal. Sing-Shou provides an example of that. The question is whether the relevant provisions here compel a different conclusion.

47. Paragraph 6(b) of the 2015 Assessors Rules, looked at fairly and in context, does not suggest that a legally qualified chair has the schizophrenic quality – having two entirely distinct roles, each with its own criteria of conduct – as Mr Sutton contends. Indeed, the very opposite. It is clear that the changes made to the disciplinary panels from the beginning of this year were intended to emphasise and enhance the characteristics that they share with other tribunals which exercise judicial functions, e.g. the imposition, by Parliament, of an overriding objective for the procedural rules applying to disciplinary panels, in line with other courts and tribunals, "to secure that the Tribunal… deals with cases fairly and justly" (see paragraph 21(i) above). Further, and more specifically, both the structure and the content of the 2015 Assessors Rules make abundantly clear that it is intended that, in giving advice, different provisions apply to legal assessors and legally qualified chairs. Had it been intended that, when giving advice, they should be the subject of the same regime, then the GMC could – and, in my judgment, would – have made that clear, as it would have been easy to do.

48. In respect of the various documents relied upon by Mr Sutton, the extent to which extraneous documents can assist in the proper interpretation of statutory provisions (including rules made under statutory provisions) is limited. However, dealing with the documents referred to in paragraph 33 above in turn:

    i) In respect of the Secretary of State indicating, following consultation, that it was proposed to introduce a rule making power to require parties to be informed of legal advice, including while they are considering issues in private, "in line with that applicable to legal assessors":

        a) "In line with" does not mean "the same as".

        b) The proposal was merely to give a rule making *power*, wide enough to require parties to be informed of legal advice etc.

        c) The rule making power has been given, exclusively, to the GMC. Although the rules must comply with the relevant statutory provisions – which impose some constraint – the Secretary of State has no residual power to influence the rules made.

d) The GMC has exercised its power intra vires, i.e. within the scope of paragraph 1(4E) of schedule 4 to the 1983 Act.

e) In the event, in exercising that power, the GMC has clearly distinguished advice given by a legal assessor in camera and that given by a legally qualified chair in camera, as described above.

ii) Whilst, looked at in isolation, the GMC consultation document issued in May 2015, might appear to propose the inclusion of legal advice in a decision only where the parties are not present at the hearing:

a) The draft rules circulated with the consultation document proposed, in terms, that, where advice was given by a legally qualified chair in private after the tribunal has begun to deliberate, then the advice would (only) be included in the tribunal decision (see paragraph 23 above). In the event, the responses to the consultation were mixed: some consultees proceeded on the basis that the proposal was not restricted to absent parties, others that it was.

b) But, in any event, there is no challenge to the consultation process. Having consulted, the GMC clearly took a view, and adopted the proposed draft rule with the caveat now found in paragraph 6(b) with regard to circumstances in which the chair considers it necessary to disclose the advice to the parties before any decision is made.

iii) Although some points made in the training materials for new legally qualified chairs may be ambivalent or even supportive of Mr Sutton's contentions:

a) Other parts of the materials are not consistent with Mr Sutton's submission. For example, between the points upon which he relies, there is the following:

> "Where you have given advice in camera and the other tribunalists have given a preliminary indication that they do not accept your advice, consider whether to go back into hearing to hear submissions from parties, if appropriate. Then go back into camera and reach final Tribunal decision on law."

b) In any event, the court is required to construe what the relevant rules mean as an objective exercise, irrespective of whether a particular trainer understood or did not understand their true purport.

iv) Although the MPTS website initially indicated that a party would always have an opportunity to comment upon advice a legally qualified chair gave his co-panellists, the evidence is that that was withdrawn by 16 February 2016, as it was recognised by then as being an error. I accept that evidence.

For those reasons, I do not consider that the documents upon which Mr Sutton relied give his submission any significant support.

49. Nor, in my respectful view, do authorities such as Nwabueze and Clark v Kelly. In the latter, Lord Hope proceeded on the basis that the clerk was not a member of the court for article 6 purposes, and therefore gave advice to the justices as an "outsider". Lord Hope's observations have to be seen in that context. Although of course each case has to be seen in the light of its own facts and circumstances, Sing-Shou illustrates that a legal adviser can be said to "give advice" to other members of a tribunal panel where he himself is a full member of that panel, and that does not thereby attract the jurisprudence that has built up around assessors who are outsiders. It is the more helpful authority in the context of this particular case.

50. For those reasons, I am wholly unconvinced that a legally qualified chair has two discrete and distinct functions subject to different criteria of conduct, so that, when he advises his fellow panel members, the jurisprudence that has built up around assessors applies. I agree with Mr Hare: the proposition upon which Mr Sutton's submissions are based is unsound. That is sufficient to dispose of this claim: without that proposition being made good, the claim must fail.

51. I should say that the result is not (as Mr Sutton submitted) that there is a "two-tier system" of procedural protection for doctors subject to GMC proceedings, with the implication that those before MPTS panels with legally qualified chairs will not have the same standard of procedural fairness that those who have a panel supported by a legal assessor will enjoy. Rather, it means that fair process is delivered in a different manner, dependent upon whether there is or is not a legally qualified chair. That is a very different thing.

52. Mr Hare submitted that the claim was bound to fail on another, entirely discrete, basis.

53. It was Mr Sutton's contention that paragraph 6(b) of the 2015 Assessors Rules gave a legal chair a discretion as whether to give his advice in the presence of the parties, thereby giving them an opportunity to comment on that advice before the tribunal make any decision. The giving of that discretion was unlawful: it fell into the same error into which Lord Milligan fell in Clark v Kelly, by (unlawfully) leaving to the legally qualified chair, for example, the decision as to whether a particular point of law was controversial or in potential need of correction upon which the parties might have their own view.

54. On the other hand, Mr Hare submitted that whether there has been a breach of human rights is necessarily fact-specific. In determining whether it was necessary to inform and involve the parties in respect of advice he gave in private and during deliberations, the legal chair would be exercising a public function; and he would therefore be bound by section 6 of the Human Rights Act 1998 to exercise that discretion in conformity with article 6. Consequently, where, in a particular case, article 6 requires it, a chair would be obliged to provide his advice in the presence of the parties. The challenge to the lawfulness of paragraph 6(b) is therefore bound to fail, because the terms of that paragraph do not necessarily result in a breach of article 6 in an individual case. Whether, in any specific case, there is a breach of article 6 will depend upon the circumstances of that particular case, looked at as a whole; and whether the legal chair failed to give the parties an opportunity to comment upon legal issues in circumstances in which procedural fairness requires that he should. That is

(Mr Hare contended) a complete and discrete answer to the challenge to paragraph 6(b) that is made in this claim.

55. On its face, each of these submissions appears to have some force; but, in my respectful view, that is because they each look at the issue from a different perspective. Mr Hare's submission has force if the legally qualified chair is treated as a full member of the tribunal, which is exercising a full judicial function. As such, he is bound to – and can be relied upon to – exercise his judgment to ensure that the hearing, as a whole, is fair and in accordance with article 6. If he fails to ensure that fairness, then the resulting decision may be open to challenge, for example by way of appeal or judicial review. The authorities suggest that the position may be different when a legal assessor considers whether a legal matter needs to be referred to the parties to maintain the fairness of the hearing, because he is not exercising a full judicial function. It seems to me that Mr Hare's further submission is not a discrete basis of opposing the claim; but rather another formulation of his main ground of opposition, i.e. as full member of the decision making tribunal, a legally qualified chair is in a fundamentally different position from that of a legal assessor. Given my earlier findings, it is unnecessary for me to consider whether the challenge to paragraph 6(b) would be bad for "prematurity", if (as Mr Sutton considers, but I do not) a legally qualified chair acts as a legal assessor when he gives advice to the other members of the panel.

56. In any event, for the reasons I have given, I consider paragraph 6(b), as properly construed, does not require a legally qualified chair, when he has given advice to the other members of the tribunal panel in private and after their deliberations have begun, to make the parties privy to that advice and give them an opportunity to comment upon it, prior to the tribunal making a decision. It is sufficient for that advice to be incorporated into the tribunal's decision. There is an exception, where the legal chair considers it is necessary for the advice to be given to the parties, to enable them to comment upon it, before a decision is made. An example would be where a new material legal point arises during the panel's deliberations, upon which the parties have had no earlier opportunity to comment or challenge. In that event, he must give the parties that advice and that opportunity. Construed thus, paragraph 6(b) is neither contrary to the requirements of article 6 or common law fairness, nor otherwise unlawful.

Conclusion

57. For those reasons, having given permission to proceed, this claim fails.