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The Queen on the application of the British Medical Association v The General Medical Council [2017] EWCA Civ 2191

Learning Points

Under Rule 6(b) of the Schedule to the General Medical Council (Legal Assessors and Legally Qualified Persons) Rules Order of Council 2015:

- if a new point of law arises during a Tribunal's deliberations, and on which the parties have not had a reasonable opportunity to comment, the Legally Qualified Chair ('LQC') should consider it necessary to advise in their presence;
- where it is necessary to raise a new point of law in the presence of the parties (as it has arisen during a Tribunal's deliberations), the parties should be given a reasonable opportunity to make submissions about it as this is a fundamental requirement of procedural fairness.

Background

This was a renewed application for permission to appeal the decision of Judge Hickinbottom (as he then was) dated 4 May 2016, in which he granted permission to bring a claim for judicial review but refused the substantive claim¹ ('the Judgment'). LJ Davis refused permission to appeal on the papers on 19 October 2016. The British Medical Association's ('BMA's') renewed application initially came

¹ The Queen on the application of the British Medical Association v The General Medical Council v The Secretary of State for Health [2016] EWHC 1015 (Admin)

before LJ King on 20 July 2017. She directed that there should be a “rolled up” hearing before the full court, with the appeal to follow if permission were granted.

The BMA sought to bring a claim for judicial review in respect of new rules promulgated by the GMC (under paragraph 1 of Schedule 1 to the Medical Act 1983 (‘the 1983 Act’)), to govern the Medical Practitioners Tribunal’s and the Interim Orders Tribunal’s (‘the Tribunals’) procedure with effect from 31 December 2015. The new rules are set out in the Schedule to the General Medical Council (Legal Assessors and Legally Qualified Persons) Rules Order of Council 2015² (‘the LA and LQP rules’).

The changes include:

- allowing the GMC to dispense with the requirement to appoint a legal assessor to assist the Tribunal if its chair is legally qualified;
- that when providing advice to the other members of the Tribunal after the conclusion of the hearing, the LQC is not required to notify the parties that advice has been provided, although the Tribunal is required to record any advice given in the decision. By contrast, all advice provided by legal assessors must be given to the parties as soon as possible, which allows them to make representations concerning it before a decision is taken³.

Grounds for judicial review and judgment of the High Court

The provision within the LA and LQP rules which the BMA sought to challenge is:

‘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.....*

(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

² SI 2015 No. 1958

³ Rule 4(3) of the LA and LQP rules

the presence of every party, or person representing a party, in attendance at the hearing.'

The BMA submitted that the difference, in terms of how and/or when details of any advice given by a legal assessor or an LQC are provided to the parties was:

1. incompatible with Article 6 of the Convention rights, as set out in Schedule 1 to the Human Rights Act 1998 ('HRA'), and therefore unlawful under section 6 of that Act;
2. unfair and therefore unlawful at common law; and
3. irrational.

The BMA conceded before Judge Hickinbottom that the latter two grounds were subsumed within the Article 6 ground. Therefore, the key issue was whether paragraph 6(b) of the LA and LQP rules was in breach of Article 6⁴.

The BMA did not argue that there was a general requirement under Article 6 that, if legally qualified tribunal members give advice to non-legally qualified tribunal members, it must be shared with the parties [para 8 and 9]. The BMA's case was based on drawing a distinction between the role of the chair in providing legal advice and then acting as one of the tribunal members making a decision pursuant to that advice. The BMA submitted that the jurisprudence on legal assessors should apply to chairs when acting in their purported role as adviser [para 12].

The Judge rejected that distinction⁵ and cited *In re Chien Sing-Shou*⁵ ('*Sing-Shou*'), in which the Privy Council drew no distinction between the duties imposed on panel members with legal or non-legal expertise [para 13]. Moreover, he considered that the text of the LA and LQP rules makes clear that "there was no intention that the chair should have the dual role suggested by the BMA. The changes to the Rules were intended to bring them closer to the practice of other tribunals" [para 14].

The Judge also observed that the LA and LQP rules had been made after a consultation exercise. The Judge said that the documents related to the consultation demonstrated a mix of opinions on this issue and indicated that the

⁴ Paragraph 31 of the judgment [2016] EWHC 1015 (Admin)

⁵ [1967] 1 WLR 1155

GMC took a considered view that it was not necessary for legal assessors and chairs to operate under the same procedure [para 15].

Grounds of appeal

At the hearing to consider whether permission to appeal should be given, the BMA sought to advance four grounds of appeal [para 18-21]:

1. Ground 1 - that the Court erred (at paragraph 51 of the Judgment) in concluding that a professional disciplinary procedure, whereby LQCs are not required to inform the parties of the legal advice given by them to their lay colleagues in camera in advance of a decision being made, thereby affording the parties the opportunity to make submissions upon that advice, satisfied the standards of procedural fairness applicable at common law and under Article 6;
2. Ground 2 - that the Court erred in failing to find that the differing standards of procedural fairness provided for in the GMC's rules, whereby the right of a party to be informed of and given the opportunity to comment upon legal advice given in camera was dependent solely upon whether a legal assessor or an LQC was tasked with giving such advice, was unlawful on grounds of irrationality.
3. Ground 3 - that, further and alternatively, the Court erred (at paragraphs 43-46 and 49 of the Judgment) in holding that the LQC does not have a statutory advice-giving function and, citing the decision of the Privy Council in *Sing-Shou*, that a legal adviser to a panel who also acts as a member of the decision making panel need not provide his/her advice in the presence of the parties.
4. Ground 4 - that, yet further and alternatively, the Court erred in concluding (at paragraph 39 of the Judgment) that the provisions of paragraph 1(4E)(b) of Schedule 4 to the 1983 Act⁶ and the LA and LQP rules permitted the inclusion of advice given by an LQC in the written

⁶ (4E) 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)...., 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,....

determination only. In so concluding, the BMA argued, the Court erred in failing to give effect to:

- a. the Court's interpretative obligation, pursuant to section 3 of the HRA to give a 'Convention compliant' construction to the enabling legislation; and
- b. the GMC's own statutory duty, set out in paragraph 1(1A) of Schedule 4 to the 1983 Act, to discharge its rule-making function so as to secure that tribunals deal with cases 'fairly and justly.'

Judgment

Lord Justice Singh (with whom Lady Justice Gloster and Lord Justice Beaston agreed) refused permission to appeal and rejected all of the BMA's grounds of appeal. The Court said that:

1. at the heart of the present case is the following crucial issue: was the Judge right to decide that there is no material distinction between the present context and other areas in which the BMA conceded there is no legal duty for advice given during deliberations by an LQC, sitting with other lay members, to inform the parties of the advice which has been given to the lay members or to come back into open court and invite submissions by the parties on such advice;
2. the "crucial distinction for relevant purposes is between (i) the members of a court or tribunal who are vested with the power in law to make a decision; and (ii) a legal adviser or assessor, who is not a member of the court or tribunal and so does not, and must not, take part in the decision-making process itself" [para 29];
3. the Privy Council held in *Sing-Shou* that in the situation where a legally qualified person is a member of the decision-making tribunal itself, "there is no obligation on the tribunal to come back into open court and invite representations on the views proffered by the legal member." The Court did not accept the BMA's submission that *Sing-Shou* has been superseded by legal developments since 1967, such as the introduction of the HRA [para 32];
4. the scope of the challenge brought by the BMA to paragraph 6(b) had become significantly narrower during the course of the proceedings [paras 35-38]. First, it had narrowed to say that "there was no difficulty in

principle with the legally qualified chair tendering advice to the other members of the Tribunal even after the Tribunal has begun to deliberate, provided that the chair does not raise any new point of law". Subsequently the BMA submitted that "the real vice in the drafting of paragraph 6(b) is that there is no *duty* in every case where a new point arises during the course of deliberations for the chair to give the advice in the presence of every party, or person representing a party, in attendance at the hearing". The BMA complained that "it is only where the chair "considers it necessary" to advise in those circumstances that the duty arises" [para 38].

5. it agreed with the Judge in that it did "not regard that function of the chair in the Rules as being the exercise of a discretion. Rather it requires the making of a judgment which will trigger a duty ("the chair shall ...)" [para 38]. In addition the Court held that:

- a. if there is a new point of law which arises during the Tribunal's deliberations and on which the parties have not had a reasonable opportunity to comment, "the chair should consider it necessary to advise in their presence. The express words which end para. 6(b) are intended to cater for that eventuality. If, wrongly, the chair does not consider it necessary to do so, it will be possible for the aggrieved party to complain about the fact that a new point of law was taken and no opportunity was given to them to make submissions about it." [para 40];
- b. the effect of the strong interpretative obligation in section 3 of the HRA is that paragraph 6(b), like all legislation, must be read and given effect (so far as possible) in a way which is compatible with the Convention rights, including Article 6. "In an individual case where it is in fact necessary to raise a new point in the presence of the parties and to give them an opportunity to make submissions about it, there will be a breach of section 6 of the HRA if the chair does not give the parties that opportunity" [para 41];
- c. this duty does not turn in any way on the distinction which the BMA sought to draw between the sort of situation with which this case is concerned and an ordinary court or tribunal. If a case is decided on a new point of law which has arisen after the hearing has finished and on which the parties have had no reasonable opportunity to make submissions, "that would be a breach of elementary fairness. That has nothing to do with whether the LQC in the present context

is performing a function which is analogous to that of a legal assessor....It has everything to do with the fundamental requirements of procedural fairness" [para 42];

6. if the BMA's challenge cannot succeed under the HRA, it faced even greater difficulties at common law because it sought to challenge "not the exercise of a power in an individual case but the existence of para. 6(b) in its entirety" [para 43]. Although the Court found no basis at common law to strike down the provisions of paragraph 6(b), it held that "that does not mean that, in an individual case, the requirements of procedural fairness would have nothing to say; far from it. The common law is there to prevent unfairness in an individual case" [para 44].
7. "Furthermore, this legislation was the product of an extensive formal consultation process, in which the Applicant had the opportunity to participate. As the Judge noted at para. 20 of his judgment, the [BMA] did in fact make representations in that consultation process but clearly it was not satisfied with the outcome of that process. It may well have a sense of grievance in consequence but it is not a grievance which sounds in law" [para 43].

Accordingly the Court rejected all of the grounds of appeal in this case as follows and refused permission to appeal: "Ground 1 fails because there is no breach of Article 6 or the common law. Ground 2 fails because there is no irrationality. Ground 3 fails because the Judge correctly drew an analogy between the present context and that considered by the Privy Council in Chien Sing-Shou. Ground 4 fails because the interpretative obligation in section 3 of the HRA does not arise since there is no incompatibility with the Convention rights in any event" [para 45].

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