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## PRACTICE NOTE

### Proceeding in the Absence of the Respondent/Appellant

This Practice Note has been issued by the Institute for the guidance of Disciplinary and Appeal Panels and to assist those appearing before them.

#### Introduction

1. As a general principle, a Respondent/Appellant has the right to be present and represented at a Disciplinary or Appeal Panel hearing. However, the procedural rules<sup>1</sup> for such hearings provide that, if an Appellant is neither present nor represented, the Panel has the discretion to proceed to hear the matter.

#### Exercise of the Discretion

2. The discretion to proceed in the absence of the Appellant is one which has been described by the courts as 'severely constrained'. As the House of Lords held in *R v Jones (Anthony)*<sup>2</sup>, the discretion to commence and conduct proceedings in the absence of the Appellant 'should be exercised with the utmost care and caution.'<sup>3</sup> In exercising that discretion, Panels must strike a careful balance between fairness to the Appellant and the wider public interest.
3. In reaching a decision, the Panel **must** have regard to all of the circumstances of the case and, in particular, the following factors identified by the Court of Appeal in *R v Hayward*<sup>4</sup>, approved on appeal by the House of Lords, sub nom *R v Jones (Anthony)* (supra):
  - 3.1 the nature and circumstances of the Respondent's/Appellant's absence and, in particular, whether the behaviour may be deliberate and voluntary and thus a waiver of the right to appear;
  - 3.2 whether an adjournment might result in the Respondent/Appellant attending the proceedings at a later date;

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<sup>1</sup> Rules 22 and 40 of the Institute's Disciplinary Procedure Rules.

<sup>2</sup> [2003] 1 AC 1; [2002] UKHL 5

<sup>3</sup> Applied to disciplinary proceedings of professional bodies by the Privy Council in *Tait v The Royal College of Veterinary Surgeons* [2003] UKPC 34

<sup>4</sup> [2001] QB 862; [2001] EWCA Crim 168

- 3.3 the likely length of any such adjournment;
  - 3.4 whether the Respondent/Appellant, despite being absent, wished to be represented at the hearing or has waived that right;
  - 3.5 the extent to which any representative would be able to receive instructions from, and present the case on behalf of, the absent Respondent/Appellant;
  - 3.6 the extent of the disadvantage to the Respondent/Appellant in not being able to give evidence having regard to the nature of the case;
  - 3.7 the seriousness of the allegation;
  - 3.8 the general public interest and, in particular, the interest of any victims or witnesses that a hearing should take place within a reasonable time of the events to which it relates;
  - 3.9 the effect of delay on the memories of witnesses;
  - 3.10 where allegations against more than one Respondent/Appellant are joined and not all of them have failed to attend, the prospects of a fair hearing for those who are present.
4. In *Abdalla v Health Professions Council*<sup>5</sup>, the Court rejected the argument that the committee's decision to proceed in the Appellant's absence was in breach of her rights under Article 6(1) of the ECHR; or alternatively, was a breach of natural justice. Sullivan J held that lack of funds to pay for legal representation would not justify an adjournment where there was no realistic prospect that the position would change in the reasonably near future and that if the appellant chose not to avail herself of the opportunity to attend the hearing then the committee was entitled to proceed in her absence.
  5. The key issue, according to the High Court in the case of *Jawid Yusuf v The Royal Pharmaceutical Society of Great Britain*<sup>6</sup>, is whether the Respondent/Appellant has voluntarily chosen not to attend. Munby J said that the committee was properly alert to the need to exercise its discretion to proceed in the appellant's absence with the utmost caution. The committee was entitled to find, as it did, that the appellant had voluntarily chosen neither to appear nor to be represented. Similarly, in *Varma v General Medical Council*<sup>7</sup> the Court held that the Fitness to Practise panel had properly borne in mind that it had to balance the appellant's private rights against the public interest of having serious allegations properly investigated and had justifiably treated the appellant's failure to attend the hearing as a voluntary election not to be present.

### Service of Notice of Hearing

6. Provided that a Panel is satisfied that the notice of hearing has been served in accordance with the Rules<sup>8</sup>, a hearing may proceed in absence notwithstanding that it is evident that the notice was not received by the Respondent/Appellant. In *Jatta v Nursing & Midwifery Council*<sup>9</sup> the Court of Appeal held that there had been no procedural irregularity that vitiated the decision of a fitness to practise panel to

<sup>5</sup> [2009] EWHC 3498 (Admin)

<sup>6</sup> [2009] EWHC 876 (Admin)

<sup>7</sup> [2008] EWHC 753 (Admin)

<sup>8</sup> Rule 4 of the Institute's Disciplinary Procedure Rules.

<sup>9</sup> [2009] EWCA Civ 824

proceed in Mr Jatta's absence where notice of the proceedings had been duly and properly served by sending to the registrant's registered address in accordance with the council's Fitness to Practise Rules 2004, although the council was aware the registrant was no longer living at the address and was travelling in Thailand. The court was satisfied that the panel was aware of the importance of the case, carefully considered the evidence in Mr Jatta's absence, including character references for him, but was satisfied that reasonable efforts had been made to serve notice of hearing and so rightly concluded that it was in the interests of justice to continue.

## **Procedure**

7. If a Respondent/Appellant fails to attend a hearing and has not provided any explanation for that absence, the Panel should first seek clarification of whether notice of the hearing was properly served. If it is so satisfied (but not otherwise) the Panel should then consider the factors set out above to determine whether, in all the circumstances, it is appropriate to proceed with the hearing in the absence of the Appellant.
8. The decision reached and the reason for doing so should be recorded as part of the record of the proceedings.
9. If the Panel decides that a hearing should take place or continue in the absence of the Respondent/Appellant, it must ensure that the hearing is as fair as the circumstances permit. In particular, reasonable steps must be taken to test the Institute's case and to make such points on behalf of the Respondent/Appellant as the evidence permits. The Panel must also avoid reaching any improper conclusion about the absence and, in particular, must not treat that absence as an admission of guilt.