Ultra Vires Unleashed

If the incaution shown towards it by the Privy Council in its opinion on the Wislang case is anything to go by, after more than three hundred years of increasing control of it through countless learned judgments on judicial review and its English predecessor procedures, the vice of Ultra Vires is at risk of becoming the AIDS of administrative law.

This dire prediction derives from the only two possible answers to the most important question raised by the decision of the Privy Council in the Wislang case;

"How did it escape the attention of no fewer than five of Her Majesty Queen Elizabeth's Privy Councillors - all vastly experienced judges on the Judicial Committee of the House of Lords - that the principal finding that Dr Wislang was appealing to them to judicially review, namely, an assessment of his medical competence by the Medical Practitioners Disciplinary Tribunal, had been made in flagrant disregard of the fact that the Act constituting and prescribing the functions and duties of that body gave it no power whatever to make any such assessment?"

or, more shortly,

"How did their Lordships fail to see that the Tribunal, in purporting to make an assessment of Dr Wislang's medical competence, was acting entirely outside its jurisdiction and thus *ultra vires*, and that its finding on his competence, overall or on any supposed element of it, was therefore a nullity?"

The need to put this question is all the more "regrettable" by reason of Dr Wislang, in his carefully worked submissions on Competence, having plainly claimed to the Privy Council that the Tribunal's purported assessment of his medical competence was, on the ground of it having being made *ultra vires*, a nullity and stood to be quashed on appeal.

He had additionally claimed to the Privy Councillors that, because it was based primarily on the assessment of the Tribunal, the subsequent assessment of his competence by the Medical Council was also a nullity.

Dr Wislang's argument on his *ultra vires* point was developed clearly (perhaps too clearly) in paragraphs 147 through to 161, inclusive, of his written submissions; under the heading "Determinations of Competence Invalid".

Astonishingly, Lord Simon Brown in his written opinion delivered for the Privy Council unanimously recommending to Her Majesty that Dr Wislang's appeal be dismissed, makes no reference whatever to the *ultra vires* point; not even indirectly in any declining response to Dr Wislang's final request, in the last paragraph of his submisions, that the *ultra vires* assessments of his competence by the Tribunal and the Medical Council be declared invalid or, in the alternative, quashed.

What their Lordships appear to have overlooked is that the Medical Practitioners Act 1995 conferred upon one body and one body only the power to make an assessment of medical competence in the course of disciplinary proceedings against a practitioner. That body was the Complaints Assessment Committee, and any purported asessment of Dr Wislang's competence by any body other than the Committee, including the Tribunal and even the Medical Council itself, would be a nullity by reason of it having being made *ultra vires*.

In the event, after it had assessed the patient complaint against Dr Wislang, the Committee expressed no concern about his competence; nor did it recommend to the Medical Council, as it was in cases of doubt required to, that his competence be formally reviewed under the procedure for that prescribed by the Act. Nor did it recommend that Dr Wislang's fitness to practise be formally reviewed, or that his medical registration be suspended.

In other words, the Complaints Assessments Committee found that Dr Wislang's medical competence suffered from no deficiency that might cause his practising in his field to prejudice the health or safety of patients or the public. That finding of the Committee concurred with that of the Health and Disability Commissioner who, at the Medical Council's earlier referral of it to her, had inquired into the original patient complaint against Dr Wislang and had decided that no action needed to be taken in respect of his standards and competence of medical practice.

All the Committee did then was to correctly frame and lay before the Tribunal a single and simple charge; that he had practised without a practising certificate; a charge which Dr Wislang admitted promptly, in fact five months prior to the Tribunal's hearing of him as to the penalty to be imposed.

By reason of the Committee having already assessed it, the medical competence of Dr Wislang, notwithstanding the Tribunal's presumptuous and illegal seizing of jurisdiction to subsequently re-determine it, was, as an issue in relation to the remaining stages of the disciplinary proceedings against him, fairly and squarely *res judicata*.

Sections 97, 104 and 110 of the Act describe the functions, duties and powers of the Tribunal. Plainly, they did not include the power to conduct reviews of medical competence.

The only body, that being the Medical Council, empowered by the Act to require (but not to make) reviews of competence did not at any time require one to be undergone by Dr Wislang. Instead, it unflinchingly adopted and applied the findings of the statutorily unauthorised assessment of his competence by the Tribunal.

Neither did the Act empower the Tribunal to recommend at any time to the Medical Council that Dr Wislang's, or any other practitioner's, competence be reviewed. The power to so recommend was, for obviously good reasons, granted by the Act exclusively to the Committee.

What was it that moved the Tribunal to include its damning, unauthorised determination of Dr Wislang's competence in its written Decision - meant to be limited to penalty only - and to promptly publish it on its internet website for all the World to see?

Could it be that barrister Ms Wendy Brandon, chair-person of the Tribunal and writer of its Decision, simply got carried away?

Or did the Tribunal think it had some extra-statutory higher duty to warn the public against Dr Wislang by posting on its website that he

> *".... had demonstrated such a degree of a lack of insight and judgment.....as to be a risk to the health and safety of members of the public"?*

Or did it think that its publication of its decision might encourage the Medical Council to pick it up and use it as its number one piece of evidence in support of its unauthorised determination that

> *"your knowledge and skills of procedures and communication and and your attitudes (sic) and judgment is not of an acceptable level"*

to justify the imposing of conditions - gravely undermining of patient confidence in Dr Wislang - on his future practice?

Surely, you may think, the Tribunal's purported assessment of Dr Wislang's competence cannot have been solicited from the Tribunal by anyone on the Medical Council for some improper purpose, such as cost-cutting on statutory reviews of Competence or of Fitness to Practise; or worse?

But, not to disappoint anyone, even that is possible given that the last-quoted blunderbuss condemnation of Dr Wislang's competence by the Medical Council is so suspiciously in-style with the irrational outburst of President Dr MAH (Tony) Baird who chaired the meeting of the full Council at which Dr Wislang, assisted by his counsel Dr GDS Taylor, made submissions on conditions to be imposed on his future practice.

What depended on the Privy Councillors getting it right on Dr Wislang's *ultra vires* point? And why did they, by giving no reasons for their rejection of it, appear not to have addressed the point at all?

Could it be that these two questions have but a single answer? We leave it to our readers to decide.

Whatever the answer, gratis of the best efforts of the two lady barristers officiating at the Tribunal's supposed hearing of submissions as to penalty to be imposed on Dr Wislang, Ultra Vires undeniably had its day in court.

But that villain of the piece could not have done its dirty work without the prompting of the show's undoubted star performer, opportunistic prosecutor Kate Davenport; her false charge against Dr Wislang being both the enticement and the excuse for the Tribunal to go wandering outside its jurisdiction to make its fateful decision on his competence.

How disgracefully Dr Wislang was exceedingly punished by the world-wide publication of the Tribunal's *ultra vires* decision on his competence is embarrassingly plain to see.

How graceless were the Privy Councillors in their refusing to quash that professionally devastating decision against him on his appeal in-person to Her Majesty, is even plainer.

To some, the above criticism of the decisions of the tribunal and the courts in the Wislang case may appear to be unnecessary and out of order, or contemptuous, or perhaps just impolite. With respect, we do not think it is, but believe it to be highly necessary in the public interest and, if anything, warrants being even more strongly made.

As John Chipman Gray wrote in "The Rule Against Perpetuities"

> *"If a decision is wrong, one may say so, however learned or able the court that has pronounced it"*

and, concerning the decisions of the New Zealand Court of Appeal and the Privy Council in the Wislang case, we have said so.

The imperative of saying so here has been expressed never more urgently than by one of England's greatest judges, Lord Alfred Denning, MR, in one of his most celebrated judgments; in *R v. Medical Appeal Tribunal ex p. Gilmore* [1957] 1 QB 574 at 586:

> *"If tribunals were at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end"*

And who could disagree? Lord Simon Brown of Eaton-under-Heywood, deliverer of the opinion of the Privy Council in the Wislang case?

If, as appears possible, he does, why did he not say so?

Source: The Wislang Case