Neutral Citation Number: [2023] EWCA Civ 1261

Case No: CA-2023-000811

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
MR JUSTICE SWIFT
[2023] EWHC 797 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/11/2023

Before :

LORD JUSTICE BEAN
LORD JUSTICE POPPLEWELL
and
LORD JUSTICE DINGEMANS

- -

Between :

MOHAMMED ADIL	**Appellant**
- and -	
GENERAL MEDICAL COUNCIL	**Respondent**

- -
- -

Francis Hoar and **Savannah Laurent** (instructed by **PJH Law Solicitors**) for the **Appellant**
Martin Forde KC and **Peter Mant** (instructed by **GMC Legal**) for the **Respondent**

Hearing date : 19 October 2023

- -

Approved Judgment

This judgment was handed down remotely at 10:30am on 2 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Popplewell:

Introduction

1. This appeal concerns disciplinary proceedings against a doctor which engage the right to freedom of expression guaranteed by the common law and under article 10 of the European Convention on Human Rights and Fundamental Freedoms ('ECHR'). The grounds of appeal raised issues only under article 10 of ECHR and not at common law.

2. The appellant is a colorectal and breast surgeon who has been registered since 1990, having qualified in Pakistan. A medical practitioners tribunal ('the Tribunal'), which is a committee of the respondent, the General Medical Council ('the GMC'), found that he was guilty of misconduct in relation to what he said about the Covid-19 pandemic in videos posted on YouTube between April and October 2020; and imposed a sanction of six months' suspension with a review. He appealed to the High Court against the finding of misconduct and the sanction. His appeal was dismissed by Swift J. He appeals to this court with permission granted by Andrews LJ.

The statutory context and materials

3. Sections 1(1A) and (1B) of the Medical Act 1968 ('the Act') provide:

> (1A) The over-arching objective of [the GMC] in exercising their functions is the protection of the public.
>
> (1B) The pursuit by the General Council of their over-arching objective involves the pursuit of the following objectives—
>
> (a) to protect, promote and maintain the health, safety and well-being of the public,
>
> (b) to promote and maintain public confidence in the medical profession, and
>
> (c) to promote and maintain proper professional standards and conduct for members of that profession.

4. Section 35 of the Act empowers the GMC to provide advice for members of the medical profession on (a) standards of professional conduct; (b) standards of professional performance; and (c) medical ethics. It has done so in a number of published documents, two of which are relevant to the current dispute, namely "Good Medical Practice" published in March 2013 and updated in April 2014 and 29 April 2019 ('GMP'); and social media guidance in a document entitled "Doctors' use of social media" ('SM Guidance'), also published in March 2013.

5. Under s.1(3)(e) and (h) of the Act the GMC has amongst its committees an investigation committee, and one or more individual medical practitioner tribunals. The investigation committee is involved where an allegation is made against a registered person that his fitness to practice is impaired. Section 35C(2) identifies the six matters by which fitness to practice can properly be regarded as impaired, which include "(a) misconduct"; "(b) deficient personal performance"; and "(d) adverse physical or mental health".

6. The investigation committee may refer the allegation of impairment of fitness to practice for determination by a medical practitioner tribunal whose powers and functions are

regulated by s.35D of the Act. Section 35D provides that where it finds the person's fitness to practice is impaired, it may order erasure from the register, suspension for up to 12 months, or attachment of conditions to continued registration. Suspensions may be made subject to a review prior to the end of the period, with power to extend the suspension for further periods of 12 months at a time (or in a health case in some circumstances indefinitely); and power to substitute the suspension with erasure.

7. By s. 40 of the Act, a decision of a medical practitioner tribunal imposing a sanction pursuant to the provisions of s. 35D may be appealed to the High Court.

The allegations

8. The allegations against the appellant fell into three broad groups. The first group concerned treatment he had provided when working as a locum consultant colorectal surgeon at the Chesterfield Hospital in November 2019. The Tribunal concluded that three of these allegations were proved, but that none of those three matters amounted to misconduct and none demonstrated any impairment of the appellant's fitness to practise. They are not therefore the subject of this appeal.

9. The second group of allegations concerned matters that took place when the appellant was working as a locum consultant colorectal surgeon at the North Manchester Hospital NHS Trust between April and October 2020. This was during the Covid-19 Pandemic and included the early stages of lockdown imposed by the Government. These allegations did not concern treatment given to any clinical patient, but rather Mr Adil's statements in talks, interviews and rallies published as videos on YouTube. The allegations were set out as follows, in what has been referred to as the 'charge-sheet':

> "2. *Between April 2020 and October 2020, you appeared in videos that were uploaded to video sharing platforms in which you said that:*
>
> *a. the Sars-CoV-2 virus and/or Covid-19 disease do not exist or words to that effect;*
>
> *b. the Covid 19 pandemic is a conspiracy brought by the United Kingdom, Israel and America or words to that effect;*
>
> *c. the Covid-19 pandemic is a multibillion scam which was being manipulated for the benefit of:*
>
> *i. Bill Gates;*
>
> *ii. pharmaceutical companies;*
>
> *iii. the John Hopkins Medical Institute of Massachusetts;*
>
> *iv. the World Health Organisation,*
>
> *or words to that effect;*
>
> *d. the Covid-19 pandemic was being used to impose a new world order or words to that effect;*

e. the Sars-CoV-2 virus was made as part of a wider global conspiracy or words to that effect;

f. Bill Gates infected the entire world with Sars-CoV-2 in order to sell vaccines or words to that effect;

g. Covid-19 vaccines:

i. would be given to everyone, by force if necessary;

ii. could potentially contain microchips that affect the human body and further the 5G mobile phone technology agenda;

iii. will transform human psychology and beliefs;

iv. could be used to control and/or reduce the world's population,

or words to that effect.

3. In the videos referred to at paragraph 2, you used your position as a doctor in the UK on one or more occasion, to promote your opinion.

4. Your actions as referred to at paragraph 2:

a. undermined public health, and/or;

b. were contrary to widely accepted medical opinion, and/or;

c. undermined public confidence in the medical profession.

5. On or around 12 May 2020 you said to your responsible officer, Professor [Youssef], that you had and/or would remove the videos referred to at paragraph 2 from video sharing platforms or words to that effect.

6. Further to the discussions with Professor [Youssef] referred to at paragraph 5, you subsequently:

a. Failed to remove the videos;

b. appeared in further videos which were uploaded to video sharing platforms and in which you made comments as referred to at paragraph 2."

10. The third group of allegations concerned the appellant's health. By amendment these were reduced to a single matter, namely that on 5 May 2022 he was diagnosed as suffering from an identified medical condition. The Tribunal found that this did not impair the appellant's fitness to practice, and its relevance to the present appeal lies in it having been treated by the Tribunal as an explanation in part, but in part only, for some of his conduct charged in paragraphs 2 to 6 of the charge sheet.

The Tribunal proceedings

11. Before the Tribunal the GMC was represented by counsel and the appellant attended in person. The Tribunal had transcripts of the videos, running to over 200 pages (which

were also before this court) and watched some of the videos (which were not before this court). Professor Youssef gave oral evidence. The appellant chose not to give evidence but submitted a witness statement dated 15 June 2022. He addressed the Tribunal at each stage of the proceedings. He accepted that he had made the statements and expressed the views set out in the videos. He told the Tribunal that he now regretted making them and disagreed with the comments he had made.

12. The Tribunal expressed its decision in four written reasoned determinations: a Determination on the Facts made on 21 June 2022; a Determination on Impairment made on 27 June 2022; a Determination on Sanction made on 29 June 2022; and a Determination on Immediate Order also made on 29 June 2022. By its Determination on the Facts the Tribunal reached conclusions on whether the allegations made against the appellant were proved. The Determination on Impairment concerned whether what had happened amounted to misconduct and was such as to amount to an impairment of the appellant's fitness to practise. The final two Determinations addressed the sanction to be imposed.

13. In its Determination on the Facts the Tribunal found each of the allegations at paragraph 2 of the charge sheet proved, concluding from its own analysis of the videos that that paragraph accurately amalgamated and summarised the statements and reflected the meaning of what was being said. There is no appeal from that finding.

14. The Tribunal also found proved the allegation at paragraph 3 of the charge sheet that the appellant had used his position as a doctor to promote these statements. There is, again, no appeal from that finding. The Tribunal said:

> "39. During its review of the transcripts, and in the videos it had viewed, the Tribunal noted that Mr Adil had been proactive in making clear, for his intended audience, his status as a doctor in the UK. In addition, on a number of occasions he had outlined his credentials as an NHS breast and colorectal surgeon with more than 30 years' experience, as a fellow of the Royal College of Surgeons, and as a scientist, teacher, and trainer. The Tribunal noted that this had generally been done towards the beginning of the video, which set the context for what he was about to say."

15. The Tribunal further concluded that paragraph 4 of the charge sheet was made out, namely that the appellant's actions (a) undermined public health, (b) were contrary to widely accepted medical opinion, and (c) undermined public confidence in the medical profession. Its reasons included the following:

> "Paragraph 4a
>
> 46. The gravity of the impact of the coronavirus and Covid-19 on public health was being explained on a daily basis to the public and disseminated to medical professionals. The general public was required to comply with the restrictions and the messages were provided to set out the rationale for the restrictions and the reasons compliance was required. Statements of the kind set out in Paragraph 2 of the Allegation formed no part of the public health messages being provided through official channels. In the Tribunal's view they ran counter to the public health messages being disseminated at the time.

47. As it had already determined, Mr Adil had used his position as a doctor in the UK to promote his opinions. In the Tribunal's view, and in the context of the status of the pandemic at the time, hearing such opinions expressed by an NHS consultant surgeon would, on the balance of probabilities, have the effect of undermining public health. One of the key government messages at the time was that compliance with restrictions [were] required to 'Protect the NHS'. The Tribunal considered that an NHS consultant asserting as fact such statements of the kind as set out in Paragraph 2 of the Allegation undermined important public health messages.

48. The Tribunal was in no doubt that, in the context of the status of the pandemic at the time and Mr Adil's declared credentials in the videos, it was more likely than not that public health was undermined by his comments.

…

Paragraph 4b

50. As the Tribunal has already said, during the early days of the pandemic medical information and opinion was being disseminated in daily bulletins held by the UK government and its senior clinical and scientific advisors, including the Chief Medical Officer, Deputy Chief Medical Officer, Chief Scientific Officer, and members of their teams.

51. Mr Adil's statements that, for example, the Sars-CoV-2 virus and Covid-19 pandemic did not exist, or had been created as some form of conspiracy in order to sell vaccines, or that vaccines were being created in order to harm people, formed no part of widely accepted medical opinion as was being set out, for example, for the general public by the UK Chief Medical Officer.

52. The Tribunal was firmly of the view that the statements set out in Paragraph 2 of the Allegation, formed no part of widely accepted medical opinion and were, on the balance of probabilities, contrary to such opinion.

…

Paragraph 4c

54. The Tribunal had already determined that Mr Adil made the statements alleged in Paragraph 2 of the Allegation. In addition, he had done so when using his position as a doctor in the UK to promote his opinions. The Tribunal had also now determined that the statements made undermined public health and were contrary to widely accepted medical opinion. In addition, many of the statements related to conspiracy theories and the deliberate manipulation of the population by those with another agenda for the infection and vaccine development. Mr Adil had not only stated that the vaccine was damaging but that it had been designed to do harm and control the world population.

55. In the context of the pandemic at the time, and particularly the concerns of a public confined to home and dependent upon the provision of responsible and trustworthy information, the Tribunal's view was that such statements, containing

> mis-information and conspiracy theories, could be both confusing and destabilising. They had been made by a senior UK surgeon with many years' experience in the NHS. In addition, Mr Adil had promoted his professional experience and credentials in the videos so as to engender trust and confidence in their content in the minds of his audience. The Tribunal determined that, it was more likely than not, such comments undermined public confidence in the medical profession."

16. As to allegations 5 and 6, which the appellant disputed, the Tribunal held both were proved. It concluded that the appellant had told Professor Youssef in May 2020 that "he had and/or would remove the videos"; and that he had not removed them and continued thereafter to upload further videos until late September 2020. There is no appeal from that finding.

17. In its 27 June 2022 Determination on Impairment, the Tribunal first considered whether Mr Adil's actions amounted to misconduct, and then whether his fitness to practise was impaired. As to misconduct the Tribunal referred to article 10 of ECHR, which it is convenient here to set out in full:

> **Freedom of expression**
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

18. Article 10 is given effect in domestic law by section 12 of the Human Rights Act 1988 which provides at s. 12(4) that particular regard is to be had to the importance of the Convention right to freedom of expression.

19. The Tribunal also referred to paragraphs in GMP and the SM Guidance. GMP sets out guidance under four "domain" headings, namely "knowledge, skills and performance"; "safety and quality"; "communication, partnership and teamwork"; and "maintaining trust". Paragraphs 65, 68 and 69 appear under the heading "Act with honesty and integrity" within this fourth domain and state:

> "65. You must make sure that your conduct justifies your patients' trust in you and the public's trust in the profession."

> 68. You must be honest and trustworthy in all your communication with patients and colleagues. This means you must make clear the limits of your knowledge and make reasonable checks to make sure any information you give is accurate.
>
> 69. When communicating publicly, including speaking to or writing in the media, you must maintain patient confidentiality. You should remember when using social media that communications intended for friends or family may become more widely available."

20. The SM Guidance refers to paragraph 65 of GMP and states:

> "5. The standards expected of doctors do not change because they are communicating through social media rather than face to face or through other traditional media. However, using social media creates new circumstances in which the established principles apply.
>
> 17. If you identify yourself as a doctor in publicly accessible social media, you should also identify yourself by name. Any material written by authors who represent themselves as doctors is likely to be taken on trust and may reasonably be taken to represent the views of the medical profession more widely."

21. The Tribunal concluded that Mr Adil's actions fell seriously short of the conduct expected of a doctor and amounted to misconduct for reasons expressed as follows:

> "70. The Tribunal bore in mind that numerous potentially controversial comments had been made by Mr Adil in the videos that had not been brought by the GMC to form part of any allegation. These included, for example, opinions on mask wearing and the discharge of elderly patients from hospital. Whilst potentially controversial, the Tribunal agreed with the GMC's position that these remained within the domain of freedom of expression for doctors as well as the wider public.
>
> 71. However, the statements made by Mr Adil that formed the basis of Paragraph 2 of the Allegation stated that the virus was a hoax and did not exist, promoted and perpetuated various conspiracy theories and suggested that vaccines were in development for the deliberate harm or manipulation of the public. The Tribunal had already found that these were contrary to widely accepted medical opinion and undermined public health and public confidence in the medical profession. It was gravely concerned that these were made by Mr Adil using his credentials as a doctor in the UK to promote his opinions and to engender trust in him on the part of those listening.
>
> 72. In the Tribunal's view, these could not fall within the domain of legitimate freedom of expression for a doctor in the context of the pandemic at the time; such statements breached the trust that the public had a right to expect of him as a doctor in the UK. Despite his protestations that he was trying to help in a period of widespread confusion, his comments went far beyond helpful legitimate comment into the realms of scaremongering conspiracy theories, which added to public confusion. The effect of these statements could have been that, believing Mr Adil, members of the public failed to adhere to required restrictions or failed

> to get vaccinated when the vaccines became available. The Tribunal had explained the context of the pandemic in its earlier determination.
>
> 73. The Tribunal noted and agreed with the GMC position was that there was a link to Mr Adil's health in relation to Paragraphs 2-4 and, in considering the context in which these comments were made, it should also consider Mr Adil's health at the time. It had been agreed that Mr Adil had suffered some …. [illness] … in the early period of the pandemic in 2020, which culminated in him being prescribed … medication by Dr Byrne in August 2020. However, by October of that year Dr Yasmeen did not identify any … symptoms in Mr Adil, and none of the professionals he saw after that did so either. Mr Adil was still posting videos in September 2020 and Dr Zauter-Tutt remarked, in her first health assessment report, that she had concerns over how forthcoming he had been with Dr Yasmeen, because he had recently attended a rally in Berlin in October 2020, at which he was still espousing the same views.
>
> 74. Whilst mindful of these mitigating circumstances, the Tribunal considered that the impact of Mr Adil's statements as set out in paragraph 4 of the Allegation, whilst promoting his standing as an experienced UK doctor, fell seriously short of the professional standards expected of him and would be considered deplorable by his peers. It considered that all three limbs of the overarching objective were invoked in this case. It also considered that the health concerns, whist important, did not negate the seriousness of the failings. The Tribunal was in no doubt that this fell seriously short of the conduct expected of a doctor and amounted to misconduct."

22. In relation to the appellant's failure to comply with Professor Youssef's instruction to take down the videos and his false assertion that he had/would, the Tribunal found that there was an expectation on all doctors to comply with instructions given to them by their Responsible Officer ('RO'), and the conduct fell seriously below the standard expected of a practising doctor such as to amount to misconduct.

23. On the question of whether the appellant's fitness to practise was impaired, the Tribunal's reasoning and conclusions included the following:

> "Paragraphs 2-4
>
> 78. The Tribunal acknowledged the findings of the health assessors, as well as Dr Byrne and Dr Edgar that in early 2020 Mr Adil was likely to have experienced an acute … period of … illness. By November 2020 Mr Adil had stated that he was feeling better. As the Tribunal had already determined, this period of ….illness did not negate the seriousness of the failings. In the Tribunal's view, neither did it provide the whole explanation for the statements having been made at all in the context in which they were made. Although the illness provided a part explanation, in the Tribunal's view it was not the whole story.
>
> …
>
> 81. When considering Mr Adil's level of insight, the Tribunal noted that there was evidence in the bundles in which he still denied having made the statements as set

out in Paragraph 2 of the Allegation, as recently as 1 May 2022. In an email he sent to the GMC on that date he said:

"These are all wrong and ludicrous statements which you are trying to allege me falsely with your own modified words to make my case look even worst purposely. You are trying to implicate me falsely rather discriminatory which seems to be racially motivated on your behalf. If you continue doing it I may take it further to the Chief Executive and you do not need to make any further correspondence with me in future and take you hand away from my case notes any more. Please correct the statement you attributed to me falsely."

…

84. The Tribunal was concerned that Mr Adil's expressions of regret and apology had come very late in the day and had continued to develop even during the course of these proceedings. Mr Adil had submitted numerous iterations of his witness statement at the facts stage, after commencement of the proceedings, each of which developed and refined further the earlier version in light of what had been said.

85. While the Tribunal was satisfied that in relation to its findings on health impairment, it was not likely there would be a relapse in his mental health, it was concerned that, beyond the health issues, Mr Adil did not have full insight into the consequences of his actions in relation to Paragraphs 2 to 4 of the Allegation, particularly Paragraph 4.

…

Paragraphs 5-6

88. The Tribunal took into consideration that even now, in his submissions, Mr Adil failed to acknowledge that he did not comply with the request of his RO to take down the videos…….this showed a lack of respect for the position of the RO and the importance and gravity of what the RO was telling him….The Tribunal had seen nothing to satisfy it that Mr Adil understood how wrong this was.

Overall

91. The overall view of the Tribunal was that Mr Adil had limited appreciation of what he had done, and its impact. He had shown some developing insight and had, during these proceedings expressed his regret and remorse. However, that came late in the day in the face of recent denials that the statements in Paragraph 2 of the Allegation were ever made by him. In the Tribunal's view, Mr Adil still lacked adequate understanding and appreciation of the impact of his actions in relation to Paragraphs 2-6 of the Allegation. In the whole of this context, the Tribunal was not satisfied that in the face of an opportunity to proclaim his views in such a way again, there was no risk he would do so.

92. The Tribunal concluded that all three limbs of the overarching objective were engaged in this case and determined that Mr Adil's current fitness to practise is

impaired by reason of his misconduct in relation to Paragraphs 2-6 of the Allegation."

24. The Tribunal made its Determination on Sanction on 29th June 2022 after hearing submissions from both parties and considering the sanctions guidance issued by the GMC ('Sanctions Guidance'), which included the following under the heading *"Taking a proportionate approach to imposing sanctions"*:

> "20. In deciding what sanction, if any, to impose the tribunal should consider the sanctions available, starting with the least restrictive. It should also have regard to the principle of proportionality, weighing the interests of the public against those of the doctor (this will usually be an impact on the doctor's career, e.g. a short suspension for a doctor in training may significantly disrupt the progression of their career due to the nature of training contracts).
>
> 21. However, once the tribunal has determined that a certain sanction is necessary to protect the public (and is therefore the minimum action required to do so), that sanction must be imposed, even where this may lead to difficulties for a doctor. This is necessary to fulfil the statutory overarching objective to protect the public."

25. In its Determination on Sanction the Tribunal concluded that an order imposing a period of six-months' suspension was the appropriate and proportionate sanction and directed a review hearing shortly before the end of that period to consider whether the appellant had developed insight and understanding about the gravity and impact of what he had done. Its reasons included the following:

> "52. The Tribunal acknowledged Mr Adil's apologies and insight relating to Paragraph 2 of the Allegation. However, in relation to Paragraph 3, the Tribunal noted that Mr Adil's evidence had been contradictory. At times he had acknowledged that he had used his position as a doctor in the UK to add credence to his opinions, whilst at other times he told the Tribunal that he had merely described his role and qualifications as a way to introduce himself.
>
> 53. The Tribunal was particularly concerned in relation to Mr Adil's continued lack of insight into the impact of his conduct as set out in Paragraph 4 of the Allegation; the effect on public health, espousing views that were contrary to the widely accepted medical opinion at the time and undermining public confidence in the medical profession. As it had said in its earlier determination, these statements, made by an experienced UK doctor, could have led to some of those members of the public believing Mr Adil not taking up the vaccine or complying with restrictions. This clearly had the potential to cause harm, and the Tribunal determined that the first strand of the overarching objective was invoked in this case….
>
> …
>
> 55. The Tribunal noted that even at this stage, before the GMC submissions, Mr Adil was still questioning the validity of Paragraph 4, proposing that there was no proof. In addition, Mr Adil continued to challenge the GMC investigative process

and the evidence it had put before the Tribunal, particularly relating to the anonymity of individual complainants. This highlighted Mr Adil's lack of appreciation of the gravity and impact of his actions and also his ongoing lack of insight into some parts of his behaviour, which continued as late as Autumn 2020. For this reason, the Tribunal could not be satisfied that there was no risk of repetition, as it had said in its earlier determination.

56. Overall, it was of the view that the risk of repetition was low, but considered that this arose more from Mr Adil's concern about the personal hardships he and his family had faced in consequence of his actions, than from an appreciation of impact of his actions as set out in Paragraph 4 of the Allegation.

57. The Tribunal was of the view that Mr Adil's misconduct was so serious that significant action had to be taken to maintain public confidence in the profession and to maintain proper professional standards.

58. The Tribunal was satisfied that a sanction of suspension would have a deterrent effect and send the appropriate message to the profession and the wider public interest that such misconduct is unacceptable. It would meet all three limbs of the overarching objective and mark the seriousness of the Allegation.

…

68. The Tribunal had determined that Mr Adil's fitness to practise was currently impaired; its assessment being made at the present time, when Mr Adil was fit and well and not suffering any adverse health condition. He had begun to show some insight into his conduct, but this remained limited in scope. He had apologised for his conduct in making the statements in Paragraph 2 of the Allegation and expressed his regret. However, it was clear to the Tribunal that Mr Adil still failed to appreciate both the gravity of his misconduct and its impact, specifically as set out in Paragraph 4 of the Allegation. This necessitated a period for Mr Adil to reflect carefully on the findings of this Tribunal in order to be able to demonstrate that he fully understood and appreciated that impact and its consequences.

69. The Tribunal also noted that Mr Adil was a competent surgeon, whose skills would undoubtedly be of use to the NHS at a time when it was dealing with a significant backlog of patients needing surgery as a result of the pandemic.

70. The Tribunal determined that a period of suspension of six months would:

> mark the seriousness of the misconduct and send the appropriate signal to Mr Adil, the public and the profession about such conduct being unbefitting of a registered doctor;
>
> allow sufficient time for Mr Adil to continue his remediation and to reflect carefully and deeply on the Tribunal's finding and his conduct such that he was able to demonstrate his understanding and appreciation of the impact of his conduct on public health and confidence in the profession. The Tribunal noted that a review tribunal would expect to see evidence of meaningful

> reflection and genuine insight in order to consider allowing Mr Adil to return to unrestricted practice; and
>
> if Mr Adil was able so to reflect and demonstrate his genuine insight, not deprive the NHS of the services of a very capable surgeon for any longer that was necessary."

26. The Tribunal's Determination on Immediate Order on the same date, directed the suspension to have immediate effect and to remain in force pending the resolution of any appeal brought against the decision. The Tribunal's reasons were as follows :

> "9. In reaching its decision, the Tribunal has exercised its own judgement and has taken account of the principle of proportionality. The Tribunal has borne in mind that it may impose an immediate order where it is satisfied that it is necessary for the protection of members of the public or is otherwise in the public interest or is in the best interests of the practitioner. It also considered that an immediate order may be particularly appropriate where there was a risk to patient safety or a need to protect public confidence in the profession.
>
> 10. The Tribunal acknowledged that there was no risk to patient safety in this case. It had made serious findings of misconduct and had significant concerns about the impact of the conduct on public health and public confidence in the profession. It balanced the public interest with Mr Adil's own personal interests and considered whether it was appropriate to return an otherwise competent surgeon to practise pending the substantive determination taking effect.
>
> 11. On balance, the Tribunal considered that the maintenance and promotion of public confidence in the profession could not be assured by Mr Adil being permitted to return to unrestricted practise pending the conclusion of any appeal he may choose to lodge. The Tribunal therefore determined that an immediate order of suspension was necessary in order to protect public confidence in the medical profession."

Grounds of Appeal to the High Court

27. The appellant advanced five grounds of appeal before the High Court which the Judge accurately summarised at paragraph 10 of the judgment:

> "10. The grounds of appeal focus primarily on whether the Tribunal's decisions are consistent with Mr Adil's article 10 rights. Ground 1 is that the conclusions on misconduct and impairment were contrary to article 10(1) because they give rise to an interference with article 10 rights that is not "prescribed by law" that, for that reason alone, does not meet the requirements laid down within article 10(2) and is unlawful. Ground 2 is that, in any event, the conclusions on misconduct and impairment are a disproportionate interference with Mr Adil's rights under article 10(1). Grounds 3 and 4 are aspects of Ground 2. The former is that the Tribunal was wrong to conclude that expressing views "outside widely accepted medical opinion" either amounted to misconduct or was capable of providing justification for interference with Mr Adil's right to freedom of expression. The latter is that there was no evidence to support a conclusion that

> what Mr Adil said damaged the reputation of the medical profession. This too, it is submitted, goes to whether the conclusions of misconduct, impairment, and the penalty imposed can be proportionate interferences with Mr Adil's Convention rights. Ground 5 is that the decisions to impose a final order for suspension and to make an immediate order suspending Mr Adil pending any appeal were disproportionate in that each failed to give sufficient weight to mitigating or compensating circumstances."

28. The Judge dismissed the appeal on all grounds. As to ground 1, he identified the requirement for legal certainty, citing the well-known passage at [49] of the Judgment of the European Court of Human Rights in *Sunday Times v United Kingdom* (1980) 2 EHRR 245. He rejected the submission on behalf of the GMC that the provisions of the Act, on their own, were sufficient to meet the requirement of foreseeability so as to fulfil the "*prescribed by law*" condition. Nevertheless the SM Guidance read in conjunction with paragraph 65 of GMP, although in general terms, was sufficient to do so.

29. The Judge noted that the charges had not been formulated expressly by reference to paragraph 65 of GMP or by reference to the SM Guidance and said that it would be good practice to refer to the relevant provisions in the statement of charges. He went on to observe that that was not an error of substance. He said that it was a "*matter of significant misfortune*" that paragraphs 4a and 4b of the charge-sheet characterised and classified the misconduct by reference to rubrics that could not be directly traced to GMP or other GMC guidance; however, in substance, they amounted to no more than further particulars of paragraph 4c.

30. As to ground 2, the judge accepted the submission that when the issue is whether an interference with article 10 rights is justified, the margin of appreciation afforded to the Tribunal is limited; but emphasised that significance should be attached to its decision insofar as it was dealing with matters within its expertise. Maintenance of the good standing of the medical profession is a legitimate objective for the purposes of article 10.2 and the opinion of a specialist tribunal on that question was relevant to the application of article 10.2 in the circumstances of the appeal. Regardless of how narrow a margin of appreciation was appropriate, the outcome was clear.

31. The Judge described the remarks made by the appellant as "outlandish". He said that it was clearly open to the Tribunal to conclude that such remarks, presented by the appellant on the basis of his medical credentials, were likely to diminish public trust in the medical profession. The Tribunal's further specific assessments: (a) that making such remarks, claiming during a pandemic that the virus that was its cause did not exist, and that vaccines being developed to combat the virus were, among other matters, aimed at promoting population control, would undermine the protection of public health; and (b) that the appellant's opinions, as broadcast, were so far removed from anything capable of being described as legitimate medical opinion, were conclusions that were reasonable. In the context of this case, these matters were not discrete from the obligation not to act in a way that would tend to impair public trust in the profession; rather they were particular aspects of that obligation. The position did not change when considered from the perspective of the article 10 right to freedom of expression. The article 10 right is a qualified right. Exercise of the right to freedom of expression may be restricted when necessary in the interests of public safety, or for the protection of public health, or for the

protection of the rights of others. Each of these legitimate objectives was material to the Tribunal's consideration of the appellant's YouTube videos. The requirement that any restriction must be necessary sets a high bar, but the decisions of this Tribunal (a) that what the appellant had broadcast amounted to misconduct, (b) that by reason of that misconduct his fitness to practise was impaired, and (c) that his registration should be suspended for six months, were not a disproportionate interference with the appellant's article 10 rights.

32. As to ground 4, it was formulated in error. The application of a standard such as paragraph 65 of GMP requires a tribunal to apply its own expertise to make an objective assessment.

33. As to ground 5, sanction, it was clear from the Determination on Sanction that the Tribunal had well in mind that the appellant had been subject to an interim suspension order. The sanction decision rested on careful consideration of the GMC's Sanctions Guidance, with which it was consistent, and the Tribunal's reasons fully explained why a sanction of six-month suspension from the register of practitioners was appropriate, including the finding that his fitness to practice remained currently impaired. The same conclusions applied to the decision to impose an immediate order.

The grounds of appeal

34. There are three grounds of appeal. The first two essentially repeat grounds 1 and 2 advanced before the Judge. Ground 1 is that the GMP and SM Guidance do not meet the "prescribed by law" condition in article 10.2. Ground 2 is that the decisions of the Tribunal do not meet the tests of necessity or proportionality in article 10.2. The appellant's written skeleton argument relied on article 9 in addition to article 10, although it was not mentioned in oral argument. Article 9.1 protects freedom of thought, conscience and religion, rather than freedom of expression, and is not in my view engaged in this case. In any event article 9.1 is subject to the same qualifications in article 9.2 as are found in article 10.2, so far as relevant to this case, and so raises no issues which differ from those under article 10.

35. The third ground of appeal challenges the sanction as disproportionate and inappropriate.

36. By a Respondent's Notice the GMC seeks to challenge the Judge's conclusion that the terms of the Act were insufficient, without GMP and the SM Guidance, to meet the prescribed by law condition.

The approach of this court on an appeal

37. An appeal to the High Court under s. 40 of the Act is by way of rehearing, whereas the appeal to the Court of Appeal is by way of review, pursuant to CPR Rule 52.21(1) and CPR PD 52D para 19.1. The difference is not of any significance in this case. The appeal court will allow an appeal where the decision of the tribunal was wrong or unjust because of a serious procedural irregularity. The court is entitled to substitute its own view for that of the tribunal. So far as sanction is concerned, this means determining for itself whether the sanction was appropriate: *Sastry & Okpara v General Medical Council* [2021] EWCA Civ 623 at [102].

38. That is not to say, however, that the Court will give no weight to the views of the Tribunal. It is well established that a professional disciplinary tribunal is generally best placed, by reason of its experience and expertise, to weigh the existence or seriousness of the professional misconduct alleged, and the effect which its sanctions will have in protecting the public, promoting and maintaining the standards to be observed by individual members of the profession in the future, and promoting public confidence in the profession. Accordingly an appeal court will afford an appropriate measure of respect and deference to the views of the professional tribunal as to whether and to what extent conduct undermines confidence in the profession or affects public safety; and the measures necessary to maintain professional standards and provide adequate protection to the public.

39. The degree of deference will depend upon the circumstances of the case. Where the issue is one of law, the appellate court is well placed to determine it for itself. On the other hand, where it involves an evaluative judgment of whether conduct undermines public safety or public confidence in the profession, and what sanction is necessary to promote the statutory objectives, a considerable degree of respect is due to the experience and expertise of the professional tribunal. This is all the more so where the judgement depends in part upon an evaluation of the oral evidence or submissions made by the practitioner in person before the tribunal, which the appellate court does not have an opportunity to see and hear and evaluate for itself. Nevertheless if the court, despite paying such respect where it is due, is satisfied that the decision was wrong or the sanction was inappropriate, then the court will interfere.

40. Amongst the many cases of high authority establishing these principles are: *Bolton v The Law Society* [1994] 1 WLR at pp. 516, 518; *Ghosh v General Medical Council* [2001] 1 WLR 1915 at [34]; *Preiss v General Dental Council* [2001] 1 WLR 1926 at [27]; *Marinovich v GMC* [2002] UKPC 36 at [28]-[29]; *Gupta v General Medical Council* [2002] 1 WLR 1691 at [10], [21]; *Meadows v General Medical Council* [2007] QB 462 at [197]; *Raschid & Fatnani v General Medical Council* [2007] 1 WLR 1460 at [18]-[19]; and *Bawa-Garba v General Medical Council* [2019] 1 WLR 1929 at [67].

Analysis

41. Before turning to the grounds I should say something about the way the charge sheet was framed and how it affects the arguments.

42. I agree with the observations of the Judge that it would be good practice for the charge sheet to identify the guidance which the misconduct is said to breach. I also agree that it is not a matter of substance that it did not do so in this case. Paragraph 4c expressly alleged that the effect of the conduct complained of was to undermine public confidence in the medical profession, which is the substance of the requirement in paragraph 65 of the GMP to ensure that conduct justifies the public's trust in the profession.

43. Paragraph 4a identified the comments as undermining public health, and the Tribunal's conclusions were that the comments were likely to result in harm to the public. It is not necessary in this case to examine whether that is a separate yardstick by which misconduct may be judged and if so whether it is sufficiently clearly proscribed by the Act itself or specific provision in the GMP to fulfil the "prescribed by law" requirement. It might be thought self-evident that, in a profession whose raison d'être was to promote and maintain the health of members of the public, conduct which would have the opposite

effect would amount to misconduct. But however that may be, the public health consequences of the appellant's remarks were treated by both the Tribunal and the Judge as an aspect of the conduct which contributed to it undermining confidence in the profession. That is a legitimate approach, and it is neither necessary nor appropriate, to look at that paragraph in isolation. The nature and effect of the appellant's remarks must be taken in the round and as a whole in determining whether the disciplinary process was an unlawful interference with his article 10 rights or otherwise unfair or inappropriate.

44. That applies also to the formulation in paragraph 4b, that the conduct was contrary to widely accepted medical opinion. This would clearly not be a sufficient criterion on its own to establish misconduct. There are many matters of medical debate on which professional views legitimately differ, and the fact that a doctor expresses a minority view, even a view shared by a small minority is not sufficient of itself to render his conduct improper. Medical progress depends upon such debate, and is littered with examples of what were thought to be heretical views becoming accepted wisdom, and vice-versa. Article 10 and the common law protect the right to express views with which most people disagree. The Tribunal and the Judge expressly made this point, and did not purport to treat the fact that the views were contrary to widely accepted medical opinion as sufficient to establish misconduct. However the relationship between the views expressed and widely accepted medical opinion is not irrelevant to the question of whether the appellant's conduct undermined confidence in the profession in the particular circumstances of this case, for reasons I address below, and that was how the Tribunal treated it. The inclusion of paragraph 4b in the charge sheet is not to be viewed in isolation, and when taken together with the other aspects of the charge is properly included as a relevant aspect of the charge of undermining public confidence in the medical profession.

Ground 2

45. The appropriate structure for analysing the application of article 10 Convention rights is the series of questions identified by the Divisional Court (Singh LJ, Farbey J) in *DPP v Ziegler* [2020] QB 253 at [63] and approved and applied by the Supreme Court in that case [2022] AC 408 at [16] and [58], and in *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32, at [24], [110 ff]:

> (1) Is what the defendant did in exercise of one of the rights in Article 10?
>
> (2) If so, is there an interference by a public authority with that right?
>
> (3) If there is an interference, is it 'prescribed by law'?
>
> (4) If so, is the interference in pursuit of a legitimate aim as set out in paragraph 2 of article 10?
>
> (5) if so, is the interference 'necessary in a democratic society' to achieve that legitimate aim? This question will in turn require consideration of the well-known set of sub-questions which arise in order to assess whether an interference is proportionate:
>
> > (a) Is the aim sufficiently important to justify inference with a fundamental right?
> >
> > (b) Is there a rational connection between the means chosen and the aim in view?
> >
> > (c) Are there less restrictive alternative means available to achieve that aim?

> (d) Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?"

46. In this case it is common ground that the answer to questions (1) and (2) is yes. Ground 1 addresses question (3). Ground 2 addresses questions (4) and (5). It would be logical to address the Grounds in that order, because if the interference is not prescribed by law, article 10.2 is not engaged. However, there was an overlap in a number of the arguments advanced by both sides in the appeal on grounds 1 and 2, and having concluded that both grounds must fail, I find it easier to explain my reasons by addressing ground 2 first.

47. The legitimate aims in article 10.2 which are potentially engaged are the interests of public safety and protection of health. The function of the National Health Service is to promote and maintain public health and safety. Maintaining public confidence in the NHS and its staff is an essential aspect of providing such a service and serves the same aims. Sanctioning doctors for comments likely to undermine public health and cause harm to the public so as to deter such behaviour also directly engages the aim of protection of public health and safety.

48. There might also arise a question whether the legitimate aim of protecting the reputation or rights of others was potentially engaged in this case by reason of implications which might be drawn from what the appellant said about the competence or honesty of the senior clinical and scientific advisors, including the Chief Medical Officer, Deputy Chief Medical Officer, Chief Scientific Officer, and members of their teams, who were giving the daily bulletins. However this did not form any part of the reasoning of the Tribunal or the Judge below, and was not fully explored in argument, and I express no concluded views about it.

49. At the forefront of the formulation of Ground 2, and Mr Hoar's argument in support of it, was his submission that it is an unlawful interference with freedom of expression to sanction a doctor for views on matters of medical scientific or political significance, even if they are minority views which are contrary to widely accepted medical opinion. It involves the Tribunal and the court undertaking the impermissible exercise of seeking to assess the legitimate content of such views applying objective standards, and thereby breaching its duty of neutrality referenced in *Metropolitan Church of Bessarbia v Moldova* (2002) 35 EHRR 306 at [117] and *Forstater v CGD Europe* [2022] ICR 1 at [22] (in the context of legitimacy of belief). Matters of scientific medical or political debate are always something on which a doctor should be able to express his views, however far from the mainstream, without the chilling effect of the risk of being sanctioned, save where they would be seriously offensive to others, particularly groups with protected characteristics.

50. I cannot agree with such propositions expressed in such absolute terms or with the limited qualification. During the course of argument Bean LJ posited a hypothetical example of a doctor who published views that there was no link between cancer and smoking, that smoking was good for health, and that people were encouraged to smoke at least 40 cigarettes a day. In such a case the views would be so far removed from any concept of legitimate medical debate that an appeal to the importance and breadth of the freedom of expression protected by article 10 would be misplaced. All depends upon the facts of

each individual case, and Mr Hoar's appeal to some general principle in relation to medical or political debate obscures the need to focus on the particular views expressed by the appellant in this case.

51. These were that the virus (severe acute respiratory syndrome coronavirus 2, or SARS-CoV-2), and the disease (Covid-19) did not exist; the pandemic was a scam and a conspiracy by the UK, USA and Israel, i.e. something engineered or manipulated by those countries; and that any vaccination programme would be harmful because it would be for the commercial and world domination purposes identified in para 2(d) to (g) of the charge sheet. By using his professional medical credentials, the appellant's views on these matters were intended to, and likely to, engender more credence than if expressed by a layman. The appellant's views were expressed in extreme terms, and were, as the Tribunal held, asserted as fact. For example he said that "coronavirus does not exist at all" and referred to it as "so called corona"; "I must reassure you that you are not going to die because of this virus which doesn't exist"; the vaccination programme is "a mass murder programme… for mankind, for the population of the entire world."

52. The key aspect of the appellant's conduct for present purposes is that these views were (a) baseless; and (b) dangerous. Let me focus on each aspect in turn.

Baseless

53. Where statements are made by a doctor invoking his status to engender trust and support in them, the extent to which the views are capable of medical and scientific support is a matter of importance. This is recognised by paragraph 68 of GMP which provides that in communication with patients and colleagues a doctor must make clear the limits of their knowledge and make reasonable checks to make sure any information given is accurate. Mr Hoar submitted that this was confined to existing clinical patients of the doctor, but there is no reason as a matter of language or good sense why this should be so. A doctor may express views on diseases or treatment to those he hopes will become clinical patients, for example by advertising; he may express such views to existing or potential clinical patients of other practitioners. All those to whom such views are expressed are encompassed by the expression "patients" in this paragraph because they may be expected to act on them in a way which affects their health and they are potentially NHS patients. It follows that, in my view, paragraph 68 is directly applicable to the appellant's YouTube videos.

54. Irrespective of the proper construction of para 68 of GMP, which only bears on ground 1, there is an important qualitative difference between a doctor's views which have some supporting scientific basis, even if not widely accepted, and views whose validity or accuracy is unconnected to any supporting evidential basis, in other words baseless.

55. This is so as a matter of professional conduct when, and because, the views are being expressed in a form or manner which invokes the professional's medical expertise in order to seek to give added credence to them. It might be a lawful exercise of freedom of expression for a member of the public to deny the existence of the virus or disease. But for a doctor to do so invoking his medical experience and expertise brings into play different considerations, in a disciplinary context, when considering the effect it may have in trust and confidence in the profession and on public health. If such views are not merely controversial but baseless in the sense that they are insupportable from a scientific or medical point of view, that is an important consideration for the reasons explained in

the SM Guidance at paragraph 17: people will take medical views from doctors on trust and may reasonably take them as representing the views of the profession more widely. The expression "views of the profession more widely" does not mean the views of the majority of the profession, but it does mean at least a minority based on information which has been checked for accuracy and with some scientific and medical basis for support.

56. The appellant's views that the virus and disease did not exist, that the pandemic was caused by conspiratorial engineering and manipulation by the UK/USA/Israel/Bill Gates, and that vaccines were intended to serve commercial and world domination purposes not medical purposes, were baseless. That is not merely an assessment on my part that they are self-evidently so. It was in effect accepted by the appellant himself at the hearing. Mr Hoar suggested that this acceptance might have been a result of pressure to say things which could minimise the sanction imposed. However this was the appellant's position well before any question of sanction arose.

57. This was also what I take to be the conclusion of the Tribunal. Although it did not say so in such terms, it is implicit in several passages that they treated the statements as baseless. For example (in all cases with my emphasis):

> "In the context of the pandemic at the time, and particularly the concerns of a public confined to home and dependent upon the provision of *responsible and trustworthy information*, the Tribunal's view was that such statements, containing *mis-information and conspiracy theories*, could be both confusing and destabilising";
>
> "such statements *breached the trust* that the public had a right to expect of him as a doctor in the UK. Despite his protestations that he was trying to help in a period of widespread confusion, his comments *went far beyond helpful legitimate comment into the realms of scaremongering conspiracy theories*."
>
> "Mr Adil's statements ……. would be considered *deplorable by his peers*."

Dangerous

58. The Tribunal found that the appellant's conduct undermined public health. Mr Hoar submitted that the Tribunal had reached this conclusion solely on the basis that the appellant's statements ran counter to the public health messages being disseminated, in other words that the views undermined public safety *because and only because* they were contrary to the Government's public health messages. The public messages on restrictions were, Mr Hoar submitted, a matter of controversy and legitimate debate at the time.

59. The way the matter was expressed by the Tribunal in paragraphs 46 to 48 of its Determination of the Facts, and paras 71 to 72 of its Determination of Impairment lends some support to Mr Hoar's submission, expressed in the language of the Tribunal in terms of "public health messages". However the submission fails to distinguish between two aspects of the Government's health messages, namely the dangers to the health of the public posed by the virus and its pandemic spread on the one hand; and the restrictions to be imposed in order to mitigate its effect on the other. The appellant's views undermined public confidence in both aspects, not just the steps the Government was requiring or

recommending to mitigate the effects of the virus. The views being advanced were not that the restrictions imposed in order to mitigate the effects of an acknowledged disease and virus were the wrong ones. They were, rather, that there was no virus or disease, and accordingly no steps were necessary at all. People were, in effect, being encouraged to behave in the way they would have behaved if the virus and its pandemic spread did not exist. It is self-evident that this would contribute to public harm if accepted. The views expressed by the appellant were not dangerous because they contradicted public health messages on restrictions, as such, but because they undermined the public health messages about the existence, and virulence of the virus.

60. Moreover in paragraph 72 of its Determination on Impairment the Tribunal identified another risk to the health of those who might believe the appellant's opinions, namely that members of the public might fail to get vaccinated when the vaccines became available. That was so because the appellant's views were that the vaccine and vaccination programme would not be introduced by reference to medical benefits, but for commercial and world domination reasons; and this would or might discourage people from having any vaccination, irrespective of medical benefit. This is quite different from contributing to a debate on whether vaccines are, from a medical and scientific point of view, effective, or whether the medical advantages outweigh the medical risks. It was encouraging a view that vaccines should be shunned irrespective of their medical benefits or properties because there was no disease to protect against and they were being implemented for commercial and world domination purposes.

61. Accordingly I would agree with the Tribunal that the views were likely to undermine public health and safety. They were dangerous, both in relation to social behaviour and in relation to vaccination, for reasons which did not trespass into the area of any medical or political debate on the lockdown or other requirements of the Government or the medical or scientific merits or disadvantages of vaccination.

Article 10.2: pursuit of legitimate aims

62. In these circumstances, there can be little doubt, in my view, that sanctioning the appellant for misconduct was in pursuit of the legitimate article 10.2 aim of protecting public health and safety.

Article 10.2: proportionality

63. Mr Hoar emphasised that the test is one of necessity, importing a high threshold. more than mere desirability. What is meant by "necessary" in this context has been established by the Strasbourg jurisprudence as something less than indispensable but involving a pressing social need: see for example *The Sunday Times v United Kingdom* (1979) 2 EHRR 245 at [59] and *Hertel v Switzerland* (1998) EHRR 534 at [46(ii)].

64. Turning to the *Ziegler* questions (5)(a) to (d), it is clear that the legitimate aims which are engaged in this case are sufficiently important to justify interference with freedom of speech in some cases; and that a professional disciplinary regime imposing sanctions is a rational means of doing so for medical practitioners. The remaining issue is that addressed by questions (5)(c) and (d), which involve questions of proportionality.

65. Here again, the most important features of the appellant's conduct are that the views he expressed repeatedly over a period of time during the early stages of the pandemic were baseless, dangerous and given by a doctor invoking his senior professional status and

experience to lend them credence. The seriousness of that conduct fully justifies the conclusion that it fell well short of the standards to be expected of a senior doctor and undermined public trust in the medical profession; and that the application of disciplinary sanctions is a necessary and proportionate interference with freedom of expression in the interests of public health and safety in order to maintain public trust in the NHS and deter others from such unprofessional and dangerous conduct. Those were the conclusions of an expert tribunal whose views, on this aspect of their evaluation, command respect and a due degree of deference. In any event they are the same conclusions as I have myself reached independently.

66. Mr Hoar referred to a number of matters which he submitted should be taken into account in pointing away from proportionality. None, in my view, has any weight or undermines the conclusions I have expressed. They were:

    (1) the absence of express prohibition on the expression of opinion in GMC guidance;
    (2) the lack of any professional conduct caselaw that a provision prohibiting bringing a profession into disrepute is sufficiently wide to prohibit the expression of opinion in and of itself;
    (3) the lack of any foreseeable test as to what is "legitimate" opinion;
    (4) the appellant's submission that the standard to be applied should be lower than that in *Bolam v Friern Hospital Management Committee* [1975] 1 WLR 583; and
    (5) the high threshold that applies to professionals accused of misconduct "outwith professional practice".

67. As to the first, I address below under Ground 1 my reasons for concluding that GMP paragraphs 65 and 68 and SM Guidance para 17 sufficiently clearly and foreseeably restrict the expression of opinions. That disposes of this point.

68. As to the second, my conclusion on Ground 1 is equally dispositive of this point. If, as I conclude, the guidance makes it sufficiently foreseeable that expressions of opinion can amount to misconduct if and because they undermine public confidence in the profession, the absence of case law examples is immaterial to proportionality questions. There are, in any event, decided cases which recognise the lawful interference with article 10 rights in the interests of proper regulation of professions: see for example *Bamgbelu v General Dental Council* [2015] EWHC 4123 (Admin) at [49]-[51]; *R (Pitt) v General Pharmaceutical Council* [2017] 156 BMLR 222 at [69]; *Khan v Bar Standards Board* [2018] EWHC 2184 (Admin) at [68]; and *Diggins v Bar Standards Board* [2020] IRLR 686 at [74] and [84].

69. As to the third, the facts of this case do not require a determination in the abstract of what amounts to 'legitimate' political, medical or scientific opinion. Opinions expressed by a doctor which are baseless and dangerous, invoking his status and experience to engender trust in them, are not 'legitimate' in the sense of enjoying absolute immunity under article 10 rights of freedom of expression or being incapable of amounting to misconduct.

70. As to the fourth, this is an Aunt Sally. Neither the Tribunal nor the Judge applied *Bolam* standards to what was or was not protected by article 10, and nor have I.

71. As to the fifth, it is well established that conduct is capable of amounting to professional misconduct notwithstanding that it occurs outside clinical practice. Mr Hoar relied upon

statements by Elias LJ in *Remedy UK v GMC* [2010] EWHC 1245 at [27] which identified two categories of conduct, one being "in the exercise of professional practice" and the other "outwith the course of professional practice itself"; and posited a test that in the latter case the conduct must be dishonourable or disgraceful or attract some kind of opprobrium. I do not think that Elias LJ was intending any rigid classification and in my view it would not be helpful to do so. If it were necessary, I would characterise the appellant's conduct as closer to the first category than the second. At [37(4)] Elias LJ himself said that conduct may fall within the former category if it falls within the scope of a medical calling which has no direct link with clinical practice. In this case the conduct was professional conduct closely linked with the appellant's professional practice because he was using his professional practice qualification and experience to seek to engender greater trust and credence in his views. There was no "higher threshold" to apply in considering whether it amounted to professional misconduct.

72. For these reasons I would reject Ground 2.

Ground 1

73. In order to engage article 10.2 at all, the interference with freedom of expression must be prescribed by law. In *The Sunday Times v United* the European Court of Human Rights said at [49]:

> "49. In the Court's opinion, the following are two of the requirements that flow from the expression "prescribed by law". Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."

74. These remarks were repeated by the Court in *Hertel v Switzerland* at [35] and in *Chauvy v France* (2005) 41 EHRR 29 at [43], where the Court went on to say at [44]-[45]:

> "44. The scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed. A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.
>
> 45. This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails."

75. The expression "misconduct" involves a standard of behaviour falling short of what is proper or reasonably to be expected of a doctor in the circumstances: *Roylance v General Medical Council (No 2)* [2000] 1 AC 311 at p. 331B. It is not necessary in this case to address the point raised by the Respondent's Notice as to whether the provisions of the Act would satisfy the prescribed by law condition if they stood alone. They do not stand alone, but are supplemented by the statutory advice in the GMP and SM Guidance which any professional doctor would know contained principles relevant to their conduct and fitness to practice. That is emphasised by GMP para 6 and SM Guidance para 3, each of which state that serious or persistent failure to follow the guidance which poses a risk to patient safety or trust in doctors will put registration at risk.

76. Paragraphs 65 and 68 of GMP and 17 of the SM Guidance, which I have quoted above, make clear that conduct of the following kind may have that consequence:

    (1) conduct which undermines the public's trust in the profession (GMP para 65 GMP);
    (2) communication of information to patients which is untrustworthy because it does not make clear the limits of the doctor's knowledge and has not been reasonably checked for accuracy (GMP para 68). This applies to all potential patients, not merely existing clinical patients, as I have explained.
    (3) Publication on social media of views expressed as a doctor which are not views of the profession "more widely" (SM Guidance para 17). As I have explained this is not a reference to majority views of the profession, but does refer to views of a minority which have some scientific or medical basis.

77. In these circumstances it is clearly foreseeable from the published guidance that using one's status as a doctor to promote views on social media which are baseless and damaging to patient health would be regarded as misconduct and attract disciplinary sanction.

78. I detected two strands to Mr Hoar's submission on this ground. The first was that if contribution to debate on matters of medical scientific or political significance were to be proscribed and potentially made susceptible to disciplinary sanction that needed to be spelled out explicitly. In particular there would need to be express guidance saying that misconduct could cover expressions on matters of medical opinion. The other was that in order to achieve sufficient certainty and foreseeability the guidance would have to spell out what forms of opinion were proscribed. Such guidance must, he submitted, identify a particular class of expression.

79. As to the first, the guidance does expressly make clear in GMP para 68 and SMP para 17 that it covers expressions of medical opinion. But in any event the appellant's conduct was so far from being a contribution to medical scientific or political debate that it is unhelpful to formulate a proposition in these terms; what matters is whether it should have been reasonably foreseeable that the appellant's particular conduct was professional misconduct and might attract disciplinary sanction. Making comments which are baseless and dangerous is self-evidently proscribed by the paragraphs 65 of GMP quite apart from paragraphs 68, and paragraph 17 of the SM guidance.

80. As to the second wider submission that guidance would need to identify what forms of medical opinion are proscribed, this is met by the need for flexibility emphasised in the passages quoted above from *Sunday Times v UK* and *Chauvy*. Statements which

undermine public trust in the profession can be many and various, and it would be undesirable to try to identify or categorise them definitively. One cannot legislate for all forms of speech in advance. It would not be practical or realistic, to expect a regulator to publish exhaustive guidance on such matters. This is inevitable in the sphere of freedom of expression, where the application of article 10.2 requires a closely fact specific evaluation of issues of necessity and proportionality. It was essentially for these reasons that in *R (Pitt) v General Pharmaceutical Council* (2017) 156 BMLR 22 Singh J, as he then was, rejected a submission that rules of the General Pharmaceutical Council framed in terms of maintaining trust in the profession were not sufficiently certain: see [4] and [45]-[51].

81. Accordingly I would reject Ground 1.

Ground 3

82. Mr Hoar submitted that the sanction imposed was not proportionate for three reasons. The sanction should not have been one of suspension but one of attaching conditions to immediate return to practice; alternatively six months' suspension was excessive in itself; and there should have been no further period of suspension taking into account the lengthy period of suspension already imposed by interim suspension orders.

83. Those interim suspension orders were as follows. On 1 June 2020 an interim orders tribunal imposed an interim suspension order of 12 months by reason of the conduct allegations made in respect of the posts on YouTube and conversations with Mr Youssef about them. On 20 October 2020 there was a review hearing at which there were also taken into account the allegations of clinical misconduct and the appellant's mental health. These further allegations were taken into account at all subsequent interim order hearings, in addition to the allegations in relation to YouTube postings and the conversations with Mr Youssef. The interim suspension order was maintained for the protection of the public and in the appellant's own interests based on mental health concerns. This remained the position through a period involving further extensions and reviews until 11 January 2022, when the interim suspension order was replaced by the attachment of conditions for return to practice. The conditions were to address the clinical practice concerns and mental health concerns. The conditions were varied on 31 March 2022, again to address the clinical practice and mental health concerns.

84. The position at the time the Tribunal imposed its sanction in June 2022 was, therefore, that the appellant had been suspended from practice for about 18 months. During this time, we were told, he had done some professional work in Pakistan but no details were given.

85. When a tribunal orders the sanction of suspension, the sanction is itself automatically suspended by reason of the operation of Schedule 4 paragraph 10 of the Act, first for 28 days to allow time for an appeal and thereafter, if an appeal is pursued to the High Court under s. 40, until the outcome of that appeal (but not any further appeal to this court). Section 38 provides that the tribunal may make an order for immediate suspension to cover that period, which this Tribunal did by its Determination on Immediate Order. The effect has been that the appellant has remained suspended under that s. 38 order until the dismissal of his appeal by Swift J on 5 April 2023, whereupon the six month suspension imposed by way of sanction under s. 35D of the Act took effect. That sanction involved a review, which has taken place. We were told the outcome of the review because we

asked for clarification of the suspension position in the period between the Tribunal's decisions and our hearing of the appeal. However we take no account of what we were told about the outcome of the review, which does not have any bearing on our decision.

Principles applicable to sanctions

86. The principal purpose of the GMC's regulatory jurisdiction is to pursue the objectives reflected in s. 1(1A) and (1B) of the Act, namely the protection of the public by seeking "(a) to protect, promote and maintain the health, safety and well-being of the public, (b) to promote and maintain public confidence in the medical profession, and (c) to promote and maintain proper professional standards and conduct for members of the profession." It is these objectives which must inform the decisions of disciplinary tribunals in determining whether there has been misconduct and, if so, in determining the appropriate sanction.

87. When it comes to sanction, fulfilling these objectives involves elements aimed at three different targets. The sanction is in part aimed at the individual involved by way of punishment, deterrence and rehabilitation. It is in part aimed at other members of the profession through the message it sends: the sanction should be designed to maintain and promote professional standards within the profession by way of encouragement and deterrence of its members. The third target is the public at large. The sanction may be required in order to protect them from the risk of harm. Moreover the message which a sanction sends to members of the public can also promote and enhance trust in the profession. The latter aspect engages not only the public's confidence in the standards maintained by medical practitioners but also confidence in the organs of a self-regulating body to conduct effective and fair disciplinary regulation. Public trust in the profession is potentially undermined if misconduct is met with a sanction which would properly be regarded as unduly lenient for the seriousness of the conduct.

88. It has repeatedly been emphasised in the authorities that the principal considerations in determining what sanction to impose are the message it sends to others so as to promote standards of conduct within the profession, and the maintenance of public confidence in the profession, rather than deterrence or retribution for the individual concerned. See *Bolton* at pp. 518H, 519B-E; *Gupta v General Medical Council* [2002] 1 WLR 1691 at [21]; *Raschid & Fatnani v General Medical Council* at [17]-[19]; *Salisbury v Law Society* [2009] 1 WLR 1286 at [30]; and *Bawa-Garba v General Medical Council* at [76].

89. This is also reflected in paragraph 17 of the GMC Sanctions Guidance which provides:

> "Maintaining public confidence in the profession
>
> Patients must be able to trust doctors with their lives and health, so doctors must make sure their conduct justifies their patients' trust in them and the public's trust in the profession. Although the tribunal should make sure that the sanction it imposes is appropriate and proportionate, the reputation of the profession as a whole is more important than the interests of any individual doctor."

90. This too is an area in which the courts show an appropriate degree of deference and respect to the professional tribunal, which has greater expertise in judging the relationship between the nature and gravity of the offending on the one hand, and promoting professional standards and maintaining public trust in the profession on the other: see

Bolton at pp. 516F-H, 518E; *Ghosh v General Medical Council* at [34]; *Marinovich v GMC* [2002] UKPC 36 at [28]-[29]; *Meadows v General Medical Council* at [197]; *Raschid & Fatnani v General Medical Council* at [18]-[20]; *Salisbury v Law Society* at [30]; *Bawa-Garba v General Medical Council* at [67]; and *Khan v General Medical Council* [2017] 1 WLR 169 at [36].

91. In the article 10 context, the requirement of proportionality at the sanction stage was referred to by Lords Hamblen and Stephens JJSC in *DPP v Ziegler* at [57]:

> "Arrest, prosecution, conviction, and sentence are all restrictions within both articles [10 and 11]. Different considerations may apply to the proportionality of each of those restrictions".

92. Leaving aside, for the present, the significance of the interim suspension orders, the six month suspension in this case was both appropriate and proportionate. The misconduct was serious because it was damaging to public health, which was also one of the reasons it undermined confidence in the profession. The Tribunal found that at the date of imposing the sanction, the appellant's fitness to practice remained impaired by his lack of insight, which meant that they could not conclude that the risk of his repeating his conduct had disappeared. The appellant still failed to recognise that it was a failure of standards of professional conduct to ignore his RO's instructions to stop posting the material, and to mislead him by saying that he had taken down the videos or would do so when he had not and did not. These conclusions about lack of insight and risk of repetition were reached by an expert tribunal who had had the benefit of seeing and hearing the appellant making submissions over a number of days, and should be accepted by this court, which does not have those advantages.

93. Mr Hoar's submission that an appropriate and proportionate sanction would be achieved by attaching conditions to resumption of registration was unrealistic. Mr Hoar did not identify what those conditions might be or how they could address the continuing impairment of fitness to practice. A period of suspension was necessary in order to enable the appellant to gain insight into the seriousness of his conduct and avoid the risk of repetition. This directly engaged the need to protect members of the public from harm. Nor would anything less than a suspension be sufficient to mark the seriousness of the offending in order to promote standards within the profession and public trust. These were the reasons given by the Tribunal, to whose expertise some deference is due, but in any event I agree with them.

94. For similar reasons I would reject Mr Hoar's submissions that the period of six months was in itself excessive. He referred us to cases in which he suggested that lower penalties were imposed or upheld for what he contended was more serious conduct. I did not find any of these of assistance. They turned on their own facts and did not have the features of the present case of continued impairment and lack of insight which gave rise to a risk of repetition and harm to the public.

95. I turn therefore to the final consideration, the effect of the interim suspension orders.

Interim suspension orders

96. The GMC's Sanctions Guidance says this about interim suspension orders:

> "22. The doctor may have had an interim order to restrict or remove their registration while the GMC investigated the concerns. However, the tribunal should not give undue weight to whether a doctor has had an interim order and how long the order was in place. This is because an interim orders tribunal makes no findings of fact, and its test for considering whether to impose an interim order is entirely different from the criteria that medical practitioners tribunals use when considering an appropriate sanction on a doctor's practice."

97. This is unhelpful. There is no logic in treating the fact that interim orders are imposed before determination of the facts as something which affects the weight to be attached to them once the facts have been found. At that latter stage what matters is that the interim suspension has already occurred, with the effect that the practitioner has been excluded from the ability to practise for its duration. It is an independent question whether and to what extent the fact that the practitioner has already been deprived of the ability to practice for a period of time should be taken into account when a further period of suspension is being considered. Nor are GMC tribunals afforded any real guidance by the suggestion that they should not attach "undue weight" to interim suspension orders.

98. A previous version of paragraph 22 which was considered by Eady J in *Ujam v. General Medical Council* [2012] EWHC 683 (Admin), included the guidance that:

> "An interim order and the length of that order are unlikely to be of much significance for panels."

99. As a statement of general approach this is wrong and misleading. Insofar as the purpose of the sanction is to punish the practitioner or deter him from repetition of the conduct in question, it is a matter of common fairness that account should be taken of the punitive and deterrent effect of having already been deprived of the ability to practice for a period under temporary suspension orders. To that extent there is a direct analogy with sentencing for criminal conduct in which time spent in prison on remand is automatically credited against the sentence imposed for the offence.

100. It may also be appropriate to take into account periods of interim suspension insofar as the sanction is intended to mark the gravity of the offence so as to send a message to the profession and to the public. If, for example, there were a contrite practitioner with full insight into misconduct which was sufficiently serious to warrant suspension, the necessary message could be sent to the profession and the public by the tribunal making clear that the gravity of the misconduct needed to be marked by a suspension of a stated length; but that in fairness to the practitioner, he should be allowed to return to practice immediately, or within a lesser period, by reason of his already having been deprived of the ability to do so in the period prior to the imposition of the sanction. Messages depend upon the terms in which they are sent, and tribunals ought to be able to frame their decisions in language which enables the appropriate message to be sent whilst ensuring fairness to the practitioner in question.

101. However where, or insofar as, the suspension is required to return the practitioner to fitness to practise, and/or to mitigate the risk of further commission of the misconduct, and/or for the continued protection of the public from harm, periods of interim suspension may have little or no relevance. In those cases the length of suspension is tailored to what

is necessary for the removal of impairment, removal of risk of repetition, and maintaining the safety of the public. Time already spent suspended from practice has no direct bearing on the length of a suspension which is necessary to achieve these objectives. To give credit for time away from practice under interim suspension orders in such cases would be likely to undermine those objectives in protecting the public from harm, promoting professional standards in the profession and promoting and maintaining trust in the profession.

102. This is consistent with the decision of Dingemans J, as he then was, in *Kamberova v Nursing and Midwifery Council* [2016] EWHC 2995 (Admin) and his reasoning at [36] and [40]. We were referred to the remarks made by Eady J in *Ujam v. General Medical Council* [2012] EWHC 683 (Admin) at [5] and Silber J in *Abdul-Razzack v General Pharmaceutical Council* [2016] EWHC 1204 (Admin) at [84]-[85]. They were saying no more than the particular purposes of professional sanctions mean that there is no universal analogy with periods of imprisonment served on remand. That point is well made. It does not mean, however, that time spent suspended under interim orders should generally be ignored, and it may be required to be taken into account in favour of the practitioner within the framework of the sanctioning objectives in the ways I have suggested.

103. In this appellant's case the suspension was required to rehabilitate him so as to remedy his continued impairment to practice through lack of insight; to remove or mitigate the risk of further commission of the misconduct; and for the protection of the public from harm. The six month period was necessary for those objectives, to which the period spent suspended under interim suspension orders was irrelevant. In those circumstances there was no error in the Tribunal failing to reduce it on account of the interim suspension orders. I would reject ground 3.

Events following the hearing

104. After the conclusion of the hearing, the appellant sent further letters and emails directly to members of the court, containing and attaching further evidence and submissions. These were sent directly by the appellant himself, not via his legal representatives. An email of a similar nature was also sent by a non-party to the Civil Appeals Office. We have not taken these into account because appeals are to be determined on the materials lodged at court and exchanged between the parties prior to the hearing, and the argument addressed in open court which is based on such materials. The appellant had had ample opportunity prior to the conclusion of the hearing to adduce whatever material could properly be relied on, and to advance argument about it as he saw fit, with the benefit of full legal representation.

Conclusion

105. For these reasons I would dismiss the appeal.

Lord Justice Dingemans:

106. I agree.

Lord Justice Bean:

107. I also agree.