Neutral Citation Number: [2022] EWHC 1606 (Admin)

Case No: CO/2157/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/06/2022

Before:

MR JUSTICE SWEETING

- -

Between:

DR. ANANDAGOPAL SRINIVASAN	**Appellant**
- and -	
GENERAL MEDICAL COUNCIL	**Respondent**

- -
- -

Anthony Haycroft (instructed by **RadcliffesLeBrasseur**) for the **Appellant**
Peter Mant (instructed by **General Medical Council**) for the **Respondent**

Hearing date: 1st February 2022

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 11am on Wednesday 22 June 2022.

Mr Justice Sweeting:

1. This an appeal under s.40 of the Medical Act 1983 against a decision of a Medical Practitioners' Tribunal, ("the Tribunal"), dated 26 May 2021. The time allocated, and suggested, for reading was not sufficient to allow me to read, in any detail, the transcripts of the hearing as well as police interviews and other evidence related to connected proceedings. I was invited to read this material in its entirety having heard the parties' submissions. Given the significance of this appeal for the Appellant I have done so.

2. The Tribunal determined that during two clinical examinations the Appellant, Dr Srinivasan, had performed actions which were not clinically indicated and were sexually motivated, in that:

    i) During an examination, on 24 October 2014, he had lifted the top of a female Patient (Patient A) and stared at her bare breasts.

    ii) During an examination on 6 October 2016, he touched the pubic area of a female Patient (Patient B) and attempted to put his fingers inside her vagina.

3. A number of other allegations were found not to have been proved, or were decided in the Appellant's favour, as follows:

    i) The Appellant had not failed to offer a chaperone for either patient because there was, ultimately, expert agreement that a chaperone was not mandatory for non-intimate abdominal examinations.

    ii) That whilst the Appellant had pulled down Patient A's trousers and had taken a femoral pulse these actions may have been clinically justified and were not sexually motivated.

    iii) The Appellant had not inserted his fingers into Patient B's vagina (but had attempted to do so).

4. The Tribunal decided that the appropriate sanction was that the Appellant's name should be erased from the Medical Register for impairment of his fitness to practise as a result of sexual misconduct. The Tribunal concluded that the second incident represented an escalation of his behaviour both because of its nature and the fact that it had taken place notwithstanding a police investigation of the first complaint.

5. At time of the first examination, the Appellant was a medical student at Cambridge. By the time of the second he had qualified as a doctor and was undertaking his foundation year, and first clinical rotation, in the Accident and Emergency department of the John Radcliffe Hospital, Oxford.

6. Both Patients complained to hospital staff on the day that their examinations took place. Neither of the complainants were known to each other and there was no possibility of any cross contamination between their accounts which were separated in time and location.

7. The police investigated the complaint made by Patient A and interviewed the Appellant. In March of 2015 they closed their file. The case was reopened following the complaint

made by Patient B. The Appellant was charged with criminal offences arising out of both examinations and stood trial at the Crown Court in November 2018. He was acquitted in respect of Patient A and the jury discharged in relation to Patient B. There was a retrial in May 2019 which resulted in a further not guilty verdict in respect of Patient B.

8. The Appellant has always maintained that the accounts given by both Patients are inaccurate and that no sexual misconduct occurred.

9. The Tribunal hearing took place over four days in May of 2021. The Tribunal heard oral evidence as to what had taken place during the examinations from Patient A, Patient B, her friend Ms C and the Appellant. There was expert evidence from Dr Peter Burnett-Smith, Consultant in Emergency Medicine, instructed on behalf of the GMC and Mr Tajek Hassan, Consultant in Emergency Medicine, and Dr Stephen Morely, Consultant Chemical Pathologist and Forensic Toxicologist, on behalf of the Appellant. The Appellant also relied on two character witnesses. His case was argued skilfully and comprehensively both before the Tribunal and before me at the hearing of the appeal.

The Grounds of Appeal

10. The Grounds of Appeal are that:

    i) The Tribunal's findings of fact in respect of the examinations of both Patient A and Patient B were wrong and/or irrational.

    ii) The finding of impairment and the sanction of erasure were unfair and wrong insofar as they were based on erroneous findings of fact.

11. The second ground is dependent upon the first. It was accepted that if the Tribunal's findings of fact were to be upheld on appeal, then the Appellant's fitness to practice was impaired and the sanction of erasure was appropriate. The Appellant contends that the Tribunal did not apply the relevant principles fairly in its examination of the facts and reached the wrong conclusion, in part as a result of having failed to give a fully reasoned and rational Determination including an explanation as to why the Appellant's evidence had been disbelieved. It is also argued that the Tribunal failed to deal with arguments advanced on behalf of the Appellant and identified similarities between the complaints which did not exist.

The Legal Framework

12. An appeal may be allowed if the decision of the Tribunal was wrong or unjust because of a serious procedural or other irregularity in the proceedings in the lower court (CPR R52.21(3). The form of the appeal is a rehearing without evidence (*Fish v General Medical Council* [2012] EWHC 1269 (Admin)).

13. In *Azzam* [2008] EWHC 2711 (Admin) the court gave guidance as to the principles which apply in the context of medical appeals:

    [25] … The principles are:

(1) The panel is concerned with the reputation and standing of the medical profession, rather than with the punishment of doctors;
(2) The judgment of the panel deserves respect as the body best qualified to judge what the profession expects of its members in matters of practice and the measures necessary to maintain the standards and reputation of the profession;
(3) The panel's judgment should be afforded particular respect concerning standards of professional practice and treatment;
(4) The court's function is not limited to review of the panel decision but it will not interfere with a decision unless persuaded that it was wrong. The court will, therefore, exercise a secondary judgment as to the application of the principles to the facts of the case before it.
[26] To this list one can also add that the Panel is entitled and bound to consider aspects of the public interest that arise in any case.

14. The challenge in this appeal is to primary findings of fact. The approach that the court should take in these circumstances was summarised by Morris J in *Byrne v General Medical Council* [2021] EWHC 2237 (Admin):

11. The issue is as to the circumstances in which an appeal court will interfere with findings of fact made by the court or decision maker below. This is an issue which has been the subject of detailed judicial analysis in a substantial number of authorities and where the formulation of the test to be applied has not been uniform; the differences between formulations are fine. I do not propose to go over this ground again in detail, but rather seek to synthesise the principles and to draw together from these authorities a number of propositions.

12. First, the degree of deference shown to the court below will differ depending on the nature of the issue below; namely whether the issue is one of primary fact, of secondary fact, or rather an evaluative judgment of many factors: Assicurazioni Generali at §§16 to 20. The present case concerns findings of primary fact: did the events described by the Patient A happen?

13. Secondly, the governing principle remains that set out in Gupta §10 referring to Thomas v Thomas. The starting point is that the appeal court will be very slow to interfere with findings of primary fact of the court below. The reasons for this are that the court below has had the advantage of having seen and heard the witnesses, and more generally has total familiarity with the evidence in the case. A further reason for this approach is the trial judge's more general expertise in making Determinations of fact: see Gupta, and McGraddie v McGraddie at §§3 to 4. I accept that the most recent Supreme Court cases interpreting Thomas v Thomas (namely McGraddie and Henderson v Foxworth) are relevant. Even though they were cases of "review" rather than "rehearing", there is little distinction between the two types of cases for present purposes (see paragraph 16 below).

14. Thirdly, in exceptional circumstances, the appeal court will interfere with findings of primary fact below. (However the reference to "virtually unassailable" in Southall at §47 is not to be read as meaning "practically impossible", for the reasons given in Dutta at §22.)

15. *Fourthly, the circumstances in which the appeal court will interfere with primary findings of fact have been formulated in a number of different ways, as follows:*

    - where "any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusions": per Lord Thankerton in Thomas v Thomas approved in Gupta;

    - findings "sufficiently out of the tune with the evidence to indicate with reasonable certainty that the evidence had been misread" per Lord Hailsham in Libman;

    - findings "plainly wrong or so out of tune with the evidence properly read as to be unreasonable": per in Casey at §6 and Warby J (as he then was) in Dutta at §21(7);

    - where there is "no evidence to support a ... finding of fact or the trial judge's finding was one which no reasonable judge could have reached": per Lord Briggs in Perry after analysis of McGraddie and Henderson.

    In my judgment, the distinction between these last two formulations is a fine one. To the extent that there is a difference, I will adopt, in the Appellant's favour, the former. In fact, as will appears from my analysis below, I have concluded that, even on that approach, I should not interfere with most of the Tribunal's primary findings of fact.

16. *Fifthly, I consider that, whilst noting the observations of Warby J in Dutta at §21(1), on the balance of authority there is little or no relevant distinction to be drawn between "review" and "rehearing", when considering the degree of deference to be shown to findings of primary fact: Assicurazioni §§13, 15 and 23. Du Pont at §§94 and 98 is not clear authority to the contrary. Rather it supports the proposition that there may be a relevant difference when the court is considering findings of evaluative judgment or secondary or inferential findings of fact, where the court will show less deference on a rehearing that on a review. Nevertheless if less deference is to be shown in a case of rehearing (such as the present case), then, again I will assume this in the Appellant's favour.*

15. The reliability and credibility of the two complainants was and is challenged. In *Bryne* Morris J observed:

17. *First, the credibility of witnesses must take account of the unreliability of memory and should be considered and tested by reference to objective facts, and in particular as shown in contemporaneous documents. Where possible, factual findings should be based on objective facts as shown by contemporaneous documents: Dutta §§39 to 42 citing, in particular, Gestmin and Lachaux.*

18. *Secondly, nevertheless, in assessing the reliability and credibility of witnesses, whilst there are different schools of thought, I consider that, if relevant, demeanour might in an appropriate case be a significant factor and the lower court is best placed to assess demeanour: Despite the doubts expressed in Dutta §42 and Khan §110, the balance of authority supports this view: Gupta §18 and Southall at §59.*

19. *Thirdly, corroborating documentary evidence is not always required or indeed available. There may not be much or any such documentary evidence. In a case where the evidence consists of conflicting oral accounts, the court may properly place substantial reliance upon the oral evidence of the complainant (in preference to that of the defendant/Appellant): Chyc at §23. There is no rule that corroboration of a Patient complainant's evidence is required: see Muscat §83 and Mubarak §20.*

20. *Fourthly, in a case where the complainant provides an oral account, and there is a flat denial from the other person concerned, and little or no independent evidence, it is commonplace for there to be inconsistency and confusion in some of the detail. Nevertheless the task of the court below is to consider whether the core allegations are true: Mubarak at §20.*

16. Rule 17(j) of the General Medical Council (Fitness to Practise) Rules 2004 requires the Tribunal to give reasons for its findings of fact. The nature of the obligation to do so both under the rules and more widely has been considered in a number of cases. The requirement, in anything other than an exceptional case, was succinctly summarised by Levinson LJ in *Southall v General Medical Council* [2010] EWCA Civ 407:

For my part I have no difficulty in concluding that, in straightforward cases, setting out the facts to be proved (as is the present practice of the GMC) and finding them proved or not proved will generally be sufficient both to demonstrate to the parties why they won or lost and to explain to any appellate Tribunal the facts found. In most cases, particularly those concerned with comparatively simple conflicts of factual evidence, it will be obvious whose evidence has been rejected and why. I echo and respectfully endorse the observations of Sir Mark Potter.

17. The observations to which he referred are to be found at paragraph 106 of the judgment of Sir Mark Potter in *Phipps v General Medical Council* [2006] EWCA Civ 397, [2006] Lloyds Reports (Medical) 345:

I agree with the judgment of Lord Justice Wall and, for my part, I would endorse his observations at paragraphs 65 to 87 concerning to the inter-relation of paragraph 14 of the decision of the Privy Council in Gupta and the principles set out in English v Emery Reimbold. The latter case made clear that the so-called "duty to give reasons", is essentially a duty which rests upon judicial and quasi-judicial Tribunals to state their decisions in a form which is sufficient to make clear to the losing party why it is that he has lost. This requirement will be satisfied if, having regard to the issues as stated and decided and to the nature and content of the evidence in support, the reasons for the decision are plain, whether because they are set out in terms, or because they are implicit i.e. readily to be inferred from the overall form and content of the decision. I do not think that there is any real difference or substantial inconsistency, other than one of emphasis, between that principle and what was stated in Gupta, namely that there is no general duty on the PCC of the GMC to give reasons for its decisions on matters of fact, in particular where the essential issue is one of credibility or reliability of the evidence in the case, whilst at the same time recognising that there are cases where the principle of fairness requires reasons to be given "even on matters of fact": see paragraph 14 of Gupta. It seems to me that such cases are those where, without such reasons, it will not be clear to the losing party why he has lost. It is not a necessary

ingredient of the requisite clarity that the reasons should be expressly stated when they are otherwise plain or obvious.

18. The Tribunal's task was not to prepare a detailed legal and factual analysis of all the evidence and submissions it had heard so long as the parties were able to understand why they had won or lost and an appellate court is able to decide whether or not the decision is sustainable (see *Sait v General Medical Council* [2019] EWHC 3279).

19. The two verdicts of not guilty were relevant insofar as they underlined the need for a careful assessment but the standard of proof before the Tribunal was the balance of probabilities and not the higher criminal standard. There is no shifting civil standard which requires a different degree of proof because of the nature or seriousness of what is alleged. As Morris J. observed in *O v Secretary of State for Education* [2014] EWHC 22 (Admin): *there is only one civil standard of proof in all civil cases, that is proof that the fact in issue more probably occurred than not* (at paragraph 66).

20. The Appellant was of good character, a factor that the Tribunal expressly considered in its deliberations, along with the seriousness of the allegations, as going to the probability that the conduct alleged did or did not occur and the weight to be given to the Appellant's evidence.

Patient A

21. Patient A was admitted to Addenbrooke's Hospital, Cambridge on 21 October 2014 with acute abdominal pain and vomiting. She was 18 years old. The Appellant examined her on his own on 24 October, behind drawn curtains. She alleged that he lifted up her top and exposed her bare breasts staring at them whilst using a stethoscope. He told her that he needed to take a pulse in her groin. He pulled down her trousers a short way to enable him to do so but was in fact checking for a hernia. After the examination Patient A told her mother what had taken place and they reported the matter to the hospital authorities and then the police. The Appellant gave a written account on the same day and was later interviewed by the police on 8 January 2015.

22. The Appellant's argument before the Tribunal and on appeal was that Patient A's account was unreliable and not supported by cogent evidence. The submissions made to the Tribunal were grouped into five "topics" each containing multiple, numbered points.

23. Appendix A to the Appellant's skeleton argument identified the paragraphs of the Tribunal's Determination which contain findings which taken individually or together are "wrong". I deal with the issues raised in the appeal by reference to paragraphs in the Tribunal's Determination, with reference where appropriate to the topics and points set out by the Appellant.

24. Paragraphs 29 and 30 of the Determination related to Topic three which concerned Patient A's lucidity and the possibility that her recollection might have been confused. Dr Morley gave evidence on behalf of the Appellant that the drugs which she had been prescribed and had taken just before seeing the Appellant, codeine and cyclizine, could cause confusion. However, he agreed in cross examination that the side effects were relatively uncommon and accepted that there was no record of confusion or cognitive impairment in her medical notes for the duration of her stay in hospital.

25. The Appellant relied upon an apparent contradiction in the medical notes, as to whether she had vomited, as evidence of potential confusion on her part. It is apparent from the records that she had been vomiting repeatedly on the day of and following her admission but told the gynaecological registrar on 25 October that she had not vomited on that day. She gave a different account to the surgical team who saw her on the same day and were told, by her, that she had vomited five times. I note that the nursing record indicates that the nurses then attempted to pass a nasogastric tube, necessitated it appears by the history of vomiting, which led to her being "instantly upset" and "very vocal". She then vomited. Whatever the reason for the differing account she gave there is nothing in the notes to suggest it was the result of a reduced mental state or confusion and it took place on the day following the examination carried out by the Appellant.

26. The Appellant's own contemporaneous medical notes recorded that there was no complaint of any neurological symptoms and he agreed in his evidence that he had no reason to believe that her perception of reality was distorted when he was talking to her and had not thought that at the time. It was not his impression that she was confused. Although Dr Morley suggested that evidence might be obtained from Patient A's mother or the nurses caring for her, the fact that the GMC did not do so, in the absence of any other indication that her lucidity was affected by drugs or illness (including the entirety of the nursing notes), cannot be said, as the Appellant submits, to amount to a reversal of the burden of proof.

27. Whilst the Tribunal accepted that not all of the matters which related to Patient A's lucidity and mental state would necessarily have been written down in her medical records, its conclusion at paragraph 30 of its Determination was well founded on the evidence:

Importantly, the Tribunal noted that there was no other evidence in any contemporaneous documents or otherwise that Patient A was displaying or suffering from any confusion or alteration in her level of consciousness, either caused by her illness or any medication she was taking. The Tribunal accepted the expert evidence that some of the medication prescribed to Patent A; codeine and cyclizine, had theoretical side effects that could have impacted on her, but Dr Morley considered these to be relatively uncommon and more likely to be seen in older Patients. There was no evidence that the medication, illness, or a combination of the two had any impact on Patient A. The Tribunal therefore found it likely that there was no, or no significant, impact on Patient A's lucidity or perception of events and found there was no corresponding impact on her reliability, from a medical perspective, as a witness.

28. Paragraphs 31 and 32 of the Determination relate to Topic five, an argument that Patient A was an unreliable historian. Paragraph 31 in fact sets out the evidence on which the Tribunal found that Patient A had been consistent (rather than suggesting that there were no inconsistencies). These were clearly core allegations which led the Tribunal to conclude at paragraph 34:

In all the circumstances, the Tribunal was of the view that the core complaint that Patient A made against Dr Srinivasan had remained clear and consistent, despite the lapse of time and number of occasions it had been provided. The Tribunal found Patient A to be a credible witness, and whilst there were inconsistencies in her recollection – over 6 years after the events – these did not impact on the central Allegation.

29. Of the six points which were identified under this topic as amounting to inconsistencies which suggest that Patient A was unreliable:

    i) Points 4 and 5 are simply argumentative and depend upon the Appellant's evidence being preferred.

    ii) Point 3 is a candid admission by Patient A that she could not remember much about a conversation with the Appellant.

    iii) Point 2 is at best a mistaken understanding as to whether or not the Appellant took bloods from all the patients on the ward or only Patient A and one other patient; it is a peripheral point on which nothing can turn.

    iv) Point 6 appears to be factually incorrect or at best only one interpretation of Patient A's account. The evidence referred to suggests that Patient A exposed about half her pubic area by pulling down her tracksuit bottoms at the Appellant's request after which he pulled them down further, exposing more of her pubic region. In her police interview she said:

    > *Um, so I did. So I pulled them down so it was sort of, they were sat, like, (indicating) on my hip bones. 'Cause I've never had to pull them down lower when anyone else has done it. Um, and then he said, "Oh no, can you pull them down a bit lower?" so I did. And, at that point, half of my vagina, well, not vagina, like pubic region, I guess, was exposed. And then, and then I remember that he did take my trackies and he tried to pull them down a bit lower..*

    v) Point 1 refers to the fact that Patient A could not remember when she had been seen by the Appellant and had guessed. This error, and the fact that there were other inconsistencies, was expressly noted by the Tribunal at paragraph 32 of its Determination: *The main inconsistency identified by the Tribunal in Patient A's evidence related to the timing the events took place, but whilst other inconsistencies were noted, these were peripheral and minor in nature*. The error was not regarded as material by the Tribunal and is referred to in the Appellant's own submissions as "a small point", which it is.

30. Paragraphs 39 to 46 of the Determination related to the Tribunal's assessment of the Appellant and the identification of inconsistencies in his evidence. They are the subject of points seven to eleven in appendix A to the Appellant's skeleton.

31. The Tribunal had evidence from the Appellant in the form of the initial account drafted by him on the day of the examination, a transcript of his police interview on 8 January 2015, a witness statement produced for the Tribunal proceedings and the oral evidence which he gave at the hearing.

32. Paragraph 39 of the Determination (Point 7) identified differences between the Appellant's initial account of whether he or Dr Turnock (the Senior House Officer on duty) had suggested an examination of Patient A and the evidence given to the Tribunal on the point.

33. At paragraph 36 to 38 of the Determination the Tribunal set out and quoted the evidence from the Appellant as to whose suggestion it had been to carry out an examination. The Appellant's witness statement, in contrast with the initial account does suggest in my view, as the Tribunal concluded, that the examination was carried out at the request of Dr Turnock as the senior doctor. His oral evidence was then equivocal on the point. The Appellant's first contact with Patient A, as a medical student, was for the purpose of taking blood rather than carrying out any examination His initial account was clearly to the effect that he had already told the Patient he would return to examine her before the matter was discussed with Dr Turnock. There is nothing illogical, as the Appellant suggests, in the conclusion reached by the Tribunal that this was either an important inconsistency in the Appellant's recollection or an attempt to distance the Appellant from his role in initiating the examination.

34. Dr Turnock gave evidence at Crown Court but not before the Tribunal. The Appellant complains that the Tribunal reached its conclusions on the basis of incomplete evidence. However, he did not seek to adduce evidence from Dr Thurnock (nor does he suggest in his appeal what difference that evidence might have made). The Tribunal properly reached its decision on the evidence which was presented to it.

35. Paragraphs 40 to 41 of the Determination (Point 8) relate to the Appellant's contention that he did not know at the time of the initial investigation, and indeed up to a point during the course of his police interview in January 2015, of the nature of the allegations against him.

36. The Tribunal concluded that it was inherently unlikely that he did not know or realise the allegation was one of sexual impropriety. It characterised both his initial account and his interview with the police as having been *"provided in a manner which appeared to be defensive of an allegation he claimed to be unaware of"*. Both of the Appellant's accounts deal with the extent to which Patient A's breasts and pubic region were exposed. At an early point in the police interview, after he had been asked to explain what had happened in his own words, he said:

"so I listened to her chest but she was wearing like a sleeveless top so I didn't need to expose her chest because it wasn't like a thorough cardiac exam, it wasn't... it didn't need like a full... and so I just listened to the front just over the top and like the edge of her clothes basically.."

37. He went on:

"I continued to examine her abdomen, so I asked her to pull her top up just to expose her... she kind of did that without me asking, as soon as I indicated, so I palpated her abdomen.."

38. In relation to checking the femoral pulse he said:

39. *"I didn't think she had a hernia so it was just more ... coz it's part of the routine for the examination, as a complete examination you do all that, so her trousers were already lowered down to kind of her hips and then there was the strap of her... kind of underwear was already visible."*

40. On the Appellant's case these statements were made at a time when he was unaware that Patient A had complained that he had exposed her breasts and then pulled down her trousers. The focus of his account to the police does not sit easily with this contention. The Tribunal was not simply speculating, as the Appellant suggests, in inferring that he knew the nature of the allegations against him. There was ample basis for the Tribunal to conclude that the Appellant must have been aware of the subject matter of the complaints; it is not easy to see what he can sensibly have thought the complaint was about if not an inappropriate examination. That appears to be what he is addressing in his police interview where his answers appear to correlate with the matters that Patient A complained of.

41. The Tribunal is also criticised for finding that the Appellant did not make any concessions as to his knowledge when he was asked questions about it at the hearing. Whilst it is true that in his oral evidence he said that he could not remember whether he was aware that there was an allegation of a sexual nature, it is equally the case that he did not concede that he must have known this when he was taken to the early passages in the police interview which dealt with Patient A's clothing and the extent to which she was exposed.

42. The Appellant was asked on more than one occasion what his state of knowledge was and answered that he could not remember. The Tribunal chair properly intervened to prevent the Appellant being asked the same question on a fourth occasion, observing: *"I'm not sure how much further you can genuinely take it, save for obviously making submissions in relation to what may be reasonable or unreasonable inferences."* There was nothing unfair, as the Appellant argues, in the Tribunal then drawing such an inference when submissions had been made. The intervention by the chair did not close down a line of questioning *"in a way that can only be interpreted as in his favour";* it simply prevented repetitious questioning where the Appellant's evidence had been firmly established. What the Tribunal made of that evidence was a separate matter.

43. Paragraph 42 of the Determination (Point 9) relates to the issue of when the Appellant had first mentioned that he carried out an examination of the groin area for a hernia, albeit that he told Patient A that he was checking the femoral pulse. Insofar as the Tribunal found that this had not been mentioned in his initial account which had been provided on the day and was therefore a "concerning" omission, neither the factual conclusion or its significance, in the Tribunal's view, can be open to criticism.

44. However, the Tribunal also stated that the examination in the groin area had not been mentioned in the police interview which, as the Respondent accepted, is plainly incorrect. The error is surprising given that elsewhere in its Determination the Tribunal referred to the transcript of the police interview at the very point at which the Appellant had explained that he had palpated the inguinal and femoral regions bilaterally.

45. I should add that the assertion that the Tribunal's finding that the Appellant took a femoral pulse was irrational leads nowhere. The Tribunal found at paragraph 68 of its determination that it was more likely than not that the Appellant was checking Patient A's femoral pulse or for a hernia and that either of these reasons gave rise to a clinical justification for removing her trousers and the touching which followed; the allegation of sexual misconduct which was based upon this aspect of the examination was found not to have been proved.

46. Paragraph 43 of the Determination (Point 10) relates to a similar issue as to when the Appellant first mentioned that Patient A was unable to sit forward in order to have her back examined. Again, this was not mentioned in the initial account, as the Tribunal noted, but the suggestion in the Determination that the Appellant had only remembered this when giving his account to the Tribunal was not accurate. In his police interview the Appellant had stated:

I did ask her to sit... if she was okay to sit up so l could listen to the back as well, she was in a bit of pain and didn't want to sit up so I said that's okay it just didn't matter because she seemed okay so I thought I'd just leave that out,

47. Paragraph 46 of the Determination expresses the Tribunal's view as to the significance of the inconsistencies it had identified:

The Tribunal considered that whilst Dr Srinivasan may just have been adding detail, these were important factors and the inconsistencies identified were central to the issues in the case. The Tribunal determined these changes in Dr Srinivasan's accounts undermined his credibility.

48. The Appellant's criticism of this paragraph is, in effect, a summary (Point 11) of his overall contention that the inconsistencies identified were factually incorrect and amounted to unfair criticism of his evidence: *"when that evidence is in part a direct product of the Crown court proceedings, both in terms of the material disclosed to him, his reaction to that material, and any corresponding adjustment or augmentation to his evidence".*

49. The suggestion that he was as a result in a worse position than someone who had not faced a Crown Court trial is difficult to follow. The principal inconsistencies relied on by the Tribunal were based on the evidence before it, which as far as his account as part of the criminal process was concerned was limited to the police interview. The Tribunal explicitly allowed for the fact that evidence might evolve, as matters were investigated and as a result of the Tribunal hearing. This did not detract from its finding that the inconsistencies were central to the issues.

50. In addition, and whilst paragraph 46 of the Determination may give an overall summary of the Tribunal's view, it is also to be read in the context of the two paragraphs which come before it which were ignored in the Appellant's submissions.

44. As further evidence of the evolution of Dr Srinivasan's evidence, with regards to the chest/respiratory examination, he stated in his initial account: 'Listened to the heart and lungs through her clothes'

45. But when this is compared to his later witness statement, Dr Srinivasan stated:

'I performed a stethoscopic examination of [Patient A]'s heart and lungs by applying the diaphragm of the stethoscope under the sleeveless top, so as to avoid her having to lift the top or expose her chest/breasts. Proper stethoscopic examination of the heart and lungs requires the stethoscope diaphragm to be applied directly to the skin. It cannot be done properly through clothing, consequently like many doctors, rather than requiring avoidable exposure, if the Patient's clothing is loose enough, I apply the stethoscope diaphragm by sliding it under the clothing, if the relevant area is not

already exposed. Neither I nor the Patient pulled the top up or down for that part of the examination.

51. These accounts were significantly different and, as the Tribunal commented, were central to issues in the case.

52. Apart from the matters identified above in relation to paragraph 42 and 43 of the Determination there were, in my judgement and for the reasons set out above, no factual errors which undermined the inferences which the Tribunal drew from those inconsistencies. The errors at paragraphs 42 and 43 were partial; the Tribunal's observations were correct insofar as they referred to the Appellant's initial account in which he might reasonably have been expected to mention those matters which emerged only at a later stage.

53. The Tribunal's conclusion were based on an assessment of the overall effect of the evidence:

*In all the circumstances, and balancing all the evidence before it, the Tribunal therefore preferred the recollection of Patient A of the events surrounding the examination. The Tribunal found Patient A to be a credible witness who tried her best to assist these proceedings. Whilst the Tribunal accepted that there were inconsistencies within her evidence, these were minor and her account on the core allegation remained consistent. In contrast, Dr Srinivasan had provided the Tribunal with inconsistent evidence as to the manner of his examination and repeatedly avoided directly answering questions on important issues. On that basis, the Tribunal was satisfied that there was clear and cogent evidence of the events happening as described by Patient A. (*Paragraph 47)

54. It is to be noted that the Tribunal's conclusion as to which evidence it preferred is based not only on inconsistent accounts but also on the manner in which the Appellant, a professional man, answered or failed to answer questions at the hearing; a factor which the Tribunal was in the best position to assess.

55. There are a number of other topics and points which it is said the Tribunal did not deal with (topics 1, 2 and 4 of the Appellant's submissions).

56. The first topic, comprising six points, is summarised in the Appellant's submissions to the Tribunal as "six things you would expect a sex pest to do/try". Whether or not any such expectation could be said to arise the Tribunal, sensibly, confined itself to determining whether or not the allegations which were in fact made by Patient A were proved. The fact that the Appellant did not, for example, conduct a breast or vaginal examination (two of the six points) had little or no probative value. A limited allegation of sexual misconduct is not less likely to have occurred because it did not progress to a more serious assault.

57. The second topic, comprising four points, relates to Patient A's perception that the examination conducted by the Appellant was different from her experience of being examined by other doctors. In her police interview for example she said:

And then he said I need to feel for a pulse in your groin. Um, so then, obviously, I felt that was a bit strange because no other doctor had done that since I'd been in hospital.

58. She made similar observations in relation to the fact that she had not previously been examined without her mother or other medical staff being present and that, as part of the abdominal examination (which she explained had been carried out in a different way by other doctors following her admission), she was exposed to the top of her pubic area. The factual basis for the views expressed does not appear to have been in issue. The Appellant's case was that these features of the examination were justified and explicable. Whether or not Patient A found some parts of her examination by the Appellant to be odd or strange, the issues to which such comments gave rise were all canvassed during the hearing and, insofar as they related to allegations of misconduct, were determined in the Appellant's favour.

59. More significantly there is nothing to indicate that the case against the Appellant depended upon whether Patient A found his behaviour unusual or that the Tribunal reached any of its conclusions on this basis. The allegations of sexual misconduct which were determined to have been proved were that he had exposed her breasts and stared at them; stark factual allegations which he denied.

Patient B

60. On 6 October 2016 Patient B attended the emergency department at the John Radcliffe Hospital in Oxford where the Appellant was working as a junior doctor. She complained of abdominal pain and vomiting blood. She is Romanian and had only recently arrived in the United Kingdom. She did not speak English and so attended with a friend, Ms C, who acted as her interpreter. She was seen by the Appellant in a curtained area. Ms C was present during the examination and corroborated her account that the Appellant had put his fingers and then hand inside her lower underwear.

61. After having spoken to Patient B when she went to the toilet to provide a urine sample Ms C reported the matter to another member of the medical staff who had taken bloods. The police were involved and took a statement from Ms C on the same day whilst Patient B provided statements to the police on 7 October 2016 and 28 February 2018. The Appellant made his own written record on the day of the examination.

62. Again, I deal with the Appellant's submissions as they relate to paragraphs in the Determination with reference to topics and points (4 topics and 21 points) where possible.

63. Paragraphs 81 and 85 (Points 12 and 13) relate to the differences in the estimates of time given by Patient B and Ms C as to how long the Appellant's fingers/hand went beneath Patient B's underwear. The Tribunal considered that the difference in the evidence in relation to the first alleged occasion was significant; as indeed it was. The Tribunal took into account a number of factors which might have had an impact upon Patient B's recollection including, it appears, the possibility that the failed attempts by the Appellant to take blood could have been conflated with her time estimate.

64. Ultimately the Tribunal described the question of the duration of the first touching as difficult to resolve concluding that however long it lasted it was clearly more than inadvertent. This was plainly the effect of Patient B's evidence which was that the Appellant had touched her around her clitoris on the first occasion and tried to insert his fingers into her vagina on the second. She described him *"taking his hand out"* on the first occasion but did not know "*exactly what stopped him"*. Her account of the

nature of what took place on both occasions, if not its duration on the first occasion, was supported by her friend.

65. In relation to the first occasion Ms C said in her evidence before the Tribunal:

... he only had his fingers under her underwear and I could see the rest of his hand

66. When she was asked about the second occasion she said:

I am definitely sure that it was longer than the first time because he put his hand underneath her underwear and he started - I have noticed him starting to shake, and I am definitely sure that it was around two/three minutes at least.

67. The Tribunal did not resolve issues against the Appellant by assuming in a circular fashion that Patient B had been touched inappropriately nor did it ignore Ms C's evidence. The Tribunal identified the consistent features of the evidence, concluding that they were persuasive and outweighed any inconsistencies:

The significant difference between the accounts of Patient B and Ms C was the amount of time that Dr Srinivasan placed his hand inside Patient B's underwear on the first occasion. Patient B stated that it was for 5 – 15 minutes, whilst Ms C stated that it was a few seconds. On the second occasion, Ms C stated that Dr Srinivasan's hands were inside Patient B's underwear for 2 – 3 minutes. The Tribunal noted that in the other main areas – the fact that there were two incidents of Dr Srinivasan touching Patient B's pubic region, the lay out of the cubicle, the interruption by the nurse, the events on the second occasion and Dr Srinivasan shaking – both witnesses were consistent...

Both witnesses provided very similar accounts of the key issues in relation to the second incident and the surrounding events. Importantly, Ms C supported Patient A's evidence on Dr Srinivasan's fingers going into Patient B's underwear on the first occasion and his whole hand going inside on the second occasion.

68. Paragraph 86 (Point 14) reads as follows:

The Tribunal noted that a complaint was made almost immediately and it had not identified any explanation as to why Patient B and Ms C would provide inaccurate evidence, or be mistaken in their separate, individual recollections.

69. The Appellant suggests that there was a delay of an hour in making a complaint although it is not clear where that time period is derived from. The fact that there was a short interval is no doubt why the Tribunal said "almost immediately". During that time Ms C accompanied her friend to the toilet where she, Patient B, was in tears. The Appellant raises the possibility that this could have led to a conversation which tainted their individual recollections. This was not suggested to either witness in cross examination and might be thought to be at odds with the submission that there are significant inconsistencies in their accounts. This paragraph comes at the conclusion of the section in the Determination dealing with Ms C's evidence and the extent to which it supported the account of Patient B.

70. The Tribunal as the fact-finding body was entitled to reach the view, and record, that it had found no basis to conclude that consistent evidence from two witnesses was

mistaken. It must equally have discounted the possibility of lying or collusion. The Appellant's skeleton states: *"The defence position has always been that the witnesses were honest but incorrect in asserting any sexual acts."* His case involved a denial that he had placed his hand beneath Patient B's underwear and then touched or attempted to penetrate her genitalia.

71. Paragraph 89 (Point 15) relates to the Tribunal's observation, which is correct as a matter of fact, that the initial account provided on the day of the examination by the Appellant simply recorded that Patient B's underwear was visible:

The Tribunal considered Dr Srinivasan's evidence that some part of his hand may have touched some part of Patient A's pubic bone. It also noted the expert evidence which stated that there was no reason for Dr Srinivasan to go below Patient B's pubic bone. The Tribunal noted that Dr Srinivasan could not be clear if his hands or fingers went inside Patient B's underwear, but he thought that this may have occurred. The Tribunal noted that the only mention of Patient B's underwear in the initial account provided by Dr Srinivasan on the day of the incident was that the underwear was visible. The Tribunal was conscious that this was the second time, from the evidence before it, that Dr Srinivasan had been tasked to provide a detailed written account of events, following a concern being raised about his conduct. The Tribunal considered this omission important, as it was central to the issues under scrutiny and demonstrated a further example of Dr Srinivasan's evidence evolving – potentially to fit the evidence he was presented with.

72. His later witness statement and evidence to the Tribunal accepted that it was possible that his fingers went under the Patient's underwear:

I have no direct recollection of my fingers going under the Patient's underwear whilst palpating the lower sections of the abdomen, but it is entirely possible that they did so, in which case they would have gone just below the underwear line, but only as far as necessary to complete the examination

73. The Tribunal regarded this as another example, comparable to the position in relation to Patient A, of the Appellant's evidence evolving. I do not read the Tribunal's comment as in any way suggesting that the doctor had been given details of Patient B's allegation before his initial written account was produced. Nevertheless, the assertion by the Appellant that the Tribunal had done so was the basis for an application made to me to admit fresh evidence, under the principles set out in *Ladd v Marshall* [1954] 1 WLR 1489 CA, from Dr Philip Hormbrey who had informed the Appellant of the complaint on the day on which it was made. I was prepared to consider this evidence and I am content to allow it to be admitted, not least because there is no prejudice to the Respondent in doing so, as it submits, and I accept, that the Tribunal did not proceed on the basis that the Appellant had details of the complaint.

74. Dr Hombrey's evidence was that he told the Appellant there had been an allegation of assault and that the matter would need to be reported to the police. When Dr Hombrey asked the Appellant if there was anything untoward in his assessment of the patient he denied this but revealed that a previous allegation been made against him whilst he was a medical student; this was of course the allegation concerning Patient A which also arose out of an abdominal examination of a young woman and was a complaint of sexual misconduct. The Tribunal's view, without the benefit of this evidence, was

clearly that the Appellant should, in those circumstances, have at least contemplated that the complaint might be of sexual misconduct. The Appellant's witness statement for the Tribunal hearing said that an examination would involve applying significant pressure in the region immediately above the pubic bone and usually below the knicker line.

75. The Appellant plainly thought it appropriate to mention that Patient B's underwear line was visible but neglected to say that his examination might have involved his fingers in passing over or beneath his patient's underwear. The Tribunal was fully entitled, in my view, to regard this as an important omission and, in effect, part of a pattern, evident from the totality of the evidence. The Tribunal did not mischaracterise this feature of the evidence as "cogent proof" but viewed it as part of its assessment of the Appellant's credibility as a witness.

76. The Appellant also suggests he was disadvantaged by the fact that he had been tried and acquitted in the Crown Court on the same matter. Again, it is not easy to follow the basis for such a submission. The Tribunal dealt with the matter on the basis of the evidence before it. The evolving nature of the Appellant's evidence to which it referred arose out of the contrast between his initial account and the evidence prepared for the Tribunal hearing. If the Appellant had wished to refer to and rely upon the transcript of his evidence in the Crown Court he could have done so but it would not have undermined the point identified by the Tribunal in relation to the way in which his evidence had developed. His witness statement for the hearing refers to a number of aspects of the evidence in the Crown Court so he had plainly addressed the question of what was relevant for the purpose of the Tribunal hearing. The Tribunal commented in this respect:

The Tribunal was conscious that Dr Srinivasan's evidence was otherwise largely consistent with that in his initial account, but was also aware that it was only comparing two previous accounts – not four as with Patient B. The Tribunal did not speculate on the contents of any evidence not before it, but noted that Dr Srinivasan confirmed he gave evidence on the same issues in both Crown Court trials.

77. A further point is taken in relation to paragraph 89 which included the observation that the Appellant:

"*... also accepted that he had examined Patient B twice and could have been shaking, as he has a tendency to do so when he is nervous, which was absent from his initial account."*

78. It was open to the Tribunal to point out that this had not previously been mentioned although this does not appear to have been a central factor in its assessment of the Appellant's evidence. Both Patient B and her friend observed, and mentioned in their evidence, that the Appellant was shaking and may have been aroused and so were consistent in their accounts as to a feature which was noticeable and unusual.

79. A number of points are taken in relation to paragraph 91 of the Determination (points 17,18, and 19).

80. Point 17 addresses the opening sentence which reads:

"The Tribunal considered that Dr Srinivasan's evidence was not persuasive; he gave different accounts on important issues and was unable to assist the Tribunal on significant points."

81. This is described as "a sweeping generalised and unparticularised assertion". That could only be so if it is read in isolation from the rest of the Determination; it is plainly intended to stand as an overall assessment on the basis of the conclusions set out at length elsewhere.

82. Point 18 relates to the comment by the Tribunal that:

The Tribunal also considered the chronology of events, in particular that Dr Srinivasan indicated in his first police interview that he had altered his practice and would ensure that he had a chaperone when conducting similar examinations to that with Patient A.

83. The criticism that this is not what he had said in his first police interview appears to be based upon a mis-reference to the Appellant's later evidence before the Tribunal (where he makes a more nuanced comment). The Appellant did in fact say in his police interview that he had changed his approach and that for the rest of his placement he always had a chaperone with him.

84. Point 19 relates to the comment by the Tribunal that:

The Tribunal was not convinced by Dr Srinivasan's account that he considered Ms C a chaperone in the circumstances and found this somewhat inconsistent with his comments in the January 2015 police interview. In the circumstances, Dr Srinivasan's actions, in not even considering the offer of a chaperone to Patient B, demonstrated an improbable disregard for his own professional practice.

85. The criticism advanced by the Appellant is that he considered that Ms C was indeed acting as a chaperone according to the chaperone policy in place at the John Radcliffe and that the comment by the Tribunal was accordingly both incorrect and unfair. However, the relevant policy makes it clear that formal chaperoning was only to be undertaken by clinical staff who understood the procedure or examination to be undertaken, which Ms C clearly did not.

86. I note that the exhibit to Dr Hombrey's statement, in the form of a letter of 23 November 2016, states that the Appellant told him *"that an independent chaperone was not present during his full assessment although a female friend of the Patient was there in the cubicle."*

87. The Tribunal was, as it stated, considering the chronology of events in the context of the Appellant's statement to the police that he had changed his clinical practice. It was entitled to conclude, if that was the case, that it was unlikely that he could have considered Ms C to be a chaperone. These comments were of course in the context of the assessment of the Appellant as a witness given that the Tribunal accepted expert evidence that a chaperone was not required for a straightforward abdominal examination.

88. Three points are taken in relation to paragraph 92 of the Determination (points 20, 21 & 22) which I deal with compendiously since I regard none of them as having any force.

The Tribunal was addressing the argument raised by the Appellant that the events described by Patient B were inherently improbable. Contrary to the Appellant's submissions, the Tribunal gave reasons for rejecting the most cogent of these arguments, namely the presence of her friend and the likelihood of interruption, and for preferring the evidence of Patient B. Those reasons included the fact that Patient B was particularly vulnerable having just arrived in the United Kingdom speaking no English, that her friend would not have seen the intimate touching which took place inside the underwear and had no clinical knowledge as to whether the form of the examination was clinically appropriate or not and that the risk of being disturbed was on the Tribunal's own experience mitigated by the fact that any other member of the medical staff would have asked before entering (a requirement reflected in the chaperone policy).

89. Paragraph 108 (Point 23) relates to the Tribunal's identification of "some" similarities between the allegations made by Patient A and B and its conclusion that two separate allegations against the same clinician arising in similar circumstances in a comparatively short period of time made it more likely that the alleged incidents of sexual misconduct had occurred.

90. There was nothing illogical or wrong in principle with this approach. There was no suggestion of collusion, the complainants were both young women in a vulnerable position who were the subject of a similar examination by the Appellant in the absence of other medical staff in a private setting. Both complained almost immediately after the incidents had taken place. The interval between the complaints can properly be described as having taken place over a comparatively short time period, but little turns on whether that is an apt description or not. The fact that there were such similarities was a factor which the Tribunal identified as having *"enhanced the probability that the Allegation occurred as it had found,"* that is to say, once it had considered the evidence and reached findings on each allegation individually.

91. The Appellant also argues, as he does in relation to Patient A, that the tribunal failed to deal adequately or at all with a number of the topics and points raised in relation to Patient B.

92. The first of these topics, containing five points, is also framed in terms of what the Appellant did not do and what he might have been expected to do if he were a "sex pest". An example given in submissions to the Tribunal was that *"sex pests often have a type"* of victim but that there was no evidence that the Appellant had targeted a particular "type". That might well be a matter of argument, since it is far from obvious, but for the reasons given in relation to Patient A, I do not consider that there is any force in these submissions; it is a non sequitur to suggest that sexual misconduct did not occur because it might have been more serious or that there are particular features of such conduct whose absence might have probative value in establishing that nothing untoward occurred.

93. The second topic relates to Patient B's perception which it is suggested was unreliable or affected by other matters. The fact that she was unwell and anxious was simply one of the contextual matters that the Tribunal had to take into account and there is nothing to suggest that it ignored any cogent evidence that she was an unreliable witness as a result. It is, equally, hardly surprising that evidence about the alleged touching was largely based on what she felt and not what she saw. Her surprise that the appellant

touched her without gloves, which is normal for an abdominal examination, is a minor matter and certainly not the basis on which she made a complaint.

94. The third topic relates to whether Patient B and her friend were unreliable historians. As I have summarised above the Tribunal referred to inconsistencies in both of their accounts but in weighing the evidence gave reasons for preferring their accounts on the core allegations. The Tribunal was well aware of the arguments being advanced in relation to Patient B which it summarised at paragraph 13 of the Determination. Where the Tribunal had any doubt as it did, in relation, for example, to whether there had been penetration, it resolved the issue in favour of the Appellant. The argument that other witnesses, who had given evidence at the Crown Court, could have been called by the Respondent, takes the matter no further. The Tribunal dealt with the issues on the evidence before it and no one else, other than Patient B and her friend, were present and witness to the acts which were alleged to amount to sexual misconduct.

95. There were, finally, a number of miscellaneous points, some of which are essentially argumentative as to the conclusions which might be reached one way or another on the evidence. The most significant of these was the absence of any DNA evidence supporting the allegation of digital contact with Patient B's vagina. The forensic evidence was inconclusive in relation to the DNA samples. The Tribunal did in fact determine that there had been no penetration. The Tribunal noted the absence of DNA on high vulval swabs but whereas the presence of DNA would have been difficult to explain without digital contact its absence did not preclude touching of the sort alleged. Ultimately the case depended upon evidence from those present. On the account given by the Appellant nothing had occurred to reduce a young woman to tears such that she made a complaint of sexual assault shortly after the Appellant had examined her; on the evidence given by Patient B and her friend the explanation was that he had placed his hand inside her underwear and touched her genital region when there was no reason for him to do so.

Conclusions

96. For the reasons set out above the matters raised by the Appellant and argued on appeal are not capable, in this case, of disturbing primary findings of fact made by the Tribunal in a careful determination handed down on the eighth day of the hearing. The Tribunal was satisfied that the events happened as described by the individual patients having considered each allegation and patient separately. The reasons given by the Tribunal for its conclusions were more than adequate for the appellant to understand why he had lost and provide cogent explanations in relation to the evidence which was accepted and rejected and for those allegations which the Tribunal found to have been proved as a result. The findings, in my judgement, accord with the evidence.

97. In those circumstances the sanctions imposed cannot be challenged.

98. The appeal is dismissed.