Neutral Citation Number: [2023] EWHC 1515 (Admin)

Case No: CO/1617/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN MANCHESTER

Tuesday, 20th June 2023

Before:
MR JUSTICE FORDHAM

- -

Between:

DR ZOE SUN	**Appellant**
- and -	
GENERAL MEDICAL COUNCIL	**Respondent**

- -
- -

Ben Collins KC and **Ben Jones** (acting pro bono, instructed by **Advocate**) for the **Appellant**
Alexis Hearnden (instructed by GMC) for the **Respondent**

- -
Hearing date: 24.5.23
- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

INTRODUCTION

1. This is a case at whose heart are questions about mental health and dishonesty. There is a substantive issue. It concerns the soundness of a decision of the Medical Practitioners Tribunal ("the Tribunal") to direct the erasure of the name of the Appellant ("Dr Sun") from the Medical Register operated by the General Medical Council ("GMC"). There is also a procedural issue. It concerns the Court's jurisdiction to deal with the appeal, given that Dr Sun needs an extension of time. The case comes before me as a statutory appeal pursuant to s.40 of the Medical Act 1983 ("the 1983 Act"). The Tribunal's decisions which are challenged on the appeal are a "Determination on the Facts and Impairment" dated 23.3.22 and a "Determination on Sanction" dated 24.3.22 ("the Determinations"). The appeal is against sanction, but it is common ground that the Determinations have to be read together. It is also common ground that I should hear full argument on both the substantive and procedural issue and determine both issues. The appeal was transferred to the Administrative Court in Manchester as the appropriate venue given that the GMC is based there as is Dr Sun's support network.

2. I start with a point about open justice. At the start of the hearing of the appeal, Ben Collins KC who with Ben Jones appears (pro bono) for Dr Sun requested "reporting restrictions" or "anonymity". He did not ask for the hearing or any part of it to be "in private". This was unheralded and unsupported: no application had been made or foreshadowed; no written submissions were filed or produced; no case-law or commentary was provided. I was told that what had prompted the requests was the 'unexpected' presence in court of people observing the case. They were sitting in public seats at a public hearing in a public court room. Reliance was placed on the fact that certain parts of the hearing before the Tribunal had been in "private", and certain parts of the transcript and Determinations were "private", where the subject-matter involved discussing aspects of Dr Sun's mental health. In my judgment, the Court was given no cogent justification – to meet the relevant test of necessity – for any order derogating from open justice in this Court in this case. I declined to make the orders sought.

Law

3. The Determinations arose within a specific legal matrix whose key features include the following. There are the three limbs (a)-(c) of the statutory overarching objective, applicable to the GMC's functions by reason of s.1(1A)(1B) of the 1983 Act:

> ***(1A) The overarching objective of the [GMC] in exercising their functions is the protection of the public. (1B) The pursuit by the [GMC] of their overarching 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.***

Then there is the scheme of the General Medical Council (Fitness to Practise) Rules 2004 ("the Rules"), including the sequence of these issues requiring determination (Rule 17): whether on the basis of facts found proved, fitness to practise is "impaired" because of "adverse physical or mental health" or because of "misconduct"; if so, the

appropriate "sanction" if any to impose. Next, there are key sources of relevant standards which include the General Medical Council ("GMC")'s Good Medical Practice ("GMP") and Good Practice in Research and Consent to Research ("GPR") Finally, as to the approach to sanctions, there is GMC's Sanctions Guidance.

4. The appeal to the High Court has its own legal overlay. The right of appeal is governed by s.40 of the 1983 Act. An appellant has 28 days, from the date of notification of the decision, to appeal to the relevant court (s.40(4)) – the Administrative Court – and an out of time appeal must be dismissed unless human rights standards require an extension of time (§50 below). The Court's appellate powers are (s.40(7)): to dismiss the appeal; to allow the appeal and quash the direction, substituting any other direction which the Tribunal could have made or remitting the case for the Tribunal to dispose of in accordance with the directions of the Court. Key points – as to the nature and extent of the appeal and this Court's approach – are identified in Sastry v GMC [2021] EWCA Civ 623 [2021] ICR 1565 at §102: (i) this is an unqualified statutory right of appeal; (ii) the jurisdiction of the Court is appellate, not supervisory; (iii) the appeal is by way of a rehearing in which the Court is fully entitled to substitute its own decision for that of the Tribunal; (iv) the Court will not defer to the judgment of the Tribunal more than is warranted by the circumstances; (v) the Court must decide whether the sanction imposed was appropriate and necessary in the public interest or was excessive and disproportionate; (vi) in the latter event, the Court should substitute some other penalty or remit the case to the Tribunal for reconsideration.

Some Features of This Case

5. Key features of this case include the following. First, there is the conduct of Dr Sun which was the focus of the Determinations ("the Conduct": see §§6-11 below). The following were accepted at the hearing before the Tribunal, by and on behalf of Dr Sun: that the Conduct had taken place as alleged; that all of the allegations of "misconduct" did constitute "misconduct"; that all 13 incidents of dishonesty alleged did constitute dishonesty; and that there was a present "impairment" of fitness to practise by reason of the misconduct. Secondly, the Tribunal conducted an oral hearing over 8 hearing days (between 7.3.22 and 24.3.22). All transcripts of those hearings were before this Court. Thirdly, there were four expert witnesses – all consultant psychiatrists – who gave evidence about Dr Sun's mental health and its implications. They were Dr Gareth Vincenti, Professor Marios Adamou, Dr Packeer Saleem and Dr Martin Baggaley. Professor Adamou and Dr Baggaley gave oral evidence. The four experts agreed that Dr Sun had had a mental health condition during the period in which the Conduct had taken place. Fourthly, it was originally part of the GMC's case that Dr Sun's fitness to practise was impaired because of her adverse mental health. But that was withdrawn by the GMC (pursuant to Rule 17(6)), with the approval of the Tribunal. This was because updated health assessments in early 2022 had concluded that Dr Sun was no longer suffering from any mental health condition, or any such condition such as to impair her fitness to practise. Fifthly, it was common ground that limb (a) of the statutory overarching objective (§3 above) is not engaged. No sanction was or is being said by the GMC or the Tribunal to be necessary to protect, promote and maintain the health, safety and well-being of the public. Put another way, public safety would not be at risk by reason of Dr Sun being able to continue to practise. The limbs of the statutory overarching objective which

are engaged are (b) and (c). Sixthly, the sanction which the GMC was inviting the Tribunal to impose was suspension, rather than erasure. That was also Dr Sun's position. But the Tribunal decided on erasure.

The Conduct

6. The Conduct was described in the first 9 pages of the Tribunal's Determination on the Facts and Impairment. It was derived from the GMC's 29-paragraph "Allegation". It was admitted by Dr Sun, and found proved by the Tribunal, in its entirety. It was admitted, and found, to constitute "misconduct", in its entirety.

7. The setting was as follows. Dr Sun was born in 1985 and qualified in 2009 from Hull York Medical School. She then became a trainee in vascular surgery, based at Leeds Teaching Hospitals, within Health Education England Yorkshire and Humber ("HEYH"). Mr Jon Hossain was a Vascular Surgeon at the Leeds Trust. Dr Sun's Responsible Officer at HEYH – for regulatory and compliance purposes – was, and continued to be, Dr David Eadington. Dr Eadington was the Acting Postgraduate Dean at HEYH. As part of Dr Sun's training, in April 2017, she went to work at the University of Cambridge ("the University"). That was a PhD Research Studentship, partly funded by GlaxoSmithKline ("GSK"). Dr Sun was to act as a Clinical Research Associate in a Study called OPERA ("the Study"). The Study had been designed by Professor Ian Wilkinson. Professor Wilkinson was Consultant at Cambridge University Hospitals NHS Foundation Trust ("the Trust"), Professor of Therapeutics and Director for the Experimental Medicine and Immunotherapeutic Training ("EMIT") Initiative at the University. Dr Sun's role was to collect data from human subjects, analyse the results and report them to Dr Joseph Cheriyan before they were presented to GSK. Dr Cheriyan was a Consultant Physician and Clinical Pharmacologist at the Trust and the Designated Chief Investigator for the Study. Others involved in the Study included Dr Thomas Hiemstra, Lecturer within the Department of Medicine at the University and supervisor of PhD students; and Dr Viknesh Selvarajah, Clinical Pharmacology Unit within EMIT at the University. Others with whom Dr Sun was in contact included Dr Firth, the Deputy Medical Director at Addenbrooke's Hospital in Cambridge who was Dr Sun's Responsible Officer and Appraisal Lead in Cambridge.

8. The actions of Dr Sun which constituted "misconduct" – but which did not also involve "dishonesty" – were, in summary, as follows. (1) Between 28.5.18 and 15.1.19, Dr Sun received a number of email and verbal communications, from Dr Cheriyan and from others involved in the Study and in supervising Dr Sun. These communications requested Dr Sun to provide the data in various forms so that Dr Cheriyan could verify the integrity of the data and the results. Dr Sun failed fully to comply with those requests. (2) On 25.9.18, Dr Sun submitted a manuscript to the Journal of the American Society of Nephrology ("JASN") regarding the Study. She did this without obtaining (what she knew was) the required prior authorisation from Dr Cheriyan, Professor Wilkinson, Dr Hiemstra, Dr Selvarajah and GSK. Also, in the manuscript which she submitted to JASN, Dr Sun removed the names of several team members. (3) On 26.9.18, Dr Hiemstra instructed Dr Sun to withdraw the manuscript which she had submitted to JASN, but Dr Sun ignored that request. (4) On three dates in August 2019, Dr Sun accessed her own medical records at the Trust without (what she knew was) the necessary authorisation. All of these actions by Dr Sun constituted "misconduct", as she accepted and as the Tribunal found.

9. I turn to summarise the 13 actions of Dr Sun which constituted "misconduct" and which also involved "dishonesty". I start with September 2018. (1) On 26.9.18, Dr Sun sent an email to Professor Wilkinson in which she stated (a) that Dr Hiemstra and Dr Cheriyan had been given deadlines to work on the manuscript which they had ignored; and (b) that GSK had seen the manuscript and had given permission for its submission. All of those statements were untrue and Dr Sun knew that they were untrue.

10. Next, March, April and May 2019. (2) In March 2019, Dr Sun made an application for a job in the Chemical Pathology Training Programme with HEYH. In that job application, Dr Sun told HEYH that she did not know of any matters in her background which might cause her reliability or suitability for employment to be called into question. That was, to her knowledge, untrue. She also failed to declare the fact that she was under investigation by Cambridge University, as she knew from a letter dated 8.2.19, and which she knew should have been declared. (3) On 19.3.19, Dr Sun completed a Self-Declaration for Revalidation (a requirement of continuing professional development compliance). In that self-declaration she told the Revalidation regulatory authorities that she did not have anything new to declare since her last annual review and appraisal. She knowingly failed to declare that Cambridge University had begun its investigation into her conduct. (4) On 29.3.19, Dr Sun made an application for a job in the General Practice Training Programme with Health Education England North West ("HENW"). In that second job application, Dr Sun told HENW that she did not know of any matters in her background which might cause her reliability or suitability for employment to be called into question. That was, to her knowledge, untrue. She again, knowingly, failed to declare the fact of the Cambridge University investigation. (5) On 9.4.19, Dr Sun wrote an email to Dr Eadington as her Responsible Officer at HEYH. In that email, she stated to Dr Eadington that she had had no direct contact with the University. That statement was untrue and she knew it was untrue. (6) On 1.5.19, Dr Sun wrote a formal complaint which she lodged with Cambridge University. The formal complaint was against Professor Wilkinson. Within the complaint, Dr Sun stated that Professor Wilkinson, Dr Hiemstra and Dr Selvarajah had all agreed for the manuscript to be published. That was untrue and Dr Sun knew it was untrue.

11. Then July, August and September 2019. (7) After receiving a letter of 16.7.19 from Cambridge University, which informed her that the University had found a case to answer against her, Dr Sun failed to declare this to HENW, knowing that she should have done so. (8) After having been told on 2 August 2019 that she had been referred to the GMC, Dr Sun failed to declare this to HENW, knowing that she should have done so. (9) On 14.8.19, Dr Sun submitted a Work Details Form to the GMC. In it, she stated that Dr Eadington and Dr Firth had criminal proceedings against them, involving a continuing criminal investigation, and with a warning by the police for sexual harassment and slandering of a female trainee. All of this was untrue and Dr Sun knew that it was untrue. Dr Sun had been told on 8.8.19 by Cambridgeshire Police that no further action was being taken in relation to allegations which she had made against Dr Eadington, Dr Firth and Mr Hossain. On 12.8.19, West Yorkshire Police had told Dr Sun that no further action was being taken in relation to allegations which she had made to that police force against Dr Eadington, Dr Firth and Mr Hossain. (10) Also on 14.8.19, Dr Sun wrote an email to the GMC Revalidation Team. In it she stated that Dr Eadington and Dr Firth had criminal proceedings

against them and had received a warning from the police for sexual harassment of a female trainee. This was untrue and Dr Sun knew that it was untrue. (11) On 16.8.19, Dr Sun wrote a further email to the GMC Validation Team. In that email she stated that the criminal investigation against Dr Eadington and Dr Firth was ongoing, that Dr Eadington and Dr Firth had been issued with a warning by the police, and that Dr Eadington and Dr Firth were to be arrested if their actions continued. All of this was untrue and Dr Sun knew that it was untrue. (12) On 31.8.19, Dr Sun filed an online report with Cambridgeshire Police making an allegation against Mr Hossain. In that online report she stated that she had previously reported Mr Hossain to the police for slander in the workplace for threatening behaviour and breach of GDPR. She stated in the online report that Mr Hossain had been issued with a formal warning to stop his action. All of those statements were untrue and Dr Sun knew that they were untrue. (13) On 3 September 2019, Dr Sun sent an email to the GMC. It she stated that warnings had been issued by Cambridgeshire Police to Dr Eadington, Dr Firth and Mr Hossain to stop their actions and that if their actions continued they would be arrested. All of those statements were untrue and Dr Sun knew that they were untrue.

The Expert Evidence

12. The evidence of the four expert consultant psychiatrists (§5 above), with their suggested diagnoses of Dr Sun's mental health at the time of the Conduct, was identified by the Tribunal in the Determination on Facts and Impairment. Dr Vincenti and Professor Adamou had both undertaken health assessments directed by the GMC during the course of the GMC investigation. In an 18.2.20 report, Dr Vincenti diagnosed Dr Sun with Moderate Severe Depression. In a 19.2.20 report, Professor Adamou diagnosed Dr Sun with Adjustment Disorder. In a 27.3.20 Joint Health Assessment Report, Dr Vincenti and Professor Adamou agreed: that the evidence did not suggest a personality disorder; that they did not believe that Dr Sun had suffered from a psychosis (whether a delusional disorder or an acute and transient psychosis); and that it would be appropriate for the GMC and the Tribunal to take Dr Sun's mental health problems in mitigation when considering her conduct. In a 25.1.22 report, Dr Saleem diagnosed Dr Sun with moderate depressive episode, in remission. In a 20.2.22 report, Dr Baggaley diagnosed Dr Sun depressive disorder and expressed the opinion that the most likely explanation for the events was that she had psychotic symptoms, for example she misinterpreted situations, possibly experienced false perceptions and formed false conclusions.

13. In his oral submissions, Mr Collins KC invited my attention to the entirety of the expert evidence, from all four experts. Particular passages, on which he laid particular emphasis or which I wish to emphasise, were these. From Dr Vincenti (18.2.20):

> ***I believe that Dr Sun's thoughts and feelings about her mistreatment by various bodies, can be attributed to an over-valued idea consequent upon her depressive illness. Her subsequent out-of-character conduct in the past year should be judged with this in mind, and her depressive illness taken in mitigation… In my view, Dr Sun has been suffering from a moderately severe depression with paranoid ideation, but the latter falls short of delusional beliefs. She has not been suffering in my view from a depressive psychosis…***

From Professor Adamou (19.2.20):

> ***In my opinion, there [is] information to conclude that [Dr Sun's] behaviour was linked to an Adjustment Disorder (AD) (F43.24) These disorders are states of subjective distress and***

> ***emotional disturbance, usually interfering with social functioning and performance, arising in the period of adaptation to a significant life change or a stressful life event…***

From Dr Vincenti and Professor Adamou (27.3.20):

> ***We agree that there is a link between Dr Sun's behaviour that gave rise to concerns and her poor mental health over the relevant period. We agree that it would be appropriate for the [GMC] and/or [the] Tribunal to take her mental health problems in mitigation when considering Dr Sun's conduct.***

From Dr Saleem (25.1.22):

> ***[Dr Sun] believed that fellow Registrars took her out of a WhatsApp group deliberately. She felt marginalised and alienated. She expressed the belief that her colleagues and her seniors were making things difficult for her. She believed that one of her supervisors accessed her computer and removed data from the computer. She also believed that the settings on the instrument she was working on were changed deliberately. She felt that she was not coping with her PhD course. She started to dwell on negative ideations. She felt anxious and panicky… My preferred diagnosis is moderate depressive episode currently in remission (F32.1). [Dr Sun] responded favourably to antidepressant medication. She did not require antipsychotic medication. In the context of depression, she entertained sensitive and paranoid ideations.***

From Dr Baggaley (20.2.22):

> ***I believe that for a period of perhaps 12 to 18 months (mid 2018 until late 2019) Dr Sun's judgement bec[a]me impaired because of a mental disorder leading to her misconduct at Cambridge (withholding data and submitting a paper without appropriate authority). Further, this impaired judgement led to misconduct at Leeds Teaching Hospitals (making allegations to the police and GMC about the conduct of senior colleagues). It also led to a false belief that she had been stabbed by a colleague in an operating theatre with a needle which might be misconduct or a mis interpretation of events. I believe that the most likely explanation for these events is that during this period she had psychotic symptoms (e.g. she misinterpreted situations, possibly experienced false perceptions and formed false conclusions). She described various beliefs that her research equipment had been tampered with. I note the meeting with the Associate Dean in on 29th May 2019 … in which she describes what I would describe as paranoid ideas about a letter from Npower and an email from a pharmaceutical company. I note Dr Vincenti considers that these may not have been full blown delusional beliefs but would be what might be described as 'over valued ideas'. Delusional beliefs do not present as fully formed but rather emerge so that there is a spectrum from no delusional ideas, then partial delusions/'over valued ideas' to full blown delusions. A reverse process occurs when patients recovered from a severe depression with psychosis. The difference between these states is how certain these ideas are and whether or not they can be challenged as well as how prominent they are in someone's thinking. In my opinion her beliefs at times are sufficiently bizarre to be delusional. I am of the opinion that there is sufficient evidence to form a view that for a significant period, Dr Sun had full-blown delusions.***

THE SUBSTANTIVE ISSUE

Substance Before Procedure

14. I am going to deal first with the Substantive Issue. In doing so, I put to one side the Procedural Issue. I do so, recognising that the Procedural Issue goes to my jurisdiction and the answer to it may mean I have no jurisdiction to do other than dismiss this appeal. I do so in the following circumstances (referring to the cases listed at §50 below). The sanction of erasure is challenged on substantive grounds. All issues have

been fully argued. The GMC did not apply to strike out the appeal (as happened in Rakoczy §1), nor ask for the Procedural Issue dealt with as a freestanding preliminary issue (as happened in Daniels §18), nor ask the Court at the substantive hearing of the appeal to hear argument confined to it (as happened in Parkin §§15-16). Ms Hearnden for the GMC invited me to hear all argument on all issues and determine all issues. That position was a conscious, fair and responsible one. It is right to consider whether the appeal has substantive legal merit. The career of a 38 year old doctor is at stake. There are rights of appeal and my decision on either issue, or both, would stand to be corrected in the Court of Appeal if I get it wrong. Dr Sun will receive a substantive judgment on the Substantive Issue.

Dr Sun's Argument

15. In challenging the soundness of the Tribunal's imposition of the sanction of erasure, Dr Sun's grounds of appeal and arguments in support focus squarely on her mental health condition and on its implications. The essence of Dr Sun's argument, as I saw it, was as follows:

16. A central issue before the Tribunal was whether and to what extent the Conduct had been affected by Dr Sun's mental health condition. Dr Sun's case – presented to the Tribunal by her Counsel Mr Lambis – largely rested on this issue. So, at the Facts/ Impairment stage:

> ***Mr Lambis accepted that Dr Sun's actions amounted to misconduct and conceded that her fitness to practise is impaired. He invited the Tribunal to have regard to the context in which Dr Sun's conduct occurred. Namely, that the evidence before the Tribunal pointed to the fact that Dr Sun's misconduct was fully enveloped by the health condition that she was experiencing at the time, from which she has now thankfully recovered and that this has been the "view of all the experts from all sides"… Overall, Mr Lambis submitted there was a clear and intrinsic link between the health issues and the misconduct and that if it had not been for those health issues this practitioner would not be before the Tribunal. He turned to the expert evidence of Dr Baggaley who opined that Dr Sun's judgement was impaired at the time, that her conduct was explained by her illness and that had she not been ill, it would not have occurred.***

At the Sanction stage:

> ***On behalf of Dr Sun, Mr Lambis … was concerned that Dr Sun was being sanctioned for becoming ill and for the conduct that flows from it. Mr Lambis submitted that it was not just the evidence of the defence expert witness but also of the GMC's expert witnesses, that Dr Sun's misconduct was mitigated by her health issues and the missed opportunities by many individuals and organisations who could see this strange and different behaviour but did not intervene. Instead, they placed a greater burden on Dr Sun. Mr Lambis referred the Tribunal to his submissions at the previous stage and submitted that all the documents and evidence at that stage had played a vital role but were now fundamental at this stage and went to the heart of the manner in which this case should be disposed of.***

17. The centrality of the question – whether and to what extent the Conduct had been affected by Dr Sun's mental health condition – was clear. Dr Sun was relying on the "view of all the experts from all sides"; that "all psychiatrists agreed that the mental illness provided some mitigation for her actions"; that "all of the medical experts agreed that Dr Sun's mental health issue should be taken into consideration in mitigating her actions". The expert evidence (§§12-13 above) included "Professor Adamou [who] opined that at the time of the events, Dr Sun was not a

'psychologically minded' person who was able to identify difficulties and take appropriate action to resolve them". It included "Dr Baggaley who opined that Dr Sun's judgement was impaired at the time, that her conduct was explained by her illness and that had she not been ill, it would not have occurred"; and who "opined that the most likely explanation for the events is 'that she had psychotic symptoms (e.g. she misinterpreted situations, possibly experienced false perceptions and formed false conclusions)'". Dr Sun's own evidence told the Tribunal "that she had misinterpreted events and she had falsely perceived a conspiracy and malice against her when there was none"; that "she now understood her personal difficulties in mental illness and how this may have led to her misconduct"; said that "whilst it is not put forward as a defence, at the relevant times I was not my normal self and her health deteriorated to such an extent that I did not appreciate what I was doing and why"; and said that "she was firmly of the view that her mental health issues led to her being unable to appreciate the extent of what she was doing and why she was doing it". The GMC's own Counsel, Ms Oldfield, recognised the impact of the mental health condition. She "submitted that the Tribunal would want to take into account Dr Sun's inexperience, her cultural background, and her poor health at the time, as these had affected her judgement and impacted upon her behaviour"; and she "submitted that Dr Sun's health condition mitigated her culpability".

18. Dr Sun's case – that the Conduct had been affected by her mental health condition – stood alongside her acceptance that the 13 incidents did constitute dishonesty (§§9-11 above). In law, two necessary features combine to constitute dishonesty. A third feature is unnecessary. The two necessary features of dishonesty are: (i) the individual's actual state of mind as to knowledge or belief of factual matters; and (ii) the objective standards of ordinary decent people. The third and unnecessary feature is: (iii) the individual's subjective appreciation that what they have done is dishonest by those objective standards of ordinary decent people. This is explained by the Supreme Court in Ivey v Genting Casinos (UK) Ltd [2017] UKSC 67 [2018] AC 391 at §74 (for criminal cases), echoing §62 (for civil cases). By her admission of dishonesty, Dr Sun accepted features (i) and (ii); but not (iii). As to feature (i), Dr Sun accepted that she "knew what she was saying was false, but said it anyway". As to (ii), Dr Sun accepted was that the Conduct – as to the 13 instances – was dishonest applying the objective standards of ordinary decent people. Notwithstanding the acceptance of dishonesty, the key question – whether and to what extent Dr Sun's conduct had been affected by her mental health condition – remained of central significance.

19. The evidence as to mental health and its implications (§§13, 17 above) was capable of reducing Dr Sun's culpability in relation to the Conduct. This could be expressed in a number of ways: that Dr Sun's health condition "mitigated her culpability"; that it "may have had an impact on her judgement in relation to some of her misconduct"; that it was relevant "in mitigation when considering her conduct"; that it "provided some mitigation for her actions"; that it "mitigated her actions"; and that it "should be taken into consideration in mitigating her actions". This was relevant to assessing "the gravity of the conduct" (see Belal v GMC [2011] EWHC 2859 (Admin) at §59), to understand the nature of the impairment and identify the appropriate sanction. The question of reduced culpability was important on the evidence, in two ways. These involved recognising that Dr Sun's mental health condition gave rise to a distorted appreciation on her part: (1) of the situation in which she was acting; and/or (2) of

whether her conduct was dishonest by the objective standards of ordinary decent people. This was very different from being a case of 'poor judgment against a background of stress' as is illustrated in the solicitors' dishonesty/mental health case relied on by the GMC: Solicitors Regulation Authority v James [2018] EWHC 3058 (Admin) [2018] 4 WLR 163.

20. There was a live issue as to (1): Dr Sun's mental health condition having given rise to a distorted appreciation of the situation in which she was acting. This was what was described in Dr Sun's oral evidence "that she had misinterpreted events and she had falsely perceived a conspiracy and malice against her when there was none". It was reflected in the expert evidence (§§13, 17 above): in Dr Vincenti's view 'that Dr Sun's thoughts and feelings about her mistreatment by various bodies, can be attributed to an over-valued idea consequent upon her depressive illness', so that her 'out-of-character conduct … should be judged with this in mind'; in Professor Adamou saying that Dr Sun's behaviour was 'linked to an Adjustment Disorder'; in what Dr Vincenti and Professor Adamou were jointly saying about an agreed 'link between Dr Sun's behaviour … and her poor mental health over the relevant period'; in what Dr Saleem recorded Dr Sun as having believed (§13 above); and in Dr Baggaley opinion that 'Dr Sun's judgement bec[a]me impaired because of a mental disorder leading to her misconduct at Cambridge (withholding data and submitting a paper without appropriate authority)' and which 'impaired judgement led to misconduct at Leeds Teaching Hospitals (making allegations to the police and GMC about the conduct of senior colleagues)', as well as having 'led to a false belief that she had been stabbed by a colleague in an operating theatre with a needle which might be misconduct or a misinterpretation of events'.

21. As to (2): Dr Sun's mental health condition having given rise to a distorted appreciation of whether her conduct was dishonest by the objective standards of ordinary decent people, this engages the third and unnecessary feature (iii) of "dishonesty" (§18 above). The relevance of the unnecessary feature is this. Dishonesty will be the more serious – the more culpable – if there is the added feature (iii). It is not necessary for dishonesty. But dishonesty is more serious where it is present, and the less serious where it is absent. For dishonesty is "not necessarily a monolithic concept" and "questions of degree obviously arise": see GMC v Chaudhary [2017] EWHC 2561 (Admin) at §57. To find – entirely consistently with Dr Sun accepting that she had acted dishonesty – that Dr Sun had subjectively believed that she was acting honestly (by the standards of ordinary decent people) would serve to reduce her culpability (or mitigate the Conduct).

22. This was a live issue as to (2): Dr Sun's mental health condition having given rise to a distorted appreciation of whether her conduct was dishonest by the objective standards of ordinary decent people. Correctly understood, Dr Sun's own evidence went to this point when she told the Tribunal "in January 2022, in her witness statement" that "she was firmly of the view that her mental health issues led to her being unable to appreciate the extent of what she was doing and why she was doing it". Dr Baggaley's oral evidence to the Tribunal expressly raised (2). Dr Baggaley had begun with this:

> ***My view would be that her mental state at the relevant time was substantially – her judgement was substantially impaired, such that I don't believe that she, you know, I don't think she was in a state of mind to know clearly what she was doing, so I would say it was***

> ***substantially impaired and therefore is a significant mitigation towards the dishonesty which she's admitted to.***

But Dr Baggaley was able orally to amplify what he meant (emphasis added):

> ***DR BAGGALEY: I understand she has indeed admitted dishonesty, but as I said, I remain of the view that at the time she committed those acts of dishonesty her judgement was impaired. I think that's probably a better way of looking at it. I don't personally believe that when she did - when she committed those acts of dishonesty for which she has admitted that she did, I am not sure at the time she would have necessarily believed that they were dishonest, if you see what I mean. I think this is the problem with these things, that if your judgement changes over time, I think it's hard. I think now she's admitting that, yes, she was dishonest; I'm not certain that at the time she would have believed that she was being dishonest, but then that's my conjecture. I think perhaps the way I've put it, the way I've put it in terms of I think that it's her judgement was substantially impaired, which is mitigation, is perhaps a better way of looking at it. TRIBUNAL MEMBER: Yes, I think ... I just wonder whether is it a case that, what you said, her misconduct was caused by the illness or, had it not been for the illness, the misconduct would not have occurred, is there a distinction there? DR BAGGALEY: Yes, I think that's right, but I think her conduct is explained by her illness, and had she not been ill to that degree, I don't believe it would have occurred. That's probably different from saying it was caused by.***

23. Next, and quite apart from the question whether and to what extent the Conduct had been affected by Dr Sun's mental health condition, there was a further important and freestanding way in which the evidence about Dr Sun's mental health condition, its implications and effect, could make a substantial and material difference. This was as classic 'personal mitigation': a 'personal' circumstance capable of tending to suggest a lesser sanction. This can be expressed in terms of "mental health" as "a relevant mitigating factor"; or as Dr Sun's "mental illness" being considered alongside her "personal difficulties".

24. What was essential in the present case was that the Tribunal grappled with all of this, with clear and evidentially sound findings as to: the nature and seriousness of Dr Sun's mental health condition; its effect and the role which it played; and the extent to which Dr Sun's actions were affected by it. The Tribunal needed to grapple with 'causation', not as a simple but-for test, but an overall evaluative assessment. Had the Tribunal grappled with the issues, the only evidentially sound findings fairly open on the evidence would have recognised that there was a material and significant reduction in culpability (or mitigation of the Conduct) by reason of the effect of the mental health condition; and that in any event there was a material and significant 'personal mitigation' capable substantially of weighing in favour of a lesser sanction. On the evidence, those are findings which this Court should substitute.

25. The Tribunal did not grapple with the issues, adequately or at all. It did not – anywhere in the Determinations – make the necessary clear findings; still less evidentially sound findings. It did not recognise a material and significant reduction in culpability (or mitigation of the Conduct) by reason of the effect of Dr Sun's mental health condition. It did not recognise that Dr Sun's mental health condition gave rise to a distorted appreciation on her part of the situation in which she was acting. It did not recognise that Dr Sun's mental health condition gave rise to a distorted appreciation on her part of whether her conduct was dishonest by the objective standards of ordinary decent people. Nor did it recognise the mental health condition as a material and significant personal mitigation capable substantially of weighing in

favour of a lesser sanction. Instead, what the Tribunal did involved a series of four incorrect, unjustified, inadequate and evidentially unsound reasons:

26. First, in its Determination on Facts and Impairment (at §87) the Tribunal said this about Dr Baggaley's evidence:

> ***Dr Baggaley, in his report dated February 2022, opined 'In my opinion her misconduct was caused by her severe depression with psychotic features.' However, in his oral evidence to the Tribunal, he said that he believed Dr Sun's judgment was impaired by her health issues and this mitigated her actions rather than caused them.***

This reasoning was flawed. It involved a false dichotomy. There was no material difference between Dr Baggaley's written evidence describing the misconduct as being "caused" by the mental health condition and his oral evidence describing the actions being "mitigated". The word "mitigated" rather than "caused" did not detract from the weighty point being made. The essential point, from first to last, was that Dr Sun's mental health condition had impacts and implications capable of explaining the Conduct and reducing Dr Sun's culpability in relation to it. The Tribunal did not grapple with that key point and failed to make a finding, still less an evidentially sound finding, about it.

27. Secondly, in its Determination on Facts and Impairment (at §90) the Tribunal said this about Dr Sun's evidence and degree of insight:

> ***The Tribunal recognised that Dr Sun now demonstrates full insight into her mental health issues as evidenced by the measures she has put in place to deal with and manage her health issues. However, the Tribunal noted that even as late as January 2022, in her witness statement, she was firmly of the view that her mental health issues led to her being unable to appreciate the extent of what she was doing and why she was doing it. The Tribunal has found that this is demonstrative of her developing, but as yet incomplete, insight, given that it was at odds with her admissions to her dishonesty.***

The same point was in substance repeated in the Determination on Sanctions (at §40). But this was erroneous and illogical reasoning. The Tribunal failed to appreciate that Dr Sun's witness statement (§17 above) was describing a distorted appreciation of whether her conduct was dishonest by the standards of ordinary decent people (§22 above). That was not "at odds" with her admissions as to dishonesty. It related to the third and unnecessary feature (iii) which is no part of the test for dishonesty (§18 above) but whose absence lessens the seriousness of the dishonesty (§21 above). The question was whether that distorted appreciation – of whether her conduct was dishonest by the standards of ordinary decent people – arose from Dr Sun's mental health condition. Dr Baggaley's evidence (§22 above) supported the conclusion that it did. Once Dr Sun's evidence is understood, it displayed no lack of "insight" but rather a high degree of insight. She was describing feature (iii) and making the very point supported by Dr Baggaley. The Tribunal failed to recognise this. It failed to make any finding about it. The only evidentially sound findings that the Tribunal could have reached were that there was indeed a distorted appreciation on Dr Sun's part, as to whether the conduct was dishonest by objective standards of ordinary decent people, and that this distorted appreciation was the consequence of her mental health condition.

28. Thirdly, in its Determination on Sanction (§39) the Tribunal said this – under a heading "Mitigating factors" – about whether the Conduct had been affected by Dr Sun's mental health condition:

> ***The Tribunal noted that all of the medical experts agreed that Dr Sun's mental health issues should be taken into consideration in mitigating her actions. The Tribunal accepted that Dr Sun's mental health may have had an impact on her judgement in relation to some of her misconduct.***

This was the closest that the Tribunal got in dealing with the central issue (§§16-17 above). But the Tribunal's reasoning was plainly inadequate and unsustainable. One problem is that the Tribunal abdicated its function. It needed to decide whether or not Dr Sun's mental health did have an impact on her judgement in relation to her misconduct. The use of the word "may" shows that the Tribunal sat on the fence. Another problem is that the Tribunal's reasoning was evidentially unsound in any event. The Tribunal referred to "some of her misconduct". It gave no explanation of which misconduct it had in mind as falling one side of the line or the other. There was no identification, discussion or explanation of what evidence was said to be capable of supporting a conclusion, or possible conclusion, that the impact of the mental health condition was in relation only to "some" of the Conduct. None of the evidence of Dr Sun or any of the four experts distinguished between different aspects of the Conduct – or different points in the time-frame – so far as the implications of the mental health condition was concerned. The only evidentially sound finding could have been that the mental health condition did have an impact – and a significant one – in relation to all of the Conduct.

29. Fourthly, in its Determination on Sanction (§50) the Tribunal said this – under a heading "Suspension" – about Dr Sun's mental health condition as a mitigating factor:

> ***The Tribunal noted that the medical experts' opinions that Dr Sun's mental health issues should be taken into consideration in mitigating her actions. Whilst Dr Sun's mental health was a relevant mitigating factor it considered that Dr Sun's health did not significantly mitigate her persistent and repeated dishonest behaviour.***

This was internally contradictory. Mental health was being identified as a "relevant mitigating factor" and then not "significantly mitigat[ing]". This was, in the same sentence within the same paragraph, a recognition and a non-recognition of the same factor. It is, in any event, unsustainable to find that Dr Sun's mental health "did not significantly mitigate". On the evidence, it plainly did.

30. For any or all of these reasons the sanction of erasure cannot stand. Applying the principled approach articulated in Sastry (§4 above), the sanction of erasure was not appropriate and necessary in the public interest. It was excessive and disproportionate. The Tribunal made errors of approach. It adopted reasons which were wrong and inadequate. Any, or any significant degree of, deference to the Tribunal's judgment is unwarranted in the circumstances. The Court should substitute its own decision. The sole justifiable penalty was suspension, as indeed the GMC was inviting (§5 above). This Court should substitute a suspension. And bearing in mind that Dr Sun has, in effect, been suspended for some 15 months by reason of the immediate bite of the sanction of erasure imposed on 24.3.22, the appropriate suspension should now be treated as having been served. That outcome is consistent with the position that was adopted by the GMC before the Tribunal. It is consistent with the fact that Dr Sun

does not pose a threat to the public. It is consistent with the Sanctions Guidance (§128): dishonesty, where persistent, is "likely" to result in erasure (but not necessarily). The present case, with the implications of Dr Sun's mental health condition, and with the implications for public confidence and relevant standards, illustrates why it is that erasure may not need to follow a finding of persistent dishonesty. The consequence is that a talented young doctor, recognised to have had a mental health condition from which she has recovered, who has had an exemplary record prior to the Conduct, and who had an exemplary record in the subsequent period (as attested to in glowing testimonials), can properly be allowed to return to practice as a doctor serving the public and the public interest. There is no question of risk to the public which is why the first limb (a) of the statutory overarching objective (§3 above) was expressly not relied on by the GMC or by the Tribunal. Alternatively, if this Court is not persuaded that it should substitute a sanction, the Tribunal's errors and inadequacies are such that the case should be remitted for reconsideration afresh by a differently constituted Tribunal.

31. That, then, is the essence of Dr Sun's argument on the substance of the appeal.

Analysis

32. I am not able to accept the argument. In my judgment, the Tribunal was not wrong in deciding on the sanction of erasure in the light of the misconduct and impairment, on all the evidence and in all the circumstances of the present case. In my judgment, the sanction of erasure was appropriate and necessary in the public interest; it was not excessive and disproportionate. In my judgment, there is no basis for this Court to substitute some other penalty or remit the case for reconsideration by the Tribunal. I will explain the reasons why – accepting the essential submissions of Ms Hearnden for the GMC – I have arrived at those conclusions.

33. The starting point is that the Tribunal well understood the points which are being emphasised on behalf of Dr Sun. It understood Dr Sun's position. It understood the evidence. The Tribunal's Determination on the Facts and Impairment was a 24-page, 94-paragraph reasoned determination. The Tribunal's Determination on Sanction was a 9-page 55-paragraph reasoned determination. The Tribunal included a detailed discussion of the evidence, the applicable standards, the law and the submissions which had been made on every issue. The Tribunal grappled in detail with each issue that it had to decide. The Tribunal's appreciation, in relation to the points emphasised on this appeal, can readily be demonstrated. Where key points advanced in the argument on behalf of Dr Sun are reflected in quotations in the Determinations, I have been using those quotations. The quotations at §16 above are from the Determination on Facts and Impairment (§§35, 40) and the Determination on Sanction (§§16-18). The points quoted within §17 above are from the Determination on Facts and Impairment (§§26, 35, 40, 83, 85, 87, 90) and the Determination on Sanction (§§10, 13, 39). The point quoted within §18 above is from the Determination on Sanction (§8). The points at §19 above are all as quoted from the Determination on Facts and Impairment (§§24, 87) and the Determination on Sanction (§§13, 39). The points at §20 above in double quotations (appearing as "quote") are quoted from the Determination on Facts and Impairment (§83), while those in single quotations (appearing as 'quote') are from the various expert reports which the Tribunal read and discussed. The quotations at §22 are from the transcript (Day 3, 9.3.22) of what the Tribunal heard.

34. In considering the questions relating to Dr Sun's mental health condition, the Tribunal rightly recognised the central importance of the Conduct (§§6-11 above). The Conduct was what was alleged, what was admitted, what was found proved, what was found to be "misconduct" and what was found to be "dishonest". The Conduct was the necessary reference-point for the Tribunal's assessment of the nature of the "misconduct", the nature of the "impairment" arising from that misconduct, and the question of "sanction" having regard to the two limbs (b) and (c) of the statutory overarching objective (§3 above). It is clear from the Determinations that the Tribunal kept the Conduct and its nature well in mind, throughout. The Tribunal was right to do so. I have done so too.

35. It is quite right that the role played by Dr Sun's mental health condition in relation to the Conduct was at the heart of the case. The Tribunal appreciated that. But there was a key point – in the Tribunal's assessment – about what that role was not. The Tribunal rightly explored this at the hearing and emphasised it in the Determinations. The key point was that all the evidence and argument, regarding Dr Sun's conduct being 'affected by her mental health condition', did not extend to any sustainable suggestion that Dr Sun's mental health had led her to misappreciate what she was doing. Dr Sun knew what she was doing. She had the actual state of knowledge and belief which made the entirety of the Conduct "misconduct". She had the actual state of knowledge and belief which made the 13 incidents "dishonest". There was no mental health distortion capable of defending, excusing or exonerating any of the Conduct. That was a central point made by the GMC. It was a central point accepted by the Tribunal. To take each of the 13 incidents, the Tribunal found that Dr Sun wrote those untruthful communications on all 13 occasions, she did so knowing and understanding that what she was saying was false. As the Tribunal recorded, Dr Sun:

> ***knew what she was saying was false, but she said it anyway.***

The key point was therefore this. Dr Sun's mental health condition did not alter the character of the "misconduct". It did not excuse or exonerate. This was carefully explored by the Tribunal, whose conclusions were clear and fully justified. As Ms Hearnden put it in her oral submissions, the recognition of this key point 'fundamentally changed the exercise', in evaluating the evidence relating to the mental health condition.

36. Having decided that the mental health condition did not alter the character of the misconduct, there were important aspects of the nature and character of the misconduct. The Tribunal carefully examined the Conduct – and specifically the incidents of dishonesty – by reference to the length of time over which it was perpetrated, finding it to be persistent, repeated and multi-faceted. As the Tribunal found and explained, this was a case of "prolonged dishonesty". As the Tribunal pointed out in relation to the dishonestly made complaint of 1.5.19 (§10 above), Dr Sun was choosing to repeat untrue allegations similar to those which she had made in her dishonestly sent email of 26.9.18 (§9 above). As the Tribunal also explained, there was a "persistent" and dishonest failure by Dr Sun to declare the ongoing Cambridge University investigation in applying for two separate posts in March 2019 with HEYH and HENW (§10 above); followed by the later dishonest failure to update HEYH on the outcome of that investigation and on the GMC referral (§11 above). As the Tribunal further explained, the conduct concerning communications with the GMC and with the Cambridgeshire and West Yorkshire police forces (§11 above)

constituted "repeated" dishonest breaches of applicable standards of conduct. So, the Tribunal concluded that "Dr Sun's dishonesty was persistent, deliberate and continued over a period of 16 months"; that this was "persistent and repeated dishonest behaviour". It found that this "persistent dishonesty marked a serious departure from the principles set out in [GMP] and [Dr Sun's] behaviour demonstrated a deliberate disregard for those principles". It identified, correctly, that the 13 incidents of dishonest communication had involved a range of different documents, written to a range of agencies, including continuing in relation to two police forces to "fabricate allegations such as sexual harassment", and including "false statements made to Cambridge University, to colleagues, [to] two separate police force forces and to her regulator, the GMC".

37. Another important dimension of the Conduct, carefully examined by the Tribunal, was the question of harm. The Tribunal recorded, as a point in Dr Sun's favour, that the Conduct "did not result in direct harm to patients". However, as the Tribunal went on to say: Dr Sun's "dishonesty related to providing false statements which was particularly serious and caused distress" it "caused serious harm and distress and had serious consequences to her colleagues". As the Tribunal explained, the dishonesty in the communications with HENW meant that HENW were "left … to discover… for themselves" the outcome of the University investigation and the GMC referral, at which point they "withdrew an offer of a place on a GP training programme". The dishonest communications involving the two police forces were actions by which Dr Sun "made a serious allegation against an innocent doctor". The Tribunal identified "the gravity of Dr Sun's actions in reporting professional colleagues to the police and the various Trusts, and the effect it had on those involved". Alongside the impact of the incidents of dishonesty, the Tribunal identified serious impacts and implications of the other "misconduct" (§8 above). For example, the failure between May 2018 and January 2019 fully to comply with requests to provide data breached multiple provisions of GMP and GPR and had a "serious impact". It resulted in a delayed start of a GSK follow-on trial. It put "at risk" the "important relationship" between Cambridge University, the Trust and industry partners, "which could have jeopardised future clinical study partnerships". The action in submitting the manuscript to JASN without the required authorisations and removing names had "potentially serious consequences, not only for Dr Sun but for everyone who was involved in the OPERA project". It was a fundamental principle of research that agreement between all parties involved in the Study must be obtained before publication. Dr Sun's actions deprived Dr Cheriyan of the credit owed to him as the senior author and also the credit owed to those others who had contributed to the study. This had "caused a great deal of distress to those removed from the authorship list". Choosing not to withdraw the manuscript as requested removed the chance of mitigating Dr Sun's initial error of submitting it, before the manuscript went out for review. Had the manuscript been withdrawn immediately as requested, the risk of reputational damage to the OPERA team and to the University-Trust-GSK partnership could have been avoided. The impact of the misconduct included Dr Cheriyan and Professor Wilkinson having to "put in many hours of additional work to minimise the long-term consequences of Dr Sun's actions, including re-analysing the data and checking everything that was submitted". As the Tribunal explained, when Dr Cheriyan was finally able to analyse the data, he found that different results were produced from those which Dr Sun had produced, with a statistically significant result for the primary endpoint which meant that the results submitted by Dr Sun were "enhanced" and gave rise to Dr Cheriyan's

concerns regarding the risk that Dr Sun's actions could have had on his own reputation and on the reputation of the University.

38. Another dimension of the Conduct was the professional working context in which it arose. These were not actions in the personal sphere of a clinician's private life. The Tribunal, rightly, recognised that particular and relevant professional standards derived from GMP included: to act with honesty and integrity when carrying out research (GMP §67); to be honest in all communications with colleagues (GMP §68); and to be honest and trustworthy when writing reports, when completing or signing forms, reports and other documents, making sure that such documents are not false or misleading, both as to the correctness of the information included and as to any information omitted (GMP §71). The Tribunal also, rightly, recognised that relevant professional standards from GPR included to be open and honest with participants and members of the research team and answer questions honestly (GPR §22). Alongside these professional standards specifically referable to honesty, there were further such standards including as to working collaboratively with colleagues, communicating information and openness in the context of disciplinary proceedings. The Tribunal also rightly recognised that the Sanctions Guidance refers (at §124) to dishonesty, even when related to matters outside a doctor's clinical responsibility, as being particularly serious because it can undermine the trust that the public place in the medical profession. It also describes (Sanctions Guidance §127) "research misconduct" as an example of dishonesty which undermines the trust that the public and profession have in medicine, with potentially far-reaching consequences, so as to be particularly serious. As the Tribunal rightly appreciated, this is a case of a series of dishonest communications arising in and out of a professional and working setting, in the context of a research project. As the Tribunal explained, issues of probity, integrity and honesty are fundamental tenets of the medical profession, in a context where doctors occupy a position of privilege in trust and are expected to act in a manner which maintains public confidence and uphold proper standards of conduct. As the Tribunal put it, Dr Sun's misconduct breached those tenets; and her dishonest actions had serious implications for Dr Sun and the profession as a whole.

39. It was alongside all of these important aspects of the case that the Tribunal was considering what – in the application of limbs (b) and (c) of the statutory overarching objective (§3 above) – to make of the evidence about Dr Sun's mental health condition at the time of the Conduct, its nature and its implications. The Tribunal recognised and recorded that "all psychiatrists agreed that the mental illness provided some mitigation for [Dr Sun's] actions". The Tribunal also "accepted that Dr Sun's mental health may have had an impact on her judgement in relation to some of her misconduct". The Tribunal found that: "[w]hilst Dr Sun's mental health was a relevant mitigating factor, it considered that Dr Sun's health did not significantly mitigate her persistent and repeated dishonest behaviour". This reasoning is criticised in Dr Sun's arguments on this appeal. But, in my judgment, this reasoning was justified, sound and sufficient, in the context and circumstances of the present case.

40. What the Tribunal was clearly recognising was this. The evidence about Dr Sun's mental health condition could not bear the weight of making a substantial difference to the key evaluative assessment of the appropriate and necessary sanction in the public interest, by reference to the two applicable limbs (b) and (c) of the statutory overarching objective (§3 above), in light of the nature of the misconduct and the

nature of the impairment. The directly relevant "judgements" by Dr Sun in relation to the misconduct were her conscious and deliberate decision-making as reflected in the Conduct. That included the 13 instances of dishonesty. It included what to say and write; what to send; and to whom. It involved consciously writing and sending communications, of many and various types, to many and various persons and agencies, containing information known and understood by Dr Sun to be untrue. The evidence was that there were circumstances, situations and events which were misappreciated, including thoughts and feelings about mistreatment, and false perceptions about events and colleagues. But none of that misappreciation could, or did, change the fact that the various communications contained information which was false, and which Dr Sun knew and appreciated was false, and she chose to send that series of communications containing that information in this "persistent and repeated" dishonest behaviour. This was what the Tribunal was saying. It was fully justified. There is no 'abdication' by the Tribunal (§28 above) in using the word "may", and no unevidenced evaluation in using the word "some", especially when it is remembered that the "judgement" of Dr Sun which was directly relevant to the misconduct was not a judgement about understanding various circumstances or situations, or treatment, events or colleagues. The judgements that centrally mattered were about actions and the state of mind about those actions and their contents, when they were being done.

41. There is, in my judgment, no substance in the criticism of the Tribunal for supposedly contradicting itself (§29 above) in identifying Dr Sun's mental health as a "relevant mitigating factor" while also concluding that it "did not significantly mitigate her behaviour". Whether a factor can be identified as a relevant mitigating factor is one question. The appropriate weight to be given to such a factor, once identified, is another. The Tribunal made this very point when it said this: "The Tribunal must consider any relevant mitigating and aggravating factors, giving them appropriate weight, and address them within the context of the determination". What the Tribunal was saying was that Dr Sun's mental health was a relevant mitigating factor but that, when it came to the question of weight, it did not "significantly" mitigate "her persistent and repeated dishonest behaviour". That was a careful fully justified conclusion. Moreover, as Ms Hearnden pointed out, the idea of "mitigation" – including 'classic personal mitigation' – needed to be approached remembering that the Tribunal was not exercising a punitive jurisdiction, but a prospective assessment of fitness to practise applying the public interest imperatives arising from limbs (b) and (c) of the statutory overarching objective. The Sanctions Guidance reflects that truth. So, in my judgment, did the Tribunal's approach and reasoning.

42. There is no substance, in my judgment, in the criticism (§27 above) of the Tribunal's observation that a description given by Dr Sun in her January 2022 witness statement was "at odds with" her admissions of dishonesty, and for that reason demonstrative of an incomplete "insight". On this topic, Mr Collins KC has to characterise Dr Sun's January 2022 statement as explaining that her mental health gave her a distorted misappreciation of whether her actions were dishonest by objective standards of ordinary decent people. But what Dr Sun actually said in the January 2022 witness statement was far more straightforward. As the Tribunal recorded, Dr Sun was describing a deterioration in mental health which she was saying meant "I did not appreciate what I was doing and why". The Tribunal described that as a witness statement expressing the view that "her mental health issues led to her being unable to

appreciate the extent of what she was doing and why she was doing it". That was fairly described as being "at odds with" the admissions of dishonesty. It is right that Dr Baggaley's oral evidence alluded to whether Dr Sun appreciated that her conduct was dishonest. But he spoke in cautious terms, about whether Dr Sun "would necessarily have believed" that the acts were dishonest, and whether "she would have believed that she was being dishonest". Dr Baggaley did not say that this was his reading of what Dr Sun was saying in her witness statement. He also used the phrases "I am not sure"; "I'm not certain"; and "my conjecture". This was not a point which could materially influence the decision on sanction, in light of the Tribunal's fully justified and cogent reasoned analysis on core points, such as Dr Sun's directly relevant subjective state of mind and knowledge; and the persistent and repeated nature of the dishonest behaviour. The point which the Tribunal was making about the January 2022 witness statement – a point which went no further than "insight" having been "developing" but "incomplete" – was fully justified.

43. In my judgment, there was no 'false dichotomy' (§26 above) in the Tribunal recording that Dr Baggaley's report had described Dr Sun's misconduct as having been "caused by her severe depression with psychotic features", whereas his oral evidence described Dr Sun's judgement as impaired by her health issues which "mitigated her actions rather than cause them". That was an entirely fair and appropriate description of what Dr Baggaley had sent to the Tribunal, when asked questions. The Tribunal had been probing what Dr Baggaley meant when he spoke of mental health as "the cause of the misconduct". Here, as elsewhere, the Tribunal was rightly concerned with what was, and was not, being said. In one part of his report Dr Baggaley said, in the context of Dr Sun making allegations of sexual harassment, that "she did believe this was actually happening". The Tribunal needed to be clear about whether Dr Baggaley was making a point about a distorted perception in Dr Sun's state of mind and knowledge, going to the character of the Conduct as "misconduct" and the communications as "dishonest". When asked, it was Dr Baggaley himself (§22 above) who said "mitigation is perhaps a better way of looking at it". Then, when asked whether there was 'a distinction" regarding the description of misconduct "caused by the illness", it was Dr Baggaley who used the word "explained" and said it was "probably different from saying it was caused". Dr Baggaley himself thought there was a difference, and a better way of expressing the point he was making. The Tribunal was recording his evidence.

44. Viewed in the context and circumstances of the case as a whole, and remembering the importance of reading the Tribunal's reasoning fairly and as a whole, I can find no basis on which, or respect in which, the Tribunal's evaluative assessment was wrong. As to the fact that the GMC was inviting suspension, it was for the Tribunal to identify the appropriate sanction. Ms Oldfield as Counsel for the GMC said that "in an effort to assist the Tribunal, the GMC submits that suspension would be an appropriate sanction to make in the circumstances of this case". She prefaced that with this submission: "The decision as to sanction is of course entirely a matter for the Tribunal". The Tribunal was very well aware of all of the features of the present case which were capable of counting in favour of Dr Sun and capable of counting against erasure. The Tribunal particularly noted what had been described as "glowing testimonials" attesting to Dr Sun's general good character and medical abilities, as being a highly competent well respected and caring doctor with whom colleagues liked working. That included the evidence of Mr David Wilkinson, Consultant

Vascular Surgeon at Bradford Teaching Hospitals; and Dr Rosalind Roden, Associate Postgraduate Dean at the Leeds Trust, both of whom had given written and oral evidence. The Tribunal noted that Dr Sun had no previous fitness to practise history and that her misconduct had not been repeated. The Tribunal had and kept well in mind that the first limb (a) of the statutory overarching objective was not engaged. It noted that Dr Sun did and does not present a risk to patient safety. The Tribunal reminded itself of principles – which it derived from cases like Bolton v Law Society [1993] EWCA Civ 32 and Bukhari v GMC [2021] EWHC 3278 (Admin) about the reputation of the profession and about serious dishonesty. The Tribunal identified the relevant paragraphs within the Sanctions Guidance, and the submissions which had been made to it about them. Ultimately, what the Tribunal plainly had at the forefront of its mind was Sanctions Guidance at §97 which describes "suspension" as appropriate in the case of a serious breach of GMP where the doctor's misconduct is "not fundamentally incompatible with their continued registration so that complete removal from the medical register would not be in the public interest"; and Sanctions Guidance at §§109a, 109h and 128 which identify as factors which "may indicate erasure is appropriate": "a particularly serious departure from the principles set out in [GMP] where the behaviour is fundamentally incompatible with being a doctor"; and "dishonesty, especially where persistent".

45. The Tribunal ultimately found of central significance that whatever the evidence of the mental health condition, it did not alter the central character of the dishonesty because Dr Sun knew what she was doing including that she was communicating false information. In the light of that central feature of the case, the Tribunal was astute to have close regard to the other aspects of the dishonesty, such as the length of time of its perpetration, whether it was repeated and the harm which it caused. Ultimately, the Tribunal concluded as follows (Determination on Sanction §§53-55).

> ***The Tribunal bore in mind the nature and extent of Dr Sun's dishonest conduct, including the impact and consequences it had on other colleagues… [T]he Tribunal noted that suspension has a deterrent effect and can be used to send out a signal to the doctor, the profession and public about what is regarded as behaviour unbefitting a registered doctor. The Tribunal considered that suspending Dr Sun's registration would not be sufficient to maintain public confidence in the profession, to promote and maintain public confidence in the medical profession and to promote and maintain proper professional standards and conduct for members of that profession nor would it reflect the seriousness and gravity of her multiple serious breaches of GMP, over a prolonged period of time. The Tribunal determined that Dr Sun's misconduct is fundamentally incompatible with continued registration. Whilst recognising the impact of Dr Sun's underlying health condition, the Tribunal nevertheless concluded that the nature, breadth and seriousness of her dishonesty was such that only erasure could be the appropriate and proportionate sanction to impose to uphold limbs (b) and (c) of the overarching objective. The Tribunal therefore directs erasure of Dr Sun's name from the medical register.***

In my judgment, those conclusions were not wrong; the sanction imposed was appropriate and necessary in the public interest; it was not excessive and disproportionate. For these reasons Dr Sun cannot succeed on the Substantive Issue and her appeal stands to be dismissed.

SRA v James

46. Before leaving the Substantive Issue, I will deal with SRA v James (§19 above). That case concerned the position of solicitors, with their distinctive regulatory framework.

There is no direct read-across. The Court itself explained the need for caution in seeking to draw parallels between solicitor cases and medical practitioner cases (James §50). Aspects of James are, moreover, about work-related stress. However, in thinking about the relationship between dishonesty and a mental health condition, reduced culpability and personal mitigation, I derived some assistance from the discussion in that case.

47. In James there were three separate cases heard together. Ms James was a solicitor who had made 9 misleading statements to a client about the progress of the case and who had then created 4 letters to give the misleading impression that the case had been being progressed. The Solicitors Disciplinary Tribunal ("SDT") had described, as the "root cause" of that dishonest misconduct, a combination of the pressures at work and mental ill-health (James §14). Mrs McGregor was a partner solicitor who had assisted a fellow partner at her firm in covering up overcharging. The SDT had described her circumstances at the time of the conduct as involving perceived unbearable pressure (§27). Mr Naylor was a solicitor who sent 5 emails to a client giving the misleading impression that steps had been taken. The SDT had accepted that Mr Naylor "had suffered from mental health issues and this affected what he did" (§36), his mental health issues having "affected his ability to conduct himself to the standards of the reasonable solicitor" (§39).

48. In Mr Naylor's case the submission for the SRA had emphasised that the medical evidence about mental health "did not impinge on his dishonesty, since the medical evidence was not to the effect that he did not understand what he was doing"; and Mr Naylor "knew that the information he provided the client in the emails was untrue" (James §84). The SRA was submitting that striking off would be appropriate "where there was dishonesty … and the [solicitor] was suffering from mental ill health, but the medical evidence did not establish that the [solicitor] did not know what he was doing" (James §88). The Court had been referred in that context (James §§85-87) to SRA v Farrimond [2018] EWHC 321 (Admin). That was a case about attempted murder by a solicitor where in the crown court "psychiatric evidence was found to reduce his culpability substantially" (James §85), but where the "powerful mitigation … advanced on his behalf … did not alter the character of the offence itself" and "there was no question of his suffering a defect of reason due to disease of the mind such that he did not know the nature or quality of his act or that it was wrong" (James §86, quoting Farrimond §86).

49. Within the judgment in James (at §§103-104), the Court made the following points. First, that "an assessment of the nature and extent of the dishonesty and the degree of culpability will involve an examination of … the 'mind set' of the [solicitor], including whether the [solicitor] is suffering from mental health issues …, as part of the overall balancing exercise". Secondly, that where it is "concluded that, notwithstanding any mental health issues …, the [solicitor's] misconduct was dishonest, the weight to be attached to those mental health … issues in assessing the appropriate sanction will inevitably be less than is to be attached to other aspects of the dishonesty found, such as the length of time for which it was perpetrated, whether it was repeated and the harm which it caused, all of which must be of more significance". Thirdly, that "the mental health … issues … should be considered as part of the balancing exercise required in the assessment or evaluation", engaging in "the balancing exercise which the evaluation requires" between the "critical questions

of the nature and extent of the dishonesty and degree of culpability … on the one hand and matters such as personal mitigation" including "health issues" on the other hand.

THE PROCEDURAL ISSUE

50. My analysis of the Substantive Issue has been (see §14 above) subject to the Procedural Issue. The Procedural Issue concerns whether this Court has jurisdiction to deal with the appeal on its substantive merits. It turns on whether Dr Sun can satisfy the human rights test for an extension of time. In the light of what I have decided on the Substantive Issue, nothing can now turn on the Procedural Issue. That is because the appeal stands to be dismissed in any event. I will give my reasoned analysis of the Procedural Issue, having been invited by both parties to consider and address all issues on their legal merits. The line of cases to which I was referred was as follows: Adesina v Nursing and Midwifery Council [2013] EWCA Civ 818 [2013] 1 WLR 3156 (9.7.13); Parkin v Nursing and Midwifery Council [2014] EWHC 519 (Admin) (30.1.14); Pinto v Nursing and Midwifery Council [2014] EWHC 403 (Admin) (4.2.14); Nursing and Midwifery Council v Daniels [2015] EWCA Civ 225 (20.3.15); Rakoczy v General Medical Council [2022] EWHC 890 (Admin) [2022] ACD 77 (13.4.22); and Stuewe v Health and Professions Council [2022] EWCA Civ 1605 [2023] 4 WLR 7 (8.12.22). The two apex cases, discussed in that line of cases, are the judgment of the European Court of Human Rights in Tolstoy Miloslavsky v United Kingdom (1995) 20 EHRR 442 and the judgment of the Supreme Court in Pomiechowski v Poland [2012] UKSC 20 [2012] 1 WLR 1604. The upshot of all these authorities is that an extension of time is available only where compelled by the standards of Article 6 of the European Convention on Human Rights, applicable through a conforming interpretation of the otherwise inflexible terms of s.40 of the 1983 Act.

Dr Sun's Argument

51. On the Procedural Issue, Mr Collins KC submitted – in essence as I saw it – as follows. It is accepted that the appeal was filed out of time because it was only filed with the relevant court (the Administrative Court), with the fee paid, on Wednesday 4.5.22. The final day for filing the appeal and paying the fee, within the statutory 28 day time limit, was Friday 29.4.22. The applicable Article 6 standards permit the appeal to be excluded – and an extension of time refused – only if the application of the time limit on the particular facts: (i) does not restrict or reduce the access to the court left to the individual in such a way that the very essence of the access to the court is impaired; and (ii) involves a restriction with a reasonable relationship between the means employed and the legitimate aim sought to be achieved (Stuewe §§44-47). Both limbs (i) and (ii) must be satisfied if the appeal is to be excluded and an extension of time refused. It follows that a failure to satisfy either limb (i) or (ii) must lead to an extension of time. On the special facts and in the special circumstances of the present case (§§55-57 below), the rigid application of the time limit (i) impairs the very essence of Dr Sun's access to the court, and in any event (ii) would not involve a reasonable relationship between the means and the legitimate aim of certainty and finality. Indeed, although no further gloss is apt (Stuewe §54), there are in the present case "exceptional circumstances", and Dr Sun did personally do all that she could to – or reasonably do – to bring the appeal timeously (Stuewe §52). In having regard to the circumstances, and in applying the standards of Article 6, it is appropriate to have regard to 'what is at stake' for Dr Sun, and the Court can properly

have regard to the substantive merits. This appeal should not be excluded on grounds of delay but rather, if Dr Sun's appeal were well-founded on the substantive merits, the appeal should be entertained and allowed.

A Single Question?

52. In order to assess the viability of this argument it is necessary to examine the factual circumstances of the case, but also two key legal points which were contentious. I will start with the legal points. The first is the question whether limb (i) (impairment of the very essence of the right of access to the court) operates in the present context as the sole and exclusive question. Ms Hearnden submits that it does. Her argument, in essence as I saw it, was as follows. It is true that Tolstoy §59 (Stuewe §44) was identifying two limbs, and that the rigidly applied time limit for the appeal would need to satisfy both limbs in order to be compatible with Article 6 standards. However, the Court of Appeal in Stuewe unmistakeably and authoritatively spoke of "a discretion (or duty) to extend time for the bringing of a statutory appeal … only in exceptional circumstances, namely where to deny a power to extend time would impair the very essence of the right of appeal", saying "that is the key question" (Stuewe §49). The Court of Appeal said "the central and only question for the court is whether or not 'exceptional circumstances' exist, namely where to deny a power to extend time would impair the very essence of the right of appeal" and spoke of "answering the question" (§54). Its conclusion was that "this is not a case where a refusal to extend time impaired the very essence of the Appellant's statutory right of appeal" (§67). This is clear and binding. The limb (i) question is therefore the only question. The explanation for this is as follows. Limb (i) operates at the 'micro' level, for evaluating the lawfulness of the application of the rigid time limit in the facts and circumstances of the individual case (Stuewe). Limb (ii) operates only at the 'macro' level, for evaluating the lawfulness in general and systemic terms of the provision imposing the rigid time limit. Like Stuewe, this is a 'micro' case where the limb (i) question is the only question.

53. I have not been persuaded by these submissions. At Stuewe §44 the Court of Appeal cited the key passage from Tolstoy §59, in which the two limbs (i) and (ii) are clearly identified. At Stuewe §45 the Court of Appeal cited the key passage from Pomiechowski §39 where that two-limb test from Tolstoy was adopted by the Supreme Court. The Supreme Court's shorthand was "whether the operation of the time limits would have this effect", meaning the effect identified in either of the two limbs. The Court of Appeal in Stuewe's "key question" (§49) and "only question" (§54) was a reference to the question on which "the court must be satisfied" from Tolstoy. That is a single question of Article 6 compatibility, but it is a single question which requires the state to satisfy both limbs, and failure to satisfy either one is a basis for the extension of time. I think the phrase "would impair the very essence of the right of appeal" is used in Stuewe, as it was in Daniels §39, as a shorthand to reflect the test in Tolstoy. I cannot see how it can be otherwise, for there is no indication of any intention to remove, still less of a reason for removing, limb (ii) (see Stuewe §44). As I had explained in Rakoczy (at §21vii), Julian Knowles J used the same shorthand from limb (i) in Gupta v GMC [2020] EWHC 38 (Admin), while Lady Hale in her concurring judgment in Pomiechowski used as shorthand the language from limb (ii). Importantly, at the heart of Stuewe itself was a warning against introducing any additional condition or gloss (§§52, 54) into the "relevant

test" derived from Tolstoy (§52). The Court of Appeal cannot have intended to cut down that test. No Court has said that limb (ii) is applicable only to a 'macro' challenge to a provision. Lord Mance (Pomiechowski at §35) authoritatively explained that the question whether the statutory time limit generated "unfairness in individual cases" was answered by applying both limbs (i) and (ii). Lord Mance made the same point later, when he spoke about the effect described in Tolstoy being determined "in any individual case" (at §39). I do not read the Court of Appeal in Stuewe as departing from that. Had it been doing so it would have said so. It would have said it was departing from the "Dual Principles" (see Rakoczy at §6) identifying as featuring at the heart of four Strasbourg cases (Rakoczy §9).

Merits and Implications

54. The second legal point of controversy is whether, in applying the standards of Article 6, it is appropriate to have regard to what is at stake for Dr Sun, including the substantive merits of the appeal. On this issue, Ms Hearnden made the measured submission that the Court should be 'cautious' about allowing the strength of the substantive merits of an appeal to enter the assessment of the extension of time. She cited Parkin where (at §§15-16) Eder J was "prepared to assume", in the practitioner appellant's favour, that the merits of the appeal may be relevant to the Article 6 extension of time. There is, in my judgment, no difficulty with taking account of what is at stake, as part of the context (Adesina §14) and part of the individual circumstances (Rakoczy §15iii). But Ms Hearnden is right about the need for caution so far as the substantive merits of the appeal. The logic of a self-standing time-limit provision is that it must, in principle, be capable of excluding a meritorious appeal. And it must be possible to address the jurisdictional question as a standalone issue, as seen in the cases. In the present case the GMC – very properly – has not sought to strike out the appeal (cf. Rakoczy §1; Stuewe §3), did not ask the Court not to hear full argument (cf. Parkin §§34-35), but rather encouraged the Court to hear full argument on the substantive merits, dealing with substance and procedure in the round. In the end, the question whether an extension of time is appropriate is driven by Article 6 compatibility. I would be surprised if the proportionality limb (ii) of Tolstoy mandates a rigid exclusion or appreciation – however encouraged by the parties and however well-informed – of the strength or weakness of the case. In the absence of authority to that effect, I would not close the door on taking 'cautious' account in the circumstances of an individual case of the substantive merits, as being linked to what is at stake for the individual. That, I think, puts me in the company of Eder J in Parkin.

The Factual Circumstances

55. I turn to identify the factual circumstances. Based on all the evidence before the Court, I accept – and I find – that the key facts were as follows. In the proceedings before the Tribunal, Dr Sun had been represented by the Medical Protection Society ("MPS") and by Counsel. By email to the MPS (25.3.22) and by special delivery to Dr Sun herself (received by her on 26.3.22), the Medical Practitioners Tribunal Service ("MPTS") sent the Determinations, a covering letter and appeal notes. The covering letter explained that the appeal needed to be lodged on or before 28.4.22 and that Dr Sun needed to immediately provide the MPTS with evidence of lodging the appeal, which could be the receipt of payment to the court (of the relevant fee). On 4.5.22 Dr Sun did lodge the appeal with the Administrative Court and at 11:20 on

4.5.22 Dr Sun did notify MPTS by email that she had lodged the appeal, providing as evidence the confirmation (received at 10:53 on 4.5.22) of payment of the fee. The circumstances in which she missed the deadline of 28.4.22 were as follows. Until 20:03 on 20.4.22, Dr Sun was relying on the MPS. The sanction of erasure had been a shock. Indeed, it was not the sanction which the GMC was inviting. Dr Sun lost her job. Her health deteriorated and she made urgent self-referrals to her GP on 6.4.22 and 8.4.22, receiving counselling on 8.4.22 and 14.4.22. After receipt of the Determinations, the MPS told Dr Sun that her Counsel had become unwell and was not available to advise about appealing. She had been told that MPS were seeking alternative representation for her. But then, at 20:03 on 20.4.22, Dr Sun was told by MPS that it was not going to be in a position to support an appeal and she would have to manage this herself. She was unemployed and had limited financial means. She set about drafting appeal documents herself. The MPS no longer responded to her questions about how she should go about lodging an appeal herself. Dr Sun tried Citizen's Advice. In light of MPS's position (20.4.22) Dr Sun promptly (on 21.4.22) sought assistance from the British Medical Association ("BMA"). The BMA responded on 25.4.22 and then on 26.4.22 told Dr Sun that they were unable to assist with her appeal and were unable to provide any further information. However, the BMA adviser contacted a barrister on the evening of 26.4.22 and the barrister agreed to provide informal assistance, because Dr Sun could not afford formal advice.

56. The barrister was able to speak to Dr Sun first thing in the morning of 28.4.22. That was the day of the deadline. The barrister indicated during that conversation that Dr Sun would have to lodge her appeal with the Queen's Bench Division. However, the barrister then sent an email (at 09:36 on 28.4.22) saying: "I have just checked up on the location of your appeal. It is not as I indicated the Queen's Bench Division and it is the Chancery Division". In these circumstances, Dr Sun set about filing the appeal with the Chancery Division on the deadline day. During her attempts to do this, she found that she needed to sign up for a CE-filing account to enable the electronic filing of the appeal. She set about this and was successful in registering. At 15:52 on 28.4.22 received an email confirmation of the registration of the CE-filing account. Having done so, she found she was unable to identify an appropriate option for filing the appeal with the Chancery Division. Dr Sun spoke to her contact at the BMA who suggested emailing the appeal documents to the Chancery Division. She did so. At 16:31, on the deadline day, she sent an email to the three email accounts at the Chancery Division which she was able to find on the Chancery Division website. That email attached Dr Sun's appeal documents. At 16:31 she received auto-replies. These indicated that she should use CE-filing except in exceptional circumstances. She had tried to do that. Later on 28.4.22 – deadline day – Dr Sun informed the GMC about her appeal application, and she emailed the Chancery Division again (at 20:32) sending transcripts of the Tribunal hearing for use in the appeal.

57. The next day was Friday 29.4.22, immediately before a Bank Holiday weekend. At 15:57 on 29.4.22 Dr Sun received an email from the Chancery Listing Officer. It said that the papers had been reviewed and they needed to be filed with the Administrative Court. Dr Sun was directed to forward them to a general office email address at the Administrative Court in London. She re-sent her appeal papers to the Administrative Court email address at 17:28, asking in that same email how she could pay the Administrative Court fee. It was now Bank Holiday weekend and the next working day was Tuesday 3.5.22. Dr Sun received no email response from the Administrative

Court. She made several phone calls on 3.5.22 and 4.5.22. She was finally able to speak to someone on Wednesday 4.5.22. In that conversation Dr Sun explained that she was now beyond the appeal deadline. She was told that she could revise her appeal documents and include an application for an extension of time. She did revise the appeal documents, including an application for an extension of time. Having received an answer to her question how to pay the fee, she did so and received the electronic confirmation at 10:53 on 4.5.22. She emailed MPTS at 11:20 on 4.5.22 providing MPTS with evidence in the form of a receipt of payment to the court, to which reference had been made in the original MPTS covering letter (25.3.22).

Analysis

58. If I had decided that there was substantive merit in the appeal I would, at this point in the Judgment, be deciding whether to grant an extension of time. My decision would have been to grant the extension. This is a case of "exceptional difficulties" (Adesina §17) and Dr Sun has provided "evidence" with a full "explanation" (cf. Daniels §34iv). I can find nothing in Dr Sun's conduct which can properly be criticised, up to the morning of 28.4.22. She did not "do nothing about appealing" until the end of the 28 days (cf. Daniels §§16, 34i). Until 29.4.22 she was in the hands of others. First, there were the representatives and Counsel, who would have drafted the appeal documents and lodged them. After the news on 26.4.22 from the MPS, Dr Sun was trying to get help, waiting for help and drafting her own appeal documents. Ultimately, she was waiting for the morning of 28.4.22 to come, because that was the timing of the informal discussion scheduled with a barrister who was going to help her with the question of how to lodge the appeal. That help had been lined up in a situation where Dr Sun – in her very difficult personal circumstances – had tried and exhausted other avenues open to her to get help. The informal advice from the barrister came on the morning of 28.4.22. It was the wrong advice (albeit not emanating from MPTS or the GMC: cf. Rakoczy §19), and she set about following it. I have no doubt – and I find – that, had Dr Sun been informed or understood on the morning of 28.4.22 to file the appeal papers with the Administrative Court, that is what she would have done. She had drafted her own appeal documents. She would also have had time to deal with the fee. Payment of the fee was something which she raised in the first email she sent to the Administrative Court, and she paid the fee as soon as she understood how to do so. She would also have been able to confirm the position with MPTS. Ultimately, at the heart of Dr Sun's problems was that on the deadline day of 28.4.22 she received clear but erroneous assistance from a barrister on whom she was relying for help, which pointed her in the wrong direction and which lost her that all-important final day. These are, in my judgment, wholly exceptional circumstances. In my judgment, the very essence of the access to the court would be being impaired. Further, in my judgment, the restriction would – in its operation on the facts – be one which did not have a reasonable (ie. proportionate) relationship between the means and the legitimate aim of certainty and finality. In my judgment, Dr Sun had personally done all that she could –all that she reasonably could (Rakoczy §13; Stuewe §53) – to bring the appeal timeously.

59. It is true that the cases powerfully explain and illustrate the high degree of strictness which the law embraces (Stuewe §55). It is also true that each case turns on its own facts and assistance from other cases may be limited (Stuewe §55). The fact that there can be an extension of time, on special facts in a wholly exceptional case, does not of

itself undermine the legitimate policy aims of certainty and finality. That ship has sailed, with the recognition of a power (or duty) to grant an extension of time on special facts. Leaving aside graphic examples of appellants in comas or who never receive documents (Adesina §14), it will doubtless always be possible to identify what an appellant could have done differently, especially with hindsight. Dr Sun had, I find, been provided with an information sheet which pointed her in the direction of web-pages where she could have found for herself an explanation of the relevant court and the way to pay the relevant fee. She could have acted differently. But so could Mr Halligen in Pomiechowski. His entitlement to an Article 6 extension of time arose (§41), in circumstances where his lawyers had let him down (§15), but where he was treated as having personally done all that he could (§39). In fact, a communication had stated that needed to be served on the Home Office and the CPS (§14) and his ultimate problem was that he had written only to the Home Office (§20) and not to the CPS (§21). What is at stake in the present case is the young career of an NHS doctor whose continued career has been assessed as posing no risk to the public. What is at stake is laid bare by the fact that a composite hearing – a course supported by the GMC – leaves the Court poised to decide the substantive merits. Had I been persuaded on those substantive merits that the sanction of erasure was unjustified, I would have found it my Article 6 duty to grant an extension of time. I would, if asked, have granted the GMC permission to appeal. Had I felt constrained to find that the appeal door remained locked to Dr Sun, I would I think have invited further submissions on whether this line of analysis might apply: that statutory appeal remedy had proved inadequate, that the Court's judicial review jurisdiction is not ousted, and that the case could properly be directed to continue and be disposed of as a 'last resort' claim for judicial review.

CONCLUSION AND COSTS

60. For the reasons I have given, the appeal is dismissed. It cannot succeed on the substantive merits, and the question of an extension of time does not arise. Having circulated this judgment as a confidential draft, I can deal here – on all Counsel's helpful written submissions – with the single contested consequential matter. It concerns costs. The GMC applies for its costs, inviting their summary assessment in the full sum of £12,150 inclusive of VAT. My jurisdiction to order costs is found in s.40(8) of the 1983 Act and s.51(3) of the Senior Courts Act 1981. The GMC invokes the general rule (CPR44.2) that a losing party should pay the winning party's costs, emphasising the reasonableness and proportionality of using Junior Counsel and attendance by a Grade C solicitor.

61. For her part, Dr Sun invokes CPR52.19, inviting the paper-determination of her application to limit the recoverable costs to zero (or the smallest sum which the Court considers reasonable) having regard to the CPR52.19(2) factors (the parties' means, all the circumstances of the case and the need to facilitate access to justice). CPR52.19 reads as follows:

> ***52.19. Orders to limit the recoverable costs of an appeal – general. (1) Subject to rule 52.19A [appeals in Aarhus Convention claims], in any proceedings in which costs recovery is normally limited or excluded at first instance, an appeal court may make an order that the recoverable costs of an appeal will be limited to the extent which the court specifies. (2) In making such an order the court will have regard to – (a) the means of both parties; (b) all the circumstances of the case; and (c) the need to facilitate access to justice. (3) If the appeal raises an issue of principle or practice upon which substantial sums may turn, it***

> ***may not be appropriate to make an order under paragraph (1). (4) An application for such an order must be made as soon as practicable and will be determined without a hearing unless the court orders otherwise.***

The GMC does not contest the applicability of CPR52.19, nor the promptness of its invocation and appropriateness of paper-determination (CPR52.19(4)). The GMC does, however, resist the Court making any modified order in the application of CPR52.19. Its key points – as I see it – are: that there was no issue of "general public importance" (as required in the related area of a protective costs order); that this appeal was really about Dr Sun's "private interests"; that there is insufficient proper evidence of Dr Sun's impecuniosity; that any unrecoverable GMC costs will have to be borne by the profession; and that the access to justice implications are no different from any professional misconduct case.

62. On this issue, the submissions filed by Mr Collins KC and Mr Jones on behalf of Dr Sun have persuaded me to limit the GMC's costs recovery on this appeal to £2,000 including VAT, to be paid within 6 months. My reasons are as follows. (1) It is common ground that CPR52.19 is applicable. It can apply to protect an appellant. Dr Sun promptly included, in her notice of appeal, an application to limit the recoverable costs. As with the extension of time issue, the GMC did not seek to insist that this costs issue be resolved as a preliminary issue. By reason of Rule 16B of the Rules, costs before the Tribunal are not awarded as a matter of routine but may be awarded where conduct is unreasonable. A clear function and purpose of CPR52.19 is to allow, in an appropriate case, the fact of an underlying costs regime of that kind to resonate for costs purposes in the subsequent appeal. There is no requirement of an issue of general public importance. I can properly focus on the factors identified in CPR52.19(2). (2) In my judgment, Mr Collins KC and Mr Jones have put forward proper written material – on instructions – regarding Dr Sun's means. In the circumstances of the present case, I do not require a witness statement. Following her erasure Dr Sun was for a time unemployed but has secured part-time work as a Band 3 support secretary within the NHS. That carries a modest annual net income of £7,000, significantly below her estimated annual expenditure of £11,000. She has – and is drawing upon – savings of £6,448. Her limited means are why – as explained in her previous witness statement evidence – she could not afford to pay a barrister to help with the appeal, after her erasure and the MDU discontinued acting. As to the GMC's means, I accept that any unrecoverable GMC costs will fall on the profession as a whole. On the other hand, Rule 16B recognises that this is generally appropriate as regards Tribunal proceedings and CPR52.19 recognises that it could be appropriate – in a particular case – on an appeal. (3) This case has special circumstances. It concerns a doctor who is recognised to present no risk to the public, and who is recognised to have had a mental health condition. Her appeal served to test whether it was justified as necessary that she should have been met with the sanction of erasure, by reference to the statutory overarching objective. The appeal testing that question has arisen in a case where the GMC was itself not inviting the Tribunal to impose erasure, but rather suspension. Testing the justification for erasure, in the circumstances of this case, transcends matters of purely 'private interest'. Public interest considerations have been engaged, on both sides. The 'access to justice' implications of a modified costs order arise, and should be seen, in that light. To put it another way, the phrase "pro bono publico" (for the public good) is especially apt to describe the appeal which Mr Collins KC and Mr Jones presented on Dr Sun's behalf, instructed by Advocate (formerly the Bar Pro Bono Unit). (4) In all the circumstances,

the just and appropriate order for costs is a relatively modest – but for Dr Sun still a substantial – costs order in the sum of £2,000, which she should have a full 6 months to pay. The GMC is entitled to that costs order. As always, enforcement is entirely a matter for it.