IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
[2023] EWHC 1906 (Admin)

No. CO/1705/2023

Royal Courts of Justice

Thursday, 13 July 2023

Before:

MR JUSTICE LANE

B E T W E E N :

DAVID COOK — Appellant

- and -

GENERAL MEDICAL COUNCIL — Respondent

MS V TANCHEL (instructed by Weightmans) appeared on behalf of the appellant.

MS H EMMERSON (instructed by the General Medical Council) appeared on behalf of the respondent.

J U D G M E N T

MR JUSTICE LANE:

1 This is an application under section 41A(10) of the Medical Act 1983. It is brought by Dr David Cook ("the appellant"). The respondent is the General Medical Council.

2 The appellant was represented at the hearing before me on 11 July 2023 by Ms Tanchel. The respondent was represented by Ms Emmerson. I am most grateful to them both for the high quality of their respective oral and written submissions.

3 The appellant challenges the decision of the Interim Orders Tribunal ("the IOT") on 10 March 2023 to maintain the interim order of suspension of the appellant's ability to practise medicine. That order of suspension has been in place since 5 August 2021.

Background.

4 The relevant background is as follows. On 22 May 2021 the appellant sent an email to the respondent informing it that he had been arrested by the West Midlands Police for offences relating to sexual activity with a person under the age of 13, which arose out of conversations he had had on the internet. On 28 May 2021 the respondent received a referral from the appellant's responsible officer informing them of the appellant's arrest. On 8 June West Midlands Police emailed the respondent setting out the charges under investigation and the fact that the appellant had been bailed.

5 It is necessary to refer to how the IOT approached matters on 28 June 2021. At paragraph 5 of its decision, the IOT took account of the fact that the appellant had been arrested in respect of the following:

> "Arranging or facilitating a child sex offence contrary to section 14 of the Sexual Offences Act 2003 in order to commit a section 9 offence, sexual activity with a child under 13 years, and conspiring to engage in penetrative sexual activity with a girl under 13 contrary to section 1(1) of the Criminal Law Act 1977."

The IOT on that occasion heard submissions of the representative for the GMC as follows:

> "10 Mr Lasker rehearsed the background to the case. He submitted that in the light of the serious concerns raised about Dr Cook's conduct involving his arrest and the subsequent police investigation into allegations of sexual offences involving a child below 13 years of age, his fitness to practise may be impaired. He submitted that it is therefore necessary and proportionate to impose an interim order of conditions on Dr Cook's registration for a period of 18 months for the protection of members of the public and otherwise in the public interest. Mr Lasker drew attention to paragraphs 29 to 31 of the Imposing Interim Order Guidance in relation to allegations made before criminal charges are brought, and also to paragraphs 38 and 40 in relation to cases involving sexual misconduct and the impact that such cases may have on public confidence in the profession."

6 The IOT agreed with these submissions. It imposed conditions on the appellant's practice as set out at paragraphs 17 and 18 of its decision. These included a condition not to carry out

consultations with patients younger than 18 years, save in life threatening emergencies in which event he was to inform the GMC within seven days. There were also unpublished conditions concerning the appellant's health and medical treatment. At the time of the IOT's decision the appellant was receiving treatment as an inpatient for major depression. As recorded in paragraph 13 of its decision, the IOT reached its conclusion bearing in mind:

> ". . . the serious nature of the concerns raised about Dr Cook's conduct involving the ongoing police investigation into allegations of sexual offences against a child under 13 years of age."

7 On 2 July 2021 the appellant was charged by the Crown Prosecution Service. This development resulted in the IOT imposing an interim order of suspension on the appellant. At that time, with a criminal trial pending in respect of alleged offences, which I shall detail in due course, the appellant did not object to the fact that he should be suspended.

8 There were four counts on the indictment:

> Count 1: arranging and facilitating a child sex offence – section 14 of the Sexual Offences Act 2006, in order to commit sexual activity with a child under 13 years, section 9 of the Sexual Offences Act 2003.
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> Count 2: conspiring to engage in penetrative sexual activity with a girl under 13 – section 9 of the Sexual Offences Act 2003.
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> Count 3: publishing an obscene article, namely an online conversation discussing sexual abuse of an eight year old child – section 2(1) of the Obscene Publications Act 1959.
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> Count 4: publishing an obscene article, namely an online conversation discussing meeting up with an adult female in order to sexually abuse children under 13.

9 The jury heard evidence from the appellant. That evidence was essentially to the following effect. The appellant was, at the time, suffering from a severe depressive illness. He also suffers from autism, albeit on the lower end of the spectrum. As a Respiratory Consultant the appellant was very much in the front line of the medical profession's response to the Covid pandemic, which began in 2020. The stress of this was intense. He began to have feelings of self-loathing, which led him to engage in online conversations of an explicit nature involving female children. Certain of the conversations were, in fact, with undercover police. The appellant denied having any sexual interest in children. He denied having any intention actually to carry out any activities of the kind being discussed by him.

10 The defence at the criminal trial adduced evidence from Dr Maganty, a Consultant Forensic Psychiatrist. In his report, Dr Maganty said this:

> "4. Over the last few years Dr David Cook has suffered a perfect storm of events involving:
>
> 1. Worsening of his depressive illness (a mental disorder within the meaning of the Mental Health Act) with it reaching the severe end of the spectrum, with low mood, tiredness and impaired concentration.

2. The COVID pandemic affecting him severely, with severe traumatic experiences as a respiratory hospital consultant with a number of his patients dying.

3. He was particularly poorly equipped to deal with such a severe traumatic experience as a treating respiratory physician during the COVID pandemic due to a combination of his recurrent depressive disorder and Asperger's. Having to improvise, loss of structure and offer of suboptimal care due to lack of resources would have been extremely traumatic to him and a sense of self-blame and self- loathing borne out of these traumatic experiences has occurred in his case.

4. He appears to have found an outlet for his distorted cognitions and disordered thinking via his online web conversations.

Over the last few years a combination of his depressive illness and autistic spectrum disorder has affected his thought process and judgement. This would have influenced his interactions online with the decoy undercover officer.

5. Dr David Cook would benefit from engaging in an internet specific sex offender treatment programme should he be found guilty. The continued treatment that he has received for his severe depressive episode, including inpatient care, has led to improvement in his mental health. He has also received cognitive behavioural therapy, which is likely to further improve his mental health in combination with his ongoing treatment pharmacologically. A combination of the above two would substantially reduce his risk of further offending online.

6. A direct correlation or causative link cannot necessarily be drawn between the actions of individuals such as Dr Cook, who was suffering with a depressive illness together with autism, and their online actions involving conversations and actual physical sexual assaults or violence. A good quality evidence that individuals who suffer with autism and severe depression who indulge in online conversations regarding sexual abuse going on to commit in person sexual violence does not exist.

7. There has been marked improvement in Dr Cook's mental health since my first assessment in his case to the latest assessment , with his recurrent depressive disorder current episode severe depression being currently in remission. His attention and concentration have improved. His mood has improved significantly. His obsessional thinking and compulsive behaviour which had intensified due to his severe depressive episode has also reduced in its intensity. His underlying childhood autism remains due to its neurodevelopmental aetiology. His difficulties around

communication and reciprocal social interaction and stereotyped patterns of behaviour and restricted interests remain. He currently remains fit to plead and stand trial.

8. Currently he remains suspended from work and is spending his time with his family and gardening. He is receiving intensive treatment for his depression by way of antidepressant medication and anxiolytic medication together with cognitive behaviour therapy psychological treatment and this has had a substantial effect in improving his mental health. Him being off work and away from the stresses of work during a pandemic as a respiratory consultant has also helped and also with the pandemic abating this has had a significant effect on improving his mental health. His underlying cognition and thought process has improved substantially, with his sense of self-loathing and negative cognitions markedly reducing.

9. Individuals with autism have obsessions and a stereotyped pattern of becoming obsessed with particular acts or patterns of interest. These obsessions can be online chats which are extremely inappropriate in a normal social context. These are conducted in an obsessional manner. He describes a sense of self-loathing and feeling disgusted by his actions subsequently. Individuals who suffer with severe depression in combination with their autism have a sense of numbness and inability to feel emotions and being alive. Individuals with severe depression carry out acts of self-harm including cutting themselves to feel the pain to give them a sense of feeling alive and typically describe feeling something even if it is pain as less painful than not feeling anything, which is part of a depressive mental state. Under those circumstances individuals who suffer with a combination of autism with severe depression do describe carrying out acts which they normally would not carry out and which go against their grain of social morals to feel a sense of self-loathing and as part of their negative cognitions intermixed with their obsessional pattern of functioning. Dr Cook's explanation for his offending is compatible with an individual suffering with autism and severe depression. What his intent ultimately was and what his motivation ultimately was is an issue for the court and is not a matter of psychiatric expertise.

10. With substantial improvement in his mental health with regard to his depression and its response to antidepressant medication and anxiolytic medication, it is clear that his future risk of offending is also significantly reduced if one accepts the above formulation. Should one accept that he repeatedly put off meeting in person, under those circumstances in an individual who suffers with autism with a severe depressive episode, his risk of contact sexual offending would be substantially lower when compared to other cases of internet sexual offending. This is especially the case as his severe depression has improved substantially and is responsive to treatment."

11 On 20 September 2022 the appellant was sentenced in respect of counts 3 and 4. He was given a conditional discharge for one year. The jury failed to agree on verdicts concerning counts 1 and 2. Those counts were ordered to lie on the file but subsequently the Crown Prosecution Service indicated that they have no intention of proceeding with them. The note of the sentencing remarks of the Judge say this:

> "The Judge took account of the fact that:
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> (i) Publication was not for commercial gain.
>
> (ii) Persons with whom he was communicating were corrupted in any event.
>
> (iii) Those persons were willing participants in the conversation.
>
> (iv) The defendant was of positive good character.
>
> (v) At the time of committing the offence the defendant was suffering from a severe mental illness that affected his judgment, supported by the psychiatrist Dr Maganty.
>
> (vi) The defendant has suffered for many months during the currency of these proceedings. "

12 I can now turn to the decision of the IOT of 10 March 2023. I have before me a transcript of the hearing which covers the submissions made to the Panel and their observations and questions to the representatives of the respondent and the appellant.

13 It is important to understand the basis on which the GMC put its case to the IOT on 10 March. In her oral submissions counsel for the GMC, said this:

> "In relation to the summary of the allegations in this case, they do relate to misconduct and health and arise out of the Doctor's conviction in relation to two of the four matters that he was facing in criminal proceedings. As you will be aware from the papers, the Doctor was facing criminal charges of arranging or facilitating a child sex offence in order to commit sexual activity, conspiring to engage in penetrative sexual activity with a girl under 13, and also two counts of publishing an obscene article relating to online discussions involving the sexual abuse, firstly of an eight year old child and, secondly, arrangements to meet up with an adult in order to sexually abuse children under the age of 13."

Having dealt with the psychiatric evidence, counsel for the GMC continued as follows:

> "Sir, on behalf of the General Medical Council it is, of course, a factor for you to take into account that the Doctor's improvement in health has therefore significantly reduced the risk of repetition of this in the future. However, it does appear from what the psychiatrist sets out that the psychiatrist is unable to say that there is no risk of a repetition of such behaviour in the future. So, the submission that is made in

relation to this case is that notwithstanding the change in the situation in that the Doctor has been acquitted of the two of the more serious charges in the case, evidence does remain to suggest that the Doctor's fitness to practise may be impaired.

The ground that is relied upon is the public interest, and the submission that is made is that it is in the public interest to maintain the current order of suspension. The submission made is that a reasonably informed member of the public would be concerned at the conviction that the Doctor has, acknowledging that he was sentenced to a conditional discharge. You have the opportunity of seeing the conversations in full and the submission made is the contents of those conversations will be shocking to a reasonably informed member of the public even when that member of the public balanced the nature of the conversation against the Doctor's own health issues."

14 As counsel for the GMC said, the Panel had before it the police records detailing the internet conversations that the appellant had had. These were summarised by counsel as follows:

"You can see, sir, from the police material disclosed that the full detail of the conversation that took place between the Doctor and the undercover police officer is set out. You can see, sir, that in relation to that conversation it took place over a period of about one month, and there was conversation on 14 days. The conversation related to an eight year old girl. The undercover police officer saying that they were a father with a daughter of that age. Sir, you will have seen that there are references during that communication to vaginal and oral rapes. The conversation describes how the Doctor would gain the trust of the child and the phrase that he would 'train her' is also used.

There is much detail set out in that conversation as to how the Doctor would sexually abuse that child. There are also references to third parties being involved, the father of the girl being involved by watching but also participating in raping the child. There are also references to ejaculation to occur.

In addition to references to that specific eight year old child, the Doctor also describes having abused other children on other occasions, and there are also discussions about meeting up.

In addition to the conversation relating to that child, there is also a conversation with an undercover officer, that undercover officer pretending to be a female person with a son, although it does appear that that conversation did not develop to any great extent."

That is a reasonable synopsis of the submissions which formed the case for the GMC that the Interim Order of Suspension should continue on public interest grounds.

15 Those grounds derive from section 1(1B)(b) and (c) of the 1983 Act, which require the GMC to pursue *inter alia* the objectives of maintaining public confidence in the medical profession, and maintaining proper professional standards and conduct for members of the profession. The fact that by communicating online as described the appellant was acting

contrary to these objectives was acknowledged by him in his evidence to the jury when he said, as recorded in the Judge's summing-up:

> "I accept that I was the author of the messages which are on my phone. They were sent by me and not anyone else. I don't expect to continue in my medical practice because of what's happened. The messages are horrendous. They go against everything I've always believed in."

16 The Panel's questions to counsel for the GMC were concerned with the nature and significance of the conditional discharge in respect of counts 3 and 4. The solicitor for the appellant then began his submissions. He addressed the issue of the convictions and the conditional discharge. He said this:

> "In relation to the convictions no one, sir, expects that there should be no concern at all about them, but I hope I am not inappropriately minimising things by pointing out that a conditional discharge is, as you, sir, and my friend know, aside from absolute discharge, the lowest form of sentence that can be administered in the criminal courts. Essentially, to assist your colleague in particular who asked the question, the punishment is to not reoffend, that is a conditional discharge. I am mindful you have defence counsel's note of the sentencing hearing at page 341. As I say, public interest, I do ask you to think carefully whether a conditional discharge on its own could be said to trigger a public interest, certainly sufficient public interest to warrant a suspension, and just by way of comparison, of course, someone who incurred a drink drive conviction would have obtained a greater sentence than the one incurred by Dr Cook. They are not sexual offences. There is no suggestion he should be on the Sex Offenders' Register or anything like that. My friend referenced the treatment programme in Dr Maganty's report. I just wanted to clarify that that is only available as part of a rehabilitation package and, indeed, Dr Maganty's point was that it would be appropriate if he had been convicted of the first two offences, so obviously that is not something that Dr Cook has undergone nor, indeed, do we say it is appropriate for him to have done so."

17 After his submissions, the lay member asked the solicitor for the appellant this:

> "Mrs Miller-Varey: Thank you, Mr Charles. I am just thinking and addressing my mind to the question of risk, and you have spoken a number of times about the risk of repetition by which I think you are referring to the risk of repetition of behaviour that would give rise to a conviction of one of the two varieties that the Doctor has. Is there a risk in terms of the public interest that, taking Miss Johnson's points, seised of all of this material, that the question mark remains over the Doctor's underlying motivation and that there is a possibility that a full NPI, contrary to the professional opinion that is put forward that seeks to explain the Doctor's behaviour, that the conduct will be found to be sexually motivated, and that possibility that that may become a finding is where there is a risk to the public interest?

> I am trying to conceptualise exactly the risks that you would invite us to focus on, and repetition is one aspect of it. We obviously do not yet know the basis on which the allegation has been put, but the difference, the factual difference, given how, in a sense, incomplete is the material that we have, it seems to be on that question of motivation, I just wonder what you would say about that?"

For my part, I am not persuaded that counsel for the GMC had, in fact, taken this point in her submissions. In any event, the appellant's solicitor responded to the questions of the lay member in a way that did not take matters further – unsurprisingly, in my view, given the point in time at which the issue was being raised. The lay member then said: "We can consider the risk of a later finding that the underlying conduct was sexually motivated." After some further exchanges, the lay member asked if counsel for the GMC wanted to comment on the lay member's question to the solicitor about whether the Panel:

> ". . . can properly address our minds to the risk that there may be a finding that this conduct, which encompasses everything, not simply that which was the subject of the two convictions?"

After further exchanges with the Chair, counsel for the GMC said that the lay member:

> ". . . is correct in that the proceedings that may be brought by the General Medical Council could well encompass not only the conviction but also the circumstances surrounding the conviction, including the material upon which the Doctor has been acquitted."

As can, however, be seen from the foregoing, that was not the basis upon which the GMC had come to the hearing on 10 March in order to argue for a continuation of the interim order of suspension.

18 The Panel then retired to deliberate. It returned and delivered its determination which was as follows:

> "1. Dr Cook is currently the subject of a fitness to practise investigation by the GMC. On 10 June 2021, pursuant to section 35C of the Medical Act 1983 as amended ("the Act"), his case was referred to the MPTS by the GMC. The role of this Tribunal is to consider whether a doctor's registration should be restricted on an interim basis, either by imposing conditions on their registration or by suspension. In accordance with section 41A (1) of the Act, this Tribunal will make an order if it is satisfied that there may be impairment of a doctor's fitness to practise, which poses a real risk to the public or may adversely affect the public interest or the interests of the practitioner and, after balancing the interests of the doctor and the public, that an interim order is necessary to guard against such risk.
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> 2. An Interim Orders Tribunal determined on 28 June 2021 to impose an order of conditions on Dr Cook's registration for a period of 18 months following allegations relating to the investigation of sexual offences involving a child under 13 years

of age. There was an early review of the order on 5 August 2021 when the order was varied to one of suspension following information that Dr Cook had been charged with criminal offences. The order of suspension was reviewed and maintained on 14 October 2021, 29 March 2022 and 7 September 2022. The order was extended by the High Court on 19 December 2022 for a period of 12 months, up to and including 27 December 2023.

3. The Tribunal had regard to Indictment from Birmingham Crown Court. It also had regard to an email of 20 September 2022 from Dr Cook's representative confirming the criminal trial outcome of a conditional discharge for 12 months. The Tribunal took note of the disclosure information from the West Midlands Police, dated 22 February 2023 and Summing-up transcript from Birmingham Crown Court, dated 8 September 2022.

4. The Tribunal considered the documents provided on behalf of Dr Cook including:

    - Psychiatric report by Dr Dinesh Maganty, Consultant Forensic Psychiatrist; dated 8 August 2022;
    - Defence case statement, dated 12 October 2021;
    - Referral Outcome Report and;
    - Sentencing Remarks, dated 20 September 2022.

5. The Tribunal has considered all of the information presented to it, and the submissions made by Ms Kathryn Johnson, Counsel, on behalf of the GMC, and by Mr William Childs, on behalf of Dr Cook.

6. Ms Johnson rehearsed the background to the case. She submitted that in the light of the serious allegations in this case, the current order of suspension remains both necessary and proportionate in this case in the public interest.

7. Ms Johnson submitted there has been a change in circumstances, in that Dr Cook has been acquitted of the two more serious charges however, had been convicted and sentenced for two other offences. She submitted that evidence still remains to suggest that Dr Cook's fitness to practice may be impaired. She drew the Tribunal's attention to the information contained in the Transcript of the trial and the police interview. She highlighted in particular, the transcript of the conversation between Dr Cook and the undercover police officer. She stated that there has been an improvement in Dr Cook's health and therefore the risk of repetition has significantly reduced but she was unable to say that there is no risk of repetition of this behaviour in future. Ms Johnson submitted that a reasonable and fully informed member of the public would be surprised to learn Dr Cook had been permitted to return to unrestricted practice, pending the outcome

of the GMC's investigation. She relied upon an Interim Order being necessary solely in the public interest.

8. Mr Childs submitted that the current interim order of suspension should be revoked and in the alternative varied to one of conditions in light of the conditional discharge and that a maintenance of suspension would be disproportionate at this stage.

9. Mr Childs stated that Dr Cook is deeply sorry for his actions and did not appreciate how his health was deteriorating at the time. He stated that those were the actions of a very ill man who had not recovered from an episode of severe depression. Mr Childs further submitted that Dr Cook accepted that he did engage in communication with an undercover police officer but that his actions were simply a fantasy, however he stated there was no evidence to suggest that a meeting actually took place. Mr Childs submitted that a conditional discharge is the lowest sentence from court, it is not a sexual offence and nor is Dr Cook on a sexual offender register. In relation to Dr Cook's health, Mr Childs confirmed that Dr Cook's health is currently stable, and he remains under the care of his GP which significantly reduces the risk of repetition now that he has insight into managing his health.

10. In accordance with Section 41A of the Medical Act 1983, as amended, the Tribunal has determined that it is necessary to maintain the existing interim order of suspension.

11. The Tribunal has determined that, based on the information before it today, there are concerns regarding Dr Cook's fitness to practise which may adversely affect the public interest. After balancing Dr Cook's interests and the interests of the public, the Tribunal has decided that an interim order remains necessary to guard against such a risk.

12. In reaching its decision, the Tribunal bore in mind the nature and seriousness of any potential allegations arising in the regulatory process from the evidence gathered during the police investigation. It noted that Dr Cook was convicted of Attempting to/Attempted publish an obscene article and publishing an obscene article and has now been sentenced to a 12-month conditional discharge. The Tribunal had regard to the imposing interim sanctions guidance, in particular the following parts under the heading Public Confidence:

> "*40 …allegations leading to the imposition of interim conditions are not published or disclosed to general enquirers. It is therefore the responsibility of the IOT to consider whether, if allegations are later proved, it will damage public confidence to learn the doctor continued working with patients while the matter was investigated.*
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> …..

42 In exercising their discretion in relation to the particular facts of each case the IOT should also consider any immediate risk to patient safety [Yeong 2009]. However, there are circumstances in which it is necessary to take action to protect public confidence even where there is no immediate risk to patient."

13. The Tribunal notes that any allegations are not yet formulated but may encompass all those matters founding the basis of the convictions in relation to obscene publication as well as those in relation to the sexual offences of which the doctor has been acquitted to the criminal standard. The Tribunal noted that the regulatory standard and the remit of the regulator is different.

14. The Tribunal determined that a reasonable and properly informed member of the public would be surprised and concerned to learn that Dr Cook's had been permitted to practise unrestricted whilst the GMC investigation is ongoing. The Tribunal has determined that the statutory test for the imposition of an interim order continues to be met in this case on the grounds of public interest.

15. The Tribunal first considered whether conditions could be formulated to address the risks identified in this case. The Tribunal determined that in light of the material before it, which may suggest a sexual interest involving children, there are no conditions that can reasonably be formulated to address the risk posed. The Tribunal determined that the seriousness of the charges and the need to maintain confidence in the profession rendered an interim order of suspension is the only proportionate response. The Tribunal noted that the bar for an Interim suspension on the grounds of the public interest is high but nevertheless considers that given the nature of the concerns in this case, the threshold is met such that an order of suspension is necessary.

16. Whilst the Tribunal notes that the order has removed Dr Cook's ability to practise medicine it is satisfied that the order imposed is the proportionate response."

19 The appellant advances seven grounds of challenge against the decision of the IOT:

1. It is not necessary for the protection of members of the public, nor in the public interest (whether those two elements are viewed cumulatively or separately) to suspend the Appellant's registration.

2. Further or alternatively, the Interim Orders Tribunal failed to take any or any adequate account of the following:

    a) It is disproportionate to impose an Interim Order of Suspension on Dr Cook given the nature of the jury verdicts and the fact that before Dr Cook was

criminally charged a Conditions of Practice Order was imposed.

b) The unchallenged psychiatric evidence of the causative nature of Dr Cook's mental ill health at the time of the offending.

c) The unchallenged psychiatric evidence of the fact that Dr Cook's mental health is now well controlled.

d) The Crown Prosecution Service's decision not to seek a retrial and the fact that there are no longer any outstanding criminal proceedings.

e) The objective evidence that Dr Cook had no sexual interest in children.

f) The low level of seriousness attributed to the offending which the jury found proven as evidenced by the Learned Judge's imposition of conditional discharges.

g) The Appellant has not had any findings of misconduct made against him in over 20 years of practice.

h) There is no evidence of recurrence of these events in the two years since they were raised.

3. Further or in the alternative, the Interim Orders Tribunal gave undue weight to the type of allegation, namely alleged sexual abuse of children, rather than to the surrounding circumstances of the same, including the passage of time and changes in circumstances since the first order of suspension was imposed.

4. Further or in the alternative, the Interim Orders Tribunal did not follow the Respondent's own Guidance in that it did pay any or any adequate regard to the fact that to justify an order, the risk of damage to public confidence in the profession must be 'serious'.

5. Furthermore, the Interim Orders' Tribunal did not correctly apply the Guidance on proportionality and the order of suspension is disproportionate in the circumstances of this case and interferes with Dr Cook's right to practice.

6. Further and in the alternative, the Interim Order Tribunal's decision is illogical and inconsistent with previous orders made in this case.

7. For the reasons set out above the decision of the Respondent is not a decision that is supported by the facts,

> circumstances, and evidence and therefore is manifestly disproportionate."

20 The relevant legal principles this court must follow in deciding an application of this kind are essentially as follows. The court must disturb the decision of the IOT only if satisfied that the decision is "wrong". This does not mean that the court is confined to acting only if a public law error is identified, such as would be the position on judicial review. The way in which the principle operates so as to prevent an unconstrained "merits" review is by requiring this court to give weight to the views of the specialist Tribunal.

21 Although arising in a different statutory context, it is instructive to note what Andrews LJ has said recently in *Waltham Forest LBC v Hussain & Ors* [2023] EWCA (Civ) 733 at paragraph 64:

> " 'Wrong', as Upper Tribunal Judge Cooke explained in *Marshall v Waltham Forest LBC* [2020] UKUT 35 (LC) . . . means in this context that the appellate tribunal disagrees with the original decision despite having accorded it the deference (or 'special weight') appropriate to a decision involving the exercise of judgment by the body tasked by Parliament with the primary responsibility for making licensing decisions. It does not mean 'wrong in law'. Put simply, the question that the FTT must address is, does the Tribunal consider that the authority should have decided the application differently?"

22 The attribution of weight is not, however, fixed. On the contrary, the weight to be given will vary depending upon the circumstances of the case. Accordingly, in *GMC v Jagjivan* [2017] 1 WLR 4438 Sharp LJ said this at paragraph 40(v) and (vi):

> "(v) In regulatory proceedings the appellate court will not have the professional expertise of the Tribunal of fact. As a consequence, the appellate court will approach Tribunal determinations about whether conduct is serious misconduct or impairs a person's fitness to practise, and what is necessary to maintain public confidence and proper standards in the profession and sanctions, with diffidence: see *Fatnani* at paragraph 16; and *Khan v General Pharmaceutical Council* [2016] UKSC 64; [2017] 1 WLR 169, at paragraph 36.
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> vi) However there may be matters, such as dishonesty or sexual misconduct, where the court 'is likely to feel that it can assess what is needed to protect the public or maintain the reputation of the profession more easily for itself and thus attach less weight to the expertise of the Tribunal …': see *Council for the Regulation of Healthcare Professionals v GMC and Southall* [2005] EWHC 579 (Admin); [2005] *Lloyd's Rep Med 365* at paragraph 11, and *Khan* at paragraph 36(c). As Lord Millett observed in *Ghosh v GMC* [2001] UKPC 29; [2001] 1 WLR 1915 and 1923G, the appellate court 'will afford an appropriate measure of respect of the judgment in the committee … but the [appellate court] will not defer to the committee's judgment more than is warranted by the circumstances'."

In *Harry v GMC* [2012] EWHC 2762 (QB) Burnett J (as he then was) held at paragraph 2 of his judgment that: ". . . if the reasoning is inadequate or opaque the weight to be attached to

the professional opinion of the Panel will be diminished . . ." In support, Burnett J cited a number of authorities, including *GMC v Sandler* [2010] EWHC 1029 (Admin).

23 In considering challenges to decisions of the IOT, this court must be mindful of the particular functions of that Tribunal under the 1983 Act. Although concerned with a different, but nevertheless analogous, regulatory regime, the judgment of Sir Stanley Burnton in *Perry v Nursing and Midwifery Council* [2013] 1 WLR 3423 is important in this regard:

> "19. What is required by fairness depends on the nature of the inquiry being conducted by the tribunal in question. The statutory function of the Committee relevant in this appeal is its duty to determine whether to make an interim order, and the statutory right of the registrant under Article 26 of the Nursing and Midwifery Council (Fitness to Practise) Rules Order of Council to give "any relevant evidence in this regard" refers to evidence relevant to that question. For this purpose the Committee must decide whether, on the basis of the allegation and evidence against the registrant, including any admission by him, it is satisfied that an order is necessary for the protection of the public, or otherwise in the public interest or in the interests of the registrant himself. The Committee must of course permit both parties to make their submissions on the need for an interim order and, if one is to be made, its nature and its terms. For that purpose it must consider the nature of the evidence on which the allegation made against the registrant is based. It is entitled to discount evidence that is inconsistent with objective or undisputed evidence or which is manifestly unreliable. The Committee may receive and assess evidence on the effect of an interim order on the registrant, and the registrant is entitled to give evidence on this. The registrant may also give evidence, if he can, to establish that the allegation is manifestly unfounded or manifestly exaggerated; but the Committee is not otherwise required to hear his evidence as to whether or not the substantive allegation against him is or is not well-founded: that is not the issue on the application for an interim order.
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> 20. What the Committee cannot do, and should not do, is to seek to decide the credibility or merits of a disputed allegation: that is a matter for the substantive hearing of the allegation by the Conduct and Competence Committee, pursuant to Article 27 of the Order. Necessarily, at the interim stage, the Committee must not and cannot decide disputed issues of fact in relation to the substantive allegations. The Committee must also be extremely cautious about rejecting or discounting evidence on the basis that it is incredible or implausible. In the course of argument I mentioned the Challenor case in the 1960s, when allegations by demonstrators against the Vietnam War that bricks had been planted on them by a police officer were dismissed as self-serving and incredible, only later to be found to be true.
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> 21. In my judgment, the foregoing is consistent with authority. In *R (George) v The General Medical Council* [2003] EWHC 1124 (Admin), Collins J said:

> '42 Now I should make it plain that the Committee did not, and was not required to make any findings as to whether the allegations were or were not established. It was sufficient for them to act, if they took the view that there was a prima facie case and that that prima facie case, having regard to such material as was put before them by the medical practitioner, required that the public be protected by a suspension order.
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> 43 They were not making any final decision because, as I say, they were not reaching any conclusions of fact. That is important, because it must not be taken that I have made any conclusions of fact. I have not. It has not been my task in the context of this application to do so'."

24 Finally, I agree with Ms Emmerson that lengthy or elaborate reasons are not required from the Tribunal. On the contrary, they are positively discouraged by the terms of the non-statutory guidance. Furthermore, given that a transcript is routinely made of the hearing which culminates in the Tribunal's determination, there can be scope for inferring from what was said that particular matters were, in fact, in the Tribunal's mind when it came to deliberating.

25 This last point, however, does not serve to assist the respondent in the present case. On the contrary, as my analysis of the transcript has shown, the issue which had a significant bearing on the IOT's conclusion that the interim order should continue (paragraphs 13 and 14 of the determination), and which had a crucial bearing on the decision that conditions would not be sufficient to address the public interest concerns (paragraph 15) was the issue that the lay member raised midway through the submissions of the solicitor for the appellant, and after counsel for the GMC (not Ms Emmerson) had concluded her opening submissions.

26 An expert Tribunal such as the IOT has the ability to raise a matter of this kind, but it must also bear in mind that this was not an issue which, in the present case, the appellant and his solicitor had come to the hearing expecting to have to address. It was not, in my view, an obvious issue, for which they should have been prepared. This goes directly to the third of the appellant's grounds of challenge, namely that the IOT gave undue weight to the "allegation" regarding the alleged sexual abuse of children. Given the way in which the issue had emerged, the IOT's reasoning in respect of it was, I find, inadequate. There is nothing in the determination to show that the issue was examined in the round; that is to say, against the background that, first, the appellant had not been convicted of counts 1 and 2; secondly, that there was psychiatric evidence which, whilst properly disclaiming any right to usurp the function of the jury, was nevertheless strongly indicative of the appellant's mental state being the reason for his behaviour, rather than any genuine sexual interest in children; and thirdly, that the appellant was now in a very different position as regards his mental health.

27 It is not sufficient to point out that these considerations were aired by the appellant's solicitor. Those considerations had essentially been advanced in the context of the case based on the convictions in counts 3 and 4. All this means that this court cannot afford significant weight to the IOT's conclusions on this issue. It means that the IOT decision is wrong. I agree with Miss Tanchel that it led to the appellant not being able to understand why he had "lost".

28 I also find that the decision is wrong for the reason advanced in the sixth ground of challenge. This alleges the decision is illogical and inconsistent with previous orders made in the case. The focus here is on the IOT's decision of 28 June 2021 to impose conditions on the appellant's practice as a physician. I described earlier the background to this decision and the broad nature of the conditions imposed.

29 Ms Emmerson submitted that it was wrong, in her words, to "time travel" back to the point at which the IOT had made that decision; matters had moved on. In particular, the Panel which convened on 10 March 2023 had before it the police interview records, and the text of the internet conversations. This position falls, she said, to be contrasted with the paucity of information in June 2021.

30 I do not consider that this distinction holds good. On the contrary, the position that the 2023 IOT Panel put itself in when it decided to concentrate on the possibility that the allegations underlying counts 1 and 2 could be revisited by the GMC in due course in the regulatory context, is materially analogous to the position in June 2021 when the appellant had been arrested in connection with what were plainly serious sexual offences concerning children. At the very least, therefore, the IOT in 2023 should have considered whether, in deciding that conditions would not satisfy the public interest, there was a good reason to depart from the decision of June 2021. There is, after all, a public interest in consistent decision making, as the existence of the guidance makes plain.

31 Paragraph 15 of the IOT's determination states that it was the seriousness of the "charges" that meant an interim order of suspension was the only proportionate response. There are, of course, no regulatory charges against the appellant at the present time, nor are there any extant criminal charges, in that counts 1 and 2 lie on the file and the CPS has said that they would not seek a retrial of them. Counts 3 and 4 had resulted in convictions. This uncertainty in paragraph 15 as to what was meant by the IOT's reference to "charges" underscores the concerns that I have already expressed about the IOT's approach, and also those which I shall express in a moment.

32 The fact that we now have the full prosecution evidence, including what the appellant said in his internet exchanges, is nevertheless important. Faced with the deeply unpleasant things the appellant was saying in these exchanges, public confidence is clearly a matter to be addressed. However, because of the way in which the IOT based its decision, the Panel simply did not address the question raised by this evidence, and which was the question which the parties thought was relevant when they remotely attended the hearing; namely, in the light of the change in circumstances whereby the appellant has been convicted on counts 3 and 4 and received a conditional discharge, in part because of his mental illness at the time, did the public interest require suspension or the imposition of conditions? That important question went unanswered because it was subsumed in the Panel's flawed finding on the issue I have described earlier.

33 In the light of my findings, I do not need to address the other grounds of challenge. This court's powers under section 41A(10)(a) to (c) are narrow. In particular, I may not substitute conditions for an order of interim suspension. Ms Emmerson drew attention to the fact that the appellant is due to undergo a medical assessment in August 2023, which may have light to shed upon the public interest being met by the imposition of conditions rather than suspension. For this reason, she suggested that this court might make no order, even if it found the impugned decision had been wrong, bearing in mind that the interim order is, in any event, required to be reviewed in September. Ms Tanchel opposed that course as well as Ms Emmerson's alternative submission that I should substitute a period of suspension

that would end in eight weeks' time. Ms Tanchel told me that in her experience an IOT Panel could easily be convened to sit within a period of 28 days.

34 I can see an advantage in the IOT having a medical assessment before it. I do not, however, consider that it is right to let matters proceed to the currently scheduled next review. The appellant has succeeded in his challenge to the decision of 10 March 2023. It is in both his interest and the public interest that his immediate (i.e. interim) position, vis-à-vis the profession, is resolved as soon as practicable. Accordingly, erring slightly on the side of caution, I shall order that the period of interim suspension shall be such as to end at 11.59 hours on Thursday, 17 August 2023.

35 That is my judgment.