Neutral Citation Number: [2025] EWHC 459 (Admin)

Case No: AC-2023-LON-002156

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

Friday, 28th February 2025

Before:
ALAN BATES
(sitting as a Deputy Judge of the High Court)

- -

Between:

DR MAHENDRA NATHADWARAWALA

Appellant

- and –

GENERAL MEDICAL COUNCIL

Respondent

- -

The **Appellant** appeared in person.
Alexis Hearnden (instructed by the General Medical Council) for the **Respondent**.

- -

Hearing date: 26 November 2024
Confidential draft judgment circulated: 26 February 2025
Judgment Released: 28 February 2025

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Judgment

This judgment was handed down remotely at 2:00 p.m. on 28 February 2025 by circulation to the parties or their representatives by e mail and by release to the National Archives. 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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ALAN BATES

THE DEPUTY JUDGE:

INTRODUCTION AND SUMMARY

1. This is an appeal by a medical doctor (the "Appellant") against the sanction imposed on him by the Medical Practitioners Tribunal ("MPT") in respect of conduct by him which the MPT found to have constituted "misconduct" and also to have been "dishonest". The sanction imposed by the MPT was that the Appellant's registration as a medical practitioner be suspended for 6 months, with a review. (Upon such a review, the MPT would be able to bring the suspension to an end at the end of the 6-month period, but could instead decide on another course, such as extending the suspension for a further period.) By his appeal, the Appellant contends that the sanction was, in all the circumstances, excessive, and that a lesser sanction would have sufficed.

2. The Respondent to the appeal is the General Medical Council ("GMC"), which brought the fitness to practise proceedings before the MPT. The GMC has raised a jurisdictional objection to the appeal, namely that the appeal has not been brought within the statutory 28-day period for appealing to the High Court against a decision of the MPT. Although the Appellant submitted an Appellant's Notice form, and paid the relevant court fee, a few days before the 28-day period expired, the form was not signed by him: the signature box was blank. By the time the error was pointed out to the Appellant by the Court's administrative staff, the 28-day appeal period had already elapsed. Although the Appellant then acted reasonably promptly in submitting a signed appeal form, he was already out of time for bringing an appeal. The GMC argued before me that, in the circumstances of this case, the Court has no power to extend time for bringing the appeal.

3. The first set of questions I have to decide, therefore, are these: (1) Did the Appellant's submission to the Administrative Court Office of an Appellant's Notice form, and payment of the fee, within the 28-day period suffice to constitute the bringing of an appeal, notwithstanding that the form was not signed? And if not, then (2) does the Court, in the circumstances of this case, have a power either to deem the appeal to have been brought within time, or to grant a retrospective extension of time, so that it can then proceed to determine the appeal on its substance?

4. For the reasons set out in Part A of this judgment, I have decided that: (1) the Appellant's submission to the Administrative Court Office of an unsigned Appellant's Notice form did not suffice to constitute the bringing of an appeal within the 28-day period; and (2) in the circumstances of this case, I have no power either to treat the

appeal as having been brought within time or to extend time. It follows that I have no jurisdiction to entertain the late-filed appeal, which must therefore be dismissed regardless of its substantive merits.

5. Given my answer to the first set of questions, it is strictly unnecessary for me to determine the second set of questions, namely: (1) Was the suspension imposed by the MPT an excessive sanction such that I should determine the decision to impose that sanction to have been wrong? If so, then (2) should I remit the matter back to the MPT to make a fresh determination as to the appropriate sanction, or should I determine the sanction myself?

6. In deference to the efforts expended, both by the Appellant personally and by Counsel for the GMC, in arguing those questions before me, I have considered what my answers to that second set of questions would have been if the appeal had been brought within time or if I had been able to extend time. My relevant reasoning is set out in Part B of this judgment. My answer would have been that the sanction imposed by the MPT was a reasonable sanction in the circumstances of this case, and I am unable to say that the MPT's decision to impose that sanction was wrong. It follows that, even if the appeal had been brought within time, I would have dismissed it.

PART A: DO I HAVE JURISDICTION TO DECIDE THE APPEAL ON ITS MERITS?

Factual background

7. The appeal challenges a decision of the MPT dated 30 May 2023 (the "Decision") which was sent to him by the Medical Practitioners Tribunal Service under cover of a letter dated 31 May 2023. The letter stated that notification of the Decision would be deemed to have been served on the Appellant on 5 June 2023 and that, accordingly, "*any appeal must be lodged on or before 3 July 2023*".

8. On 28 June 2023, the Appellant sent to the Administrative Court Office (the "ACO") in London, by email, a Form N161 Appellant's Notice which he had omitted to sign (the "First Appeal Form"), together with his Grounds of Appeal and other supporting documents. On the same date, he made payment of the requisite court fee for an appeal.

9. On 9 July 2023, the Appellant received an email from the ACO attaching a letter dated 5 July 2023. The letter informed the Appellant that his appeal could not be accepted as the First Appeal Form had not been signed in the signature box that requires a signature of, or on behalf of, the appellant. That box appears in section 14 of Form N161, which is headed, "*The notice of appeal must be signed here.*"

10. On 11 July 2023, the Appellant sent to the ACO, by email, a signed version of his Form N161 (the "Second Appeal Form"), together with his Grounds of Appeal and other supporting documents. The Second Appeal Form was essentially identical to the First Appeal Form, except for the inclusion of some text within section 11 (the section for "*Evidence in support*"). By way of that text, the Appellant sought an extension of time for bringing the appeal. In support of his request for an extension, the Appellant explained that his First Appeal Form had been submitted within the 28-day appeal period, but that, due to "*an unfortunate oversight*", it had not been signed. Her further stated that he had been "*under the impression that [he] had completed all necessary formalities correctly*". His evidence in section 11 of the Second Appeal Form was verified by a signed statement of truth.

11. The ACO, having received that Second Appeal Form, then processed the appeal, subsequently listing the appeal for hearing before me.

The GMC's position

12. At the hearing before me (which was listed as the substantive hearing of the appeal), the GMC's position was that I had no jurisdiction to determine the appeal, since it had not been brought within the 28-day period prescribed by statute in absolute terms, i.e. without affording the Court any discretion to extend time. In the GMC's submission, although the Court of Appeal held in *Adesina* (discussed further below) that the High Court might, in exceptional circumstances, be required to extend time so as to avoid a breach of the intending appellant's Convention Right of access to a court, this was a narrow exception and could not avail the Appellant in the present case. That was essentially because the Appellant could, by acting diligently, have filed his appeal within the 28-day period by submitting a signed Appellant's Notice form. The Court's refusal to extend time in this case could not, therefore, amount to depriving him of access to the court. Rather, his inability to obtain a substantive determination of his appeal would be attributable to his own failure to do all that he reasonably could have done to bring an appeal within time.

Is an extension of time appropriate in this case?

13. In my view, there are three questions I need to answer in order to decide whether I have jurisdiction to decide the appeal on its merits:

    (1) Did the filing by the Appellant of the First Appeal Form (and accompanying documents) on 28 June 2023 suffice to constitute the bringing of an appeal for the purposes of section 40 of the Medical Act 1983?

(2) Do I have a discretionary power, pursuant to CPR r.3.10, to order that the Appellant's failure to sign the First Appeal Form does not render it invalid, and/or to permit that failure to be remedied now?

(3) If the answer to Questions (1) and (2) is no (meaning that no appeal was brought until after the time-limit), should I grant an extension of time so as to allow the appeal brought late, by way of the Second Appeal Form, to proceed?

14. I will consider each of those questions in turn.

(1) Did the filing by the Appellant of the First Appeal Form (and accompanying documents) on 28 June 2023 suffice to constitute the bringing of an appeal for the purposes of section 40 of the Medical Act 1983?

15. The right of appeal from a decision of the MPT suspending a medical practitioner is provided for by section 40 of the Medical Act 1983. Subsection (4) of that section provides a person in respect of whom an appealable decision has been taken may appeal against the decision to the court "*before the end of the period of 28 days beginning with the date on which notification of the decision was served*".

16. The Act does not specify a particular court form that is to be used, or any procedural requirements to be followed, for bringing such an appeal. In my judgment, it is, however, implicit that any such appeal must be brought pursuant, and subject, to the procedural rules of the court to which the appeal is to be made. Appeals are, like any action or proceedings brought in a court, governed by the procedural rules of the relevant court. In principle, an appeal to a court is constituted only if it has been brought in accordance with the relevant procedure set out in the relevant rules. Further, it is to those rules that one must look in a case, such as this one, in which it is necessary to consider whether the submission of certain papers to the court office on a certain date legally sufficed to constitute the bringing of an appeal.

17. Statutory appeals under section 40 of the Medical Act 1983 are governed by CPR Part 52. Practice Direction 52B (appeals in the High Court) provides, in paragraph 4.1, that:

> "An appellant's notice (Form N161 …) must be filed and served in all cases. The appellant's notice must be accompanied by the appropriate fee or, if appropriate, a fee remission application or certificate".

18. That provision of the Practice Direction requires Form N161 to be used for bringing an appeal but does not expressly state that the form must be signed. In my judgment, however, it is implicit that the form must be duly completed in order to constitute a valid appeal. By this, I do not mean that *any* minor error or omission will necessarily

render a form that has generally been completed a nullity. But a significant omission – such as, for example, a failure to clearly identify the decision being appealed against – is likely to vitiate the validity of the appeal form as constituting a valid appeal.

19. In my judgment, the omission of a signature is itself a significant omission vitiating the validity of an otherwise completed Form N161 as constituting a valid appeal. Even in this modern age when a court form may be signed electronically (such as by 'pasting in' an image of one's signature, or simply by typing one's name into the signature box), the signing of a court form remains a significant act; it is not a mere formality. The affixing of a signature, by whatever method, indicates that the form has been completed (i.e. it is no longer a working draft) and confirms the information stated in the form. Further, the necessity of signing Form N161 is expressly stated within the form: the text in the heading above the signature box (section 14) states with absolute clarity that "*The notice of appeal must be signed here.*"

20. In the supplementary written submissions I permitted her to file after the hearing, the GMC's Counsel, Ms Hearnden, properly and commendably (given that the Appellant was a litigant in person) drew attention to a point in the Appellant's favour. This was the fact that the Guidance Notes on completing Form N161 do not state that the form must be signed. In that respect, the N161 Guidance Notes differ from, for example, the Guidance Notes on completing the Appellant's Notice form used for Family Court proceedings (Form FP161), which state:

> "The Appellant's Notice MUST be signed by the appellant or by the appellant's solicitor if legally represented. Unsigned forms will be returned by the court which could lead to the appeal being dismissed if it is out of time."

In my judgment, however, this point is ultimately of no assistance to the Appellant, given that Form N161 itself contains text that makes clear that it must be signed in section 14.

21. As the Appellant's First Appeal Form was not signed, it was not, in my judgment a valid Appellant's Notice bringing an appeal. The ACO staff were therefore right to reject it.

(2) Do I have a discretionary power, pursuant to CPR r.3.10, to order that the Appellant's failure to sign the First Appeal Form does not render it invalid, and/or to permit that the failure to sign that document be retrospectively remedied now?

22. At the hearing, as the Appellant was a litigant in person, I raised the issue of whether I could rely on CPR r.3.10 so as to retrospectively validate the Appellant's First Appeal Form. CPR r.3.10 provides that:

> "Where there has been an error of procedure such as a failure to comply with a rule or practice direction –
> (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and
> (b) the court may make an order to remedy the error."

23. Having considered Ms Hearnden's post-hearing written submissions in response to my raising the issue, I am satisfied that CPR r.3.10 does not enable me to assist the Appellant in that way. This follows from the conclusion I have reached under Question (1) above, namely that the Appellant's submission of the unsigned First Appeal Form did not constitute a valid Appellant's Notice and was not, therefore, capable of starting appeal proceedings. CPR r.3.10 is concerned with circumstances where proceedings have already been started and there is then an error of procedure during those proceedings. As the First Appeal Form did not suffice to start any proceedings, it is not open to me to make an order remedying the Appellant's failure to sign that form. As Newey LJ explained in *Jennison v Jennison* [2023] 2 WLR 1017 (which concerned proceedings brought by someone purporting to be the personal representative of a deceased's estate, but who did not have the requisite lawful authority), at [59]:

> "CPR r 3.10 is not applicable where the proceedings that have purportedly been brought are to be regarded as a nullity. CPR r.310 allows existing proceedings to be regularised, not the creation of valid proceedings."

24. I am fortified in my conclusion by the judgment of Eyre J in *Peterson v Howard de Walden Estates Ltd* [2023] EWHC 929 (KB), in which the learned judge held that a failure to pay the correct issue fee when seeking to issue a claim does not come within the scope of CPR r.3.10. In explaining his reasons, the judge noted that the failure to pay the issue fee was not a failure to comply with a procedure specified in the CPR; rather, it was a failure to comply with a requirement imposed by a statutory instrument mandating payment of a fee before the officials in the court administration would issue the claim. Moreover, CPR r.3.10 is located in Part 3 of the CPR, i.e. the part concerned with the court's case management powers, and *"[s]uch powers are necessarily concerned with events after proceedings have been commenced*" (at [43]). Sub-paragraphs (a) and (b) of CPR r.3.10 deal sequentially with the consequences of an

error, and "*this has significant consequences because the reference in paragraph (a) of rule 3.10 to the invalidity or otherwise of any step taken in the proceedings strongly suggests that the rule is concerned with errors made after the commencement of an action*" (at [44]).

25. In my judgment, the Appellant's failure to submit a signed Form N161 within the 28-day period prescribed in section 40(4) of the Medical Act 1983 constituted a failure to comply with a requirement laid down in a statute, not merely a requirement set out in the CPR. CPR r.3.10 cannot come to the rescue in such a situation, with the effect of enabling the Appellant to pursue an appeal despite his not having validly submitted the appeal within the 28-day period.

(3) If the answer to Questions (1) and (2) is no (meaning that no appeal was brought until after the time-limit), should I grant an extension of time so as to allow the appeal brought late, by way of the Second Appeal Form, to proceed?

26. In *Adesina v Nursing and Midwifery Council* [2013] EWCA Civ 818, [2013] 1 W.L.R. 3156, the Court of Appeal addressed the question of whether the Human Rights Act 1998 (the "HRA") required the courts to imply the existence of a judicial discretion to extend the 28-day time-limit for a nurse to appeal to the court against a decision of her professional regulator. The legislation laying down that time-limit was Article 29(10) of the Nursing and Midwifery Order 2001, which was in similar terms to section 40(4) of the Medical Act 1983. Neither the Order, nor the 1983 Act, include any provision conferring on the court a discretion to extend time so as to admit an appeal that has been submitted late.

27. The Court of Appeal in *Adesina* did not find it possible to infer the existence of such a discretion from legislation that laid down a 28-day time-limit in clear terms and did not include any provision for time to be extended. The Court of Appeal held, however, that a court could extend time in a narrow class of cases, namely those in which a strict application of the time limit, with the effect of shutting out an appeal, would constitute a disproportionate interference with the 'right of access to the court' protected by Article 6(1) of the Convention Rights set out in Schedule 1 to the HRA. In so holding, the Court of Appeal applied, in the context of medical profession appeals, the principles identified by the Supreme Court in *Pomiechowski v Poland* [2012] UKSC 20, [2012] 1 W.L.R. 1604, in the context of extradition appeals.

28. In *Pomiechowski*, the Supreme Court decided that an appeal against an extradition decision which was filed after the end of a statutory time-limit that was, on its face, absolute, should not be shut out where this would contravene the intending appellant's

'right of access to the court' protected by Article 6(1). As to the circumstances in which an extension of time could be available on this basis – i.e. to avoid a contravention of Article 6(1) – the Supreme Court referred to the judgment of the European Court of Human Rights ("ECtHR") in *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442 applying Article 6(1) of the European Convention on Human Rights ("ECHR"). (As is well-known, the Convention Rights replicate rights set out in the European Convention on Human Rights ("ECHR").) In *Tolstoy,* the ECtHR stated, at [59], that procedural requirements limiting an individual's access to a court must not restrict or reduce that access in such a way, or to such an extent, that "*the very essence of the right is impaired*".

29. In *Adesina*, the Court of Appeal emphasised that the circumstances in which a discretion to extend time would arise were no wider than necessary for avoiding a contravention of Article 6(1) of the Convention Rights. Maurice Kay LJ, with whose judgment the other members of the Court agreed, stated as follows at [15] (quoting words used by Lord Mance JSC in *Pomiechowski* at [39]):

> "If [Article 6 of the Convention Rights] and section 3 of the [HRA] require article 29(10) of the 2001 Order to be read down, it must be to the minimum extent necessary to secure compliance with Convention. In my judgment, this requires adoption of the same approach as that of Lord Mance JSC in [*Pomiechowski*], para 39. A discretion must only arise "*in exceptional circumstances*" and where the appellant "*personally has done all he can to bring [the appeal] timeously*". I do not believe that the discretion would arise save in a very small number of cases."

30. *Adesina* and the subsequent case law applying the principles laid down by the Court of Appeal in that judgment were analysed in detail by Fordham J in *Rakoczy v General Medical Council* [2022] EWHC 890 (Admin). After tracking back to the principles set out by Lord Mance JSC in *Pomiechowski*, which the Court of Appeal in *Adesina* imported back to the context of medical profession appeals, Fordham J expressed the following views:

(1) The words "*personally has done all he can to bring [the appeal] timeously*" should not be regarded as the "*legal litmus test*" for determining whether an extension of time could or should be granted. Rather, the true test was whether refusing to acknowledge the existence of a discretion to extend time would, in the circumstances, contravene one or other of the "*Dual Principles*" extracted by Lord Mance JSC from *Tolstoy*. Those principles are: [1] that "*the limitations applied [should] not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired*"; and [2] that "*a*

restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved". The Dual Principles were concerned, not only with whether a prescribed time limit was disproportionately short, but also with whether the strict application of the time limit would, in the circumstances of the individual case, be disproportionate. In a case where there was nothing more that the appellant could have done to bring the appeal within time, then the test would be satisfied. But it was, in principle, possible for the test also to be satisfied in other circumstances.

(2) In a case where the test is satisfied, the court has a *duty*, not merely a discretion, to grant an extension.

(3) The words "*has done all he can to bring [the appeal] timeously*" had, in any event, be read with the interposition of the word "reasonably". Accordingly, an extension should be granted where the appellant has done all he *reasonably* could to bring the appeal within time, even if he did not do absolutely everything that it would have been possible to do.

31. Those views expressed by Fordham J in *Rakoczy* were strictly *obiter* because the learned Judge went on to find, on the facts of that case, that: (a) the appellant doctor in that case had not done everything reasonably possible to bring the appeal within time; and (b) nor would shutting out his appeal contravene either of the Dual Principles.

32. Subsequently to *Rakoczy*, however, the Court of Appeal decided *Stuewe v Health and Care Professions Council* [2022] EWCA Civ 1605, [2023] 4 W.L.R. 7. That was a case relating to the 28-day time-limit for appeals which is laid down in Article 29(10) of the Health Professions Order 2001. Carr LJ (as she then was), with whom the other members of the Court agreed, stated:

> "[48] Both courts in *Pomiechowski* and *Adesina* spoke in terms of the court's "discretion" or "power". It may, as Fordham J pointed out in *Rakoczy* … at [21(ix)], be more accurate to speak in terms of the court's duty, … given the positive obligation of the domestic court under s. 3 of the Human Rights Act 1988 (so far as possible) to read and give effect to legislation in a way which is compatible with Convention rights. The difference may not matter in real terms, not least since the courts in *Pomiechowski* and *Adesina* were at pains to emphasise that they were not speaking of a general discretion to extend time, but only a narrow discretion that arises in exceptional circumstances (see for example *Adesina* at [15]).
>
> [49] Thus, there is a discretion (or duty) to extend time for the bringing of a statutory appeal but only in exceptional circumstances, namely where to deny a power to extend time would impair the very essence of the right of appeal. That

> is the key question. Once the discretion (or duty) arises, it must then be exercised to the minimum extent necessary to secure ECHR compliance.
>
> [50] As set out above, Lord Mance at [39] in *Pomieschowski* identified the power to permit and hear an out of time appeal if statutory provisions would otherwise operate to prevent an appeal in a manner conflicting with the right of access under Article 6 as identified in *Tolstoy*. He went on (in the same sentence) to add that the appeal would be one "which a litigant personally has done all he can to bring and notify timeously." Maurice Kay LJ adopted this sentence in *Adesina* at [15], as have other courts subsequently ….
>
> [51] Care needs to be taken in relation to this additional statement. The reference to a litigant doing all that they personally could to bring and notify timeously appears to have been treated in some of the cases as an independent requirement for the discretion (or duty) to arise (see for example *Gupta v General Medical Council* [2020] EWHC 38 (Admin) … at [58] to [60]). Fordham J in *Rakoczy* [21(ii)], on the other hand, appears to have doubted that it was. There he stated that it was not "laying down a test, in the nature of a legal litmus test" (albeit that he also described it as an "expected essential characteristic"). He stated that it was instead "intended to be a valuable encapsulation", "a guide as to what, in essence, the [court] could expect to be looking for". He also stated at [13] that the obligation on the appellant (to do all that they could to bring and notify timeously) would have to be tempered by reference to reasonableness.
>
> [52] I do not consider that Lord Mance in [39] of *Pomiechowski* , having referred to the relevant test by reference to *Tolstoy*, was then imposing an additional condition (beyond the need for the existence of "exceptional circumstances") by reference to the efforts made (or not) by an appellant to appeal in time. Rather, he was simply identifying the type of situation in which exceptional circumstances sufficient to give rise to the discretion (or duty) may arise. Put simply, and without being in any way prescriptive, exceptional circumstances are unlikely to arise where an appellant has not personally done all that they could to bring the appeal in time. There is no independent jurisdictional requirement that a litigant must have done personally all that he could.
>
> [53] The need to import the notion of reasonableness, as suggested in *Rakoczy*, underscores the importance of adhering to the approach identified above. …
>
> [54] As set out above, therefore, 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. Any gloss is unhelpful. Answering the question may or may not include consideration of whether or not the litigant has done everything possible to serve within time, depending on the facts of the case. Once the discretion (or duty) arises, it must then be exercised to the minimum extent necessary to secure compliance with Article 6 rights.

33. I therefore ask myself the question *Stuewe* requires me to ask: *In the circumstances of this case, would denying a power to extend time impair the very essence of the*

Appellant's right of appeal? Asking that question, of course, begs the question as to what is meant by "*impair the very essence of the right of appeal*". Clearly, in a case in which the intending appellant was not realistically able to appeal within the 28-day period – for example, because he was in hospital, in a coma, for the whole of that period – it would "*impair the very essence of the right to appeal*" if the court were to deny that it had a power to grant him an extension of time. But that is not the situation of the Appellant in the present case: throughout the 28-day period, he was physically able to submit an appeal. Can he nevertheless be granted an extension of time? *Stuewe* and *Rakoczy* allow that there might potentially also be other circumstances – i.e. not just *inability* to have submitted a valid appeal within time – in which it would be contrary to Article 6(1) of the Convention Rights to deny the existence of a power to extend time so as to allow the appeal to proceed.

34. In the present case, in order properly to consider whether an extension of time might be available to the Appellant, I need to consider this question: Was the Court of Appeal in *Stuewe*, by emphasising the "*impair the very essence of the right of appeal*" test as being the true litmus test, intending to preclude reliance on the second of the two "*Dual Principles*" (to use the shorthand used by Fordham J in *Rakoczy* for identifying the twin requirements, derived by the Supreme Court from *Tolstoy*, as requirements that must be satisfied if a rejection of an appeal for having been brought out of time is to be compatible with Article 6(1))? The second of the Dual Principles requires that there be "*a reasonable relationship of proportionality between the means employed and the aim sought to be achieved*". As illustrated by the four ECtHR judgments listed, and briefly summarised, in *Rakoczy* at [9], the ECtHR is, in principle, willing to find (depending on the circumstances) that shutting a litigant out from pursuing a matter in court in consequence of a failure by him to satisfy a procedural requirement for validly starting court proceedings, is disproportionate and thus incompatible with Article 6(1) ECHR. Those were cases in which the ECtHR found that the relevant national courts had applied "*excessive formalism*".

35. In my judgment, the Court of Appeal did not intend to deny the second of the Dual Principles as constituting a requirement that must be met if rejection of an appeal for having been brought out of time is to be compatible with Article 6(1) of the Convention Rights. Rather, in directing courts to focus on the "*impair the very essence of the right of appeal*" test, the Court of Appeal regarded that test as being sufficiently wide as to include *both* of the Dual Principles. The Court was not seeking to narrow the requirements of Article 6(1), as recognised in this jurisdiction pursuant to the HRA, to narrower than the requirements as identified in the case-law of the ECtHR. In that regard, I note that Carr LJ's judgment quoted extensively from both *Tolstoy* and

Pomiechowski, including passages in which both Dual Principles were set out, and did not express any intention to depart from the ECtHR case law.

36. I therefore ask myself the question "*Would denying a power to extend time impair the very essence of the Appellant's right of appeal?*" based on an understanding that my answer should be 'yes' if shutting the Appellant's appeal out of the court would, in the circumstances, be a disproportionate means for pursuing relevant legitimate aims. In doing so, however, I also bear in mind that it is clear from both the domestic and ECtHR case law that it is not, in principle, an impairment of "*the essence of the right to appeal*" to require that an appeal be brought in compliance with applicable procedural requirements, including time-limits, that are not in themselves unreasonable or disproportionate. Nor is it an impairment of "*the essence of the right to appeal*" (i.e. a *disproportionate* bar to an appeal being pursued) that an intending appellant's ability to pursue his appeal may be lost in consequence of a failure on his part to exercise reasonable care and diligence to comply with such requirements.

37. In my judgment, in the circumstances of this case, denying a power to extend time would <u>not</u> impair the very essence of the Appellant's right of appeal. My reasons are the following points, in combination with each other:

(1) The requirement that a Form N161 be signed, in order for it to constitute a valid Appellant's Notice commencing an appeal, pursues an important legitimate aim. As I explained above, at paragraph 19, the affixing of a signature to a court form carries real significance and is not a mere formality. Thus, the lack of a signature is not merely a procedural or presentational deficiency. The rejection of such a form is because it does not include an important substantive element required for constituting the appeal. Accordingly, it is proportionate for the court administration to operate internal procedures whereby a Form N161 that has not been signed will be rejected.

(2) It is also proportionate that the applicable legislation and rules of court do not allow for an unsigned Form N161 to be retrospectively corrected by, or pursuant to, a judicial order. Maintaining a clear distinction between ongoing proceedings (where CPR r.3.10 applies) on the one hand, and non-existent proceedings (such as an intended appeal that has not been issued) on the other, pursues a legitimate aim of promoting legal certainty. The issuance of a valid appeal has legal and practical consequences: for example, in the context of medical profession appeals, such an appeal may have the effect of staying the coming into force of a sanction (such as an order of the MPT for suspension or erasure of a medical practitioner). There is

thus a need for clarity and certainty as to whether, and when, an appeal has been brought.

(3) The Appellant was, throughout the 28-day appeal period, physically able to submit a valid appeal. The time and effort involved in preparing the necessary form and paperwork is not particularly great.

(4) The principal cause of the Appellant not having submitted a valid appeal within time was his own lack of care when completing the First Appeal Form and failing to notice the clear text in the heading of section 14 which clearly states that the form must be signed. This is an unpromising basis for any argument that the essence of the Appellant's right to appeal has been impaired. Although the Appellant did not have the benefit of assistance from solicitors when preparing to file his appeal, he is an experienced medical doctor and had sufficient education, intelligence and skills to have been able to follow the clear instructions in Form N161.

(5) Although the Appellant received the MPT's Decision at around the beginning of June 2023, even the First Appeal Form was not sent to the ACO until around 4 weeks later, on 28 June 2023. This had the consequence that, by the time when the deficiency with his attempt to submit the appeal on that date was identified by court staff and brought to his attention, he was already outside the 28-day appeal period. A litigant in person who claims to have been unsure about court procedures, but leaves it until close to the end of the appeal period before first attempting to submit an appeal is taking a risk of being 'timed out' in the event that a deficiency with its appeal submission is identified. The fact that the Appellant chose to run that risk, and was then caught out by it, does not support a conclusion that the essence of his right to appeal has been impaired.

38. It follows that I have no power to extend time and, thus, no jurisdiction to determine the appeal on its substantive merits. The appeal must therefore be dismissed.

PART B: WAS THE SANCTION IMPOSED BY THE MPT EXCESSIVE?

39. In view of my conclusion, set out in Part A above, that I have no power to extend time for the appeal, it is strictly unnecessary for me to consider the substantive merits of the appeal. Nevertheless, as I have heard full argument on the appeal, I will set out what my conclusion on that matter would have been.

Factual background

40. The MPT proceedings against the Appellant arose out of his practise as a locum consultant in 2016 and 2017. During the relevant period, he and his wife (who was also a medical professional) supplied their services as locum medics through a company called Daivum Group Limited ("DGL"). DGL was a family-owned company in which the Appellant was a director and shareholder. One of their sons was DGL's Finance Director, and their other son was also a director of the company.

41. DGL's principal purpose was effectively to serve as a corporate vehicle through which the Appellant and his wife could supply their services as locum medics to locum agencies. Those agencies, in turn, supplied the services of locum medics to NHS Trusts and other customers. As to the reasons why it made sense for the Appellant and his wife to supply their services through a company, it should be borne in mind that, during the relevant period, it was common for locum medics to supply their services in this way because of the perceived tax advantages of such a structure. The medics, rather than being remunerated by the locum agencies as individuals (and thus being liable to pay Income Tax and National Insurance Contributions on the fees they received, either employees or sole traders) could instead have flexibility to take some or all of their remuneration by way of dividends from their company.

42. One of the locum agencies that, through DGL, engaged the Appellant to carry out locum shifts was an agency called DRC Locums Limited ("DRC"). Between 11 November 2016 and 24 March 2017, DGL received various payments from DRC in respect of locum shifts fulfilled by the Appellant at an NHS Trust's Emergency Department, but which were of amounts significantly in excess of the amounts properly due in respect of those shifts. In other words, DRC overpaid DGL. The reason for the overpayments appears to have been a clerical error made within DRC.

43. On 31 March 2017, DRC noticed that it had made these overpayments and contacted the Appellant to ask that he arrange for the total amount overpaid – which by then amounted to £31,500 – to be refunded to DRC. It appears that between April and July 2017, the Appellant was slow to engage with DRC about the overpayments, and that DGL had not refunded any of the overpaid amounts to DRC.

44. A meeting took place between the Appellant and DRC in August 2017 at which it was agreed that the overpayment would be refunded over time, at a rate of £1,000 on the 1st day of each month. Payments were made by DGL pursuant to that arrangement in the four months from September to December 2017. A payment of £500 was made in

January 2018, and again in February 2018, DGL having unilaterally reduced the monthly amount owing to "cashflow problems". The monthly payments then ceased.

45. It appears that DGL may well have been in financial difficulties in and after 2017 and owed significant amounts of tax to HMRC. It appears that, at around the time of the hearing before the MPT, DGL was the subject of court proceedings brought by HMRC, seeking that DGL be compulsorily wound up.

46. In December 2021, DRC's Responsible Officer, Dr Shahid Khan, made a fitness to practise referral to the GMC in respect of the Appellant, setting out the history relating to the overpayments and the fact that only a small proportion of the overpaid amount had been refunded. That referral was made in circumstances where DRC had, since the monthly payments stopped in March 2018, been chasing for repayment of the outstanding amount. The efforts made by DRC to chase for repayment included, not only many communications to the Appellant, but also the starting of county court proceedings against DGL. The referral stated, "*We are bringing this [matter] to the GMC's attention as this represents an issue of probity, ethics, honesty in financial dealings and good medical practice.*"

47. After considering the referral, the GMC brought fitness to practise proceedings against the Appellant alleging, *inter alia*, dishonesty. The matter was heard by the MPT between 16 and 30 May 2023. The Appellant acted in person; the GMC was represented by counsel.

48. The MPT's Decision found that the Appellant's conduct had constituted misconduct and that his fitness to practise was impaired. Of particular significance amongst the findings made by the MPT was that two elements of the Appellant's conduct had been "*dishonest*":

(1) The first of those elements was his failure to bring to DRC's attention the fact of the overpayments, prior to DRC itself noticing them and requesting repayment from the Appellant. Although the Appellant claimed that, prior to being contacted by DRC on 31 March 2017, he had not been aware that any overpayments had been made, the MPT found it to be proved, on the balance of probabilities, that he did know, prior to that date, that DGL had received payments exceeding the amounts properly due. The MPT considered that his failure to act on that knowledge by taking positive steps to bring the overpayments to DRC's attention was dishonest.

(2) The second of those elements was his failure to refund the overpayments, whether through DGL or personally. The MPT took the view that the Appellant had a personal responsibility for ensuring that the repayments were made, and that the

level of income of himself and his wife was such that he could have afforded to make those repayments but had not done so. In these circumstances, the failure to ensure that the overpayments were refunded was, in the MPT's view, dishonest.

49. Having made those findings, the MPT imposed a sanction of suspension for a period of 6 months, with a review.

The Appellant's grounds of appeal

50. In his skeleton argument for the hearing before me, the Appellant sought to argue that the Decision was flawed for "*four main reasons*", the first of which was "*[m]isapplication of the standard of dishonesty*". This was surprising, as it amounted to a challenge to the findings of dishonesty made by the MPT, whereas the Appellant's Grounds of Appeal, attached to his Second Appeal Form, challenged only the sanction.

51. At the hearing, I refused to allow the Appellant to expand his case in this way, instead confining him to his Grounds of Appeal. Whilst I recognised that conducting litigation without a solicitor is not easy for any litigant, he is, as a medical doctor, a well-educated professional person. It is not unreasonable to expect such a person to have understood the need to indicate within his Grounds of Appeal that he wished to challenge the MPT's finding of dishonesty, if that was his intention. In my judgment, his desire to expand that scope was attributable, not by any misunderstanding on his part as to the relevant court procedures at the time when he was filing his appeal, but by a late change of mind as to the matters he wished to argue. The time of filing his skeleton argument for this hearing was far too late a time to seek to make such a radical expansion to the scope of the appeal. In any event, he had not filed any application to amend his Grounds of Appeal.

52. In so deciding, I also took account of the Appellant's approach to the proceedings generally, including his failure to sign the First Appeal Form, and his approach at the hearing itself. When I asked him at the hearing to refer to his Grounds of Appeal in the bundle, it became apparent that he had not brought a hard copy of the bundle to court, and nor had he brought a laptop computer or tablet on which he could view an electronic copy. He then took his mobile phone from his pocket and offered to try to locate and look at relevant documents using it. This lack of preparedness for advancing his case at the hearing was surprising, given his professional background, and did not present a picture of an appellant who was taking a diligent approach to his conduct of the proceedings.

53. His pleaded Grounds of Appeal were these:

> "a) Severity of Sanctions: The imposition of a six-month suspension seems unduly severe, considering the isolated nature of the misconduct, my immediate actions to rectify the situation, and my long-standing and hitherto unblemished medical practice spanning over 33 years.
>
> b) Consideration of Mitigating Factors: I argue that the tribunal did not adequately weigh significant mitigating factors, including the swift and proactive repayment of the outstanding debt, the extraordinary circumstances precipitated by the global pandemic, my exemplary service record, and the absence of prior misconduct.
>
> c) Impact of New Evidence: I have presented new evidence - the complete repayment of the debt owed to DRC on 12-13 June 2023. This action, taken immediately after the tribunal's decision, reflects my commitment to remediate the situation and should be considered in my favour.
>
> d) Demonstrated Insight: Throughout the proceedings, I have shown deep insight into the gravity of the situation, accepted responsibility, and expressed remorse. My proactive repayment efforts and continuous engagement with all parties involved further underscore this point.
>
> e) Disproportionate Consequences for Livelihood and Future Professional Practice: The impact of the sanction on my livelihood and professional reputation appears disproportionate. The sanction threatens my ability to continue serving the public through the NHS, which I have done diligently for over three decades."

The law

54. As noted above, CPR Part 52 applies to appeals under section 40 of the Medical Act 1983. Pursuant to CPR r.52.21(3), the High Court will allow such an appeal only where the MPT's decision was either: (a) "*wrong*"; or (b) "*unjust because of a serious procedural or other irregularity*".

55. The court's approach to such appeals was summarised as follows by Sharp LJ and Dingemans J (as he then was) in *General Medical Council v Jagjivan* [2017] 1 WLR 4438, at [40]:

(1) It is not appropriate to add any qualification to the test in CPR Part 52, for instance that decisions are 'clearly wrong'.

(2) The court will correct material errors of fact and of law.

(3) The appeal court must be extremely cautious about upsetting findings of primary fact, particularly where the findings depended upon the assessment of the credibility

of the witnesses, who the tribunal, unlike the appellate court, has had the advantage of seeing and hearing.

(4) Where the question is: "what inferences are to be drawn from specific facts?" an appellate court is under less of a disadvantage. The court may draw any inferences of fact which it considers are justified on the evidence: see CPR Part 52.21(4).

(5) A failure to provide adequate reasons may constitute a serious procedural irregularity which renders the Tribunal's decision unjust.

56. As to the approach to be taken by a court when considering appeals against MPT decisions in relation to fitness to practise and sanctions, the applicable principles were summarised by Nicola Davies LJ in *Sastry v General Medical Council* [2021] EWCA Civ 623, at [102]-[103]:

> "[102] Derived from *Ghosh* are the following points as to the nature and extent of the section 40 appeal and the approach of the appellate court:
>
> i) an unqualified statutory right of appeal by medical practitioners pursuant to section 40 of the 1983 Act;
>
> 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 appellate court will not defer to the judgment of the Tribunal more than is warranted by the circumstances;
>
> v) the appellate 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 appellate court should substitute some other penalty or remit the case to the Tribunal for reconsideration.
>
> [103] The courts have accepted that some degree of deference will be accorded to the judgment of the Tribunal but, as was observed by Lord Millett at [34] in *Ghosh*, "*the Board will not defer to the Committee's judgment more than is warranted by the circumstances*". In *Preiss*, at [27], Lord Cooke stated that the appropriate degree of deference will depend on the circumstances of the case. Laws LJ in *Raschid* and *Fatnani* … stated that on such an appeal material errors of fact and law will be corrected and the court will exercise judgment but it is a secondary judgment as to the application of the principles to the facts of the case ([20]). In *Cheatle* Cranston J accepted that the degree of deference to be accorded to the Tribunal would depend on the circumstances, one factor being the composition of the Tribunal. He accepted the appellant's submission that he could not be "*completely blind*" to a composition which comprised three lay members and two medical members".

Analysis

57. In my judgment, the Appellant's Grounds of Appeal, quoted at paragraph 53 above, can be boiled down to a single ground, namely that the sanction imposed by the MPT was excessive. The other elements referenced in the Grounds of Appeal are factors which the Appellant says should have been, or should now be, taken into account when determining a proportionate sanction.

58. I have some misgivings about the quality of the MPT's reasoning underlying the second of the two elements of the Appellant's conduct which it found had been "dishonest". That reasoning arguably failed to pay sufficient regard to the fact that the Appellant and DGL are legally separate persons, and the debts and obligations of DGL are not legally those of the Appellant. It appears that DGL may not itself have had sufficient funds to be able to repay the overpaid amounts. Although the MPT Decision appears to have regarded a term contained in a set of terms and conditions signed by the Appellant as giving rise to an obligation for the Appellant personally to refund DRC, it is noteworthy that DRC brought its county court claim against DGL and not against the Appellant. There has not (as far as I know) been any judgment against the Appellant in respect of any debt relating to the overpayment. Against this background, the MPT's reasoning in relation to whether the failure to refund the overpayment constituted "dishonest" conduct by the Appellant should arguably have included greater analysis of whether it was dishonest for the Appellant to fail to personally discharge the debt in circumstances where, at least from a legal standpoint, the liability rested with DGL, and DGL was not financially able to do so.

59. As I have set out above, however, the Appellant's Grounds of Appeal attached to his Second Appeal Form do not include any challenge to the MPT's conduct findings, including the findings of "dishonest" conduct. Rather, his Grounds of Appeal challenge only the proportionality of the sanction that the MPT imposed; and I have refused him permission to expand his grounds. Accordingly, I must consider the proportionality of the sanction based on – i.e. 'taking as read' – the conduct findings made by the MPT, including the finding that the Appellant was personally obliged, at least from a professional conduct standpoint, to refund the overpayment to DRC, and that his failure to do so constituted conduct that was "dishonest".

60. Honest dealing in all professional matters should be a hallmark of the medical and allied professions. These are professions whose members are trusted by patients with their most vital and intimate interests and confidences, and who are rightly held in high respect by the community. Any kind of dishonesty by a medical practitioner in his professional life is therefore intrinsically liable to harm the reputation of the profession.

As Julian Knowles J stated in *Nkomo v General Medical Council* [2019] EWHC 2625 (Admin) at [35]:

> "The starting point is that dishonesty by a doctor is almost always extremely serious. There are numerous cases which emphasise the importance of honesty and integrity in the medical profession and they establish a number of general principles. Findings of dishonesty lie at the top end of the spectrum of gravity of misconduct …. [M]isconduct involving personal integrity that impacts on the reputation of the profession is harder to remediate than poor clinical performance: *Yeong v General Medical Council* [2009] EWHC 1923 and GMC v Patel [2018] EWHC 171 (Admin) at [64] …."

61. In *Professional Standards Authority v Health and Care Professions Council and Ghaffar* [2014] EWHC 2723 (Admin), at [44], Carr J (as she then was) stated:

> "[44] There are, of course, numerous authorities emphasising the public interest in maintaining the standards and reputations in the professions. The importance of honesty to the health and care professions is underlined by the fact that striking off may be an appropriate sanction under the indicative sanctions guidance. It will often be proper, even in cases of one-off dishonesty (see *Nicholas-Pillai v GMC* [2009] EWHC 1048 (Admin) at paragraph 27). It has been said that where dishonest conduct is combined with a lack of insight, is persistent, or is covered up, nothing short of striking off is likely to be appropriate (see *Naheed v GMC* [2011] EWHC 702 (Admin))."

62. That is not, of course, to say that all findings of "dishonest" conduct should lead to a finding that the medical practitioner's fitness to practise is impaired, let alone to striking off or to some default or minimum sanction. The MPT must carefully assess, on a case-by-case basis, the seriousness of the registrant's specific conduct, taking account such matters as the nature of that conduct, the degree of culpability, and whether it caused any financial or other loss or harm. A particularly significant factor will be the extent to which the conduct has harmed, or risked harming, the profession's public reputation for honesty and probity. Having assessed the seriousness of the conduct, the MPT should consider other factors relevant to sanction, including any mitigation.

63. The nub of the conduct identified by the MPT as constituting dishonest conduct by the Appellant was his having adopted a "*cavalier attitude*" to the overpayments (from which he had personally benefited financially) and not doing what he reasonably could to ensure that the overpaid amounts were refunded, insofar as it was within his ability and control to do so. His failure to act in that way constituted 'dishonourable behaviour' (my term, not one that was used by the MPT, but which I think captures the essence of the MPT's concern about the Appellant's conduct) and thus fell below the high standard

of probity to be expected of members of his honourable, and highly trusted, profession. His conduct was liable to damage the public reputation of the medical profession. Locum agencies and NHS Trusts should be able to have confidence that professionals will display a high standard of probity and not seek to retain the benefit of monies paid to them, in connection with their professional activities, as a result of administrative mistakes. Further to that, his conduct amounted, in the MPT's assessment, to "dishonesty", applying the test in *Ivey v Genting Casinos* [2017] UKSC 67. The MPT also found, for reasons set out in the Decision, that the Appellant had displayed only limited insight into why his conduct had been unacceptable.

64. Having examined the reasoning in the Decision in relation to sanction, I am satisfied that the MPT carried out a proper assessment of all relevant features of the case. The MPT noted the statements in the case law to the effect that conduct amounting to dishonesty will often warrant an order for erasure but nevertheless went on to impose a lesser sanction in this case, which did not involve "*active falsification or fraudulent behaviour*". In determining what that lesser penalty should be, the MPT took into account, expressly or impliedly, the mitigating features referenced in the Appellant's Grounds of Appeal insofar as those factors existed, and were known to the MPT, at the time of the Decision. The sanction of suspension imposed by the MPT was, in my judgment, a reasonable, proportionate and appropriate sanction. It appropriately marked the seriousness of the Appellant's conduct, and it provided an opportunity for him to demonstrate to the MPT, at a review, that he had developed greater insight into why his conduct had been found to have been incompatible with his professional status, so that he might then be permitted to resume practising.

65. It follows that I am unable to say that the MPT's decision on sanction was, as per CPR r.52.21(3), either "*wrong*", or "*unjust because of a serious procedural or other irregularity*". It follows that, even if the appeal had been brought within time, I would have been bound to dismiss it.

66. For the sake of completeness, I note that one of the mitigating features cited in the Appellant's Grounds of Appeal was that, in June 2023, he had personally made a payment to DRC clearing the outstanding balance. As this development occurred after the date of the MPT Decision, it was not something that the MPT could have taken into account when deciding the sanction. In my judgment, therefore, it is not something to which I could properly have regard when deciding whether the Decision was wrong. The development could be relevant to my decision-making only if I had a proper basis for setting aside the Decision and was then seeking to determine the appropriate sanction afresh.

67. In any event, the value, as mitigation, of the fact that the Appellant had cleared the balance is very limited. It occurred more than 6 years after the time when DRC first requested that the overpayments be refunded, and only after the MPT had made its Decision. To the extent that it is evidence that, following the MPT Decision, the Appellant has developed greater insight into why his conduct was incompatible with the conduct to be expected of a person of his profession, it can be taken into account in the MPT's review of the suspension which will be carried out towards the end of the initial 6-month suspension period.

CONCLUSION AND DISPOSAL

68. For the reasons set out in this judgment, the appeal is dismissed.