Neutral Citation Number: [2024] EWHC 3270 (Admin)

Case No: AC-2023-LON-003075

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17th December 2024

Before:

Neil Cameron KC
sitting as a Deputy High Court Judge

Between:

Dr MOHAMMAD ADIL

Appellant

- and –

GENERAL MEDICAL COUNCIL **Respondent**

The Appellant in person

Peter Mant (instructed by the GMC Legal) for the **Respondent**

Hearing date: 13th November 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on Tuesday 17th December 2024 by circulation to parties or their representatives by e-mail and by release to the National Archives.

THE DEPUTY JUDGE NEIL CAMERON KC

The Deputy Judge (Neil Cameron KC):

Introduction

1. Mohammad Adil appeals against a decision of the Medical Practitioners' Tribunal ("the Tribunal") made in September 2023 to direct that his name be erased from the Medical Register. At the time of the events relevant to the Tribunal's decision Mr Adil worked as a locum consultant colorectal surgeon, first at the Chesterfield Hospital and then at the North Manchester Hospital National Health Service ("NHS") Trust.

2. The Tribunal is a committee of the General Medical Council ("the GMC"). The Tribunal's decisions were taken in exercise of its power under section 35D of the Medical Act 1983 Act ("the 1983 Act"). This appeal is brought under section 40 of that Act.

3. The Appellant appealed to this Court on four grounds. By an order sealed on 6th August 2024 Sir Duncan Ouseley sitting as a High Court Judge ordered that Grounds 1 and 2 be struck out.

4. This appeal is proceeding on Ground 4 alone, namely that the sanction of erasure imposed by the Tribunal was disproportionate as (amongst other things):

   i) The sanction was a disproportionate interference with the Appellant's right to freedom of expression pursuant to Article 10.2 of the Convention even if (contrary to the Appellant's primary position) it was not disproportionate to make a finding of misconduct in respect of the comments made in 2020;

   ii) Save for findings in respect of comments made in 2020 and one unrelated finding in 2022, the Appellant has not previously been found guilty of misconduct.

   iii) The Tribunal had no evidence that the Appellant had abused his position.

   iv) The Tribunal had no evidence that the Appellant posed a risk to patient safety.

   v) The Tribunal had no evidence that public confidence was damaged by the Appellant's actions.

5. There are two preliminary procedural applications before the court:

   i) An application that Mr Jan Khan be allowed to act as a 'McKenzie Friend' to assist the Appellant.

   ii) An application that documents not before the Tribunal be admitted as evidence before the Court.

6. At the hearing I was informed that Mr Khan had no interest in the outcome of the case and that he was not being paid for his assistance. I allowed the application that Mr Jan Khan be allowed to give reasonable assistance to the Appellant as a 'McKenzie Friend'.

7. My ruling on the application to admit documents which were not before the Tribunal is set out below.

The Background Facts

8. In April and May 2020, the Respondent received online complaints in which it was alleged that the Appellant had been posting videos on You Tube relating to the Covid-19 pandemic.

9. On 1st June 2020 the Interim Orders Tribunal ("IOT") met to consider whether to make an interim order under section 41A (1) of the 1983 Act. The IOT determined that an interim order of suspension was appropriate and proportionate and that the appropriate period for suspension was 12 months.

10. In June 2022 the Appellant appeared before the Tribunal.

11. There were two main allegations before the Tribunal.

    i) The first main allegation was that, while working as a locum consultant colorectal surgeon at Chesterfield Hospital the Appellant carried out a procedure on a patient and failed to ensure that they had initialled changes to their previously signed consent form, failed to perform the procedure correctly, failed to visit the patient on the day after the procedure or become involved in their post-operative care when it became clear that they were unwell as a result of the procedure.

    ii) The second main allegation was that, between April and October of 2020, while working as a locum consultant colorectal surgeon at North Manchester NHS Trust, the Appellant appeared in publicly accessible videos expressing his views about the Sars-CoV-2 virus, the Covid 19 pandemic, and the proposed vaccination programme. It was alleged that the Appellant used his position as a doctor in the UK to promote his opinions and that his actions undermined public confidence in the medical profession and were contrary to widely accepted medical opinion at the time. It was further alleged that despite telling the responsible officer he had and/or would remove the videos, the Appellant failed to do so and appeared in further videos which were uploaded to video sharing platforms.

12. The June 2022 Tribunal ("the 2022 Tribunal") took four decisions: a Determination on the Facts (made on 21 June 2022); a Determination on Impairment (made 27 June 2022); a Determination on Sanction (made on 29 June 2022); and a Determination on Immediate Order (also made on 29 June 2022). I will refer to the determinations made in June 2022 collectively as "the 2022 Determinations".

13. In its determination on the facts the Tribunal found that 3 of the 6 charges under the first main allegation were proved. In its determination on impairment, the Tribunal found that, in relation to the first main allegation, there was no misconduct. None of the matters contained in the first main allegation is therefore the subject of this appeal.

14. The charge-sheet relating to the second main allegation set out the following allegations:

"2. Between April 2020 and October 2020, you appeared in videos that were uploaded to video sharing platforms in which you said that:

a. the Sars-CoV-2 virus and/or Covid-19 disease do not exist or words to that effect;

b. the Covid 19 pandemic is a conspiracy brought by the United Kingdom, Israel and America or words to that effect;

c. the Covid-19 pandemic is a multibillion scam which was being manipulated for the benefit of:

i. Bill Gates;

ii. pharmaceutical companies;

iii. the John Hopkins Medical Institute of Massachusetts;

iv. the World Health Organisation,

or words to that effect;

d. the Covid-19 pandemic was being used to impose a new world order or words to that effect;

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

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

g. Covid-19 vaccines:

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

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

iii. will transform human psychology and beliefs;

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

or words to that effect.

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

4. Your actions as referred to at paragraph 2:

a. undermined public health, and/or;

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

c. undermined public confidence in the medical profession.

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

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

a. Failed to remove the videos;

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

15. The Tribunal found that all the allegations falling under the second main allegation were proved.

16. The Tribunal found that the Appellant's fitness to practise was impaired by reason of misconduct in relation to paragraphs 2-6 of the second main allegation.

17. When considering sanction, the Tribunal stated (at paragraph 221 of the 2022 Determinations):

"Overall, considering the mitigating factors and the developing insight Mr Adil has shown, albeit late in the day, the Tribunal determined that a sanction of suspension was the most appropriate in this case."

18. The Tribunal noted the Appellant was a competent surgeon whose skills would be of use to the NHS (paragraph 226). At paragraph 227 the Tribunal stated:

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

• mark the seriousness of the misconduct and send the appropriate signal to Mr Adil, the public and the profession about such conduct being unbefitting of a registered doctor;

• allow sufficient time for Mr Adil to continue his remediation and to reflect carefully and deeply on the Tribunal's finding and his conduct such that he was able to demonstrate his understanding and appreciation of the impact of his conduct on public health and confidence in the profession. The Tribunal noted that a review tribunal would expect to see evidence of meaningful reflection and genuine insight in order to consider allowing Mr Adil to return to unrestricted practice; and

• if Mr Adil was able so to reflect and demonstrate his genuine insight, not deprive the NHS of the services of a very capable surgeon for any longer that was necessary."

19. The Tribunal determined that a suspension of the Appellant's registration for six months was the appropriate and proportionate sanction. The Tribunal directed that a review of the Appellant's case be carried out shortly before the end of the suspension. The Tribunal determined that an immediate order of suspension was necessary.

20. The Appellant appealed to the High Court against the 2022 Determinations. The appeal was heard by Swift J on 15th February 2023 and judgment was handed down on 5th April 2023 ([2023] EWHC 797 (Admin)). The appeal was dismissed. As the appeal was dismissed the six-month suspension ordered by the Tribunal in June 2022 took effect from the date of dismissal of the appeal (paragraph 10(1)(c) of Schedule 4 to the 1983 Act).

21. The Appellant appealed against Swift J's decision. The case was listed to be heard by the Court of Appeal on 19th October 2023.

22. The review hearing, which had been ordered as part of the 2022 Determinations, was listed to be heard via Microsoft Teams on 18th September 2023 ("the Review Hearing"). The Appellant filled out an Attendance Form in which he indicated that he had received notice of the hearing, that he would not be attending the hearing, and that he wished to make representations which were attached to the form. Those representations included a witness statement made by the Appellant and dated 15th August 2023.

23. In his witness statement dated 15th August 2023 the Appellant addressed each of the matters set out in paragraph 2 of the charge-sheet and put forward his case as to why the statements set out were justified. At paragraph 58 the Appellant stated:

> "I have lost my career, my reputation and substantial income for making statements which are evidence based but also statements of politics."

24. The Appellant attended an appraisal held on 4th September 2023 by video conference. The record of that appraisal includes an 'Agreed personal development plan'. That plan records that the Appellant would prepare for the hearing before the Tribunal on the 19th September 2023 by "a successful, cooperative and humble appearance before my peer group MPTS colleagues."

25. The Review Hearing was held on the 18th and 19th September 2023. The Tribunal decided to proceed in the absence of the Appellant.

26. The Tribunal's conclusions on the issue of impairment are set out at paragraphs 40 to 44 of their decision:

> "40. In considering whether Mr Adil's fitness to practise is impaired or not, the Tribunal considers that overall, the position is worse now than it was before the Tribunal in 2022. He has posted further similar comments on social media, He is no longer expressing remorse or regret and the insight which was thought to be developing is now seen to be non-existent and it may not have been genuine when expressed to the Tribunal in 2022. He was given credit for that by the 2022 Tribunal.

41. He appears to have misled the Tribunal in 2022 and to have misled his Appraiser in September 2023. He indicated in his statement that he does not accept any misconduct. It further appears from this statement that he does not have insight and is unwilling to remediate. There is still a real risk of repetition,

42. This Tribunal found Mr Adil's actions clearly fell well below the standards expected of a registered practitioner. Proper standards in the profession must be upheld and maintained and a finding of impairment against Mr Adil is necessary to reflect the seriousness of the allegations found proved against him.

43. The Tribunal determined that Mr Adil's behaviour had the potential to put patients at risk of harm and brought the medical profession into disrepute.

44, In all the circumstances, the Tribunal concluded that all three limbs of the overarching objective continued to be engaged and that a finding of impaired fitness to practise was required in order to protect the public and maintain the public confidence in the profession and to promote and maintain proper professional standards and conduct for members of the profession. The Tribunal has therefore determined that Mr Adil's fitness to practise is currently impaired by reason of his misconduct."

27. The Tribunal also made a determination on sanction. The transcript shows that sanction was considered on the second day of the hearing. Mr Mensah for the Respondent set out the GMC's position that a further period of suspension would be an appropriate sanction. Mr Mensah then received further instructions from the Respondent, and he changed his submission, submitting that erasure would be the appropriate sanction.

28. In making their determination on sanction the Tribunal considered aggravating and mitigating factors. At Paragraphs 13 to 16 of their decision the Tribunal state:

"13. The Tribunal consider the following to be aggravating features of Mr Adil's case.

• The Tribunal has no evidence before it that Mr Adil demonstrates any insight into his misconduct. He has not provided a reflective statement as suggested by the 2022 Tribunal.

• Mr Adil has made no attempt to remediate his misconduct;

• He has repeated his conduct in November 2022 when he posted further messages on this topic as set out in the determination on impairment;

• The Tribunal has Mr Adil's witness statement which confirms that Mr Adil still holds the same views which were reflected in the videos he posted, and which were the subject of the original misconduct;

• Mr Adil appears to have misled the 2022 Tribunal in expressing that he no longer held these views and regretted his actions. His developing insight appears not to have been genuine.

• Mr Adil misled his Appraiser on 4 September 2023 by suggesting he had a level of insight and remorse and produced evidence of remediation. Further he attended (sic) to engage positively at the MPTS hearing.

14. The Tribunal balanced those aggravating features against what it considered to be the mitigating features in this case.

Mitigating Factors

15. The Tribunal first considered the mitigating factors found by the 2022 Tribunal, and whether they were still present, these were:

• Mr Adil's XXX had played a part in his misconduct;

• His XXX, meant that his actions were not reckless or deliberate;

• There had been no repetition of the misconduct;

• He had shown developing insight and expressed remorse.

16. The Tribunal considered that these mitigating factors were no longer present. The Tribunal did not identify any mitigating factors."

29. The Tribunal determined that the sanction of no action was not appropriate or proportionate. The Tribunal held that it did not consider that workable conditions could be devised to reflect the seriousness of the misconduct. The Tribunal determined that an order of suspension was not appropriate.

30. The Tribunal considered the sanction of erasure at paragraphs 29 to 36 of their decision. At paragraphs 30 to 31 the Tribunal stated:

"30. The Tribunal had regard to the following paragraphs of the SG, which it considered to be engaged in this case, in particular:

'108 Erasure may be appropriate even where the doctor does not present a risk to patient safety, but where this action is necessary to maintain public confidence in the profession. For example, if a doctor has shown a blatant disregard for the safeguards designed to protect members of the public and maintain high standards within the profession that is incompatible with continued registration as a doctor.

109 Any of the following factors being present may indicate erasure is appropriate (this list is not exhaustive),

a A particularly serious departure from the principles set out in Good medical practice where the behaviour is fundamentally incompatible with being a doctor.

b A deliberate or reckless disregard for the principles set out in Good medical practice and/or patient safety.

c Doing serious harm to others (patients or otherwise), either deliberately or through incompetence and particularly where there is a continuing risk to patients,

…

j Persistent lack of insight into the seriousness of their actions or the consequences,'

31. The Tribunal considered all the above paragraphs were engaged in this case and was of the view that action was necessary to maintain public confidence in the profession."

31. The Tribunal directed that the Appellant's name be erased from the Medical Register.

32. On 17th October 2023 the Appellant filed an appeal to the High Court against the decision of the Tribunal to order that his name be erased from the register.

33. On the 2nd November 2023 the Court of Appeal affirmed Swift J's decision ([2023] EWCA Civ 1261).

The Application to Admit Documents

34. The Appellant seeks to adduce evidence which was not before the Tribunal when it made the decision under appeal.

35. At the hearing, the Respondent objected to the admission in the High Court of the evidence which was not before the Tribunal. The documents to which objection was taken were included in bundles which had been submitted to the court. I indicated that I would accept the documents de bene esse and incorporate in my judgment a ruling on whether or not they should be admitted.

36. I asked Mr Mant to produce a schedule of the documents to which objection was taken, and he undertook to provide that schedule following the hearing.

37. On 26th November 2024 I received a schedule which identifies the additional documents and sets out the position of the Respondent and the Appellant on whether or not they should be admitted. The Respondent has indicated that it has no objection to certain documents being admitted as legal submissions or as case law. Accompanying the schedule was a document produced by the Appellant dated 23rd November 2024 and headed 'Summary of My Case in Entirety' ("the Summary Document"). In a letter to the court dated 29th November 2024, the Appellant withdrew the Summary Document.

38. The Respondent does not object to the following documents being considered by the court so long as they are treated as being legal submissions:

i) 'Closing Statement' made by the Appellant dated 12th September 2024.

ii) Appellant's Skeleton Argument dated 27th September 2024.

iii) Statement of the Appellant dated 13th October 2024.

iv) Appellant's Skeleton Argument dated 6th November 2024.

v) Appellant's Skeleton Argument with chronology (undated).

39. I admit those documents as legal submissions.

40. The Respondent argues that correspondence relating to expenses, and bank statements, should be admitted and considered in relation to costs only. The Appellant submits that the correspondence should be admitted as evidence going to the question of financial hardship.

41. Admission of the following documents is in dispute:

i) The Appellant's Hearing Bundle:

a) Executive Summary of a report of a GMC Internal Review on Doctors who commit suicide while under GMC fitness to practise investigation (14th December 2014).

b) Government guidance on 'High consequence infectious diseases'.

c) Article on Thomas Rivers Revision of Koch's Postulates (1937).

d) List of 'Doctors who had breached COVID narrative, vaccine mandate and lockdown without any discipline by the trust, medical regulator and the NHS.

e) Article relating to sexual misconduct of doctors.

f) Letter from the Appellant dated 13th October 2024 concerning 'Partygate'.

g) An illegible screenshot.

ii) The Appellant's Skeleton Argument Bundle:

a) ACPGBI 2024 Annual Meeting certificate of attendance 01.07.24-03.07.24

b) Advanced coloproctology course certificate 20.03.24-21.03.24

c) Certificate of attendance at the European Association of Endoscopic Surgery 14.06.17- 17.06.17

d) Healthier Business Group certificates relating to courses undertaken in 2021 and 2022.

e) ACI certificate relating to a course undertaken in 2020.

f) Interact medical certificate relating to training in 2020, 2021 and 2022.

g) References dated 30th April 2017, 28th June 2018, 2nd July 2018, 4th July 2018, 24th August 2018, 15th March 2019, 12th May 2019, 12th December 2019 (x 2), 13th December 2019, 8th March 2022, and 16th November 2023.

h) News articles relating to COVID-19.

iii) The Appellant's Second Supplementary Bundle:

a) News articles relating to the role of the GMC.

b) Certificates and other documents relating to the Appellant's attendance at continuing professional development events. Some of those certificates are duplicates of those forming part of the Skeleton Argument Bundle.

c) The Appellant's bank statements.

d) Utility bills.

e) Universal credit statements.

f) Articles on doctors committing suicide whilst under GMC investigation.

42. Part 52.21(2) of the Civil Procedure Rules ("CPR") provides:

"(2) Unless it orders otherwise, the appeal court will not receive—

(a) oral evidence; or

(b) evidence which was not before the lower court."

43. Mr Mant, for the Respondent, submitted that the principles established in ***Ladd v. Marshall*** [1954] 1 WLR 1489 apply when exercising the discretion conferred on the Court by CPR 52.21(2), and are consistent with the overriding objective set out at CPR 1.1. In making that submission Mr Mant relies upon ***General Medical Council v. Adeogba*** [2016] 1 WLR 3867, and in particular, paragraph 31 of the judgment of Sir Brian Leveson P (with whom the other members of the Court of Appeal agreed).

44. In ***Ladd v. Marshall*** (at page 1491) Denning LJ (as he then was) identified three conditions:

" To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be

believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

45. Mr Mant objected to the admission of the documents (the admission of which were identified in the schedule as being in dispute) on the ground that those documents could have been submitted to the review tribunal had the Appellant wished to do so.

46. The Appellant argues that the documents should be admitted as they are relevant when considering whether the sanction imposed was proportionate.

47. When notified of the review hearing which was to be held by the Tribunal on 18th September 2023 the Appellant responded by stating that he did not wish to attend but that he did wish to make written representations. The Appellant submitted written representations which included the witness statement dated 18th August 2023, and supporting documents.

48. The majority of the additional documents on which the Appellant seeks to rely were in existence in August and September 2023. The exceptions are the documents relating to the Appellant's finances, documents relating to continuing professional development courses undertaken after September 2023, one reference, and information relating to deaths by suicide of medical doctors published by the Office for National Statistics in October 2023.

49. Evidence which was not before the Tribunal can only be admitted by order of this court. The discretion to admit such evidence must be exercised in accordance with the overriding objective of enabling the court to deal with cases justly and at proportionate cost, and in particular ensuring that the case is dealt with fairly.

50. Insofar as the documents on which the Appellant seeks to rely predate the September 2023 hearing (including those relating to the Appellant's finances), there is no evidence before the court to demonstrate that they could not have been obtained with reasonable diligence and submitted with the Appellant's August 2023 witness statement. I note that the Appellant did, in August 2023, submit information which he considered to be relevant, in particular a letter before action relating to a case in Australia. For that reason, and in relation to those documents, the first condition set out in ***Ladd v. Marshall*** is not satisfied. On that basis, and on the basis of the application of the overriding objective, I reject the application to admit documents which were in existence at the date of the hearing in September 2023.

51. The documents which were not in existence at the date of the hearing in September 2023 do not fall into the category of evidence which demonstrates a change of circumstances since the original decision was made. The documents relate to other investigations by the GMC on different facts, to the Appellant's continuing professional development and finances, and a reference from a professional colleague. Information relating to the Appellant's continuing professional development was before the Tribunal and included in the hearing bundle prepared for the Tribunal hearing. The post hearing documents can properly be said to be an 'update' to information which was available in August/September 2023 and do not introduce new factors such as to have an important influence on the outcome of the case. As a result, the second condition set out in ***Ladd v. Marshall*** is not satisfied. On that basis, and on the basis of the application of the overriding objective, I reject the application to

admit documents which came into existence after the date of the hearing in September 2023.

The Legal Framework

52. A Medical Practitioners Tribunal is a committee of the General Medical Council (Section 1(3) of the 1983 Act).

53. Section 1 of the 1983 Act provides:

"…

(1A) The over-arching objective of the General Council in exercising their functions is the protection of the public.

(1B) The pursuit by the General Council of their over-arching objective involves the pursuit of the following objectives—

(a) to protect, promote and maintain the health, safety, and well-being of the public,

(b) to promote and maintain public confidence in the medical profession, and

(c) to promote and maintain proper professional standards and conduct for members of that profession."

54. The appeal to the High Court from the Tribunal is brought pursuant to the provisions of section 40 of the 1983 Act.

55. Section 40(7) of the 1983 Act provides:

"(7) On an appeal under this section from [a Medical Practitioners Tribunal] , the court may—

(a) dismiss the appeal;

(b) allow the appeal and quash the direction or variation appealed against;

(c) substitute for the direction or variation appealed against any other direction or variation which could have been given or made by [a Medical Practitioners Tribunal]; or

(d) remit the case to [the MPTS for them to arrange for] [a Medical Practitioners Tribunal] to dispose of the case in accordance with the directions of the court,

and may make such order as to costs (or, in Scotland, expenses) as it thinks fit."

56. Part 52.21 of the CPR provides:

"(1) Every appeal will be limited to a review of the decision of the lower court unless —

(a) a practice direction makes different provision for a particular category of appeal; or

(b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.

…….

(3) The appeal court will allow an appeal where the decision of the lower court was—

(a) wrong; or

(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court."

57. Practice Direction 52D ("PD 52D") paragraph 19.1 applies to appeals under section 40 of the 1983 Act. PD 52D paragraph 19.1(2) provides:

"(2) Every appeal to which this paragraph applies must be supported by written evidence and, if the court so orders, oral evidence and will be by way of re-hearing."

58. An appellate court must approach a challenge to the sanction imposed by a professional disciplinary committee with diffidence (***Khan v. General Pharmaceutical Council*** [2017] 1 WLR 169, Lord Wilson JSC (with whom the other Justices of the Supreme Court agreed) at paragraph 36).

59. The nature of an appeal made under section 40 of the 1983 Act was considered by the Court of Appeal in ***Sastry v. General Medical Council*** [2021] EWCA Civ 623. Nicola Davies LJ, giving the judgment of the court, stated (at paragraph 102):

"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."

60. At paragraph 112 in ***Sastry*** Nicola Davies LJ considered the extent of the court's duty on appeal, stating:

"112. Appropriate deference is to be paid to the determinations of the MPT in section 40 appeals, but the court must not abrogate its own duty in deciding whether the sanction imposed was wrong; that is, was it appropriate and necessary in the public interest. In this case the judge failed to conduct any analysis of whether the sanction imposed was appropriate and necessary in the public interest or whether the sanction was excessive and disproportionate, and therefore impermissibly deferred to the MPT."

61. In this case the decision under appeal was a decision made on a review. Section 35D(5) of the 1983 Act provides:

"(5) On a review arranged under subsection (4A) or (4B), a Medical Practitioners Tribunal may, if they think fit—

(a) direct that the current period of suspension shall be extended for such further period from the time when it would otherwise expire as may be specified in the direction;

(b) except in a health case or language case or a case of suspension under paragraph 5A(3D) or 5C (4) of Schedule 4, direct that the person's name shall be erased from the register;

(c) direct that the person's registration shall, as from the expiry of the current period of suspension or from such date before that expiry as may be specified in the direction, be conditional on his compliance, during such period not exceeding three years as may be specified in the direction, with such requirements so specified as the Tribunal think fit to impose for the protection of members of the public or in his interests; or

(d) revoke the direction for the remainder of the current period of suspension, but, subject to subsection (6) below, the Tribunal shall not extend any period of suspension under this section for more than twelve months at a time."

62. On a review the Tribunal must consider and announce its finding on whether the fitness to practise of the practitioner is impaired (Rule 22(1)(f) of the General Medical Council (Fitness to Practise) Rules Order of Council 2004).

63. The effect of Rule 22 was considered by Blake J in ***Abrahaem v General Medical Council*** [2008] EWHC 183 at paragraph 23:

"The statute is to be read together with the 2004 Rules (cited [12] above) and Rule 22 a) to i) makes clear that there is an ordered sequence of decision making, and the Panel must first address whether the fitness to practice is impaired before considering conditions. In my judgment, the statutory context for the Rule relating to reviews must mean that the review has to consider whether all the concerns raised in the original finding of impairment through misconduct have been sufficiently addressed to the Panel's satisfaction. In practical terms there is a persuasive burden on the practitioner at a review to demonstrate that he or she has fully acknowledged why past

professional performance was deficient and through insight, application, education, supervision or other achievement sufficiently addressed the past impairments."

64. When a Tribunal finds that the practitioner's fitness to practise continues to be impaired it must proceed to determine sanction. In ***Okpara v. Nursing and Midwifery Council*** [2016] EWHC 1058 (Admin) the court considered the approach to be taken when considering whether a striking off order for a nurse was proportionate. At paragraph 48 Warby J followed the principles set out in relation to solicitors:

"48. The relevant principles are of long standing and have never been better expressed than by Sir Thomas Bingham MR in *Bolton v The Law Society* [1994] 1 WLR 512. In words that apply as well to a nurse appearing before the CCC as to a lawyer subject to discipline by their regulator he said this at 519:

"It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. A solicitor can often show that for him and his family the consequences of striking off and suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again … All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence … the reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price." "

65. The General Medical Council has issued Sanctions Guidance for use by members of medical practitioners' tribunals. The Sanctions Guidance is non-statutory guidance, which helps provide consistency of approach, and should be consulted by a medical practitioners tribunal (***Bawa-Garba v. General Medical Council*** [2018] EWCA Civ 1879 at paragraph 81). That document includes guidance on mitigating and aggravating features to consider. The following example of a mitigating factor is given at paragraph 25(b) of the guidance in force at the time that the decision under appeal was made:

"Evidence that the doctor is adhering to important principles of good practice (ie keeping up to date, working within their area of competence), and of the doctor's character and previous history."

66. The following is included in the examples of aggravating factors set out in the Sanctions Guidance (at paragraphs 51 and 52):

"Lack of insight

51 It is important for tribunals to consider insight, or lack of, when determining sanctions. It is particularly important in cases where the doctor and the GMC agree undertakings, or the tribunal imposes conditions. The tribunal must be assured that this approach adequately protects patients, in that the doctor has recognised the steps they need to take to limit their practice to remediate.

52 A doctor is likely to lack insight if they:

a refuse to apologise or accept their mistakes

b promise to remediate, but fail to take appropriate steps, or only do so when prompted immediately before or during the hearing

c do not demonstrate the timely development of insight

d fail to tell the truth during the hearing (see paragraph 72 of Good medical practice)."

Consideration of the Ground of Appeal

The Appellant's Submissions

67. The Appellant submits that:

i) The sanction imposed was disproportionate and excessive.

ii) At the hearing before the Tribunal in September 2023 the GMC's initial suggestion was that suspension was appropriate. The GMC's initial approach is an indicator that erasure was an excessive and disproportionate sanction.

iii) In weighing the proportionality of the sanction, public confidence in the profession must be assessed by reference to the standard of the ordinary intelligent citizen (***Bawa-Garba*** at paragraph 96, citing the judgment of Holgate J in ***Wallace v. Secretary of State for Education*** [2017] PTSR 675 at paragraphs 92 and 96(v)).

iv) Most members of the public would consider sexual misconduct to be more serious than the public statements of the kind made by the Appellant. The sanction of suspension has been applied in cases where the misconduct was inappropriate sexual behaviour.

v) There was no evidence that the Appellant's actions (in making public statements) in fact caused any harm. The Tribunal erred by failing to consider whether harm was caused to patient safety.

vi) In stating that it did not identify any mitigating factors the Tribunal did not take account of:

a) The Appellant's unblemished previous record of 30 years in medical practice.

b) The absence of complaints from patients.

c) The contribution that the Appellant could make to the provision of healthcare services in the NHS.

d) The impact erasure would have on the Appellant and his family, including one of his children who has special needs.

e) The fact that he had made no further Tweets since November 2022.

vii) The sanction of erasure was disproportionate, unfair and draconian.

The Respondent's Submissions

68. Mr Mant, on behalf of the Respondent, submitted:

i) The sanction of erasure was necessary in the public interest and appropriate given:

a) The seriousness of the original misconduct;

b) The subsequent repetition of similar misconduct;

c) The apparent misleading of the 2022 Tribunal and the September 2023 appraiser;

d) The Appellant's complete lack of insight; and

e) The on-going risk of repetition.

ii) The Appellant's actions objectively undermined public confidence.

a) Specific evidence relevant to public trust and confidence is not required because the matter is to be judged based upon an objective standard applied by an expert tribunal (per Swift J at paragraph 35 in ***Adil v. General Medical Council*** [2023] EWHC 797 (Admin) an approach which was not challenged in the Court of Appeal).

b) Central to the Court of Appeal's decision was the finding at paragraph 61 (***Adil v. General Medical Council*** [2023] EWCA Civ 1261)

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

iii) Meaningful comparisons cannot be made between the present case, which concerns comments made to the public at large, and other cases of serious clinical failure involving a single patient (***Bawa-Garba***) or sexual misconduct.

Discussion

69. Although appropriate deference must be paid the decision of the Tribunal, the court must not abrogate its duty to consider whether the sanction was appropriate and necessary in the public interest, and to consider whether it was excessive and disproportionate (***Sastry*** at paragraph 112).

70. In the decision under challenge the Tribunal was conducting a review. A review has to consider whether all the concerns raised in the original finding of impairment through misconduct have been sufficiently addressed to the panel's satisfaction (***Abrahaem*** at paragraph 23).

Article 10

71. The Appellant argues that the sanction was a disproportionate interference with his right to freedom of expression pursuant to Article 10.2 of the European Convention on Human Rights ("the Convention"). The application of Article 10.2 to the specific facts of this case was considered by Popplewell LJ when giving judgment in Mr Adil's case in the Court of Appeal (***Adil v. GMC*** [2023] EWCA Civ 1261 at paragraph 65):

> "65 Here again, the most important features of the appellant's conduct are that the views he expressed repeatedly over a period of time during the early stages of the pandemic were baseless, dangerous and given by a doctor invoking his senior professional status and experience to lend them credence. The seriousness of that conduct fully justifies the conclusion that it fell well short of the standards to be expected of a senior doctor and undermined public trust in the medical profession; and that the application of disciplinary sanctions is a necessary and proportionate interference with freedom of expression in the interests of public health and safety in order to maintain public trust in the NHS and deter others from such unprofessional and dangerous conduct. Those were the conclusions of an expert tribunal whose views, on this aspect of their evaluation, command respect and a due degree of deference. In any event they are the same conclusions as I have myself reached independently."

72. The Court of Appeal has found that the application of disciplinary sanctions in this case is a necessary and proportionate interference with freedom of expression in the interests of public health and safety in order to maintain public trust in the NHS and deter others from such unprofessional and dangerous conduct. Given that determination the Appellant cannot argue that the imposition of a sanction is a disproportionate interference with his freedom of expression. Recognising that point, the Appellant argues that the sanction of erasure was disproportionate.

73. Opinions which have been found to be 'baseless and dangerous' are not legitimate in the sense of enjoying immunity under Article 10. Once it is established that the application of disciplinary sanctions is a necessary and proportionate interference with freedom of expression in the interests of public health and safety in order to maintain public trust in the NHS and deter others from such unprofessional and dangerous conduct, the full range of sanctions available to the Tribunal fall to be considered depending upon the facts of the case. Whether the sanction was disproportionate on the facts is considered below.

The GMC's change in position at the September 2023 hearing

74. The initial suggestion made on behalf of the GMC at the September 2023 review hearing was that the appropriate sanction was a further period of suspension with a review hearing. The rationale for that suggestion was that the hearing before the Court of Appeal was listed for the 19th October 2023 and that a suspension would protect the public and allow the appropriate sanction to be reviewed in the light of the judgment of the Court of Appeal. The submission made on behalf of the GMC was then changed to a suggestion that erasure was the appropriate sanction on the basis that the Appellant had shown no insight, had misled the previous tribunal and had misled the appraiser.

75. I note that the final position of the GMC was that erasure was the appropriate sanction.

76. The Tribunal's decision on appropriate sanction was matter for their own independent judgment. The fact that the GMC at first suggested suspension as the appropriate remedy is an indicator that suspension was among the reasonable options to be considered by the Tribunal. However, that suggestion did not prevent the Tribunal from considering other options and does not indicate that erasure was beyond the reasonable range of sanctions open to the Tribunal.

77. The suggestion that suspension was an appropriate sanction was made in a specific context, namely that the Appellant's appeal against the judgment of Swift J was yet to be determined, and that suspension would allow a review to be undertaken following the Court of Appeal's decision. Indeed, counsel for the GMC told the Tribunal that, but for the appeal, the sanction submission would be far more 'draconian'. The Tribunal decided to impose a final sanction. In my judgment the fact that the GMC at first suggested suspension followed by review as an option does not, of itself, indicate that erasure was a disproportionate final sanction in this case.

Impact on public confidence in the profession and evidence of harm

78. I accept Mr Mant's submission in relation to this point.

79. As held by Swift J (at paragraph 35 in ***Adil v. GMC***) whether conduct has tended to diminish public trust and confidence in the profession required the Tribunal to apply its own expertise to assess whether, objectively, the conduct found to have occurred had that effect on an ordinary, reasonable member of the public. Evidence of harm to specific members of the public or of undermining of the confidence of specific members of the public was not required.

80. The Court of Appeal (at paragraph 65 in ***Adil***) referred to the fact that the 2022 Tribunal had found that the views expressed by the Appellant were baseless and dangerous. Popplewell LJ said that they were the conclusion he had reached independently.

81. In its decision the Tribunal referred to paragraphs 108 and 109 of the Sanctions Guidance and found that paragraph 108, and paragraphs 109 (a), (b), (c) and (j) were engaged. Paragraph (c) states "Doing serious harm to others (patients or otherwise), either deliberately or through incompetence and particularly where there is a continuing risk to patients."

82. The Tribunal turned its mind to the relevant guidance and made a finding that the guidance that applies when an Appellant's actions had caused serious harm to others was engaged. There is no indication that the Tribunal applied an inappropriate or otherwise defective approach in coming to that conclusion. The Tribunal exercised its own objective judgment and there was no error in its approach.

Comparison with other cases

83. The facts of each case are different. In this case the Tribunal was considering a review. As a result, the Tribunal had to consider whether the concerns raised in the original finding of impairment through misconduct had been sufficiently addressed to their satisfaction. That determination had to be made in the context of the reasons given by the 2022 Tribunal for imposing a suspension. Those reasons included to allow the Appellant sufficient time to continue his remediation and to reflect on the Tribunal's finding. In that context it is difficult to make direct comparisons with the other cases referred to by the Appellant, including those concerned with sexual misconduct. In any event those cases do not indicate that erasure was a disproportionate sanction in this case when the Tribunal were undertaking a review.

Mitigation

84. As Sir Thomas Bingham MR stated in ***Bolton v. Law Society*** [1994] 1 WLR 512 (at page 519) matters of mitigation such as references, past professional record, and the impact of a sanction on the regulated professional's family are all relevant and should be considered, although none of them touches on the essential issue being the need to maintain public confidence in the profession.

85. In this case the Tribunal held that the mitigating factors identified by the previous tribunal in 2022 were no longer present and did not identify any mitigating factors. The non-statutory Sanctions Guidance states (at paragraph 24):

"The tribunal needs to consider and balance any mitigating factors presented by the doctor against the central aim of sanctions (see paragraphs 14–16). The tribunal is less able to take mitigating factors into account when the concern is about patient safety, or is of a more serious nature, than if the concern is about public confidence in the profession."

86. In this case the Tribunal found that the sanction of erasure was the only means of protecting the public, maintaining professional standards and maintaining public confidence in the profession. The matter before the Tribunal did not concern direct impact on patient safety and therefore was not a case of the kind referred to in the Sanctions Guidance where a tribunal is less able to take mitigating factors into account.

87. The Appellant argues that the Tribunal erred by failing to identify and take into account mitigating factors.

88. Mr Mant argues that the Tribunal did not err in failing to take account of mitigating factors as the factors relied upon did not mitigate the concerns previously identified,

being (in the main) the Appellant's lack of insight into the effect of his actions on the public at large, and public confidence in the medical profession. In the alternative Mr Mant argues that even if the Tribunal erred in not taking account of mitigation, their decision could not properly be categorised as being wrong.

89. The case put forward by the Appellant in his witness statement dated 15th August 2023 was, in the main, based upon arguments that the statements that he made on social media were evidence based. The Appellant did not put forward an extensive case on mitigation, although he did rely on the fact that he had lost his career, reputation and substantial income.

90. The Tribunal made two findings on mitigation. It considered that the specific mitigating factors taken into account by the 2022 Tribunal were no longer present. The Tribunal also stated that it did not identify any mitigating factors. Given the Tribunal's findings, in particular the identification of the aggravating features at paragraph 13 of their decision on sanctions, their finding that the mitigating features listed in paragraph 15 of their decision were no longer present cannot legitimately be criticised. However, the second finding, that the Tribunal did not identify any mitigating factors can be the subject of valid criticism as the Appellant had put forward his previous record of service in the NHS, the absence of complaints from patients, the contribution he could make to the NHS in the future, his undertaking professional courses and the impact that sanctions would have on this finances and his family as mitigation. Keeping up to date with principles of good practice, and past record are both identified as mitigating factors in paragraph 25(b) of the Sanctions Guidance. Personal and professional matters are identified in paragraph 25(d) of the Sanctions Guidance. In my judgment the Tribunal erred by failing to take into account mitigation based on keeping up to date with professional issues, past record and personal circumstances.

Conclusions

91. The question for the court is whether the decision under appeal was wrong, in the sense that the sanction was not appropriate and necessary in the public interest.

92. I have found that the Tribunal erred by not taking into account certain aspects of the mitigation advanced by the Appellant. However, as made plain by Sir Thomas Bingham MR in ***Bolton*** none of those factors touches on the essential issue, which is the need to maintain public confidence and trust in the medical profession. In addition, none of those factors goes to the question of whether the concerns raised in the original finding of impairment through misconduct have been sufficiently addressed.

93. In my judgment the sanction of erasure was necessary and appropriate in the public interest. The views expressed by the Appellant have been held to be baseless and dangerous and given by a doctor invoking his senior professional status and experience to lend them credence. A review hearing was arranged at which the Appellant had an opportunity to demonstrate insight to address the impairment. The Appellant submitted a witness statement in which he sought to justify his previous statements. He did not take up the opportunity to demonstrate insight or meaningful

reflection on the findings made by the 2022 Tribunal. The Tribunal found that the Appellant made no attempt to remediate his misconduct and that he repeated the previous conduct by posting further messages in November 2022. The Tribunal found that there was a total lack of insight. In those circumstances the misconduct was so serious that action was required to protect members of the public and to maintain public confidence in the medical profession. Taking account of personal mitigation does not alter that conclusion as it does not go to the essential issue of maintaining public confidence in the medical profession. For those reasons the Tribunal's decision cannot be categorised as being wrong, and decision to erase the Appellant's name from the medical register as both appropriate and necessary.

94. I have considered whether, if I had admitted in evidence the additional documents submitted by the Appellant it would have made a difference to the outcome. I have come to the conclusion if that evidence had been admitted it would not have made a difference to the outcome as that evidence does not go to the essential issue of the need to maintain public confidence and trust in the medical profession.

Conclusion

95. For the reasons I have given the appeal is dismissed.