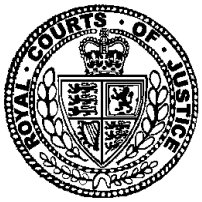

Neutral Citation Number: [2020] EWHC 2168 (Admin)

Case No: CO/4998/2019

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

Manchester Civil Justice Centre
1 Bridge Street West, Manchester, M60 9DJ

Date: 11/08/2020

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

DR MUKHLIS AZIZ ABID SIMAWI	**Appellant**
- and -	
GENERAL MEDICAL COUNCIL	**Respondent**

- -
- -

Mary O'Rourke QC (instructed by **Burton Copeland LLP**) for the **Appellant**
Alexis Hearnden (instructed by **GMC Legal**) for the **Respondent**

Hearing date: **15 July 2020**

- -

Approved Judgment

The Honourable Mr Justice Julian Knowles:

Introduction

1. This is the Appellant's appeal against the sanction imposed upon him on 21 November 2019 by the Medical Practitioners Tribunal (the Tribunal). The sanction was a nine-month suspension of his medical registration pursuant to s 35D(2)(b) of the Medical Act 1983 (MA 1983). The Tribunal also gave a direction that the suspension period be reviewed prior to its expiry, pursuant to s 35D(4A).

2. There is no challenge to the findings of fact which the Tribunal made, nor to its determination that the Appellant's fitness to practice was impaired as a result. I am solely concerned with the length of the suspension and the Tribunal's direction for a review.

3. In summary, Ms O'Rourke QC for the Appellant submitted that nine months' suspension was too long in the all the circumstances, and that there was no proper basis for the Tribunal to have directed a review. Ms Hearnden for the GMC argued that these sanctions were justified.

The factual background

Summary

4. The sanction was imposed following two findings of dishonesty made by the Tribunal against the Appellant. The findings did not relate to patient care and there was no suggestion that patients were put at risk.

5. In December 2016 the Appellant accepted an offer of employment as an anaesthetist based at King's College Hospital NHS Foundation Trust (King's) in December 2016 and commenced employment in February 2017. Shortly after he started, concerns were raised by the Anaesthetics Delivery Manager about a study leave application submitted by the Appellant seeking leave to attend a course in Dresden – Leginica between 20-27 February 2017.

6. The GMC's central case was that the Appellant made the study leave application for a conference that did not exist, and that he later submitted false documents in support of his attendance, including a false attendance certificate, false conference programme and fabricated email correspondence.

7. It was further alleged that the Appellant submitted false documents to an Interim Orders Tribunal.

8. In December 2017 the Appellant submitted an application for a post of Senior Clinical Fellow in Anaesthesia at Chelsea and Westminster Hospital NHS Foundation Trust (Chelsea and Westminster). The GMC further alleged that the Appellant failed to disclose to Chelsea and Westminster the fact that he had been subject to a GMC investigation and that conditions had been imposed on his registration at an Interim Orders Tribunal.

9. The Appellant was represented by counsel before the Tribunal. Neither the doctor nor his counsel attended from Day 10 (when the determination on impairment was announced). The Appellant's counsel submitted written submissions on his behalf.

Allegations

10. The allegations against the Appellant were lengthy, as follows:

> "*Study Leave Application*
>
> 1. After accepting an offer of employment at King's College Hospital NHS Foundation Trust ('the Trust') in or around December 2016, you sent an email to Dr A on 31 December 2016 advising him that you:
>
> a. would be abroad attending a conference between 20 and 27 February 2017; *Admitted and found proved*
>
> b. had made arrangements to attend the conference in early 2016. *Admitted and found proved*
>
> 2. On 5 January 2017 you sent an email to Ms B informing her that you would be attending a conference and asked for it to be accommodated on your rota as leave. *Admitted and found proved*
>
> 3. You knew that you had not arranged to attend a conference between 20 and 27 February 2017. *To be determined*
>
> 4. Your actions at paragraph 1 and 2 were dishonest by reason of paragraph 3. *To be determined*
>
> 5. On or around 13 February 2017 you submitted to the Trust:
>
> a. an application for study leave for a conference called '5th Symposium in Anaesthetics and ICM' in Dresden-Legnica, Germany, ('the Dresden Conference'); *To be determined*
>
> b. email confirmation from Mr C at 'support@ccage.com' dated 6 September 2016 purporting to be for registration and payment to attend the Dresden Conference; *To be determined*
>
> c. a programme purporting to be for the Dresden Conference ('the Dresden Programme'). *To be determined*
>
> 6. You knew that the documents that you submitted as described at paragraph 5 above were falsified in that you knew that the:
>
> a. Dresden Conference was fabricated; *To be determined*
>
> b. email address of Mr C was not in use; *To be determined*
>
> c. organisation 'ccage' did not exist; *To be determined*

d. Dresden Programme was a copy of another conference programme. *To be determined*

7. Your actions described at paragraph 5 were dishonest by reason of paragraph 6. *To be determined*

8. You took study leave from the Trust for the Dresden Conference. To be *determined*

9. Your action described at paragraph 8 was dishonest by reason of paragraph 6(a). *To be determined*."

Investigation by the Trust

10. On or around 1 March 2017 you confirmed to the Trust that:

a. you had attended a conference; *Admitted and found proved*

b. the conference location had been changed to take place in Krakow, Poland ('the Krakow Conference'). *Admitted and found proved*

11. Your statements as described at paragraph 10 were:

a. untrue; *To be determined*

b. known by you to be untrue. *To be determined*

12. Your actions at paragraph 10 were dishonest by reason of paragraph 11. *To be determined*

13. On 1 March 2017 you sent an email to Dr D in which you:

a. attached a document that purported to be an attendance certificate for the Krakow Conference ('the Certificate'), which:

i. was signed and dated 27 February 2017; *Admitted and found proved*

ii. included a stamp logo of the District Medical Chamber in Krakow ('the Chamber'); Amended under Rule 17(6) *Admitted and found proved*

b. told Dr D that you were 'a member of Polish Medical Chamber in Krakow', or words to that effect. *Admitted and found proved*

14. You knew that the Certificate was falsified in that the Chamber did not:

a. organise and/or co-organise the Krakow Conference; *To be determined*

b. issue the Certificate; *To be determined*

c. sign the Certificate; *To be determined*

d. ~~stamp the Certificate~~. authorise the use of their logo Amended under Rule 17(6); *To be determined*

15. You knew that the statement as set out at paragraph 13(b) above was untrue in that you knew that you were not a member of a Medical Chamber in Poland at that time. *To be determined*

16. Your actions described at paragraph:

a. (13a) were dishonest by reason of paragraph 14; *To be determined*

b. (13b) were dishonest by reason of paragraph 15. *To be determined*

~~17. On or around 1 June 2017 you submitted to the Trust a document purporting to be a programme for the Krakow Conference ('the Krakow Programme'). *Admitted and found proved'* or *'To be determined'*~~ Withdrawn by the GMC

18. On or around 20 October 2017 you submitted to the Trust a:

a. Google search screenshot purporting to show the Krakow Conference website, www.krakow-anaesthesia.pl; *Admitted and found proved*

b. ~~further~~ copy of the document purporting to be a programme for the Krakow Conference ('the Krakow Programme'); Amended under Rule 17(6): *To be determined*

c. document purporting to be a transaction confirmation for the Krakow Conference. *Admitted and found proved*

19. You knew that the documents that you submitted as described at paragraph~~s 17 and/or~~ 18 above were falsified in that you knew that the Amended under Rule 17(6) a. website described at paragraph 18

a. was created after 27 February 2017; *To be determined*

b. Krakow Programme content was a copy of one or more other conference programmes; *To be determined*

c. Krakow Conference did not take place. *To be determined*

20. Your actions described at paragraph ~~17 and/or~~ 18 were dishonest by reason of paragraph 19. Amended under Rule 17(6); *To be determined*

21. On 25 July 2017 you informed Ms B by text message that the Trust rota was incorrect as your leave between 20 and 27 February 2017 was annual leave as you were not entitled to study leave at the Trust, or words to that effect. *Admitted and found proved*

22. Your statement as described at paragraph 21 was untrue in that you:

a. knew that you were entitled to study leave as set out in the Trust's Terms and Conditions, which you had signed; *To be determined*

b. had submitted an application for study leave as described at paragraph 5(a) above. *To be determined*

23. Your actions as described at paragraph 21 were dishonest by reason of paragraph 22. *To be determined*

Interim Orders Tribunal

24. On 29 November 2017 you submitted a defence bundle to the GMC for the purpose of an Interim Orders Tribunal ('IOT'), which included emails dated 19 October 2017 from:

a. Mr C; *Admitted and found proved*

b. Ms E. *Admitted and found proved*

25. You knew that the emails described at paragraphs 24(a) and 24(b) above contained false information as neither the Dresden Conference nor Krakow Conference took place. *To be determined*

26. Your actions as described at paragraph 24 were dishonest by reason of paragraph 25. *To be determined*

Failure to disclose GMC Investigation and Interim Order

27. On 20 December 2017 you submitted an application for a post of Senior Clinical Fellow in Anaesthetics at Chelsea and Westminster Hospital NHS Foundation Trust in which you answered 'No' to the question:

a. 'Are you currently subject to a fitness to practise investigation and/or proceedings of any nature by a regulatory or licensing body in the UK or in any other country?' *Admitted and found proved*

b. 'Have you ever been removed from the register, or have conditions or sanctions been placed on your registration, or have you been issued with a warning by a regulatory or licensing body in the UK or in any other country? *Admitted and found proved*

28. You knew that your response as set out at paragraph 27(a) above was untrue in that you had been notified by the GMC that:

a. an investigation into your fitness to practise had been commenced by letter dated 3 August 2017; *Admitted and found proved*

b. an investigation had already opened and could not be reversed, by email dated 11 August 2017; *Admitted and found proved*

c. additional concerns raised by the Trust had been added to the investigation, by letters dated: *Admitted and found proved*

i. 18 August 2017; *Admitted and found proved*

ii. 7 November 2017. *Admitted and found proved*

29. You knew that your response as set out in paragraph 27(b) above was untrue in that you were present on 30 November 2017 when the Interim Order of conditions was imposed on your registration. *To be determined*

30. Your actions as described at paragraph:

a. 27(a) were dishonest by reason of paragraph 28; *To be determined*

b. 27(b) were dishonest by reason of paragraph 29. *To be determined*

31. By email dated 6 February 2018, you told Ms F that you 'never had any problems with previous employers', or words to that effect. *Admitted and found proved*

32. You knew your comment as set out in paragraph 31 above was untrue as you knew you had been subject to a formal investigation at the Trust. *To be determined*

33. Your action as described at paragraph 31 was dishonest by reason of paragraph 32. *To be determined*

34. By email dated 18 March 2018 to Ms G you:

a. supplied a copy of your revalidation details which had been amended to show:

i. the date at the top as 08/03/2018, instead of 15/03/2018; *To be determined*

ii. your designated body as last being updated on 08/03/2018, instead of 15/03/2018; *To be determined*

b. stated that 'GMC have conditions that I can't temporarily register with Private Locum agency and can't take private work, plus my

contract should be longer than four weeks. There are all conditions, nothing else.' *Admitted and found proved*

35. You knew that the amended dates as set out at paragraph 34(a) above were untrue. *To be determined*

36.You knew that your statement, as set out at paragraph 34(b) above was untrue in that you were present when the IOT imposed the interim order conditions on your registration which were more onerous than you described. To be determined

37. Your actions as described at paragraph:

a. 34(a) were dishonest by reason of paragraph 35; *To be determined*

b. 34(b) were dishonest by reason of paragraph 36. *To be determined*

38. On 22 March 2018 you:

a. commenced working at the Chelsea and Westminster Hospital NHS Foundation Trust without HR approval; *To be determined*

b. breached Condition 2a of your Interim Order of Conditions in that you did not notify the GMC of a post you had accepted before starting it. *To be determined*

And that by reason of the matters set out above your fitness to practise is impaired because of your misconduct.

The Tribunal's findings of fact

11. The Tribunal's findings in respect of the facts which had not been admitted were as follows.

12. It found the following allegations proved: [5(c)], [6(d)], [7], [18(b)], [29], [34(a)(i)], [34(a)(ii)], [35], [36], [37(a)], [38(a)], [38(b)]. The findings record [5(b)] as 'proved' but it is clear from the context this was an error and it should have read 'not proved'.

13. The findings in relation to [7] and [37(a)] were findings of dishonesty.

14. It found the other disputed allegations not proved.

15. In summary, therefore the Tribunal found that:

    a. The Dresden Conference Programme, which was submitted by the Appellant to King's (allegation [5(c)]) but not as part of the study leave application, had been created by the Appellant and was in fact a copy of another conference programme ([6(d)]), and in submitting the Dresden Programme, he acted dishonestly ([7]).

b. When submitting an application for a post of Senior Clinical Fellow in Anaesthetics at Chelsea and Westminster the Appellant failed to declare (when asked) the interim conditions that had been imposed on him by the Interim Orders Tribunal ([27]). The Appellant knew that response was untrue ([28] and [29]) but the Tribunal did not find those actions to have been dishonest ([30]).

c. The Appellant amended his revalidation dates in order to secure a more convenient start date at Chelsea and Westminster [34]), which he knew was untrue ([35], [36]) and this was dishonest ([37(a)]).

d. He commenced work at Chelsea and Westminster without HR approval and in breach of the Interim Orders Tribunal condition that he notify the GMC of a post before starting ([38(a)] and [38(b)]).

Impairment

16. At [33] of its determination on Impairment in relation to its findings of fact at [5(c)], [6(d)], and in particular [7] (a finding of dishonesty), the Tribunal said:

> "33. These paragraphs of the Allegation relate to the creation of the Dresden Conference programme and its submission to the Trust [ie, King's]. The Tribunal's finding of dishonesty under paragraph 7 of the Allegation, is a clear breach of GMP [*Good Medical Practice*, 2013 Edition], which the Tribunal had no doubt was a serious breach of a fundamental tenet of the profession. It would be considered deplorable by members of the profession. The Tribunal determined that such actions fell so seriously short of the standards of conduct reasonably to be expected of a doctor as to amount to misconduct."

17. At [34] in relation to allegations [10] and [13(a)] the Tribunal said that although admitted and found proved, it found that these allegations did not of themselves involve a breach of professional standards as set out in GMP. The Tribunal therefore said it did not need to consider the issue of misconduct in relation to these paragraphs.

18. In relation to [13(b)], at [35] of its impairment determination the Tribunal said that although the Appellant had made an incorrect statement in relation to this paragraph he had not appreciated he was doing so at the time, and it therefore found no misconduct in relation to this paragraph of the Allegation. At [36] and [38] it reached the same conclusions in relation to findings of fact [18], [21], [24] and [31]. At [40] and [41] it reached the same conclusion about the allegation in [38(a)].

19. In relation to [27a], [27b], [28] and [29], at [37] the Tribunal said that it:

> "… considered that paragraphs 68 and 71 of GMP were particularly relevant when reaching its decision. Although the Tribunal had not found any dishonesty on Dr Simawi's part in relation to these paragraphs of the Allegation, Dr Simawi had submitted an application, when under GMC investigation, to his prospective employer which was false and misrepresented his GMC status. The

> Tribunal earlier determined that Dr Simawi was lax and careless in reviewing the form and that his actions were far below the standards expected under GMP. The Tribunal determined this was a serious breach of GMP and amounted to misconduct."

20. In relation to [34], [35], [36] and [37(a)], the Tribunal said at [39]:

> "The Tribunal considered paragraphs 1, 65, and 71 of GMP to be of particular relevance. It has earlier found Dr Simawi to have been dishonest in relation to paragraph 37a of the Allegation. The Tribunal had no doubt that such dishonesty was a serious breach of Dr Simawi's professional obligations and would be considered deplorable by members of his profession. It was a breach of a fundamental tenet of the profession. Therefore, the Tribunal found Dr Simawi's actions to fall so seriously short of the requirements of GMP as to amount to misconduct."

21. At [42] the Tribunal said in relation to [38(b)]:

> "Paragraph 1 of GMP requires doctors to act with integrity and within the law. Dr Simawi was under a duty to the GMC to comply with the conditions imposed on his registration by the IOT under the provisions of the Medical Act 1983. The Tribunal has found that he failed to do so. The Tribunal determined that this failing was a serious breach of his professional obligations sufficient to constitute misconduct."

22. Under the hearing 'Current Impairment' at [43]-[46] the Tribunal said this about the findings of dishonesty in [7] and [37(a)]:

> "43. Having found that the facts found proved amounted to misconduct, the Tribunal went on to consider whether Dr Simawi's fitness to practise is currently impaired. The Tribunal took into account all of the evidence it had seen and heard in the course of these proceedings.
>
> 44. Although the Tribunal was mindful that dishonesty is difficult to remediate, it noted that Dr Simawi had voluntarily participated in the Practitioner Health Programme. The Tribunal considered the extent of Dr Simawi's insight into his dishonesty. It found he had demonstrated some insight but found that it was limited. The Tribunal noted Dr Simawi's assurance that he would be more 'careful' in creating and submitting important documents. Although he gave evidence that he acknowledged his dishonesty, the Tribunal noted that Dr Simawi still characterised his actions as a mistake which looked dishonest, rather than fully acknowledging his dishonesty.
>
> 45. The Tribunal noted that Dr Simawi said he had accepted the determination of the Tribunal. Dr Simawi had been remorseful and

> apologised for his actions. It noted his statements about the importance of honesty, trust and integrity in doctors.
>
> 46. The Tribunal took into consideration Dr Simawi's reflective statement. It noted that the statement was signed and dated before the date of its determination on the facts. The Tribunal was of the view that Dr Simawi had clearly demonstrated that he had learned some lessons from his conduct. However, the Tribunal concluded that whilst his admissions and evidence demonstrated a level of insight, it could not be entirely satisfied that the risk of repetition had been eliminated. It remained concerned that Dr Simawi still continued to characterise his conduct as a mistake. In addition, the Tribunal considered that public confidence would be undermined if a finding of impairment were not made in a case such as this. Accordingly, it found Dr Simawi's fitness to practise currently impaired by reason of his dishonesty."

23. The Tribunal did not find impairment in relation to its other findings.

Sanction

24. In relation to sanction, counsel for the GMC submitted that this was a case for erasure given that it involved two instances of dishonesty by the Appellant. She reminded the Tribunal that, under [128] of the GMC's Sanctions Guidance, dishonesty which was persistent and/or covered up was likely to result in erasure. She submitted that the Appellant had shown a blatant disregard for the principles in the GMP such that his behaviour was incompatible with continued registration.

25. In written submissions, counsel for the Appellant accepted that his standards had fallen below what that which is to expected of him as a medical practitioner. She said he had reflected and shown insight and realised how his behaviour had impacted on patients and the public interest. He had learned from his past conduct and changed his behaviour and had learned to be honest in his disclosure with colleagues and employers. He was of good character and had had a long unblemished career of over 20 years. The testimonials submitted on his behalf had described him as being trustworthy and reliable. Counsel said this was a case for conditions.

26. In its determination, the Tribunal said at [21] that it reminded itself that the main reason for imposing any sanction is to protect the public, and that sanctions are not imposed to punish or discipline doctors, even though they may have a punitive effect. Throughout its deliberations, the Tribunal said it had applied the principle of proportionality, balancing the Appellant's interests with the public interest.

27. This was plainly the correct approach. In a very well-known passage in *Bolton v Law Society* [1994] 1 WLR 512, 598, Sir Thomas Bingham MR, albeit in the context of solicitors' regulation, held as follows:

> "The most serious [lapses] involve proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases the tribunal has almost invariably, no matter how

> strong the mitigation advanced for the solicitor, ordered that he be struck off the Roll of Solicitors ...
>
> It is important that there should be full understanding of the reasons why the tribunal makes orders which might otherwise seem harsh. There is in some of these orders, a punitive element: a penalty may be visited on a solicitor who has fallen below the standards required of his profession in order to punish him for what he has done and to deter any other solicitor tempted to behave in the same way. Those are traditional objects of punishment. But often the order is not punitive in intention. Particularly is this so where a criminal penalty has been imposed and satisfied. The solicitor has paid his debt to society. There is no need, and it would be unjust, to punish him again. In most cases the order of the tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence. This purpose is achieved for a limited period by an order of suspension; plainly it is hoped that experience of suspension will make the offender meticulous in his future compliance with the required standards. The purpose is achieved for a longer period, and quite possibly indefinitely, by an order of striking off. The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied re-admission. If a member of the public sells his house, very often his largest asset, and entrusts the proceeds to his solicitor, lending re-investment in another house, he is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a while, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires ..."

28. The Tribunal then considered aggravating and mitigating factors. It set out in detail the matters to which the Appellant's counsel had referred. In relation to aggravation, it identified the following factors: the Appellant had misreported and amended a document from the GMC system so that he could achieve a start date for his employment most convenient to him and in doing so he had put his personal interests above his professional obligations. The Tribunal said it considered it significant that the Appellant had misrepresented his GMC record to his employer. His dishonesty concerned matters in his professional life.

29. The Tribunal then considered sanctions in ascending scale of seriousness, as it was required to do under the Sanctions Guidance. It ruled out making no order and the imposition of conditions as being insufficient. In relation to suspension, it said it had regard to [92], [93] and [97(a)(f)(g)] of the Sanctions Guidance. These provide:

> "92. Suspension will be an appropriate response to misconduct that is so serious that action must be taken to protect members of the public and maintain public confidence in the profession. A period of suspension will be appropriate for conduct that is serious but falls short of being fundamentally incompatible with continued registration (ie for which erasure is more likely to be the appropriate sanction because the tribunal considers that the doctor should not practise again either for public safety reasons or to protect the reputation of the profession).
>
> 93. Suspension may be appropriate, for example, where there may have been acknowledgement of fault and where the tribunal is satisfied that the behaviour or incident is unlikely to be repeated. The tribunal may wish to see evidence that the doctor has taken steps to mitigate their actions (see paragraphs 24–49).
>
> …
>
> 97. Some or all of the following factors being present (this list is not exhaustive) would indicate suspension may be appropriate.
>
> (a) A serious breach of Good medical practice, but where the doctor's misconduct is not fundamentally incompatible with their continued registration, therefore complete removal from the medical register would not be in the public interest. However, the breach is serious enough that any sanction lower than a suspension would not be sufficient to protect the public or maintain confidence in doctors.
>
> …
>
> (f) No evidence of repetition of similar behaviour since incident.
>
> (g) The tribunal is satisfied the doctor has insight and does not pose a significant risk of repeating behaviour."

30. At [36] it said a period of suspension was appropriate. As to length, it said at [37] that it had had regard to the Sanctions Guidance, and particularly [100], [101] and the table at [102]. These provide:

> "100. The following factors will be relevant when determining the length of suspension: (a) the risk to patient safety/public protection; (b) the seriousness of the findings and any mitigating or aggravating factors; (c) ensuring the doctor has adequate time to remediate.
>
> 101. The tribunal's primary consideration should be public protection and the seriousness of the findings. Following any remediation, the time all parties may need to prepare for a review hearing if one is needed will also be a factor."

102. The table on the next page gives examples of aggravating factors that will also be relevant to the length of suspension, under broad categories, depending on the nature of the case.

Area	Factor
Seriousness of the findings	• The extent to which the doctor departed from the principles of Good Medical Practice • The extent to which the doctor failed to take prompt action when patient safety, dignity or comfort was seriously compromised • Whether the doctor showed a lack of responsibility toward clinical duties/patient care • The extent to which the doctor's actions risked patient safety or public confidence • The extent of the doctor's significant or sustained acts of dishonesty or misconduct • The seriousness of the doctor's inappropriate behaviour • The extent of the doctor's predatory behaviour • The impact that the doctor's actions had on vulnerable people and the risk of harm
Subsequent steps taken	• Whether the doctor is reluctant to take remedial action • Whether the doctor is reluctant to apologise • The extent to which the doctor failed to address serious concerns over a period of time
Extent to which the doctor has complied	• The extent to which the doctor failed to comply with restrictions/requirements • Whether the doctor showed a deliberate or reckless disregard for restrictions/requirements

	• Whether the doctor failed to be open and honest with GMC and local investigations

31. When approaching the possibility of suspension, the Tribunal found that ([32]-[37]):

    a. The doctor had acknowledged fault;

    b. The risk of repetition had not been eliminated but it was satisfied that there was unlikely to be a repeat;

    c. The doctor did not pose a significant risk of repeating behaviour;

    d. There was no evidence of similar behaviour since the incident;

    e. The doctor had never sought or made financial gains from his misconduct;

    f. The dishonesty had the potential to undermine public confidence in the profession ([124] of the Sanctions Guidance);

    g. The doctor had failed to take reasonable steps to ensure that statements made in formal documents were accurate ([125(e)] of the Sanctions Guidance);

    h. There were two instances of dishonesty but no evidence of a cover-up, and his actions were not persistent.

32. At [38] it concluded:

> "38. The Tribunal determined to suspend Dr Simawi's registration from the medical register for a period of nine months. In making its decision the Tribunal had particular regard to the fact that this was dishonesty representing a grave departure from the standards of GMP. However, it was satisfied that such a period nevertheless marked the seriousness of the behaviour, reflected that there was no intent to gain financially from the conduct and was sufficient, given the circumstances of this case, to protect patients and public confidence in the profession and to maintain proper professional standards. In addition, that period would afford Dr Simawi the time and opportunity to reflect on his dishonesty sufficiently for him to be able to demonstrate his full appreciation of the gravity of his conduct."

33. In relation to review, the Tribunal said at [39]:

> "39. The Tribunal determined to direct a review of Dr Simawi's case. A review hearing will convene shortly before the end of the period of suspension, unless an early review is sought. The reviewing Tribunal may therefore be assisted by the following:

> • Evidence of the further and full development of Dr Simawi's insight.
>
> • Evidence from any courses and learning undertaken in relation to the issue of probity.
>
> • Evidence that Dr Simawi has maintained his relevant skills and knowledge.
>
> • Any other evidence that Dr Simawi may consider useful for the Tribunal."

The statutory framework

Medical Act 1983

34. Section 35D(1) of the MA 1983 provides that where an allegation against a person is referred under s 35C(5)(b) to the Medical Practice Tribunal Service, it must arrange for the allegation to be considered by a Tribunal, and subsections (2) and (3) then apply.

35. Section 35D(2) provides :

> "(2) Where the Medical Practitioners Tribunal find that the person's fitness to practise is impaired they may, if they think fit -
>
> (a) except in a health case or language case, direct that the person's name shall be erased from the register;
>
> (b) direct that his registration in the register shall be suspended (that is to say, shall not have effect) during such period not exceeding twelve months as may be specified in the direction; or
>
> (c) direct that his registration shall 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."

36. The sanction on the Appellant was imposed under s 35D(2)(b).

37. Section 35D(3) provides that where the Tribunal finds that the person's fitness to practise is not impaired, they may nevertheless give him a warning regarding his future conduct or performance.

38. Section 35D(4) provides:

> "(4) Where a Medical Practitioners Tribunal have given a direction that a person's registration be suspended -
>
> (a) under subsection (2) above;
>
> (b) under subsection (10) or (12) below; or

> (c) under paragraph 5A(3D) or 5C(4) of Schedule 4 to this Act, subsections (4A) and (4B) below apply.**"**

39. In relation to reviews, s 35D(4A) provides:

> "The Tribunal may direct that the direction is to be reviewed by another Medical Practitioners Tribunal prior to the expiry of the period of suspension; and, where the Tribunal do so direct, the MPTS must arrange for the direction to be reviewed by another Medical Practitioners Tribunal prior to that expiry."

40. Section 35D(5) provides that on a review under s 35D(4A), the Tribunal may do various things including (a) directing 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 but (apart from the cases specified in sub-section (6)), not for more than 12 months at a time; or (b) revoking the remaining period of suspension.

41. The appeal is brought pursuant to s 40 of the MA 1983 (as amended).

42. Section 40(1) provides:

> "(1) The following decisions are appealable decisions for the purposes of this section, that is to say -
>
> (a) a decision of a Medical Practitioners Tribunal under section 35D above giving a direction for erasure, for suspension or for conditional registration or varying the conditions imposed by a direction for conditional registration;
>
> (b) a decision of a Medical Practitioners Tribunal under section 41(9) below giving a direction that the right to make further applications under that section shall be suspended indefinitely."

43. The effect of s 40(3)(a) is that where a period of suspension is extended following a review under s 35(4A), then that is also an appealable decision.

44. Section 40(4) provides:

> "(4) A person in respect of whom an appealable decision falling within subsection (1) has been taken may, before the end of the period of 28 days beginning with the date on which notification of the decision was served under section 35E(1) above, or section 41(10) ... below, appeal against the decision to the relevant court."

45. The High Court is the 'relevant court' for these purposes (s 40(5)(c)).

46. Section 40(7) 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."

Appeals under s 40 of the Medical Act 1983: principles

47. This appeal is governed by CPR Part 52. The effect of CPR r 52.21(3)(a) is that I must allow the appeal if I consider that the Tribunal's decision was 'wrong'.

48. CPR r 52.21(a) provides that every appeal will be limited to a review of the decision of the lower court unless a practice direction makes different provision for a particular category of appeal. By virtue of CPR PD52D, [19.1], appeals under s 40 are by way of re-hearing. However, such an appeal 'is a re-hearing without hearing again the evidence': see *Fish v General Medical Council* [2012] EWHC (Admin) 1269, [28].

49. The relevant principles were summarised by Cranston J in *Yassin v General Medical Council* [2015] EWHC 2955 (Admin), [32]. He said the authorities establish the following propositions:

    a. The Tribunal's decision is correct unless and until the contrary is shown: *Siddiqui v General Medical Council* [2015] EWHC 1966 (Admin), per Hickinbottom J, citing Laws LJ in *Subesh v. Secretary of State for the Home Department* [2004] EWCA Civ 56 at [44];

    b. The court must have in mind and must give such weight as appropriate in that the Tribunal is a specialist one whose understanding of what the medical profession expects of its members in matters of medical practice deserves respect: *Gosalakkal v General Medical Council* [2015] EWHC 2445 (Admin);

    c. The Tribunal has the benefit of hearing and seeing the witnesses on both sides, which the appeal court does not;

    d. The questions of primary and secondary facts and the over-all value judgment made by the Panel, especially the last, are akin to jury questions to which there may reasonably be different answers: *Meadows v General Medical Council* […] [197], per Auld LJ;

    e. The test for deciding whether a finding of fact is against the evidence is whether that finding exceeds the generous ambit within which reasonable disagreement about the conclusions to be drawn from the evidence is

possible: *Assucurazioni General SpA v Arab Insurance Group* [2003] 1 WLR 577, [197], per Ward LJ.

f. Findings of primary fact, particularly founded upon an assessment of the credibility of witnesses, will be virtually unassailable: *Southall v General Medical Council* [2010] EWCA Civ 407 , [47] per Leveson LJ with whom Waller and Dyson LJJ agreed.

g. If the court is asked to draw an inference, or question any secondary finding of fact, it will give significant deference to the decision of the Panel, and will only find it to be wrong if there are objective grounds for that conclusion: *Siddiqui*, supra, [30(iii)].

h. Reasons in straightforward cases will generally be sufficient in setting out the facts to be proved and finding them proved or not; with exceptional cases, while a lengthy judgment is not required, the reasons will need to contain a few sentences dealing with the salient issues: *Southall v General Medical Council* [2010] EWCA Civ 407, [55]-[56].

i. A principal purpose of the Panel's jurisdiction in relation to sanctions is the preservation and maintenance of public confidence in the medical profession so particular force is given to the need to accord special respect to its judgment: *Fatnani and Raschid v General Medical Council* [2007] EWCA Civ 46, [19], per Laws LJ.

j. An expert Tribunal is afforded a wide margin of discretion and the court will only interfere where the decision of the Tribunal is wrong: see *R(Fatnani) v General Medical Council* [2007] EWCA Civ 46."

45. In her Skeleton Argument, Ms Hearnden drew my attention to two authorities in particular on the question of dishonesty.

46. First, the decision of Carr J in *Professional Standards Authority v Health Care Professions Council and another* [2014] EWHC 2723 (Admin), [44]:

> "[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 dishonestly (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)). It is pertinent to note that in *Naheed* (supra) a bogus CV was submitted by cutting and pasting from a colleague's career history. At paragraph 21 Parker J said this:

> 'Dishonesty acts which compromise the integrity of job applications are acts which undermine something fundamental to the system of medicine. In my view that submission is supported by *Macey v GMC* [2009] EWHC 3180 (Admin) at paragraphs 43 to 44 by Irwin J.'"

47. Also, in *Khan v General Medical Council* [2015] EWHC 301 (Admin), [6], Mostyn J noted that:

> "6. The decisions from this court have demonstrated that a very strict line has been taken in relation to findings of dishonesty. This court and its predecessor, the Privy Council, has repeatedly recognised that for all professional men and women, a finding of dishonesty lies at the top end of the spectrum of gravity of misconduct; see *Tait v Royal College of Veterinary Surgeons* [2003] UKPC 34 at paragraph 13.
>
> 7. Dishonesty will be particularly serious where it occurs in the performance by a doctor of his or her duties and/or involves a breach of trust placed in the doctor by the community. Both elements are serious and aggravating features and both are present in a case of dishonestly using prescription forms to obtain drugs. See *R (Rogers) v GMC* [2004] EWHC 424 (Admin) per Mitting J at [28–30].
>
> 8. In cases of proven dishonesty, the balance can be expected to fall down on the side of maintaining public confidence in the profession by a severe sanction against the doctor concerned. See Nicholas-Pillai v GMC [2009] EWHC 1048 (Admin) per Mitting J at [27] where he stated:
>
> > "That sanction will often and perfectly properly be the sanction of erasure, even in the case of a one-off instance of dishonesty."
>
> 9. Where proven dishonesty is combined with a lack of insight (or is covered up) the authorities show that nothing short of erasure is likely to be appropriate. As Sullivan J put it in *R (Farah) v GMC* [2008] EWHC 731 (Admin), a case which involved the theft and forgery of prescription forms in order to obtain drugs, at paragraph 21:
>
> > '… given the nature of the appellant's dishonesty and given the Panel's finding that there had been a persistent lack of insight into that dishonesty, whatever the mitigating factors were, the inevitable consequence was that erasure from the register was an entirely proportionate response to the appellant's conduct. The Panel was entitled to come to the view that where a

> doctor had engaged in deliberate dishonesty and abused his position as a doctor and then had shown a persistent lack of insight into that conduct, he simply could not continue to practise in the medical profession. Thus, the Panel's conclusion as to sanction was in practical terms inevitable once it had reached the conclusion it did about the appellant's lack of insight into his dishonest conduct. For these reasons, this appeal must be dismissed.'"

48. Also of relevance, I hope, is what I said in *Nkomo v General Medical Council* [2019] EWHC 2625 (Admin), [35]:

> "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: *Theodoropolous*¸ supra, [35]. Where dishonest conduct is combined with a lack of insight, is persistent, or is covered up, nothing short of erasure is likely to be appropriate: *Naheed v General Medical Council* [2011] EWHC 702 (Admin), [22]. The sanction of erasure will often be proper even in cases of one-off dishonesty: *Nicholas-Pillai*, supra, [27]. The misconduct does not have to occur in a clinical setting before it renders erasure, rather than suspension, the appropriate sanction: *Theodoropolous*, supra, [35]. Misconduct involving personal integrity that impacts on the reputation of the profession is harder to remediate than poor clinical performance: *Yeong v General Medical Counci*l [2009] EWHC 1923, [50]; *General Medical Council v Patel* [2018] EWHC 171 (Admin) at [64]; In such cases, personal mitigation should be given limited weight, as the reputation of the profession is more important than the fortunes of an individual member: *Bolton v Law Society* [1994] 1 WLR 512 at 519; *General Medical Council v Stone* [2017] EWHC 2534 (Admin) at [34], supra, [47]."

49. Alongside these authorities it is worth bearing in mind the observations of the Divisional Court (Sharp LJ and Dingemans J) in *General Medical Council v Jagjivan and another* [2017] EWHC 1247 (Admin), [40(v), vi] where the Court indicated that in cases of sexual misconduct and dishonesty it might be able to pay less deference to the views of the Tribunal than in cases involving standards of medical treatment where the Tribunal undoubtedly possesses greater expertise:

> "…
>
> (v) In regulatory proceedings the appellate court will not have the professional expertise of the Tribunal of fact. As a consequence, the appellate court will approach Tribunal determinations about

> whether conduct is serious misconduct or impairs a person's fitness to practise, and what is necessary to maintain public confidence and proper standards in the profession and sanctions, with diffidence: see *Fatnani* at paragraph 16 [*Fatnani and Raschid v General Medical Council* [2007] EWCA Civ 46; [2007] 1 WLR 1460; ; and *Khan v General Pharmaceutical Council* [2016] UKSC 64; [2017] 1 WLR 169, at paragraph 36.
>
> (vi) However there may be matters, such as dishonesty or sexual misconduct, where the court "is likely to feel that it can assess what is needed to protect the public or maintain the reputation of the profession more easily for itself and thus attach less weight to the expertise of the Tribunal …": see *Council for the Regulation of Healthcare Professionals v GMC and Southall* [2005] EWHC 579 (Admin); [2005] Lloyd's Rep Med 365 at paragraph 11, and *Khan* at paragraph 36(c). As Lord Millett observed in *Ghosh v GMC* [2001] UKPC 29; [2001] 1 WLR 1915 and 1923G, the appellate court 'will afford an appropriate measure of respect of the judgment in the committee … but the [appellate court] will not defer to the committee's judgment more than is warranted by the circumstances'".

The parties' submissions

The Appellant's case

50. Misconduct hearings before the Tribunal have three potential stages: Stage 1 (fact finding); Stage 2 (impairment); and Stage 3 (sanction). In summary, it is the Appellant's case that at Stage 1 the majority of the most serious allegations (mostly dishonesty) against him were found not proved and at Stage 2 the Tribunal found overwhelming majority of the remaining matters which had been found proved either did not meet the threshold for a finding of (serious) misconduct or had by the time of the hearing been remediated and therefore did not support any finding of current impairment.

51. He submitted that at the sanction stage the Tribunal made significant findings as to the two dishonesty charges actually found proved, namely, that the Appellant had made no gains from them (at [33]); they were not persistent ([34]); he had not sought to cover them up ([34]); and the two episodes of dishonesty were discrete ([34]); and that there was no significant risk of repetition ([32]).

52. Ms O'Rourke said that at the sanction stage it had been noted ([23]) that the Appellant had some insight based on his reflective statement, and that the issue for sanction on the impairment findings was an issue of public confidence rather than patient safety ([33]).

53. As I indicated at the outset, Ms O'Rourke's central submission was that taking the findings at all three stages into consideration, the sanction imposed of nine months' suspension (against a possible maximum of 12 months) was wrong because it was disproportionate and excessive. She said that the Tribunal had given inadequate reasons

for the duration of the suspension (at [38], quoted above), given all the other factors identified and that the sanction was by reason of public confidence only.

54. She said that the sanction of nine months' suspension with a review would have been appropriate had all the allegations been proved, but that given the majority had not been proved, the sanction was disproportionate.

55. Similarly, she said that had the Appellant demonstrated no remediation and/or been engaged in cover-up or persistent dishonesty then a sanction of nine months suspension might have been appropriate – but this not being the case the sanction was wrong and disproportionate.

56. It is the Appellant's case that an appropriate sanction would in all the circumstances have been a period of no more than three months.

57. Ms O'Rourke also said that the requirement for a review was wrong and disproportionate and unnecessary in all the circumstances of the case and that the Tribunal did not give adequate reasons for ordering a review.

58. Ms O'Rourke therefore submitted I should quash the suspension period of nine months and impose a shorter period of suspension (without review) pursuant to s 40(7)(c), which empowers me to substitute for the direction appealed against any other direction which could have been given by the Tribunal.

The Respondent's case

59. In response, Ms Hearnden submitted that any finding of dishonesty (and here there were two) is serious and in many cases – if not nearly all cases - represents a significant departure from the principles of Good Medical Practice which will often, but not always, justify erasure. She said the length of suspension was a matter for the Tribunal's discretion.

60. She said the points now made were made to the Tribunal (eg, there had been no financial gain by the Appellant, no cover up, etc), which had the opportunity to judge them. She said I should defer to the Tribunal's decision that nine months was an appropriate period: *Bawa-Garba*, supra, [60]-[67] and [94]. She said that a nine-month suspension was not in any way unreasonable or outside the range that the Tribunal could properly have imposed and regarded as necessary and proportionate.

61. In relation to the decision to order a review, she said that [164] of the Sanctions Guidance provided that a review would be appropriate in most cases where suspension is ordered. She therefore said that the imposition of a review hearing was in accordance with the Sanctions Guidance and was not wrong.

Discussion

The length of the suspension period

62. I am grateful to both counsel for their focussed and helpful written and oral submissions. I have not found this decision easy. I confess that initially I was

concerned that the suspension period of nine months (as against a maximum period of 12 months) was excessive and disproportionate having regard to the Tribunal's limited findings when compared with how the case was opened against the doctor at the outset and the matters of mitigation which the Tribunal set out at [23] of its sanctions determination. Having considered the matter further, however, I am not persuaded that this is a case in which it would be appropriate for me to interfere with the Tribunal's finding on sanction. My reasons are as follows.

63. It seems to me to be clear that an important factor that persuaded the Tribunal to impose a suspension at the upper end of the bracket was the need to give the Appellant time to fully develop insight into his dishonesty, and to remediate it. At [37] it quoted [100(c)] of the Sanctions Guidance which provides that the period of suspension should be long enough to ensure the doctor has adequate time to remediate. The Tribunal also had regard to [101], which requires there to be time, following any remediation, for the parties to prepare for a review hearing if one is needed.

64. One of the reasons the Tribunal gave at [38] for the figure of nine months was:

> "In addition, that period would afford Dr Simawi the time and opportunity to reflect on his dishonesty sufficiently for him to be able to demonstrate his full appreciation of the gravity of his conduct."

65. This conclusion has to be read in light of [32], where the Tribunal found that although the Appellant had acknowledged fault, the risk of repetition of dishonest behaviour had not been wholly eliminated (although it was unlikely). Earlier, at [23], the Tribunal said it had concluded that the Appellant had not demonstrated full insight into his personal culpability but that he had the capacity to do so. Finally, at [39], in ordering a review, the Tribunal said that the reviewing Tribunal might be assisted by evidence of the further and full development of the Appellant's and evidence from any courses and learning undertaken in relation to the issue of probity.

66. Also relevant is what the Tribunal found at [44] of its Impairment Determination:

> "44. … The Tribunal considered the extent of Dr Simawi's insight into his dishonesty. It found he had demonstrated some insight but found that it was limited."

67. Reading the Tribunal's findings as a whole, it was clearly of the view that the Appellant had further work to do in order to gain full insight into his behaviour and to remediate it, and that the period of suspension had to be sufficient to allow that work to be completed and to be presented at a review hearing. Given the appropriate level of deference which I must afford to the Tribunal's determination, I am unable to say that a figure of nine months was wrong. I can take it the Tribunal knew the sort of timescales that would be necessary to allow the doctor to complete the necessary work and, in light of that work, to ensure the public and profession was fully protected.

68. I readily acknowledge that a period of nine months' suspension will seriously impact on the Appellant's career and to that extent it represents a punishment. However, as Sir Thomas Bingham MR said in *Bolton*, supra, p598 the intention of disciplinary proceedings is often not punitive even if they have that effect.

69. I therefore reject the appeal against the length of the suspension period.

Is a direction made by a Tribunal under s 35D(4A) of the MA 1983 for a review of a direction that a person's registration be suspended (imposed under s 35D(2)(b)) itself an appealable decision under s 40(1) ?

70. I turn to Ms O'Rourke's second ground of appeal in relation to the direction that the Tribunal made pursuant to s 35D(4A) of the MA 1983 that the direction for suspension of the Appellant's registration be reviewed prior to its expiry. Ms O'Rourke made clear that she would not pursue ground this if she was unsuccessful on the first ground of appeal, however the issue might arise again and because I received full submissions on the question from very experienced counsel I hope the following will be of assistance.

71. This ground of appeal raises the question whether a direction under s 35D(4A) that there be a review (which I will call a 'review direction') can be the subject of an appeal under s 40(1), in other words whether it is an 'appealable decision' in the language of s 40(1). If it is not, then I have no jurisdiction to entertain this ground of appeal.

72. On behalf of the Appellant, Ms O'Rourke submitted that the Tribunal only has the power to suspend a practitioner's registration consequent upon a finding of impaired fitness to practise, pursuant to s 35D(2)(b). It does so by issuing a direction that registration be suspended.

73. She submitted the review direction was not a freestanding direction. She said it might be a second decision by the Tribunal (made under a different subsection of s 35D) but, she said, the power to make a review direction only arises where there is an original direction under s 35D(2)(b) – and so the second direction is a completion of the suspension powers. Therefore, she said the ability to order a review is inextricably linked to there being a direction for suspension under s 35D(2)(b). The power to make a review direction cannot exist unless there has been a suspension direction. It is therefore part of the suspension decision making under s 35D.

74. She said that no direction under s 35D(4A) can be made or exist independently of a direction under s 35D(2)(b). It follows and is consequent upon it.

75. Therefore there is no basis to require or seek or need an independent right of appeal of any direction under s 35D(4A) since there is no such independent direction but only an extension of the direction for suspension – for which there is a statutory right of appeal.

76. Therefore, she submitted that the right of appeal under 40(1)(a) in relation to a direction for suspension necessarily includes the right to appeal a review direction, which is not freestanding.

77. She said that if the Appellant's appeal against the length of the direction for suspension failed then she accepted that no issue arises as to the review direction because such a review is part of the suspension direction and integral to it.

78. Similarly, she said if his appeal succeeds then the whole of what she said was one direction can be subject to re-consideration by the Court.

79. On behalf of the Respondent, Ms Hearnden accepted that the question I had raised was a 'pertinent' one.

80. She submitted that s 40(1) identifies appealable decisions. It does so at sub-section 40(1)(a) by reference to the umbrella provision of s 35D (which, in its sub-sections, includes the power to impose a review, or direct that a warning is given). However, she pointed out that s 40(1)(a) clearly identifies the specific directions that can be made under s 35D which can be appealed, namely, a direction for erasure, for suspension or for conditional registration or varying the conditions imposed by a direction for conditional registration.

81. She said that s 40(3) is of relevance. It provides that where a direction for suspension is the subject of a review direction, then a decision following the review to extend the period of suspension is to be regarded as a direction for suspension (and thus is an appealable decision within s 40(1)). So, said Ms Hearnden, as in s 40(1), there is no express inclusion of a direction made under section 35D(4A) to impose a review.

82. As such, Ms Hearnden submitted that a direction for a review – by itself – is not an appealable decision within s 40(1). If the Appellant fails to persuade the court to quash the suspension, he cannot go on to argue that nevertheless the review direction should be quashed.

83. She said it was a more difficult question what happens to a review direction when the underlying sanction is successfully challenged.

84. Pursuant to s 40(7)(b), on an appeal the Court may, *inter alia*, allow the appeal and quash the direction or variation appealed against (s 40(7)(b)), or substitute for the direction or variation appealed against any other direction or variation which could have been given or made by a Tribunal (s 40(7)(c)).

85. She said a direction for review must always be parasitic on the imposition of direction for suspension of registration (per s 35D(4)). Hence, if an appellant were to successfully challenge a suspension, and persuade the court to substitute a lesser sanction which could have been made by the Tribunal, eg, conditions, then Ms Hearnden accepted that any review which attached to the suspension would, as a matter of logic, also have to fall away. But she said the Respondent did not suggest that a review requirement which attached to a suspension should on quashing of the suspension nevertheless be automatically transposed onto a lesser sanction.

86. She said that if the Tribunal's suspension direction is quashed under s 40(7)(b), the Court may then go on to give its own direction under s 40(7)(c) which may or may not include a direction for a review. She submitted that if the Tribunal's direction of suspension must first be quashed under s 40(7)(b) before the Court could substitute its own direction under s 40(7)(c), then the Respondent accepted that the Court is making the decision afresh, and is not required to preserve the review direction made by the Tribunal.

87. In my judgment, the correct analysis of the answer to the question I raised is as follows.

88. It is clear from the wording of s 40(1) that a review direction made under s 35D(4A) is not an appealable decision. Section 40(1) is quite specific as to what directions can be

appealed, and a review direction is not amongst them. As Ms Hearnden pointed out, s 40(3)(a) provides that in s 40(1) references to a direction for suspension include a reference to a direction extending a period of suspension. However, a review direction of itself is not referred to, reinforcing that it is not, of itself, an appealable decision.

89. Therefore, in my judgment it is correct that where there is an appeal against a direction for suspension, and (as in this case, at least as initially drafted) an appeal against a review direction, then if the former is unsuccessful so that the Tribunal's direction remains in being, there is no freestanding right of appeal in respect of the latter.

90. What about the situation where the appeal against the suspension direction is successful, and the Court either quashes the Tribunal's direction and allows the appeal (s 40(7)(b)), or substitutes its own direction (s 40(7)(c)) ?

91. Where there is an appeal against a direction for suspension which is quashed pursuant to s 40(7)(b) then it is clear that the review direction must also fall away. If the Tribunal's direction of suspension has been quashed, then there is, quite simply, nothing to review.

92. In my judgment the same conclusion follows where the Court substitutes for the direction or variation appealed against any other direction or variation which could have been given or made by the Tribunal, pursuant to its power under s 40(7)(c). In that case the Tribunal's review direction must also fall away. That is because a review direction made under s 35D(4A) is a review *of a direction made by the Tribunal*. Hence, where the Court substitutes its own direction under s 40(7)(c), the review direction does not bite on it. This is clear from the wording of s 35D(4) read with s 35D(4A):

> "4 Where a Medical Practitioners Tribunal have given a direction that a person's registration be suspended –
>
> (a) under subsection (2) above;
>
> …
>
> (4A) The Tribunal may direct that *the direction* is to be reviewed by another Medical Practitioners Tribunal …"

93. The words 'the direction' in s 35D(4A) plainly refer back to the direction made by the Tribunal under s 35D(2), and where the Court exercises its power of substitution under s 40(7)(c) and makes its own direction the Tribunal's direction ceases to exist, not because it is quashed, as Ms Hearnden submitted, but because it is replaced by the Court's direction so that, again, the review direction has no *Tribunal* direction to bite on. The Tribunal's review direction cannot bite on a Court ordered direction of suspension. In this situation, however, it is open to the Court to impose its own review condition if appropriate to do so.