Neutral Citation Number: [2024] EWHC 1114 (Admin)

Case No: AC-2023-LON-000104

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10th May 2024

**Before** :

**MR JUSTICE RITCHIE**

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**Between :**

**DOCTOR PETER ROACH** **Appellant**

**- and -**
**THE GENERAL MEDICAL COUNCIL** **Respondent**

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**Alan Jenkins** of counsel (instructed by **Medical Defence Union, Legal**) for the **Appellant**
**Peter Mant** of counsel (instructed by **GMC, Legal)** for the **Respondent**

Hearing date: 30th April 2024

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# Approved Judgment

This judgment was handed down remotely at 14.00 on Friday 10th May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**Mr Justice Ritchie:**

**The Parties**

1. The Appellant was a trainee General Practitioner (GP). The Respondent is the body which regulates the professional conduct of GPs.

**The Appeal**

2. On the 17th of March 2023 the Medical Practitioners Tribunal Service (the Tribunal) made a determination of the facts on various allegations brought by the Respondent relating to the Appellant's behaviour towards patient A (PA), which allegedly occurred on the 18th and 19th of March 2020. Four months later, the Tribunal determined that the Appellant had impaired fitness to practise and, two days later, on the 20th of July 2023 the Tribunal determined the sanction for the Appellant's behaviour should be erasure from the register of doctors. These decisions are the normal three stages of the MPTS Tribunal process: stage 1, fact findings; stage 2, consideration of whether there is impairment of fitness to practise; stage 3, consideration of the sanction.

3. On the 14th of August 2023 the Appellant lodged a notice of appeal against the Tribunal's decisions at all 3 stages and this judgment arises from the hearing of that appeal. No permission to appeal is needed for these statutory appeals.

**The issues**

4. The main issue on this appeal relates to whether the findings of fact made by the Tribunal at stage 1 were wrong or seriously procedurally unjust in relation to:
   (1) the Appellant's motivation (being sexual not medical);
   (2) the Appellant's sexual actions (which were disputed);
   (3) rejecting the Appellant's evidence and explanations for his words and actions;
   (4) accepting PA's evidence on the core events.

   The other grounds of appeal all related to or relied upon the main issue. So, the appeals against the decisions at stages 2 and 3 relied on the appeal relating to the findings in stage 1.

**Bundles**

5. For the hearing I was provided with 2 professionally and carefully arranged digital bundles, with bookmarks and working hyperlinks, the first relating to the law and the second relating to the evidence. I was also provided with skeleton arguments from both parties and, after the hearing, with an agreed statement of facts and further short submissions on two points which I raised during the hearing.

**The Allegations**

6. There were six allegations of inappropriate behaviour (misconduct) laid against the Appellant, the third of which involved multiple factual sub allegations which I will broadly summarise now.

(1) That the Appellant asked for PA's phone number in the surgery on the 18th of March 2020 and wrote it down.

(2) That the Appellant called PA from his personal mobile after he left the surgery and went to her flat on the 18th of March 2020 at around 7.30 pm with sexual motivation not medical motivation.

(3) That during the visit the Appellant's actions and words were inappropriate, including: making comments about PA's bedroom; offering to massage PA; asking PA to get massage oil; asking PA to lie on the sofa; asking PA to remove her top; unfastening PA's bra; asking PA to take off her bra; massaging PA's neck, back, buttocks, breasts, ribs and stomach; pulling down PA's leggings a bit; pressing his erection into her hand; giving PA hugs after the massage; offering to do so again in future.

(4) That the Appellant called PA on the 19th of March 2020 inappropriately for non-medical reasons.

(5) That the Appellant's actions in taking off PA's bra, massaging her breasts, lowering her leggings and pressing his penis against her hand were sexually motivated and without proper consent.

(6) That the Appellant failed to make any medical notes of his alleged medically motivated home visit on the 18th March 2020 and the three phones calls from his mobile phone.

**The Appellant's case**

7. Before the Tribunal the Appellant's case was a denial of all of the alleged sexual activity and sexual motivation. He asserted that he was concerned about PA's mental health, she having attempted to commit suicide the week before. He asserted that he had written down her phone number on a piece of paper during the morning examination of PA and this reminded him to call her later in the day to check on her mental health. He asserted PA asked him in the examination to come for a cup of tea. He only used his mobile phone so that he could capture her number, should he need to make the home visit and need directions to get there. PA agreed to the home visit during his first call. He attended and she let him in. They discussed her mental health, impending redundancy, her rental expenses, about which she was worried and her physical ailments. Then he suggested a massage by a third party to help resolve her chest and left shoulder pain. It was PA who chose to go and get massage oil and this made the Appellant feel uncomfortable so he left, giving her a one armed hug before he did so. He only called her the next evening, after work on his mobile, to check that she was mentally well. He accepted that he made no medical notes of any of the events and this was unprofessional misconduct. He asserted that he had been busy the next day and that the impending COVID storm clouds of lockdown were already discharging the rain of chaos on the surgery and this contributed to his failure. He asserted that he was a trainee GP and was naïve about the risks he had taken in going on a home visit to a single woman, after hours, alone.

**The Law**

**The role of the Tribunal**

8. Section 1(1A) of the *Medical Act 1983* provides that:

> "the overarching objective of the General Council in exercising their functions is the protection of the public".

Section 1(1B) provides that:

> "the pursuit by the General Council of their overarching objective involves the pursuit of the following objectives (a) to protect promote and maintain the health safety and well-being of the public, (b) to promote and maintain public confidence in the medical profession, and (c) to promote and maintain proper professional standards and conduct for members of that profession".

9. The Courts have summarised the approach and purpose of the Tribunal in such hearings as follows, per Sir Anthony Clarke MR in *GMC v Meadow* [2006] EWCA Civ. 1390:

> "32. In short, the purpose of FTP proceedings is not to punish the practitioner for past misdoings but to protect the public against the acts and omissions of those who are not fit to practise. The FPP thus looks forward not back. However, in order to form a view as to the fitness of a person to practise today, it is evident that it will have to take account of the way in which the person concerned has acted or failed to act in the past."

10. **The procedure**

The procedure of the Tribunal is set out in the *General Medical Council (Fitness to Practise) Rules 2014.* I do not need to descend into those.

**The right to appeal**

11. The right to appeal and the Court's powers on appeal are set out in the *Medical Act 1983* as follows (irrelevant parts are omitted):

> "S.40 **Appeals**
>
> (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; …

(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.

(4A) A person in respect of whom an appealable decision falling within subsection (1A) 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, appeal against the decision to the relevant court.

…

(5) … "the relevant court"

(c) means the High Court of Justice in England and Wales.

(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 … as it thinks fit."

**The grounds upon which a Tribunal's stage 1 findings can be overturned**

12. The procedure on appeal is not set out in the Act but is set out in the Civil Procedure Rules. Part 52 governs appeals. In relation to whether the appeal is a review or a rehearing and the appellate Court's powers, it says this:

"**Hearing of appeals**

52.21 (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.

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

(a) oral evidence; or

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

> (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.**
>
> (4) The appeal court may draw any inference of fact which it considers justified on the evidence.
>
> (5) At the hearing of the appeal, a party may not rely on a matter not contained in that party's appeal notice unless the court gives permission." (My emboldening).

**Rehearing not review**

13. There is a Practice Direction governing statutory appeals (PD52D). Ignoring the irrelevant provisions, para. 19.1 deals with appeals against decisions relating to healthcare professionals, which covers the *Medical Act 1983* and states:

> "(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."

**Type of rehearing**

14. It is clear that the Court's powers under CPR Part 52 to overturn a Tribunal's decision are the same whether the procedure is a rehearing or a review. Both are tied to the grounds of appeal as well. However, PD52D gives rise to the question: what type of rehearing does the High Court carry out? Does it hear all of the evidence again? The answer is: no. What the High Court does is re-analyse the transcript of the live evidence and read the witness statements and the documents put before the Tribunal below. So evidentially and procedurally, it is not a rehearing, it is a re-analysis of the evidence without live evidence (generally). This is in contrast to an appeal by way of review, in which the evidence is limited to that relevant to the grounds of appeal and the parties are discouraged from putting before the appellate Court all of the evidence before the Court below. So PD52B at para 6.4 expressly requires the appeal bundle in a review only to contain witness statements and documents relevant to the appeal. A full transcript of the evidence is not required.

**Case law on the approach to stage 1 findings of fact appeals**

15. Where the appeal is against the findings of fact of the Tribunal, what are the tests, or gateways which the High Court is to apply to determine whether the Tribunal's decision is "wrong"? There are 3 standard gateways to determining whether a decision is wrong. These are separate from the gateway for serious procedural or other irregularity.

**Gateway 1: Failure to give sufficient reasons.**

16. Failure to give adequate reasons is a longstanding gateway for allowing an appeal. This was recently neatly summarised by Morris J in *Byrne v GMC* [2021] EWHC 2237 thus:

> "**(5) The extent of the duty to give reasons**
>
> 23. In relation to the duty to give reasons, I have been referred to a number of authorities, including in particular *Selvanathan v GMC* [2000] 10 WLUK 307; *English v Emery Reimbold & Strick* [2002] 1 WLR 2409; *Gupta*, supra, at §14; *Phipps v GMC* [2006] EWCA Civ 397 at §106; *Muscat*, supra at §108; *Mubarak*, supra , at §§9-12, 35-36; *Southall*, supra , at §§50-55, 56 and 59 and *O v Secretary of State for Education,* supra , at §§59 -63.
>
> 24. In the present case Rule 17(2)(j) of the Rules requires the Tribunal to give reasons for its findings of fact. In considering the extent and content of the duty to give reasons, the current leading authority is *Southall,* citing in detail the earlier cases of *Selvanathan, Gupta, Phipps* (in turn referring to *English v Emery Reimbold & Strick*). At §54, Leveson LJ (citing *Phipps*) confirmed that the purpose of such a duty to give reasons is to enable the losing party to know why he has lost and to allow him to consider whether to appeal. It will be satisfied if, having regard to the issues and the nature and content of the evidence, the reasons for the decision are plain, either because they are set out in terms or because they can be readily inferred from the overall form and content of the decision. It is not necessary for them to be expressly stated, when they are otherwise plain or obvious. Leveson LJ then continued as follows:
>
> > "55. For my part, I have no difficulty in concluding that, in straightforward cases, setting out the facts to be proved (as is the present practice of the GMC) and finding them proved or not proved will generally be sufficient both to demonstrate to the parties why they won or lost and to explain to any appellate Tribunal the facts found. In most cases, particularly those concerned with comparatively simple conflicts of factual evidence, it will be obvious whose evidence has been rejected and why. In that regard, I echo and respectfully endorse the observations of Sir Mark Potter [in *Phipps*].
> >
> > 56. When, however, the case is not straightforward and can properly be described as exceptional, the position is and will be different. Thus, although it is said that this case is no more than a simple issue of fact (namely, did Dr Southall use the words set out in the charge?), the true picture is far more complex. … I am not suggesting that a lengthy judgment was required but, in the circumstances of this case, a few sentences dealing with the salient issues was essential: this was an exceptional case and, I

> have no doubt, perceived to be so by the GMC, Dr Southall and the panel.
>
> …
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> 59. Further, once providing some reasons, in my judgment, the panel did have to say something about Dr Southall who gave evidence on this topic for some days. If (as must have been the case) they disbelieved him, in the context of this case and his defence, he was entitled to know why even if only by reference to his demeanour, his attitude or his approach to specific questions. In relation to Ms Salem, the position was worse: to say that the panel "did not find her evidence to be wholly convincing" is not good enough. … That is nothing to do with not being wholly convincing: it is about honesty and integrity and if the panel were impugning her in these regards, it should have said so."

25. As made clear at §56, the factual issue in *Southall* was not "a simple issue of fact" of whether the doctor did or did not use particular words; rather it was particularly complex. §56 of *Southall* is not authority for the proposition that specific reasons for disbelieving a practitioner are required in every case where his defence is rejected. The references to "the circumstances of this case" and "in the context of this case and his defence" in §§56 and 59 imply that there will be cases where such reasons will not be required.

**Reasons and credibility**

26. As regards reasons concerning the credibility of witnesses

(1) Where there is a dispute of fact involving a choice as to the credibility of competing accounts of two witnesses, the adequacy of reasons given will vary. In *English v Emery*, Lord Phillips stated that "it may be enough to say that one witness was preferred to another, because the one manifestly had a clearer recollection of the material facts or the other give answers which demonstrated that his recollection could not be relied upon ". On the other hand, *Southall* at §55, and *Gupta* at §13 and 14 suggest that even such limited reasons are not necessarily required in every case.

(2) Secondly, whilst Mr Mant accepted that it is a common practice in Tribunal decisions on fact, there is no requirement for the disciplinary body to make, at the outset of its determination, a general comparative assessment of the credibility of the principal witnesses. Indeed such a practice, undertaken without reference to the specific allegations, has been the subject of recent criticism in *Dutta* at §42 and *Khan* at §§106 and 107. In my judgment, consideration of credibility by reference to the specific allegations made is an approach which is, at least, equally appropriate.

> 27. Finally, an appeal court will not allow an appeal on grounds of inadequacy of reasons, unless, even with the benefit of knowledge of the evidence and submissions made below, it is not possible for the appeal court to understand why the judge below had reached the decision it did reach. It is appropriate for the appeal court to look at the underlying material before the judge to seek to understand the judge's reasoning and to "identify reasons for the judge's conclusions which cogently justify" the judge's decision, even if the judge did not himself clearly identify all those reasons: see *English v Emery Reimbold* §§89 and 118."

17. Thus, it is apparent that the scope of the duty to give reasons is a flexible one dependent on the complexity of the facts of the case and the need for fairness in explaining to the losing party the decisions of fact and the decisions on the credibility of the witnesses, so that the losing party on any point can understand why the decisions were reached and consider whether to appeal.

**Deference to the expertise of the Tribunal**

18. I start in 2007 with the judgment of Laws LJ in *Raschid v GMC* [2007] EWCA Civ. 46; 1 WLR 1460, an appeal against sanction case:

> "17. The first of these strands may be gleaned from the Privy Council decision in *Gupta v General Medical Council* [2002] 1 WLR 1691, para 21, in the judgment of their Lordships delivered by Lord Rodger of Earlsferry:
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> > "It has frequently been observed that, where professional discipline is at stake, the relevant committee is not concerned exclusively, or even primarily, with the punishment of the practitioner concerned. Their Lordships refer, for instance, to the judgment of Sir Thomas Bingham MR in *Bolton v Law Society* [1994] 1 WLR 512, 517—519 where his Lordship set out the general approach that has to be adapted. In particular he pointed out that, since the professional body is not primarily concerned with matters of punishment, considerations which would normally weigh in mitigation of punishment have less effect on the exercise of this kind of jurisdiction. And he observed that it can never be an objection to an order for suspension that the practitioner may be unable to re-establish his practice when the period has passed. That consequence may be deeply unfortunate for the individual concerned but it does not make the order for suspension wrong if it is otherwise right. Sir Thomas Bingham MR concluded, at p 519: "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." Mutatis mutandis the same approach falls to be applied in considering the sanction of erasure imposed by the committee in this case."

18 The panel then is centrally concerned with the reputation or standing
of the profession rather than the punishment of the doctor. This, as it seems to me, engages the second strand to which I have referred. In *Marinovich v General Medical Council* [2002] UKPC 36 Lord Hope of Craighead, giving the judgment of the Board, said:

> "28. . . . In the Appellant's case the effect of the committee's order is that his erasure is for life. But it has been said many times that the Professional Conduct Committee is the body which is best equipped to determine questions as to the sanction that should be imposed in the public interest for serious professional misconduct. This is because the assessment of the seriousness of the misconduct is essentially a matter for the committee in the light of its experience. It is the body which is best qualified to judge what measures are required to maintain the standards and reputation of the profession.
>
> "29. That is not to say that their Lordships may not intervene if there are good grounds for doing so. But in this case their lordships are satisfied that there are no such grounds. This was a case of such a grave nature that a finding that the Appellant was unfit to practise was inevitable. The committee was entitled to give greater weight to the public interest and to the need to maintain public confidence in the profession than to the consequences to the Appellant of the imposition of the penalty. Their Lordships are quite unable to say that the sanction of erasure which the committee decided to impose in this case, while undoubtedly severe, was wrong or unjustified."

19. There is, I should note, no tension between this approach and the human rights jurisprudence. That is because of what was said by Lord Hoffmann giving the judgment of the Board in *Bijl v General Medical Council* [2002] Lloyd's Rep Med 60, paras 2 and 3, which with great respect I need not set out. As it seems to me the fact that a principal purpose of the panel's jurisdiction in relation to sanctions is the preservation and maintenance of public confidence in the profession rather than the administration of retributive justice, particular force is given to the need to accord special respect to the judgment of the professional decision-making body in the shape of the panel. That I think is reflected in the last citation I need give. It consists in Lord Millett's observations in *Ghosh v General Medical Council* [2001] 1 WLR 1915, 1923, para 34:

> "the Board will afford an appropriate measure of respect to the judgment of the committee whether the practitioner's failings amount to serious professional misconduct and on the measures necessary to maintain professional standards and provide adequate protection to the public. But the Board will not defer to the committee's judgment more than is warranted by the circumstances."
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> 20. These strands in the learning then, as it seems to me, constitute the essential approach to be applied by the High Court on a section 40 appeal. The approach they commend does not emasculate the High Court's role in section 40 appeals: the High Court will correct material errors of fact and of course of law and it will exercise a judgment, though distinctly and firmly a secondary judgment, as to the application of the principles to the facts of the case."

19. So, the Tribunal's expertise and role is taken into account by the High Court in an appeal and deference and respect is given to that role and to the three purposes behind that role which the Tribunal is serving, namely: protection of the public, protection of the reputation of the medical profession, not punishment and maintenance of high standards. However, whereas the respect may be profound, the deference is not total. It is measured by reference to the test to be applied to determine whether the Tribunal's decisions were wrong as to fact (or law).

**The overall approach to statutory appeals**

20. The correct approach to the test in relation to appeals against findings of fact run by way of rehearing was considered by Sharp LJ and Dingemans J in the Divisional Court in *General Medical Council v. Jagjivan* [2017] 1 WLR 4438. The following principles were expounded (at paras. 39-40):

> *"The correct approach to appeals under section 40A*
>
> 39. As a preliminary matter, the GMC invites us to adopt the approach adopted to appeals under section 40 of the 1983 Act, to appeals under section 40A of the 1983 Act, and we consider it is right to do so. It follows that the well-settled principles developed in relation to section 40 appeals (in cases including: *Meadow v General Medical Council* [2006] EWCA Civ. 1390; [2007] QB 462; *Fatnani and Raschid v General Medical Council* [2007] EWCA Civ. 46; [2007] 1 WLR 1460; and *Southall v General Medical Council* [2010] EWCA Civ. 407; [2010] 2 FLR 1550) as appropriately modified, can be applied to section 40A appeals.
>
> 40. In summary:
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> i) Proceedings under section 40A of the 1983 Act are appeals and are governed by CPR Part 52. A court will allow an appeal under CPR Part 52.21(3) if it is 'wrong' or 'unjust because of a serious

procedural or other irregularity in the proceedings in the lower court'.

ii) It is not appropriate to add any qualification to the test in CPR Part 52 that decisions are 'clearly wrong': see *Fatnani* at paragraph 21 and *Meadow* at paragraphs 125 to 128.

iii) The court will correct material errors of fact and of law: see *Fatnani* at paragraph 20. Any appeal court must however be extremely cautious about upsetting a conclusion of primary fact, particularly where the findings depend upon the assessment of the credibility of the witnesses, who the Tribunal, unlike the appellate court, has had the advantage of seeing and hearing (see *Assicurazioni Generali SpA v Arab Insurance Group* (Practice Note) [2002] EWCA Civ 1642; [2003] 1 WLR 577, at paragraphs 15 to 17, cited with approval in *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23, [2007] 1 WLR 1325 at paragraph 46, and *Southall* at paragraph 47).

iv) When the question is what inferences are to be drawn from specific facts, an appellate court is under less of a disadvantage. The court may draw any inferences of fact which it considers are justified on the evidence: see CPR Part 52.11(4).

v) In regulatory proceedings the appellate court will not have the professional expertise of the Tribunal of fact. As a consequence, the appellate court will approach Tribunal determinations about whether conduct is serious misconduct or impairs a person's fitness to practise, and what is necessary to maintain public confidence and proper standards in the profession and sanctions, with diffidence: see *Fatnani* at paragraph 16; and *Khan v General Pharmaceutical Council* [2016] UKSC 64; [2017] 1 WLR 169, at paragraph 36.

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".

vii) Matters of mitigation are likely to be of considerably less significance in regulatory proceedings than to a court imposing

> retributive justice, because the overarching concern of the professional regulator is the protection of the public.
> viii) A failure to provide adequate reasons may constitute a serious procedural irregularity which renders the Tribunal's decision unjust (see *Southall* at paragraphs 55 to 56)."

**The "live evidence" principle**

21. In *Grizzly Business v Stena Drilling [2017] EWCA Civ. 94,* the advantage which the trial Juge (or Tribunal) has over the appellate Court was summarised by Longmore, Lloyd Jones and Treacy LLJ. thus:

> "39. The parties were broadly agreed upon the relevant law in the light of the recent Supreme Court decisions of *Henderson v Foxworth* Investments Ltd [2014] UKSC 41; [2014] 1 WLR 2600 and *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477 the latter of which cited with approval *Hamilton v Allied Domecq Plc* [2006] SC 221, para 85. In the latter case it was said:-
>
> > "If findings of fact are unsupported by the evidence and are critical to the decision of the case, it may be incumbent on the appellate court to reverse the decision made at first instance."
>
> In *Henderson* the Supreme Court (para 62) also said:-
>
> > "It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached."
>
> We have also had regard to the last three reasons why appellate courts are warned not to interfere with findings of fact unless compelled to do so as enumerated by Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ. 5:-
>
> > "iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
> > v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
> > vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

22. In relation to the Appellant's appeal, which relates to alleged sexual misconduct, I take from this guidance that this Court must take into account that it is at a disadvantage when assessing the credibility of the witnesses who gave evidence in person at the Tribunal hearing. The members heard and saw them give evidence, I did not. All this Court can analyse is the transcript and the witness statements against the documentation. This is an obvious disadvantage when assessing honesty and

credibility. I also take into account that, in relation to decisions of fact in sexual misconduct cases the deference to medical expertise may be less and in relation to inferences of fact (often called secondary findings of fact), the appellate Court's "no live witness" disadvantage may be less of a hindrance.

**Generous ambit principle – on a finding of fact**

23. The correct approach to appeals against stage 1 findings of fact was reconsidered by Warby J in *R (Dutta) v GMC* [2020] EWHC 1974 (Admin). This was a statutory appeal but *Jagjivan* was not cited before the Court. Warby J ruled as follows (I have put the long list of citations in the Appendix hereto):

> "20. … This is a challenge to the Tribunal's fact-finding processes at Stage 1. A specialist Tribunal may of course have specialist expertise that is relevant at that stage, but this is not such a case. If the Court finds that the Tribunal went wrong at the first stage, it should quash the conclusions at all three Stages, unless persuaded that the error would have made no difference to the outcome. That, as Ms Hearnden rightly accepts, is a high threshold, which is not readily satisfied: *R (Smith) v North Eastern Derbyshire Primary Care Trust* [2006] 1 WLR 3315, 3321.
>
> 21. Bearing that in mind, the points of most importance for the purpose of this case can be summarised as follows:
>
> (1) The appeal is not a re-hearing in the sense that the appeal court starts afresh, without regard to what has gone before, or (save in exceptional circumstances) that it re-hears the evidence that was before the Tribunal. "Re-hearing" is an elastic notion, but generally indicates a more intensive process than a review: *E I Dupont de Nemours & Co v S T Dupont (Note)* [2006] 1 WLR 2793 [92-98]. The test is not the "*Wednesbury"* test.
>
> (2) That said, the Appellant has the burden of showing that the Tribunal's decision is wrong or unjust: *Yassin* [32(i)]. The Court will have regard to the decision of the lower court and give it "the weight that it deserves": *Meadow* [128] (Auld LJ, citing *Dupont* [96] (May LJ)).
>
> (3) A court asked to interfere with findings of fact made by a lower court or Tribunal may only do so in limited circumstances. Although this Court has the same documents as the Tribunal, the oral evidence is before this Court in the form of transcripts, rather than live evidence. The appeal Court must bear in mind the advantages which the Tribunal has of hearing and seeing the witnesses, and should be slow to interfere. See *Gupta* [10], *Casey* [6(a)], *Yassin* [32(iii)].
>
> (4) Where there is no question of a misdirection, an appellate court should not come to a different conclusion from the

> Tribunal of fact unless it is satisfied that any advantage enjoyed by the lower court or Tribunal by reason of seeing and hearing the witnesses could not be sufficient to explain or justify its conclusions: *Casey* [6(a)].
> (5) In this context, **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:** *Yassin* [32(v)].
> (6) The appeal Court should only draw an inference which differs from that of the Tribunal, or interfere with a finding of secondary fact, if there are objective grounds to justify this: *Yassin* [32(vii)].
> (7) But the appeal Court will not defer to the judgment of the Tribunal of fact more than is warranted by the circumstances; it may be satisfied that the Tribunal has not taken proper advantage of the benefits it has, either because reasons given are not satisfactory, or because it unmistakably so appears from the evidence: *Casey* [6(a)] and cases there cited, which include *Raschid and Gupta* (above) and *Meadow* [125-126], [197] (Auld LJ). Another way of putting the matter is that the appeal Court may interfere if the finding of fact is "so out of tune with the evidence properly read as to be unreasonable": *Casey* [6(c)], citing *Southall* [47] (Leveson LJ)." (My emboldening)

**Gateway 2: wrong due to Wednesbury unreasonableness**

24. The *Dutta* judgment shows how tricky it has been for appellate Courts to delineate the outer boundaries of the gateways, or the thresholds for an Appellant to satisfy, to succeed on rehearing appeals against findings of primary and secondary facts by tribunals. Clearly, if the Appellant proves that the Tribunal's decision is *Wednesbury unreasonable* then the appeal will be granted. I say this despite what Warby J ruled in *Dutta* because I consider that when he said it is not the *Wednesbury* test, he was ruling that the test of "wrong" encompasses *Wednesbury* but goes beyond it. The *Wednesbury* test is used for judicial review and involves consideration of 3 classic gateways. Firstly, whether the Tribunal has made an irrational decision, in the sense that no reasonable Tribunal could have come to that decision on the evidence. Secondly, whether the Tribunal has taken into account matters which are irrelevant when reaching a material finding of fact (for instance skin colour, gender, religious beliefs, political allegiance). Thirdly, whether the Tribunal has failed to take into account a relevant matter when making a material finding of fact (for instance objectively independent documentary evidence stating the opposite). I set out Lord Greene's classic ruling from *Associated Provincial v Wednesbury Corp* [1948] 1 KB 223, below:

"… When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. What then are those principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters.

There have been in the cases expressions used relating to the sort of things that authorities must not do, not merely in cases under the Cinematograph Act but, generally speaking, under other cases where the powers of local authorities came to be considered. I am not sure myself whether the permissible grounds of attack cannot be defined under a single head. It has been perhaps a little bit confusing to find a series of grounds set out. Bad faith, dishonesty — those of course, stand by themselves — unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent. For instance, we have heard in this case a great deal about the meaning of the word "unreasonable."

It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. **For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.** Warrington L.J. in *Short v. Poole Corporation* [1926] Ch 66, 90, 91 gave the example of the red-haired

> teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another." (My emboldening).

25. This is settled law in judicial review. If the Tribunal's decision is one no reasonable Tribunal could make then it will be held to have been wrong, but the courts have been trying to identify the boundaries of the 3rd gateway for what is "wrong" and how far beyond *Wednesbury style unreasonableness* they go.

**Is there a Gateway 3: wrong but not *Wednesbury unreasonable?***
**The three threshold principles and the test**

26. For this gateway, which may exist at an evidential level below the level at which the evidence on appeal reaches *Wednesbury unreasonable,* I conclude that there are four threshold principles set out in the case law which make the gateway difficult to open: (1) the "deference and respect" and the "professional experience in the field" principle; (2) the "Tribunal heard and saw the live evidence" principle; (3) the "generous ambit of disagreement" principle. What is very clear to me is that this Court is not permitted to allow the appeal just because this Court disagrees with the Tribunal's findings on one or more facts. Lawyers (and perhaps doctors) may honestly disagree over almost everything, but that is not a ground for allowing an appeal. These principles are what I think was behind the Privy Council's thinking when ruling that appellate courts are "slow to interfere with findings of fact". For instance, as Lord Rodger said in *Gupta v GMC* [2002] 1 WLR 1691, at para. 10:

> "10. The decisions in *Ghosh* and *Preiss* are a reminder of the scope of the jurisdiction of this Board in appeals from professional conduct committees. They do indeed emphasise that the Board's role is truly appellate, but they also draw attention to the obvious fact that the appeals are conducted on the basis of the transcript of the hearing and that, unless exceptionally, witnesses are not recalled. In this respect these appeals are similar to many other appeals in both civil and criminal cases from a judge, jury or other body who has seen and heard the witnesses. In all such cases the appeal court readily acknowledges that the first instance body enjoys an advantage which the appeal court does not have, precisely because that body is in a better position to judge the credibility and reliability of the evidence given by the witnesses. In some appeals that advantage may not be significant since the witnesses' credibility and reliability are not in issue. But in many cases the advantage is very significant and the appeal court recognises that it should accordingly be slow to interfere with the decisions on matters of fact taken by the first instance body. This reluctance to interfere is not due to any lack of jurisdiction to do

> so. Rather, in exercising its full jurisdiction, the appeal court acknowledges that, if the first instance body has observed the witnesses and weighed their evidence, its decision on such matters is more likely to be correct than any decision of a court which cannot deploy those factors when assessing the position. In considering appeals on matters of fact from the various professional conduct committees, the Board must inevitably follow the same general approach. Which means that, where acute issues arise as to the credibility or reliability of the evidence given before such a committee, the Board, duly exercising its appellate function, will tend to be unable properly to differ from the decisions as to fact reached by the committee except in the kinds of situation described by Lord Thankerton in the well known passage in *Watt or Thomas v Thomas* [1947] AC 484 , 487–488."

27. So, does gateway 3 exist? If so, what are the boundaries of gateway 3 and how can the Appellant open this slow to open gateway? Warby J defined it as: "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." But what does that mean? All findings which resolve issues are a choice between conflicting evidence. Morris J considered the boundaries in *Byrne v GMC* [2021] EWHC 2237, an erasure case with sexual misconduct findings against the doctor. He tackled the gateway 3 boundaries head on thus (I have put the many case citations into the Appendix hereto):

> **"(1) The approach of the Court on appeal to a finding of fact, and in particular a finding of primary fact**
>
> **…**
>
> 15. … the circumstances in which the appeal court will interfere with primary findings of fact have been formulated in a number of different ways, as follows:
>
> - where "any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusions": per Lord Thankerton in T*homas v Thomas* approved in *Gupta*;
> - findings "sufficiently out of the tune with the evidence to indicate with reasonable certainty that the evidence had been misread" per Lord Hailsham in *Libman*;
> - findings "plainly wrong or so out of tune with the evidence properly read as to be unreasonable": per in *Casey* at §6 and Warby J (as he then was) in *Dutta* at §21(7);
> - where there is "no evidence to support a … finding of fact or the trial judge's finding was one which no reasonable judge

could have reached": per Lord Briggs in *Perry* after analysis of *McGraddie* and *Henderson*.

In my judgment, the distinction between these last two formulations is a fine one. To the extent that there is a difference, I will adopt, in the Appellant's favour, the former. In fact, as will appear from my analysis below, I have concluded that, even on that approach, I should not interfere with most of the Tribunal's primary findings of fact.

16. Fifthly, I consider that, whilst noting the observations of Warby J in *Dutta* at §21(1), on the balance of authority there is little or no relevant distinction to be drawn between "review" and "rehearing", when considering the degree of deference to be shown to findings of primary fact: *Assicurazioni* §§13, 15 and 23. *Du Pont* at §§94 and 98 is not clear authority to the contrary. Rather it supports the proposition that there may be a relevant difference when the court is considering findings of evaluative judgment or secondary or inferential findings of fact, where the court will show less deference on a rehearing that on a review. Nevertheless if less deference is to be shown in a case of rehearing (such as the present case), then, again I will assume this in the Appellant's favour.

**(2) The credibility of witnesses and corroborating evidence**

17. First, the credibility of witnesses must take account of the unreliability of memory and should be considered and tested by reference to objective facts, and in particular as shown in contemporaneous documents. Where possible, factual findings should be based on objective facts as shown by contemporaneous documents: *Dutta* §§39 to 42 citing, in particular, *Gestmin* and *Lachaux*.

18. Secondly, nevertheless, in assessing the reliability and credibility of witnesses, whilst there are different schools of thought, I consider that, if relevant, demeanour might in an appropriate case be a significant factor and the lower court is best placed to assess demeanour: Despite the doubts expressed in *Dutta* §42 and *Khan* §110, the balance of authority supports this view: *Gupta* §18 and *Southall* at §59.

19. Thirdly, corroborating documentary evidence is not always required or indeed available. There may not be much or any such documentary evidence. In a case where the evidence consists of conflicting oral accounts, the court may properly place substantial reliance upon the oral evidence of the complainant (in preference to that of the defendant/Appellant): *Chyc* at §23. There is no rule that corroboration of a patient complainant's evidence is required: see *Muscat* §83 and *Mubarak* §20.

20. Fourthly, in a case where the complainant provides an oral account, and there is a flat denial from the other person concerned, and little or no independent evidence, it is commonplace for there to

be inconsistency and confusion in some of the detail. Nevertheless the task of the court below is to consider whether the core allegations are true: *Mubarak* at §20.

**(3) The requirement "to put your case"**

21. Where the court below is considering reaching a conclusion on a case theory, or basis of facts or a version of events, not based on the oral or documentary evidence before it and not put forward by either party, it must give the parties a reasonable opportunity to address that basis before reaching such a conclusion; and not to do so amounts to procedural unfairness: *Dutta* §§34 to 36. However there is no rule that every ground for doubting the evidence of a witness must be put to the witness. The question is whether the trial viewed overall was unfair: *Chen v Ng* [2017] UKPC 27 at §§52-56.

**(4) "Serious cases": the standard of proof and "heightened scrutiny"**

22. The standard of proof to be applied by the Tribunal and by this Court is the civil standard of balance of probabilities. As regards the position where the allegations, or the consequences for the person concerned, are particularly serious, the Appellant referred me to *Casey* at §16, suggesting that there is a need for a "heightened examination of the evidence". It was common ground that the correct approach is as set out in my judgment in *O v Secretary of State for Education* at §66. In that case, after referring to the relevant House of Lords and Supreme Court authorities (*Re B and Re S-B)* (which in turn referred to *Re Doherty* cited in *Casey*), I summarised the position as follows:

"(1) There is only one civil standard of proof in all civil cases, and that is proof that the fact in issue more probably occurred than not.

(2) There is no heightened civil standard of proof in particular classes of case. In particular, it is not correct that the more serious the nature of the allegation made, the higher the standard of proof required.

(3) The inherent probability or improbability of an event is a matter which can be taken into account when weighing the probabilities and in deciding whether the event occurred. Where an event is inherently improbable, it may take better evidence to persuade the judge that it has happened. This goes to the quality of evidence.

(4) However it does not follow, as a rule of law, that the more serious the allegation, the less likely it is to have occurred. So whilst the court may take account of inherent probabilities, there is no logical or necessary connection between seriousness and probability. Thus, it is not the case that "the more serious the allegation the more cogent the evidence need to prove it".

28. I take away from this helpful summary of the case law and the previous high appellate case law, the following guiding principles. For gateway 3 of “wrong” to be

opened, in relation to findings of fact, the appellate court must be satisfied on the balance of probabilities by the Appellant, on whose shoulders the burden of proof falls, that the findings of fact were wrong. I don't think the word "plainly" adds anything myself and so will follow the guidance in *Jagjivan*. The burden of proof is the same for severe allegations as it is for less severe allegations. The "wrong" test, when dealing with cases not concerning: (1) a failure to give adequate reasons, and not involving (2) *Wednesbury unreasonableness,* (my gateway 2) is not easy to define. There are some clear steps necessary to get through. Firstly, the reason why the Tribunal was wrong. The appellate Court must decide that the finding of fact was wrong for a reason. That reason may that there was no evidence on which to make the finding or that there was a failure to give any weight to a piece of evidence which the appellate Court considers was weighty, or a failure to find a piece of evidence was relevant, when the appellate Court considers that it was directly relevant to making the factual finding. So, the existence of evidence and the weight and relevance are potential reasons. That reason may be that the Tribunal has misread, misunderstood, overlooked or forgotten a relevant and material piece of evidence when making a factual finding. Secondly, if there is a reason identified by the appellate Court, it must be a sufficiently powerful reason for the Court to decide that the Tribunal's decision was wrong, such that it surmounts all of the three threshold principles set out above: (1) the "deference and respect/professional experience" principle; (2) the "Tribunal heard and saw the live evidence" principle; (3) the "generous ambit of disagreement" principle.

29. In this case the main issues involve findings which were based on a clash of evidence between two witnesses, the GP and the patient (PA), one of which was preferred over the other by the Tribunal. The assessment of the credibility of a witness's evidence overall and on any core issue, by a Tribunal and by the Appellate court, involves using well known methods. By comparison with the contemporaneous medical notes. By assessing whether the chronological accounts given by each of the witnesses have been internally consistent or are contradictory or have been embellished. By assessing whether the accounts are consistent with external evidence and are corroborated by other witnesses or by objective documentary evidence including the medical notes. By assessing the witnesses' behaviours peripheral to the asserted core evidence to see if they support the asserted core evidence. By assessing the witnesses' motivations, personality, mental health and past history. By assessing the witness' demeanour and way of giving evidence live in the hearing. In cases where there is no medical record and no third party contemporaneous note, the credibility of the protagonist and the antagonist may be more difficult to assess. Post event words and actions may be indicative or determinative and throughout all of these filters, the Court will take into account that memory is not perfect, it stores only what the witness saw, heard, smelt or read, it degrades with time, it may be manipulated quite honestly by the witnesses' desire to be right or justified and it may be manipulated consciously or unconsciously when it is accessed by questioning for the purposes of writing witness statements.

30. Where a witness' evidence (for instance the Appellant's in this case) is not corroborated by any or any credible contemporaneous documents and where, despite any understandable inconsistency in the detail of the witness' memory, the evidence is determined by the Tribunal as unreliable, or the evidence is rejected as lacking in credibility, the rationale and reasons for that decision by the Tribunal need to be considered by the appellate court and analysed in the context of all of the evidence. It is for this reason that the gateway 1 – the duty to provide adequate reasons - exists. For, if the parties and the appellate court cannot determine at least the basic reasons why one key clashing witness' evidence was preferred over the other key witness, the function of the appellate court may be undermined. However, as was made clear in the authorities on the requirements laid down for the scope of and details required to be given in the reasons, the law does not impose too high a standard on the first instance Tribunal when giving its reasons after a hearing. Not all evidence is required to be summarised or analysed. Not all details are required to be set out.

*31.* The latest Court of Appeal authority cited by counsel in this appeal was *Volpi v Volpi* [2022] EWCA Civ. 464. In that case the Court was dealing with an appeal from a High Court Judge in a loan and property dispute. The appeal was on a pure question of fact. It was not a statutory appeal so PD 52D did not apply to the appeal. The appeal was not a rehearing, it was a review, but the same test, set out in CPR r.52.21, applied to the Court's power to overturn. Lord Justice Lewison ruled thus:

> "**Appeals on fact**
> 2. The appeal is therefore an appeal on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:
>
> i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
>
> ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
>
> iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

> iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
>
> v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
>
> vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract.
>
> 3. …
>
> 4. Similar caution applies to appeals against a trial judge's evaluation of expert evidence: *Byers v Saudi National Bank* [2022] EWCA Civ 43, [2022] 4 WLR 22. It is also pertinent to recall that where facts are disputed it is for the judge, not the expert, to decide those facts. Even where expert evidence is uncontroverted, a trial judge is not bound to accept it: see, most recently, *Griffiths v TUI (UK) Ltd* [2021] EWCA Civ 1442, [2022] 1 WLR 973 (although the court was divided over whether it was necessary to cross-examine an expert before challenging their evidence). In a handwriting case, for example, where the issue is whether a party signed a document a judge may prefer the evidence of a witness to the opinion of a handwriting expert based on stylistic comparisons: *Kingley Developments Ltd v Brudenell* [2016] EWCA Civ 980.
>
> 5. Tribunals are free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense. Whether any positive significance should be attached to the fact that a person has not given evidence, or to the lack of contemporaneous documentation, depends entirely on the context and particular circumstances: *Royal Mail Group Ltd v Efobi* [2021] UKSC 33, [2021] 1 WLR 3863."

32. I note that the word "plainly" has crept back into use in paras. (i) and (ii) having been disavowed by the Divisional Court in *Jagjivan.* That might have been a matter of form rather than substance, however I note that in the same sub-paragraph, Lewison J folded what I have called gateway 3 back into part of the *Wednesbury unreasonableness* test (my gateway 2) – namely that in relation to findings of fact, wrong means that no reasonable judge would reach the factual conclusion which the trial judge did. The guidance clearly covers reasons given by tribunals as well as Courts. Paras. (iii) and (vi) restate the well established guidance on the relatively

undemanding requirements for the contents of a judgment or tribunal's reasons. Para. (iv) restates the generous ambit of disagreement principle. The irrationality test, which is part of the *Wednesbury unreasonableness* criteria, is then recited in (v). Para. 5. then sets out the appellate court's power in relation to secondary findings by inference. I do not read these guidance paragraphs as containing the whole scope of the test for what can be determined as wrong in relation to findings of fact. For instance, there is no reference to the other two parts of the *Wednesbury reasonableness test*, failing to take into account a relevant matter or taking into account an irrelevant matter. I take this guidance to be a reminder that the four threshold principles require this Court not to overturn the Tribunal's findings of fact without a good and clear reason to determine it was wrong which justifies the ground of appeal passing over those thresholds.

33. I end this analysis with the judgment of Lord Briggs in *Perry v Raleys* [2019] UKSC 5.

> *"The Judge's Determination of the Facts*
> 49. It is necessary therefore also to address the question whether the Court of Appeal was right to conclude that, quite separately from supposed errors of law, the judge went sufficiently wrong in his determination of the facts to enable an appellate court to intervene. The Court of Appeal expressed its positive conclusion on that issue under two headings, at para 26, namely:
>
> > "iii) he demonstrably failed to consider, or misunderstood, relevant evidence, and
> >
> > iv) his decision … cannot reasonably be explained or justified."
>
> Those are strong conclusions about a fact-finding exercise at trial by an experienced judge, but the Court of Appeal made them after reminding themselves of the very real constraints facing an appellate court when invited to overturn a judge's findings of fact at trial. For that purpose they referred to *Grizzly Business Ltd v Stena Drilling Ltd* [2017] EWCA Civ 94, *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 WLR 2600 and *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477. In the *Henderson* case the Supreme Court had said, at para 62:
>
> > "It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached."
>
> 50. In the *McGraddie* case Lord Reed said this, at paras 3-4:
>
> > "3. The reasons justifying that approach are not limited to the fact, emphasised in *Clarke's* case and *Thomas v Thomas,* that the trial judge is in a privileged position to assess the credibility of witnesses' evidence. Other relevant considerations were

explained by the *United States Supreme Court in Anderson v City of Bessemer* (1985) 470 US 564 (1985), 574-575:

> 'The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one: requiring them to persuade three more judges at the appellate level is requiring too much. As the court has stated in a different context, the trial on the merits should be 'the 'main event' … rather than a 'try out on the road'.' … For these reasons, review of factual findings under the clearly erroneous standard - with its deference to the trier of fact - is the rule, not the exception.'"

Similar observations were made by Lord Wilson in *In re B (a Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 WLR 1911 , para 53.

> "4. Furthermore, as was stated in observations adopted by the majority of the Canadian Supreme Court in *Housen v Nikolaisen* [2002] 2 SCR 235, para 14:
>
> > 'The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged.'

…

52. The question in the present case is not whether the Court of Appeal misstated those constraints. **They may be summarised as requiring a conclusion either that there was no evidence to support a challenged finding of fact, or that the trial judge's finding was one that no reasonable judge could have reached. Rather, the question is whether the Court of Appeal were correct in concluding, as they did, that there were errors in the judge's**

> **factual determination which satisfied those very stringent requirements.**" (My emboldening).

34. This guidance is clear and firm. The three threshold principles are set out. Where the appeal is against a finding of fact, and it is not made on the grounds of lack of reasoning in the judgment (gateway 1), or procedural unfairness (a different gateway), the test for the appellate Court to apply is to determine whether no reasonable judge would have made the finding of fact or whether there was no evidence to support the finding of fact. In my judgment this amounts to the same thing, because no reasonable judge could make a finding of fact on no evidence. This formulation clearly encompasses gateway 2: *Wednesbury unreasonableness,* but does it go further? Two oft used phrases in grounds of appeal, which were used by the Appellant in the appeal before me, are that the Tribunal "misread" the evidence and/or that the finding was "against the weight" of the evidence. Lord Briggs included examples of where the tribunal "misunderstood" material evidence or overlooked it. It seems to me that the question whether such a ground comes within gateway 3 depends on the circumstances and whether the misreading of or the weight of the contra-finding evidence is sufficient to satisfy the three threshold principles and lead to the appellate Court concluding that the finding was wrong. So, for instance, misreading a witness statement as asserting a traffic light was "red" when in fact what was written was that it was "green", would amount to a finding which no reasonable Tribunal could make. But that is within gateway 2. However, preferring the evidence of one eye-witness over another, may fall foul of the three threshold principles and be insufficient to make a finding that the Tribunal was wrong. If a Tribunal makes the challenged finding of fact on the live or written evidence of a witness, that is some evidence, it is not "no evidence", so powerful reasons are going to be needed for the appellate Court to find that "no reasonable" Tribunal could have reached that finding. With the above guidance in mind I now turn to the facts.

**Admitted and undisputed facts**

35. Before I consider the evidence in relation to the disputed facts, I shall set out the many facts which were not in dispute and the facts which were admitted. PA attended the surgery on the 18th of March 2020 as the Appellant's first patient. During the attendance, which lasted for more than half an hour, he took notes of her symptoms and examined PA with her top off in the presence of a chaperone (Michelle). He made notes in relation to her past history, his examination findings, his plan and the recommended treatment. The notes made were not disputed. I have already set them out above. The Appellant admitted making a handwritten note during the morning examination of the address and mobile phone number of PA and using that to make the evening phone calls. The Appellant also admitted to working in the surgery until 4.30 on patients' case files, then thereafter on his own learning matters and then leaving the surgery and making a phone call to PA at approximately 7.15 pm for less than a minute whilst he was in the surgery car park. She consented to him making a home visit. Then, he drove over and a little later, he admitted making a second phone

call for about 6 minutes during which he asked for and received directions to PA's apartment. Both calls were made on his personal mobile phone. The Appellant admitted entering PA's flat with her consent, having a conversation with her, touching a part of her back to indicate where massage would be best focused, giving her a one armed hug and then departing because PA, having left the room for a few seconds returned with massage oil. The Appellant also admitted calling PA the following evening after 7:00 pm and having a further conversation with her. The Appellant admitted wholly failing to make any notes of the home visit or the three mobile phone calls with PA.

36. Certain other facts were not disputed. So, it was not disputed that the Appellant was born and brought up in Barbados, qualified as a teacher and worked as a secondary school science teacher. He was married and had two children. He then changed to qualify as a medical doctor in Cuba. This took seven years and involved some hospital work in the last two years. He then moved to the UK in 2007 with his wife and children. He had a visa as a spouse of a British citizen. He then passed the PLAB exams for foreign doctors to transfer to work in the UK and between 2007 and 2016 (9 years) worked as a locum SHO in various hospitals around the East of London whilst his visa was sorted out. When he became a British Citizen he was allowed to specialise and he chose to specialise as a GP. He started a four year traineeship in August 2016. He was coming to the end of his last five months of being a trainee when the events occurred. He qualified fully in August 2020.

37. In relation to PA and her health and history, very little evidence was put before the Tribunal. Her GP notes from her previous GP surgery were not requested. The undisputed facts were that she was aged 57, divorced and in work but operating under a cloud of redundancy at the relevant time. She was renting an apartment and lived alone. She registered at the surgery in Waltham Abbey on 3.1.2020, where the Appellant had been working since August 2018. That surgery was run by Doctor Dabas who was also the training supervisor for the Appellant. She attended at the surgery on multiple occasions from January through to 18th March 2020. According to her medical notes, on 8.1.2020 she had an alcohol screening and informed the surgery that she did not smoke. On 17.1.2020 she was allocated Doctor Dabas as her accountable GP to co-ordinate her care and was so informed. On 23.1.2020 PA was examined by the nurse who recorded her heart rate, blood pressure and history. She had transferred from Holywell and Attenborough Surgery. She had no allergies. She had a history noted of stomach pain but no vomiting. On examination her abdomen was soft and non-tender, but she had generalised abdominal discomfort and hyperactive bowel sounds. The tentative diagnosis was gastritis. She requested medication. Results were to be chased in a week. On 28.1.2020 PA came to the surgery and met a GP called Doctor Tanna. Dietary advice was given (weight 62.7kg, BMI 23). She was issued with an unfit to work certificate. Her complaint was worsening gastritis. A stool sample had been sent off. No diarrhoea or vomiting was noted. She complained of ongoing nausea and heartburn in the past few days. No

chest pain and no shortness of breath were noted. On examination she was alert and was not febrile. ENT examination showed: nothing abnormal, "abdo snt" (I do not know what that meant). She was advised to switch her PPI medication (proton pump inhibitor). "d/c red flags" were noted. If there was no improvement in symptoms in 2 weeks she was advised to go for private referral. Her test results came back on 28.1.2020 showing no Helicobacter Pylor detected from her stool sample.

38. On 3.2.2020 PA attended and was examined by the Appellant for the first time. Her history was noted as: having stomach pains for 2 weeks; nausea but no vomiting; had been taking Omeprazole (a PPI) for 15 years and had the pills changed 1 week ago; normal stools and regular as compared to normal (constipated); reduced appetite; denied weight loss; her *** and *** had died of lung cancer and her *** had current prostate cancer. On examination she weighed 63.4 kg. A chaperone was noted as present for the examination (Helen). The diagnosis was gastritis, but the cause was unknown. The plan was that the patient wanted a private referral for faster treatment. She was advised to continue to take her PPI medication and to return if her symptoms worsened. Seven pieces of correspondence were thereafter entered on the system relating to her private tests and results for a gastroscopy and gastroenterology examination. On 10.2.2020 PA returned and saw the Appellant. The history was that she brought in a letter and was due to be seen for discussion of biopsy results on 25.2.2020 in the private system. She was complaining of a cough and hoarse voice. On examination (without chaperone) her chest was clear and the diagnosis was gastric polyps, viral "URTI" (upper respiratory tract infection). The plan was to take Paracetamol as needed, eat on time, stay erect after meals for 1 hour, to avoid eating spicy food. There was further correspondence noted in particular on 25.2.2020 about a duodenal adenoma found on gastronomy and referral for endoscopy.

39. On 27.2.2020 PA attended and saw the Appellant for the third time. She brought in a report, she was due for colonoscopy and asked for more PPI (Omeprazole). I note that this was a reversion back to the PPI she used to take before Doctor Tanna changed the PPI. The diagnosis was duodenal adenoma. Further correspondence with the private system took place on 28.2.2020.

40. On 2.3.2020 PA attended and saw Doctor Barai complaining of stomach cramps. She had no temperature. Her history was that she had had a colonoscopy and had suffered no nausea and vomiting since. No blood in stool. The colonoscopy had been challenging because she had undergone hysterectomy previously and her colon was contorted. A query was raised as to an adhesion which may have caused some bruising during the colonoscopy. She was reassured and advised to return/seek urgent medical attention if her symptoms increased or she found blood in her stool. The results came in soon thereafter and the colonoscopy, done on 29.2.2020, found everything to be normal. She was diagnosed with gastric and duodenal polyps. PA was to be reviewed on 17.3.2020 by the gastroenterologist.

41. On 13.3.2020 the surgery received a call and noted it was from "George", a counsellor at Lifeworks, who was concerned for PA who had taken 4 paracetamol and 1 amitriptyline in her attempt to "take her life". The Surgery called PA and noted she was going away for a few days.

42. On 18.3.2020 PA attended for the disputed examination. The notes made are set out below with the typing/printing errors:

> "Read Code Psor as s
> Comment H story patient says omeprazo/e working for here had bot ptrocedures OGD and co/onoscopy sayus in the week she found out that she will loose her job an was quite depressed almost suicidal still clo mild discomfort in her tummy initially in teh week not eating well but this has picked up
> Comment Exam naton good rapport Michelle present as chaperone: psoraisis plaques on chest back and hands scalp tendet intercostal musc/esof chest left trapezium
> Comment D agnos s gastritis Psoriasis
> Comment Plan patint to continue medication for gastris a s p fanned as/o use of emo/ieants to help reduce psoriasis skin flare up advioed gentle streteches fro muscular pain and massage paracetamol if needed"

43. There were no medical notes made by the Appellant relating to his phone calls to PA in the evening of 18.3.2020, or his home visit or his phone call to PA on 19.3.2020. PA contacted the police on 20.3.2020 and complained that the Appellant had given her a massage at her flat and massaged her breasts. The police took a witness statement on 20.3.2020. They contacted the surgery on 23.3.2020 and asked them not to investigate the allegations until the police had done so. They took a statement from the Appellant and the police closed the investigation in around June 2020.

44. On 1.7.2020 the Appellant made retrospective entries in the notes after the police investigation had been closed with no charges laid. It stated as follows:

> "18.03.2020 telephone
> Retrospective entry.
> Call to patient - agreed home visit.
> Dr Roach 25.06.2020
>
> 18.03.2020 home visit
> Retrospective entry.
> History: suicidal thoughts/ mental health concerns and back pain. Discussion financial concerns (rent and bills) and their effect on her, job security concerns -

having to train up a new employee/ impending job loss / application for new jobs. Assessment mental state –well kempt, good eye contact and rapport. Appeared to be coping well. No indication of self harm or suicidal intent. Discussed upper back and chest pains from the morning consultation - no improvement.
Plan: Reassured. Advised use of deep heat or ibuprofen gel to help with pain relief. Informed patient - call the next day to check up on mental health.
Dr Roach 25.06.2020
19.03.2020 telephone
Retrospective entry.
Patient coping and going about daily routine. No concern re worsening mental health. Safety net advice given - contact the surgery.
Dr Roach 25.06.2020"

**The Evidence**

45. The Tribunal heard evidence live from PA, Doctor Dabas, the Appellant, K Baluja, M Mullally, and Mr. Allum. They read the evidence in witness statements from S Green, K Brooks-Brown, E Huckstep, K Barford and H Houghton.

46. The Tribunal had a bundle before them of documents. That was copied into the appeal bundle.

**The Tribunal's Judgment**

47. The Tribunal set out some of the basic facts. I have summarised more above. They described three applications which had been made, only one of which is relevant to the appeal. They refused the Appellant's application to permit one of the Appellant's witnesses, Michelle Mullally, to try to identify PA by looking at a photo taken from her Facebook page. The Tribunal then set out the allegations and the admitted facts, listed the evidence they had considered and set out their approach to proof, clearly stating that the burden was on the GMC and the standard used was the balance of probabilities. In relation to credibility, they stressed that they did not just assess the witnesses' demeanour. They recognised that credibility was divisible and they took into account the Appellant's good character. When considering sexual motivation they relied on *Basson v GMC* [2018] EWHC 505, which defined sexual motivation as conduct in pursuit of sexual gratification or future sexual relationships. They then analysed the evidence of the two key witnesses. They identified the major disagreement related to the events at PA's apartment and that they needed to prefer one account or the other.

48. Pausing there, I do not consider that this was the correct approach in law. Firstly, they needed to assess whether the GMC had discharged the burden of proof that the events at the apartment occurred by considering whether to accept that the evidence of PA was sufficiently credible in itself and when compared with all the other evidence. If her evidence was insufficiently credible, there was no need to go further. Then they

needed to consider whether the evidence from the Appellant and all the other evidence was to be preferred such that they preferred her evidence over his.

49. The Tribunal considered the medical records and the phone records and the Appellant's retrospective note. In relation to Michelle Mullally's evidence, which had been provided in a witness statement dated 18 months after the event, they considered it was vague and the best she could say was that in reference to a patient where she was chaperoning an examination by the Appellant the patient seemed "odd". They noted that PA complained to the police on the 20th of March, two days after the events at the apartment and one day after the last phone call and they compared PA's witness statements to the police with that made to the GMC. In relation to the first consultation on the 3rd of February 2020 the Tribunal noted that PA asserted that the Appellant said that he had worries about PA having cancer which led to a gastroscopy and a colonoscopy. In relation to the 18th of March 2020 consultation PA had said the Appellant had told PA he would "call her later to see how she was getting on". Whereas the Appellant had asserted that he had concerns for her mental health and that PA had asked him to come for "a cup of tea" later. The Tribunal noted the call from the Lifeworks counsellor to the surgery expressing concern that PA had attempted suicide. The Appellant had recorded that PA was losing her job and *had* felt suicidal. She complained of pain in her chest and shoulder and he diagnosed a strain to her intercostal muscles and left shoulder. He recommended gentle stretches, massage and taking Paracetamol. He did not note that PA was either tearful or obviously depressed and he did note a "good rapport". He asserted he was due to end seeing patients at midday but worked on later into the afternoon and then called her to see if she needed a visit and she agreed. He stated he left the surgery and explained he had used his mobile phone, not the work phone, to ensure he had PA's number so he would not get lost. The Tribunal noted the supportive witness evidence that the Appellant was a "cautious" GP and used chaperones during examination. They noted the evidence of Doctor Dabas that home visits were usually for patients with mobility problems but ultimately it was a matter for clinical judgment. They noted no medical notes were made of the home visit or of the patient's mental health issues. They noted the police safeguarding unit contacted the surgery on the 23rd of March, by which stage there was still no note made by the Appellant relating to the 18th or 19th of March, despite him having been in work since those dates. The Tribunal accepted as a fact that PA had mental health issues but noted that no note had been made of those in the Appellant's consultation record on 18.3.2020. They were not persuaded that a home visit was "required" and also noted that, despite the Appellant's concern about the suicide attempt using Paracetamol, he himself prescribed more of it. They rejected the Appellant's submission that the alleged assault was unlikely because the Appellant had been told by PA that a visitor was arriving later. The Tribunal considered the evidence of Mr. Allum, in relation to the Appellant's Osgood-Schlatter's disease, which he asserted made it impossible for him to kneel. They accepted Mr. Allum's evidence that kneeling would cause symptoms but noted that the Appellant had told Mr. Allum that he used knee pads when kneeling and the

Tribunal found that crouching or kneeling was not impossible for the Appellant. They found that on the 19th of March the Appellant called PA and asked "have you found the oil yet?" and that it "would be good to hook up again". They accepted PA's evidence that the Appellant stated he was calling from a supermarket and was acting as if they were in a relationship. They noted a discrepancy in PA's evidence in that she asserted this call happened in the afternoon, whereas the phone records confirmed it was in the evening. The Appellant asserted the call confirmed that PA was coping and she raised no concerns about the previous home visit. He asserted he advised her to call the surgery if she had any problems. They noted the contradiction in the Appellant's evidence when he said he was concerned that PA might be making an advance during the home visit, yet he still called her the next day and failed to make any report to his surgery or make any note in her medical records of his concerns. Therefore, the Tribunal considered it was unlikely that the Appellant had called PA for clinical reasons on 19.3.2020. In relation to PA's witness statements, they considered there were inconsistencies, but they considered them to be understandable. On the core events they found her evidence to have been consistent. They compared her evidence with the Appellant's evidence and explanations and they found his explanations to be "implausible". They considered the witness statements and evidence supporting the Appellant's good character and good behaviour at work in the surgery, but discounted this because it did not occur outside the surgery. They found PA's evidence to have been specific and consistent on the core allegations and they were persuaded by her very timely complaint to the police. Therefore, they preferred PA's evidence in all aspects and relied upon the evidence she set out in her police witness statement, but not the evidence she set out in her later GMC statement.

50. In relation to the findings on each of the five allegations, the Tribunal found three not proven. They did not find that the Appellant had a sexual motivation at the time of the examination on the morning of the 18th of March when he was writing down PA's phone number. They did not find that that the Appellant asked PA, whilst on the home visit, about her bedroom and they did not find that the Appellant pushed his penis against PA's hand during the massage. However, they found all of the other allegations proven. They accepted that the Appellant told PA to take off her bra and gave PA a breast massage, which they held was inappropriate inter alia because she was a vulnerable patient. They found that he hugged her twice at the flat and they found that on the next day he called PA for reasons other than clinical or medical. In relation to consent, they took into account section at 74 of the *Sexual Offences Act 2003,* which defined consent as agreeing by choice with freedom and capacity to choose. They noted that PA accepted that she let the Appellant into her flat and did not resist the suggestion of massage or the taking off her bra. Her explanation was that she believed it was medical. The Tribunal found that she did not provide true consent because she had a sense of confusion, fear and duress and because she trusted the doctor as his patient. Therefore, they found that PA did not consent to the actions. They found that the Appellant's actions were all related to sexual motivation and were

inappropriate behaviours. On the Appellant's admission they found that he breached professional standards by failing to make any medical notes.

## Grounds of appeal

### Ground one. Sexual motivation.

51. The Appellant sets out 10 paragraphs in support of his appeal in relation to the finding of sexual motivation. The first three come down to an assertion that the Tribunal failed properly to consider that the Appellant was a trainee GP who grew up in Barbados and was trained in Cuba. However, no submission or foundation for satisfying an appeal gateway is set out in those paragraphs. The next submission relied on the evidence of Doctor Dabas who, it was submitted, gave evidence that the decision whether to make a home visit was one for the doctor concerned based on the information available. It was submitted that her evidence was to the effect that, although home visits would usually be made for patients who were unable to attend the surgery, doctors could use their own judgment without any specific request. It was submitted there was no evidence from any medical expert witness to the effect that it was inappropriate for the Appellant to consider a home visit to PA in all of the circumstances. It was submitted that the Tribunal put the bar too high firstly by reversing the burden of proof and secondly by requiring the Appellant to prove a need or a requirement for a home visit. Further, the Appellant submitted that, according to Doctor Dabas, as a trainee GP, who was very conscientious, he had simply committed an error of judgment. It was submitted that the Tribunal was not bound to accept Doctor Dabas's view but instead should have considered the possibility that his relative inexperience and his concern that PA might be more comfortable opening up about her mental health issues in her own home, justified the visit. The Appellant asserted the Tribunal did not even consider the Appellant's evidence on this issue. It was submitted that the Tribunal clearly misled itself as to the proper legal approach. They should have considered and excluded all other possibilities first before concluding that sexual motivation was present. Further, it was submitted that having reached the decision on the after work phone call on the 18th of March being unjustifiable, save for sexual motivation purposes, the Tribunal then went on to prefer PA's account and that approach was flawed. In relation to the post event phone call on the 19th of March the Appellant submitted that, on his own evidence, his phone call was justifiable to see how she was getting on. The Appellant submitted the Tribunal did not explain why that call was unlikely to be for clinical reasons, save to say that there was no credible explanation for it. He again relied on being a trainee GP and his lack of experience. Finally, the Appellant explained his failure to make notes was due to being busy and due to COVID yet the Tribunal failed to mention this in the reasons for the decisions.

### Ground 2. Character evidence

52. The Tribunal acknowledged the Appellant's good character but the Appellant complains that the Tribunal decided to place limited weight on the character evidence because the complained of events took place away from the surgery. The Appellant

relied on the character evidence coming from female patients and female colleagues and asserted that the Tribunal's decision to give no weight to the evidence about his wholly appropriate behaviour with female patients and colleagues was wrong.

**Ground 3. Mr Allum**

53. The Appellant submitted that the Tribunal failed to deal with the real issue arising from Mr Allen's expert evidence and reversed the burden of proof. They focused on whether it was possible or impossible for the Appellant to kneel.

**Ground 4, Michelle Mullally's evidence**

54. In this ground the Appellant asserts that the Tribunal should have put more weight on Miss Mullally's live evidence and should have permitted her to identify PA from a photograph from PA's Facebook pages. After the GMC objected to photograph identification the Tribunal refused permission for that form of identification. The Tribunal's findings on her evidence, that a patient seen by the Appellant while she was chaperoning was "odd" was criticised. It was asserted that the Tribunal confused admissibility with the weight of the evidence. The Appellant conceded that the in Court identification might properly be treated with caution, but submits that being denied the opportunity to explore the identification and present his best case was wrong.

**Ground 5. Inconsistencies in PA's evidence**

55. The Appellant put forward a long list of inconsistencies in PA's evidence, in her witness statements and her live before the Tribunal. It was asserted that PA was wrong on a wide range of issues and that the Tribunal should have found her to be an unreliable witness on the core issues as a result. The Appellant prayed in aid the Tribunal's rejection of PA's evidence that he pressed his penis onto her hand. In particular the Appellant relied on PA's errors recalling the length of the appointments with the Appellant; the number of times she saw the Appellant; whether she saw any other doctors at the surgery; her psoriasis; the discussion of her suicide attempt at the consultation on the 18th of March; her inconsistent accounts about the time when her friend was due to arrive at her apartment; her inconsistent accounts of whether the Appellant was kneeling or crouching during the massage; her plainly wrong evidence that she had never received a letter from the practice following her complaint, setting out the Appellant's version of events, despite a clear record by the practice of a conversation with her in which she confirmed receiving it; her denial that she had ever been told of the contents of the Appellant's original denial after the allegations arose and his assertion that she had invited him over for a "cup of tea". For these reasons the Appellant asserted that the Tribunal misread the evidence. I work on the basis that that means the Appellant is submitting that the Tribunal was wrong to accept that PA's evidence on the core issues was credible and their findings on that should be quashed.

**Ground 6. Flawed reasoning.**

56. It was submitted that the Tribunal was wrong to reject four submissions made by the Appellant. At the Tribunal hearing he had asserted that: because he knew a friend was visiting PA, at about the time he was there, it would have been unlikely he would have massaged her breasts for fear of being discovered. It was further asserted that the Appellant was entitled to believe PA was comfortable with him carrying out a home visit because she agreed to it on the phone and directed him to her apartment. It was asserted that a guilty man would have made notes of the home visit to cover up his sexual activities, whereas an innocent man might not through being busy and because of Covid. It was asserted that the Tribunal failed to give weight to his testimonial evidence that he was a conscientious and dedicated trainee GP.

**Grounds 7 and 8. Impairment of fitness and erasure**

57. These two grounds of appeal really flowed from the earlier 6 grounds. The Appellant submitted that if this appeal Court quashes one or more of the core findings of fact then these grounds of appeal are triggered.

58. Overall, the Appellant submitted that the factual findings were wrong and could not be sustained on a fair reading of the evidence before the Tribunal. In his skeleton the Appellant relied on the judgement of laws LJ in *Rashid* at paragraphs 19 and 20 and the judgment of Auld LJ in *Meadow* at paragraph 197. The Appellant therefore submitted that the Tribunal failed to assess PA's credibility by reference to the contemporaneous documents, namely the medical records, about which she was inconsistent and contradictory.

**The Respondent's submissions**

59. **Ground 1.** The Respondent submitted that the Tribunal had been well aware that the Appellant was a trainee and addressed his explanation for the home visit in their reasons. The Respondent submitted his cautious nature in surgery was to be compared with his lack of caution on the unchaperoned home visit. He had always required chaperones when examining PA in clinic. The Respondent relied on the complete absence of medical records made on the morning of the 18th of March, during the examination, to support the Appellant's asserted worries about PA's mental health. It was not mentioned in the diagnosis or in the suggested treatment plan. The Tribunal took into account that the Appellant did not use his work phone for what he said was work and they rejected his assertion that PA had asked him to come for a "cup of tea" inter alia because he made no record of that request. He also made no record of his phone calls on the 18th and the 19th of March relating to the home visit. The Respondent asserted that this was suspicious. The Tribunal therefore rejected the Appellant's post event reasons, expressly applying the correct burden of proof.

60. **Ground 2.** The Respondent submitted that the Tribunal was right to consider that the Appellant's conduct at work was less relevant, in view of the fact that the alleged events occurred outside work.

61. **Ground 3.** The Respondent submitted that the Tribunal's reasons showed they had carefully considered the evidence of Mr. Allum and they were correct to rule that kneeling was not impossible for short periods. The rest of his evidence was not really material.

62. **Ground 4.** Miss Mullally was the surgery reception manager. The Respondent submitted that one reason why her suggested ID by photograph in Court would be unfair was that it was so long after the event. The Respondent submitted this was a case management decision and was not a serious procedural error. In any event Miss Mullally's evidence was nothing more than that she couldn't recall the examination and all she suggested was that an unknown patient had behaved "oddly" during one chaperoned examination which she observed, which evidence had no significant probative value.

63. **Ground 5.** The Respondent submitted that the Tribunal had expressly found various inconsistencies related to the details and the logistics of PA's attendances at the surgery, but did not find inconsistencies in her core evidence about the massage. The Respondent pointed out that the penis allegation was not in the police witness statement and so the Tribunal did not accept it. PA had also said that she had assumed that it was the Appellant's penis against her hand, she did not say that she was sure. Therefore, it was right for the Tribunal to find that this was not either dishonest or an embellishment.

64. **Ground 6.** The Respondent pointed out that the Appellant's submissions failed before the Tribunal as submissions often do. The Tribunal rightly rejected the logic behind the submission that the Appellant would not have carried out the breast massage in the knowledge that a guest was coming round. Likewise, that a guilty man would have made medical notes. The Respondent submitted both were pure speculation about what dishonest or guilty men would do.

65. **Grounds 7 and 8.** The Respondent submitted that these grounds were parasitic upon the result of the earlier grounds of appeal.

**The evidence**

66. **PA's evidence.** In her witness statement to the police, made a mere 2 days after the alleged events, PA asserted that she had seen the Appellant about four times at the surgery. She asserted she had suffered stomach pain since mid-February 2020. According to the medical notes that was inaccurate because she first complained in mid-January 2020. She recalled one of the earlier surgery visits when she saw the Appellant and he set out her options. Then she went to private hospitals and had blood scans. She went back to see the Appellant but saw another doctor. Later she saw the Appellant. She complained that he would take 45 minutes with her each time and would walk her out to reception to get her letter. That was a very odd complaint in view of the evidence that the examinations did not take 45 minutes. Why would it be

wrong for a GP to spend more time with a patient rather than less? or to be kind and walk her to reception? About the 18th of March consultation, PA asserted she was at the hospital the night before and went to get her medication from the Appellant. He checked her over and he "always" used a chaperone. At the end of the consultation, he checked the last three numbers of her mobile phone number and wrote them on a piece of paper and he said he would give her a call later to see how she was getting on. She said he seemed "very caring." She asserted she had arranged for a friend to visit at 8:15 pm and at 7:15 pm the Appellant called, asked whereabouts her flat was, said he was round the corner and could come round and she agreed to him doing so. He called back 10 minutes later for directions, she saw his car out of the window and gave directions, he buzzed the intercom and she let him in. They sat down. She asserted he asked whether one of the rooms was her bedroom, looked at it and said it looked like a show bedroom and she found this really strange. He asked how many bedrooms and she answered two. He said he should rent a room there and she found that inappropriate. Pausing there, as a 57 year old divorced woman with capacity, she was perfectly capable at that stage of saying that she was uncomfortable or that he should not speak like that, but she did not. Likewise, she was perfectly capable of saying no to his suggestion of a home visit, but she did not. PA went on to suggest that the conversation turned to her physical pain and he said she had tense muscles. He asked what she was doing for the rest of the evening. She mentioned her friend was coming round. The Appellant suggested the friend could give her a massage and she replied he wasn't that type of friend. The Appellant then said that he could give PA massage quickly before her friend arrived. He asked if she had oil. Pausing there, PA as an adult woman with capacity, in her own home, with a friend who was coming round soon, could have said "no you're not giving me a massage", but she did not. She went to get the baby oil. This was undisputed and a wholly voluntary act, save that it was done in the context of a doctor/patient relationship. The Appellant rearranged the sofa and the coffee table and the cushions and she lay face down on her own sofa. She asserted that he crouched beside her and asked her to take her top off, which she did. Pausing there, she made no objection to this suggestion. The Appellant then massaged her back and undid her bra strap, which she says made her feel uncomfortable. Pausing there, she did not ask him to stop. He moved her leggings slightly but didn't touch her bottom. He asked her to turn over and she did. She held the bra to her chest then, because he said he had "seen it all before", she placed her bra to one side, exposing her breasts. She explained this by saying that she trusted him. It is difficult, objectively, to understand what trust has to do with her taking her top off and allowing him to massage her and then taking her bra away, save to understand that she trusted him only to massage her naked top half. If she did not wish to take off her bra she could have refused to do so. She says he massaged her neck and shoulders, then breasts, then under her breasts and then her stomach. The total time taken was about 5 minutes, then he got up and moved away. She put on her bra and shirt and he offered to help with her bra. He bear hugged her and said that he would bring oil next time and the massage could be longer. They hugged again and on his way out he said she would never get treatment like that at the surgery and left. PA asserted that she told

her friend afterwards. However, it should be noted that she did not call her friend (Geoff) to give evidence and in cross examination said that her friend had fallen out with her and she no longer knew where he was. Therefore, that corroboration (or undermining evidence) was not available to her. In the police witness statement she went on to say that the Appellant called her in the evening on the 19th of March and talked to her, as if they were friends and asked whether she had oil and whether they could "hook up". She asserted she was in shock. She said that he said he would call her again the next day. She asserted to the police that she was currently unemployed, recently redundant, financially stressed and had decided previously to take her own life because she felt so low, however she was given a helpline and given advice. She explained that she trusted the Appellant and that he had abused her trust and she was afraid because he knew her phone number.

67. In PA's GMC witness statement, dated November 2021, she asserted that the first appointment at the surgery with the Appellant was an hour long. She changed her evidence to accept the chest pain started in January 2020 and stated that she couldn't work. She accepted that she was advised by the Appellant in the earlier examinations that she might have cancer in the light of her family history. Contradicting her earlier statement in relation to chaperones, she asserted that she had not had a chaperone the first time the Appellant had examined her. The medical notes clearly show she was wrong about that. At para. 10 she asserted that she was "shocked" on receiving the first phone call on 18.3.2020. That was clearly untrue. Firstly, because on her own evidence he had said to her that morning that he would call her. Secondly, because she did not say that in her police witness statement and thirdly, because there was nothing in her evidence about the contents of the conversation which was shocking. Fourthly, because she agreed to him dropping by. Later, during the events at the flat, she asserted that she had told the Appellant that her friend was coming at 7:30 pm contradicting her police witness statement which was that her friend was coming at 8:15 pm. She raised, for the first time, that she had a crumbling disc in her neck and that was the reason for her neck and shoulder pain. That was wholly absent from her police statement or her medical records. She asserted, contradicting her police statement, that the Appellant was kneeling during the massage rather than crouching. She asserted, for the first time, that she felt what she assumed was an erection pressing against her hand on the sofa and that he massaged her nipples. She further contradicted her earlier witness statement by saying that the call on the 19th of March was at lunchtime not in the evening.

68. Reading the transcript of PA's evidence to the Tribunal it is clear that her recollection of events before the Appellant entered her flat on the 18th of March 2020 was wholly unreliable and full of contradictions. Under careful, professional, cross examination by Mr. Jenkins, she accepted that in her GMC witness statement she was incorrect to assert that the first time she met the Appellant was in March 2020. She accepted that she was wrong to assert that she had met the Appellant only three times when in fact it was four. She asserted that she was in the first examination for about an hour. It

was put to her that in fact it was 20 minutes or less. She asserted that two of the consultations with the Appellant were about an hour long, when they clearly weren't. She could not remember whether she had seen another doctor at the practice. She asserted again that there was no chaperone the first time he examined her, which is flatly contradicted by the medical notes made at the time (the named chaperone was Helen). Later she asserted she was actually made redundant at the end of April 2020 but accepted that she had told the police in her witness statement on the 20th of March that she was unemployed. She could not remember how she made appointments at the surgery. She could not remember that she had been to hospital on the day before the examination on the 18th of March. She did not know whether she had seen Doctor Barai at the surgery. In relation to her attempted suicide, the questions and answers were as follows:

> "Q --- after you'd learned that you were to be made redundant? Did you tell the person that you spoke to through that counselling service that you were suicidal?
> A Yes.
> Q Would that be around 10, 12, 13 March 2020?
> A I've no idea of the dates.
> Q What was said by the counsellor about, well, do you need support or should you contact your GP or anything like that?
> A No, I can't remember.
> Q You can't remember?
> A Mmm.
> Q Did you take some tablets?
> A I didn't take any, I had them there, wanting to take them but I can't even swallow a tablet. So, you know, I wanted to, you know, just - I just got a new home, everything, and I felt like my whole life was crashing round me. I wasn't feeling very well, yes, and I just didn't know what to do.
> Q Did you tell the counsellor through your work that you'd taken some tablets and tried to take your life?
> A I took a few tablets, only the amount that I could take, yes, because I find it hard to swallow tablets. If I could have carried on I would have.
> Q Were you trying to take your life at that point?
> A Probably.
> Q Probably?
> A Mmm.
> Q Well, is that what you told the counsellor ---
> A I can't ---
> Q --- that you were trying to take your life?
> A I remember having the conversation, yes."

69. An objective reading of that evidence about PA not taking any tablets, then admitting she did take some tablets, then asserting she found it hard to swallow tablets, when her notes show that she had taken PPI tablets for 15 years, leads me to conclude that PA was objectively unreliable in relation to this evidence. PA later asserted that she couldn't remember whether she made the appointment on the 18th of March 2020, could not remember why she went to the appointment, could not remember whether she still had tummy problems, could not remember whether she had tenderness around her chest and refused to accept that her left shoulder was sore, despite the clear notes made by the Appellant that it was. She accepted the Appellant's note that she had psoriasis but asserted she had never had it on her chest or on her back, denying his record that he saw it there. She then denied that he examined her for psoriasis. This is the next passage of questions:

> "Q Okay. But he examined you for psoriasis?
> A No.
> Q How did he know where that psoriasis was if he didn't examine you?
> A Well, clearly he didn't know where it was because I've never had it on my chest in my life. Never."

Later PA said this:

> "Q Does any of that ring a bell?
> A No. For the psoriasis, no. Because where it's saying that I have psoriasis, I've never had psoriasis in some of them places ever. I've had psoriasis since I was a child and I've never had them in some of them places.
> Q "Some of them places", what do you mean? You've told me you don't have it on your chest and have never had it on your chest?
> A I've never had it on my hands.
> Q Right.
> A Yes, on my hands or my chest. I have it in my scalp, on my elbows and, very occasionally, on my back. Like, I can count the amount of time on one hand in my whole life that I've had it on my back."

70. PA did not recall seeing Doctor Tanna at the surgery earlier on. She went on to say that she did not recall any discussion about medication during the 18.3.2020 examination however, she accepted such a discussion would have been reasonable. She asserted that the Appellant was always talking about other things during examinations, like her family history with cancer and she thought this was "irrelevant" because it scared her. However, she immediately contradicted herself and accepted that it was relevant if he was concerned about her having gut cancer. She couldn't remember having chest or left shoulder discomfort. She again denied that she

had ever had a chaperone in a consultation with the Appellant before the 18th of March, which was clearly wrong. Finally, she stated that:

> "A No, I don't really remember any of the conversations at all. All I know is that I was always in there a long time because the doctor was always talking."

71. Despite this assertion she went on to assert that the Appellant stated, during the conversation on 18.3.2020, that he would like to "give her a call later" and took down her number and put it on a post it note in front of his computer. She then stated that she may herself have written it down on the piece of paper. It was in that context that PA denied that she had asked him to come round for a cup of tea and a chat.

72. Later in her evidence she asserted that she did not get a letter from the surgery on the 6th of July 2020 explaining what the Appellant said had happened on 18 March and during the home visit. She asserted as follows:

> "Q Did you not get a letter from the practice on 6 July 2020 explaining what Dr Roach was saying about what had happened?
> A I don't remember.
> Q You don't remember?
> A No.
> Q In which it was being said that you had asked him to come round later.
> A Never. Never in a million years."

Later PA said as follows:

> "Q Well, can we just go through that? I suggest within the consultation on 18 March there was a chat about you losing your job, there was a chat about you being suicidal, and that the consultation had been going on for quite a while and you asked if he could pop over for a cup of tea later on?
> A Never. Never. Never in a million years. I don't have anybody and I never, even to this day, I don't have people come to my apartment. You know you've had - I had a bad relationship and I do not like anybody coming into my apartment. I do not invite anybody round there. It's very, very - very few close friends that come into my apartment. I would never, ever invite him round. That's why I was shocked when he said he was outside, he wanted to come in. I messaged my friend straightaway saying, "Is this right, that my GP is outside?"

> Q What he said in the consultation, I suggest, when you asked him if he could come for a cup of tea later, he said well if he got a chance he would probably call you or ring you.
> A No.
> Q But he did ring you later that day?
> A He rang me when he was outside my apartment."

73. Looking at that evidence objectively and dispassionately, it does not make any sense and is contradictory. PA asserted that she never invited people round unless they were very, very close friends. Yet that very evening she had invited a guest called "Geoff". But, within 2-3 years she was no longer friends with Geoff and she had lost contact with him. PA also asserted that the Appellant rang her when he was outside her flat which was untrue. The agreed evidence was that the first time he called he asked if he could come to her flat and she agreed and 10 minutes later he called again when he was lost outside her flat. If PA was so against visitors she could have said no then. In addition, her assertion that she was shocked was clearly not true. She had not asserted that to the police and she herself accepted that he had told her in the consultation that he would call her later that day.

74. The next piece of evidence which PA gave which was contradictory is set out below and concerned a letter sent by the surgery to PA in July 2020 setting out the Appellant's denial of the massage and his evidence on what happened.

> "Q No? That's the touching, I suggest, that he did. There was no massage, although he did give, standing beside you, give you a sort of one-armed hug from one shoulder to the other, as he was leaving.
> A No, not at all. Not at all.
> Q Now, let's go to ---
> A I can't believe that someone can ---
> Q --- what you say happened on the couch. Sorry?
> A I said I can't believe that someone can blatantly lie. This is just ridiculous.
> Q Well, you've seen his account before, haven't you?
> A Pardon?
> Q You were given a letter dated 6 July 2020 ---
> A I don't recall ---
> Q --- that set out his account.
> A --- this letter. I don't recall this letter.
> Q You were told in the letter that Dr Roach was saying that you had suggested he pop over for a cup of tea.
> A No. Sorry, so I certainly haven't seen this letter because ---
> Q You certainly haven't seen that letter?

A No. The reason I'm saying that because it's the first time today that you're - I've heard that I invited him over for a cup of tea or whatever because I didn't do that. I did not invite him over to my home.
Q All right, well let me assist the Tribunal, if I may, by talking about page 33. I'm going to ask you, Patient A, whether you had a telephone conversation with someone at the practice on 14 July 2020. It's not in the medical records.
A Okay. The only person I recall talking at the surgery was to the...
Q Sare Green?
A Yes, the practice manager.
Q Well, did you call the practice on 14 July 2020 to say that you'd received their letter of 6 July 2020?
A I don't recall.
Q You don't recall?
A No.
Q Did you say you were happy that they'd looked at the issue?
A I don't recall this.
Q But that you were surprised with what the letter said was Dr Roach's account?
A I don't remember that.
Q Yes?
A No.
Q Did the letter have a section in it that Dr Roach's recollection is that during your surgery appointment that morning there was insufficient time to fully address all the problems, it was clear that a further consultation was needed. Do you not remember being told that in the letter?
A No, I don't even recall no letter.
Q No?
A No.
Q Did you say that the consultation lasted 45 minutes?
A I don't recall this conversation whatsoever.
…
Q You don't recall it at all?
A No, because this is the first time I'm hearing about this - I invited him over.
Q Would you say generally you have a good memory?
A Yes."

75. By any reasonable, objective standard this series of answers by PA was unimpressive and incredible. The Tribunal had, in their bundle, the note taken by Sara Green which set out the conversation she had had with PA on 14.7.2020 about the Appellant's version of events which had been sent to her in the letter. Ms. Green's witness statement supported the note and it was accepted without the need

to call her. PA accepted, in the phone call in July 2020, that she had received the letter. Yet in evidence she denied receiving the letter and asserted she had never previously known that the Appellant's case involved asserting she had asked him to come for a "cup of tea". In evidence she could have apologised for forgetting this letter but she did not. She never conceded the point. This has troubled me greatly.

76. **Doctor Dabas.** Her witness statement was dated January 2022. She saw the Appellant as his supervisor almost every day and provided 3 hour weekly tutorials. In relation to the home visit policy at the surgery she accepted there was no written policy but stated the Appellant shadowed her and learned the policy. The Appellant had been doing home visits for about a year by the time of the events. Home visits were mainly for elderly or housebound patients who requested them, so they were request driven. After requests there would be a telephone triage and then a visit, if justified. Mainly, they occurred between midday and 3:00 pm and were rare after 4:00 pm. Home visits were listed on the appointments screen. Doctor Dabas stated that the Appellant had been investigated by the Health Education Board and given a final warning. In her live evidence she confirmed her witness statement and in cross examination did not move from it. She confirmed that she wrote to the MPTS asking them not to pursue the disciplinary proceedings. She stated that during the time at her practise there had been no complaints or concerns about the Appellant's professional conduct. She asserted that this was an isolated incident of lack of judgment in which the Appellant put himself in a vulnerable position. She considered that the Appellant had been naive. In answer to questions from the Tribunal she said this:

> "A … So, at the time what would happen is every morning from 8.30 onwards, the patients can phone up for appointments or they phone in and say what they need. The receptionists give out the appointments face-to-face, telephone calls or home visit requests will be taken by the receptionists, and at the end of the morning surgery sessions, usually there would be some slots, some home visit appointment slots that the patient would be put into if they requested a home visit. The patient would be told by the receptionist that they were put on the list to be assessed for a home visit, but not promised one. Then usually, if the patient is known to a particular doctor and that doctor is in that day, they try to give that visit to that doctor who's been before to that patient and who knows that patient, otherwise it would be random. If there's no particular ongoing story, they would be given to any doctor. Then the doctor would usually at the end of the morning session phone the patient or the carers or whoever has requested the visit to understand the situation, understand what the problem is, can they bring the patient to the surgery or not. I think in the beginning when Dr Roach first joined the practice he would have been sitting in with me and I would say, "Oh look, there's some visit requests, let's go

> through them", and then he would observe me phone them and challenge saying, "Well, can you take a taxi? Can you walk here? How do you go shopping? Do you really go anywhere?" Are they really too ill to ascertain – because if they can come to the practice, it's obviously safer for us and we're more equipped, we've got more support of the team, so it's better to do it in the practice environment, but if they really can't come to us – it also takes more time because us going out takes about 30/40 minutes. If they come to us it's ten minutes is the time taken, so we can get more patients done. So, that's how it happens. But then ultimately it is the judgement of that doctor. If that doctor is happy to go to that patient and feels that the visit will achieve a better outcome or a safer outcome, it's at that doctor's discretion whether the patient can or should come to the surgery or whether we should go out to them. It's between the doctor and the patient ultimately.
>
> Q Can I just go back a little bit. So, if the doctor is going to call the patient, how do they know the patient's number?
>
> A On the patient record, every patient's record has got their contact details and often a next of kin information. We can actually find out anyone else who is resident at the same address, so anyone living at the same house we can often phone them if the person is not answering and we do it – in general practice, we do a lot of text message invitations, campaigning and, "Come for your this check, that check, vaccination", so we're quite used to having everyone's number on their record and using it for communicating.
>
> Q Fine, I understand that. So, is there a preference in your practice for calling first the patient's mobile or their home number?
>
> A I think there isn't a practice policy about that. Traditionally, in the past, I guess the older doctors always call the landline thinking it's cheaper for the practice. Now when it's cloud-based systems and stuff, it probably doesn't matter. The chance of it being answered by the patient is usually higher on the mobile because they're out and about, or these days even at home people have their phones glued to them and so they're right next to their phone. But sometimes – we would try all the numbers in any order, there's no policy."

77. **The Appellant's evidence.** The Appellant provided a witness statement to the police and the Police/CPS did not prosecute him. The tribunal were not given that statement. He provided the Tribunal with a statement dated 17.11.2022, drafted with the assistance of the MDU. He set out his background and went through the medical records for PA. His evidence on the examination on the 18th of March was in line with his medical notes. He added that he had read her prior medical notes and the note of the telephone call from the counsellor about her suicide attempt. He stated Michelle Mullally was the chaperone. He added in his evidence further factual

assertions to what was set out in the medical notes. He asserted that PA asked him to pop over "for a cup of tea". He asserted that she had low mood so he thought she would "open up" more. He asserted he needed to see other patients, but he thought the information from the counsellor and PA were potentially significant and, despite the fact that she was not obviously depressed, tearful or struggling to engage and despite the fact that she entered into the examination with good report, he responded that he would "try to come" and he made a note to call her later. He denied that he asked for her mobile number. He admitted he called her in the evening and stated that he *then* left the surgery. He admitted the second phone call to get directions. He accepted that he complemented her flat during the visit and was told she had a guest coming later. He stated she expressed concern about her monthly rental cost of £1150 pcm, talked about her boss and receiving two months' pay for redundancy and that she had to train up someone else to do her job. He asserted they spoke about her chest pain and then that she said "wait", left the room and returned with massage oil. He asserted, in the witness statement, that he did not recall saying that she needed a massage but this was "possible". He denied offering the massage. He denied asking for the oil. He asserted he was anxious because he thought that PA was making an advance to him, so he decided to leave. He suggested she asked her friend to carry out the massage with gel or a cream and touched her back to show where, through her clothing. He asserted that his knee condition caused significant discomfort if he kneeled and that therefore he tried to avoid doing so. He said that he called the next day to make sure she was coping. He apologised for failing to make medical notes. In his reflection document he accepted he had to improve his record keeping and needed to be more careful with home visits. He had done courses on boundaries and record keeping. His retrospective entry dated the 25th of June 2020 is set out above. I note in relation to that entry that he made no mention of massage oil, or any concerns about her behaviour, he did not record the mobile phone calls he made to PA at all.

78. **The Appellant's evidence to the Tribunal.** He was a biology and chemistry teacher in Barbados at secondary school level. The rest of his evidence leading up to cross examination on the home visit is unremarkable, although he accepted he was trained in respect of home visits by Doctor Dabas. He accepted that there was a triage process before home visits were listed in the surgery diary. He refused to accept that home visits were for housebound patients and asserted that it was wholly up to the doctor's discretion. Pausing there, that was not the tenor of Doctor Dabas' evidence at all, in my judgment. The Appellant's evidence in cross examination on his justification for carrying out an evening home visit, without using the surgery's established procedure, was evasive. The following question and answer gave, perhaps, an insight into the tone of his evidence:

> "Q But, as I say, again, it's blindingly obvious but it's also – you're familiar with Good Medical Practice, aren't you? One of the duties and responsibilities of a doctor is to keep records, to make records contemporaneously. You know that, don't you?

A Are you asking me a question?"

79. The Appellant was asked about his "cup of tea" evidence and his rationale for making the home visit, which he had discussed in July 2020 with Doctor Dabas and which she recorded in a note. He answered as follows:

> "Q Look at the last paragraph on page 29. Again, this is on the premise that she, as you will claim, asked you over for a cup of tea:
>
> > "He thought the invitation [this is you] to 'pop over for a cup of tea' was for a request for a professional home visit because she wished to open up to him about her feeling low in mood and almost suicidal because of the impending loss of her job. Peter recalls my explaining to him [so this is Dr Dabas], when he first joined the practice and I was still directly supervising all his work, that our first step in responding to a home visit request is to explore why the patient could not managed in the practice." I think that should be, "To come into the practice":
> > "I have discussed with Peter why he didn't offer this patient another face to face appointment in the GP surgery or a telephone consultation. He reflected that possibly he thought she may be more comfortable opening up about this in her own home and face to face ..."
>
> If those had been the circumstances, you would have run a mile, wouldn't you?
> A What do you mean, sir?
> Q Well, a woman who you well knew by then was single, living on her own, you'd seen her that morning. She, you say, invites you to come over for a cup of tea. She's already told you that is of low mood, shall we say. At the very least you would have, surely, consulted another GP and said, "What do you think of this?" wouldn't you, if that had been what happened?
> A You have asked several questions there. First of all, you said that I knew her well. If I have seen patients several times and still can't even recognise them in the street, five minutes later because you're seeing their problem, I have seen her four times and knowing her well would hardly constitute that. In terms of saying to another GP, a cup of tea, yes, I agree, I could have said that to one of my colleagues, "What do you think about that?" The context, it was in the morning, it was the first time, first patient, as you can see a 32-minute consultation, I have already backed up the number two and number three, I've eaten into my catch-up time. I said I will think about it and I just carried on and it went out of my mind at that point in time."

80. Later, in cross examination, he accepted that the attempted suicide did not appear to him to have been a serious attempt, due to the low number of pills swallowed. He asserted that it was a red flag but that there had been no other red flags since that note. He accepted that he did nothing about the red flag on the 18th of March 2020, during the examination. He could have invited PA back to the surgery in a few days' time to review her, but he did not. He did not have any special interest in mental health problems. He accepted that he made no plan, in the medical notes, to deal with her mental health issues. He accepted he did not refer her to psychiatric or psychological services. He did not provide any crisis line number. When asked about Michelle Mullally's evidence, that a patient who was examined by the Appellant while she chaperoning, had behaved in an "odd manner" he stated that he could not say whether her manner was odd or not and that Miss Mullally's perception was her own. He accepted that he had made no reference to any further consultation, especially a home visit, in the medical notes. In answer to questions from the Tribunal, the Appellant admitted that his first phone call to PA, on the 18th of March, was made when he was practically out of the surgical compound. He accepted that, if he had decided to call PA later in the day on the 18th of March, he could have written that in the medical notes, but he did not. He accepted that he did not triage PA for a home visit. In further cross examination the Appellant accepted that PA was not obviously depressed during the examination on the 18th of March or tearful and that he could have asked her to return to the surgery the next day or later in the week. Then he said this about the turning point in the home visit:

> "Q Are you saying that she also mentioned chest and back pain and then the next thing is Patient A then said, "Wait a minute", before leaving the room and returning with a bottle of massage oil?
> A Yes."

81. **Character witnesses** were called. Ms. Baluja was a female, senior administrator in the surgery. She was very supportive of the Appellant's good behaviour. She stated he was calming and had never behaved in a flirtatious manner at work. He was hardworking and caring and devoted to his children. No complaints had been received by the surgery about him and none of the staff who had chaperoned patients during his work had any concerns. Karene Brooks-Brown was a patient who attended the surgery and was treated by the Appellant. She gave a testimonial in the knowledge of the allegations. She knew the Appellant through her church and attested to him being polite, sociable and down to earth. She considered him to be genuinely compassionate. Relatives of hers had also been patients of the Appellant and he had been articulate, provided good follow up and was reassuring. EH (anonymised) gave evidence in writing. She was a nurse practitioner at the previous surgery where the Appellant worked in Epping. She attested to him being extremely professional, diligent and courteous, alongside being calm. She herself had suffered rape in the past and yet felt very safe around the Appellant. Karin Barford gave written evidence. She was a healthcare assistant at the surgery in Waltham Abbey and had known the

Appellant for three to four years. She attested to him being highly professional, kind, pleasant and well liked. She had routinely chaperoned for the Appellant and his behaviour had been exemplary and entirely appropriate. Helen Houghton gave written evidence to the Tribunal. She was a receptionist at the surgery. She had chaperoned patients with the Appellant and gave evidence that he had never shown inappropriate behaviour. Michelle Mullally was a reception manager at the surgery and had huge experience, having worked for 18 years in other surgeries. She had acted as chaperone for the Appellant and had never seen the Appellant behave in an inappropriate or flirtatious way. None of her colleagues had any worries about his behaviour and she stated he was particularly popular with elderly female patients. He was approachable, helpful and knowledgeable. She recalled one chaperoning event with the Appellant in room 8 where the female patient, who was slightly older than herself (age 56 ), with long black hair, seemed to have a "rather odd manner" and has chest and stomach pains.

**Analysis of each Ground**

**82.** **Grounds 1, 2 and 5.** I am going to consider these Grounds together because they cover the main issues in this appeal. To determine whether the Tribunal was wrong to accept and find as a fact that PA was massaged by the Appellant, naked from the waist up, in her own home, I must ask myself firstly whether that finding was made on any evidence. Clearly it was. The direct eye-witness, it-happened-to-me, evidence from the Claimant. The next questions I must ask are: (1) whether any reasonable Tribunal would have accepted PA's evidence on the core facts; (2) whether the Tribunal omitted to take into account relevant contrary evidence; and (3) whether the Tribunal took into account irrelevant matters or evidence when making that decision. (4) whether there is any other reason for finding that the Tribunal were wrong in relation to their findings on the core issues. What the Tribunal did was fillet out and discard all matters which were not in PA's contemporaneous witness statement to the police, made 1-2 days after the events. By that process they discarded the incredible, or late introduced assertions and helped themselves to focus only on the core assertions from PA which she made contemporaneously. They also made their findings more robust because the witness statement which they accepted was given to the police, who have experience in taking unpolluted victim evidence. The Tribunal clearly compared that evidence with the medical notes and it married up to a substantial extent. PA certainly got some details wrong in the police statement (as set out above), but many right. The Appellant was not the first doctor at the surgery to see her and she did not start getting stomach pain in February 2020. The Appellant's consultations did not last 45 minutes. But she did recall seeing other doctors and some of the examination on 18.03.2020 and the presence of the chaperone. Her recitation of the events leading to his arrival and the events in the flat was full and chronological. It flowed logically. It did not have an inherent, obvious defect within it (for instance in that statement she did not assert that she was shocked by his phone calls on 18.3.2020). It did not contradict any medical notes for 18/19 March 2020, because there were none. It was supported by the Appellant's phone records, which he himself

disclosed. By accepting her contemporaneous account, the Tribunal excluded and did not take into account various less reliable and hence potentially irrelevant matters. So, for instance, PA's later witness statement to the GMC and her live evidence. Those were both objectively less reliable. The GMC witness statement contained contradictions with her earlier statement on peripheral matters and an embellishments on two core matters (the "shock" at his phone calls and the penis-hand push).

**83.** As for PA's live evidence, by any objective standard it was lacking in accurate detail, lacking in weight and lacking in credibility for the pre-core-event occurrences at the surgery, including the suicide attempt and her alleged inability to swallow pills and the 18th March 2020 examination. It was unimpressive about the "shock" at his phone calls on 18.3.2020. It was also deeply unimpressive in relation to post event matters, namely the 6th July 2020 letter setting out the Appellant's version of the facts and the subsequent conversation PA had with Ms. Green about that letter. PA's initial sworn testimony in relation to that letter was plainly wrong and untrue. When she was shown that she had in fact read the letter setting the "come for tea" offer out, she still denied ever seeing the letter. When shown the attendance note evidencing that she had called the surgery later in July and accepted that she had received the letter, she still denied that. This part of her evidence therefore lacked credibility and no reasonable judge would have accepted it. The Tribunal made no mention of this evidential and credibility land mine in their reasons. Instead, they made the general comments in para. 47 about factual inconsistencies in her evidence, mainly in relation to details and logistics. But this denial by PA may be said to have had a wider effect on her credibility than forgetting mere details and logistics. She was here denying she had ever been told that the Appellant asserted that she had asked him over "for tea". So, does this evidence, combined with the other contradictions and incredible assertions (being shocked by his phone calls on 18.3.2020) undermine her core evidence, such that no reasonable Tribunal would accept her core evidence? In my judgment this evidence was relevant and material to her credibility, but whether it undermined her core evidence was a matter of assessment of PA's evidence against all of the evidence. That was primarily a matter for the Tribunal, not for this Court. Further, I ask myself, would I be right to find that the Tribunal failed to take this into account, despite the fact that they listened to this evidence? I do not think it would be right to do so. The guidance given in *Volpi* covers this in my judgment. Just because it was not specifically mentioned does not mean it was overlooked. I note that credibility and the July letter were specifically raised by Mr. Jenkins in his submissions before the fact finding decision, so I consider that it will have been in their minds. Next, I have carefully considered the fact that Geoff did not give evidence. The police apparently found him and took a statement, according to Mr. Jenkins' submissions. The GMC did disclose the statement to the Appellant (by email to his solicitor on 8 September 2022), but the Appellant did not rely on it. It could have been evidence of immediate post event complaint by PA (or may not have supported her). In any event PA made her complaint to the police less than 48 hours later.

**84.** Next, I ask: was the Appellant's evidence so persuasive and credible, that no reasonable Tribunal would have rejected it in favour of PA's evidence? As the Tribunal set out in their reasons, his assertions were unimpressive and uncorroborated. True it is that the Appellant was a trainee GP, but he had years of experience as a doctor. He had worked in medicine for two years in Cuba, for 9 years in hospitals as a locum SHO in the UK after completing his PLAB and for 3.5 years as a trainee GP in two different surgeries. He knew what he had been trained to do for home visits by Doctor Dabas, whose evidence was not just that the decision for a home visit was a matter for the doctor concerned. Her evidence was that home visits were generally considered after a patient request, triaged by a phone call and then fitted in, if justified and if possible. They were listed on the surgery's schedule. By definition home visits take more time out of a GP's work day than surgery consultations. Instead of getting through one patient every 15-20 minutes in surgery, a home visit will take much longer for travel and then the examination for just one patient. Furthermore, the Appellant's notes of the consultation on 18.3.2020 did not support his assertion that he was worried about her mental health and so did not support his assertion that he really called her to discuss her mental health. The attempted suicide (by taking 4 Paracetamol and one Amitriptyline tablets) was not regarded as the most serious attempt by the Appellant, as he admitted in cross examination. He noted it under the history, but none of his examination findings suggested that he found current depression, let alone severe depression. He accepted that PA was not tearful but had good rapport. Under his diagnosis he made no reference to her mental health or any diagnosis of depression. Under his plan he made no reference to seeing her again or the need for a home visit and he made no referral to any community psychiatric or psychology support services or any crisis line and he did not prescribe anti-depressants. He prescribed her more Paracetamol (the very drug she had attempted suicide with) and cream for her psoriasis. He accepted that he took a handwritten note of her phone number. The Appellant's alleged concern about PA's mental health did not result in him calling her whilst he was at work up to 7:00 pm or using the work phone. Instead, he used his personal mobile phone from outside work in the car park. The Tribunal also took into account what happened on 19.3.2020. The Appellant made no note of what he says was an "advance" by PA with the baby oil, which he said made him uncomfortable. He made no note of the home visit at all, or the calls. His explanation for this was being busy and the chaos of Covid, but why would those prevent him making a note if PA and her mental health were in his mind? He chose not to call PA from the surgery phone on 19.3.2020 all day, but instead made the call after work hours from a supermarket. All of that behaviour undermined his assertion that this was a work call focussed on depression and it supported PA's account that it was not. The Appellant placed great weight on his character references. They were indeed impressive. It is correct that the Tribunal placed lowish weight on these when determining the core factual issues. I do not find that to have been wrong. These witnesses (other than Miss Mullally) were not eye-witnesses to the events. They were character witnesses. Their evidence was

secondary and of a general nature. The Tribunal was factually correct to find that they gave evidence as to his behaviour in work, in the surgery, or at church, not generally his behaviour out of work. The two fields of behaviour are different. The history of human relations show us that some people work well at work, but are troubled by drink, drugs, violence or turbulent or irrational relationships outside work.

85. The Appellant submitted that the Tribunal misdirected itself on the burden of proof by asking whether a home visit was "required" and by deciding that the Appellant had not proven that it was. In my judgment, this was just a turn of phrase, it was not a misdirection in law. The Tribunal were expressing whether they believed what the Appellant was asserting about his motivation for the calls and the visit. They rejected the Appellant's evidence on his reason for calling. They gave reasons for doing so which were logical. His clinic notes undermined his own evidence on the point.

86. Having carefully considered the Tribunal's reasoning, I do not consider that this appeal on Grounds 1, 2 and 5, satisfies the test for holding a finding to be wrong under gateway 2. It was not irrational to accept PA's core evidence relating to the massage and to reject the Appellant's evidence. I do not find any material evidence was ignored nor do I find that any immaterial evidence was taken into account. As for gateway 3, I do not consider that the Appellant has crossed any of the three limiting thresholds to get near to a ruling that the Tribunal was wrong as to a finding of fact. As for each of the threshold: (1), in relation to the "deference and respect" and the "professional experience in the field" principle, whilst none of the Tribunal were GPs, one had long medical experience to which some deference is due. As for (2), in relation to the "Tribunal heard and saw the live evidence" principle, I am unable to find that I am in a better position to assess the credibility of PA or the Appellant, having not heard their evidence or indeed the whole of the evidence at the hearing. (3) As to the "generous ambit of disagreement" principle, whilst I confess that have found the decision on whether PA's evidence was credible enough to discharge the burden of proof on the core issues difficult and troubling, I have also found, in this paper rehearing, that the Appellant's evidence was undermined by his own notes and lacking in credibility, as the Tribunal did. I do not find that the Appellant made out the submissions that the Tribunal misread the evidence or that their findings were against the weight of the evidence. Thus, I am unable to find that the Tribunal's decision was outside the generous ambit of disagreement and I do not find that the Tribunal were wrong by reference to Grounds 1, 2 and 5.

**87.** **Ground 3.** The Tribunal accepted Mr. Allum's evidence, but that did not take the Appellant home on the issue of whether to accept his evidence or PA's evidence on the core issues. It would have been painful for the Appellant to kneel, but he denied the massage. The issue was whether the massage occurred not whether he kneeled. The accepted fact that knee pain would have been caused if he knelt, was not a forceful reason for accepting the Appellant's evidence instead of PA's evidence. PA's statement to the police involved her asserting that he crouched, not kneeled. Her

evidence that he kneeled was rejected by the Tribunal. In any even she was facing away from him, lying on her front initially and then when she turned over had her eyes shut. It was an L shaped sofa. There was no evidence about whether he may have sat on the edge thereof. I do not find that the Tribunal was wrong in failing to take into account or misreading Mr. Allum's evidence.

**88.** **Ground 4. Michelle Mullally.** The weight to be given, if any, to a dock ID, by way of presenting one photograph to this reception manageress, in February 2023, three years after the events, was highly questionable. This was a case management decision which was within the reasonable ambit of the judgment calls afforded to the Tribunal over peripheral evidence. As for her eye-witness evidence, which the Appellant quite reasonably relied upon, that she was present during a top off examination of a patient. Even taken at its highest, she said no more than that a patient had "a rather odd manner". There were various ways to prove that this witness was the one who chaperoned PA on 18.3.2020. Firstly, her first name was in the notes as the chaperone. All the Appellant had to do was prove that no one else worked in the surgery called Michelle on that day. No such evidence was called. Secondly, she should have been shown PA's medical notes of 18.3.2020 and asked directly and her response put into her witness statement. Such evidence was not in it. Cross examination disclosed she had not been shown the notes and did not know what the Appellant had been accused of when she gave her statement. What she could not do was tie her "odd manner" consultation to the one with PA on 18.3.2020. On that evidence I do not see what possible ground of appeal could be based on her evidence.

**89.** **Ground 6, reasoning.** This ground was not premised on gateway 1, namely that the Tribunal failed to provide any adequate reasons to enable the Appellant to understand the rationale behind their decisions or to enable appeal. Instead, it was premised upon four submissions made by the Appellant to the Tribunal which were rejected. The first submission was a logic point. There was no time for the massage because PA's friend was arriving soon. This falters on various bases. Firstly, the timing of the arrival was 8:15 (according to one version of the timing provided by PA) and the Appellant arrived at around 7:30, so there was ample time for a talk and 5 minute massage. Secondly, there is no suggestion that the friend had a key so he would have needed to be let in. Thirdly, the logic of what risk a GP with sexual motivation would or would not take in any particular timescale is mere speculation. The second submission was based wholly on the Appellant's version of events. The Tribunal rejected that. In reality, what this submission was really saying, was that PA consented to the massage, so what's the issue? The issue was that the Appellant was her Doctor and was there for medical purposes only. Offering to massage a patient and then massaging her breasts for personal sexual gratification was improper professional behaviour, as so found by the Tribunal. The third submission related to the failure to make notes and was based on an assertion that guilty men would not omit to cover their tracks by writing dishonest notes. Whilst this may have traction for some medical sexual predators, it was pure speculation and carried no persuasive

weight in my judgment. The fourth submission was based in the Appellant's character witnesses and I have dealt with the relevance of those above.

**90.** **Grounds 7 and 8.** These Grounds were parasitic on the earlier grounds and so are not made out.

**91.** **Notes.** No appeal was made on the basis that the Tribunal was wrong to find that PA had not consented to the massage. No copies of PA's medical records from her previous GP at the Holywell and Attenborough Surgery were sought by either party or requested by the Tribunal. The Appellant's witness statement to the police was dated 4 June 2020 and was not relied upon by either party because it was accurately summarised in the notes made by Doctor Dabas.

**Conclusions**

92. This appeal will be dismissed. It is no doubt a matter of considerable regret to the Appellant, his wife and children that this family man has lost his medical career as a GP because of a finding that a 5-minute, upper body massage with a patient who did not demur or object at the time. Women must be protected from men in positions of trust and power in the medical field who seek sexual gratification in breach of and in spite of their professional obligations, rules and responsibilities. The Tribunal decided the facts and I do not find, on the Grounds presented, that they were either wrong or that there was any serious procedural unfairness.

**Appendix**

Warby J's citations in *Dutta*

*Gupta* [2001] UKPC 61 [2002] 1 WLR 1691 [10] (Lord Rodger);
*Raschid* [2007] EWCA Civ 46 [2007] 1 WLR 1460 [18-20] (Laws LJ);
*Yassin* [2015] EWHC 2955 (Admin) [32] (Cranston J);
*Bawa-Garba* [2018] EWCA Civ 1879 [60-67], [94].
*Southall* [2010] EWCA Civ 407 [47];
*Casey* [2011] NIQB 95 [6] (Girvan LJ);
*Meadow* [2006] EWCA Civ 1390 [2007] QB 462.

Morris J's case citations in *Byrne*

G*upta v General Medical Council* [2001] UKPC 61 [2002] 1 WLR 1691 at §10;
*Thomas v Thomas* [1947] AC 484 [1947] AC 484 487-488;
*E.I. Dupont de Nemours v S.T. Dupont* [203] EWCA Civ 1368 at §§84-98 esp at §84 and §98;
*Assicurazioni Generali SpA v Arab Insurance Group* [2003] 1 WLR 577 at §§13-22, 197;
*Chyc v General Medical Council* [2008] EWHC 1025 (Admin) at §23;
*Muscat v Health Professions Council* [2008] EWHC 2798 (Admin) at §83;
*Mubarak v General Medical Council* [2008] EWHC 2830 (Admin) at §§5, 20;
*Southall v General Medical* Council [2010] EWCA Civ 407 at §47 and §§50-62;
*Libman v General Medical Council* [1972] AC 217 [1972] AC 217 221F;

*Casey v General Medical Council* [2011] NIQB 95 at §6;
*O v Secretary of State for Education* [2014] EWHC 22 (Admin) at §§58 to 64, 66;
*R (Dutta) v General Medical Council* [2020] EWHC 1974 (Admin) at §§21-22, 38-43;
*Gestmin SGPS SA v Credit Suisse* (UK) Ltd [2013] EWHC 3650 (Comm);
*McGraddie v McGraddie* [2013] UKSC 58;
*Henderson v Foxworth* [2014] UKSC 41 at §§48 and 58-67;
*Perry v Raleys Solicitors* [2019] UKSC 5 at §52;
*Anderson v City of Bessemer* (1985) 470 US 564 at 574-57;
*Khan v General Medical Council* [2021] EWHC 374 (Admin).

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