Neutral Citation Number: [2019] EWHC 3279 (Admin)

Case No: CO/2427/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/12/2019

Before:

MR JUSTICE MOSTYN

- -

Between:

MOHAMMED SUHAIB SAIT	**Appellant**
- and -	
THE GENERAL MEDICAL COUNCIL	**Respondent**

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- -

Mark Sutton QC (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Appellant**
Ivan Hare QC (instructed by **GMC Legal**) for the **Respondent**

Hearing date: 26 November 2019

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Approved Judgment

Mr Justice Mostyn :

1. This is my judgment on the appellant's appeal against the decision of the Medical Practitioners Tribunal given on 21 May 2019 that the appellant's conduct on 9 May 2016 was sexually motivated. This is in fact the second time that the appellant has appealed.

2. The background to this case is set out in my judgment of 27 November 2018 (*Sait v The General Medical Council* [2018] EWHC 3160 (Admin)). I allowed the appellant's first appeal to a limited extent. I set aside the finding by the first Tribunal that the conduct listed in para 6 of that judgment was done with a sexual motivation and I directed that that issue should be retried.

3. The listed conduct in para 6 of my earlier judgment was:

   i) Between September 2014 and May 2016 on one or more occasion(s) during consultations with Patient B the appellant told her that she was "pretty", or words to that effect.

   ii) On 9 May 2016 the appellant telephoned Patient B and asked her to meet him at the Eynsford Plough pub.

   iii) On that day the appellant met Patient B at that pub and told her that she was "very pretty" (or words to that effect); that she should consider divorcing her husband (or words to that effect); that she should not tell her husband that they had met; that his wife did not know that he was meeting Patient B at the pub; and that he had met other patients outside work and had not told his wife about it.

   iv) At the end of the meeting the appellant asked Patient B to go with him to his car.

   v) And that all of the appellant's actions as set out above were sexually motivated.

4. There was a clear finding by the first Tribunal, which was not appealed, that the appellant had instigated the meeting at the pub. However, at the remitted hearing it was apparently agreed that the first Tribunal's reasons would not be placed before the second Tribunal (although my judgment would be) and that in relation to that particular issue the appellant would not be fixed with the earlier finding which was not appealed to me last year. Therefore, there was some oral evidence about this issue, but the second Tribunal did not make an explicit finding about it. This is all very difficult to understand. I think I am being asked to determine this appeal on the basis that no adverse finding in relation to that matter has been made against the appellant notwithstanding that I clearly recorded in my first judgment that there was one. This is unfortunate not least because in para 15 I ventured the view that this particular finding was important. I said:

> "Nonetheless, the Tribunal found that the appellant had made the initial approach, rather than the other way around. This was obviously an important finding and I dare say that the absence

> of corroboration from the appellant's secretary must have been influential. At all events, the appellant does not appeal that factual finding."

However, it was not disputed that the appellant had telephoned Patient B and suggested meeting at the pub. As explained, the second Tribunal was silent as to whether that call was made by the appellant out of the blue or whether it was in response to a call from Patient B to the appellant's secretary. I am clear, however, notwithstanding the absence of an explicit finding by the second Tribunal, that this issue has been decided by the first Tribunal; it was not appealed; and that therefore the appellant was and is estopped from seeking to challenge it.

5. Therefore, these were the undisputed facts before the second Tribunal:

   i) Between September 2014 and May 2016 on one or more occasion(s) during consultations with Patient B the appellant told her that she was "pretty", or words to that effect.

   ii) On 9 May 2016 the appellant telephoned Patient B and asked her to meet him at the pub.

   iii) The appellant told Patient B that she was "very pretty" (or words to that effect); that she should consider divorcing her husband (or words to that effect); that she should not tell her husband that they had met; that his wife did not know that he was meeting her at the pub; and that he had met other patients outside work and had not told his wife about it.

   iv) After lunch the appellant asked Patient B to go with him to his car.

6. The second Tribunal had to decide whether the appellant did these things with sexual motivation. It did not have to decide whether that was his only motivation; it had to decide whether there was present within his overall motivation a sexual content. The main theme of my earlier judgment was that this serious charge had to be put fairly and squarely to the appellant in cross-examination. In paragraph 53 I said:

> "If the allegation is serious (and an allegation of sexually motivated misconduct against a doctor is about as serious as it gets) then in my judgment the allegation must be fully and squarely put in cross-examination to the accused doctor. The content of the doctor's replies, as well as his demeanour, will equip the Tribunal to decide whether the allegation is, or is not, true."

7. The appellant was comprehensively and effectively cross-examined by Ms Chloe Fairley. It was a model of that art. The Tribunal duly weighed the content of the appellant's replies and, no doubt, took into account his demeanour. It acquitted him of a sexual motivation in relation to his conduct specified in paragraph 5(i) and (iv) above. However, it was satisfied that his conduct specified in paragraph 5(ii) and (iii) was done with a sexual motivation. It went on to find that this constituted misconduct; that by virtue of such misconduct the appellant's fitness to practise was impaired; and it imposed a sanction of suspension for two months. Mr Sutton QC does not seek to

argue that the sanction was inappropriate if the finding of sexual motivation is allowed to stand.

8. The appellant appeals the finding of sexual motivation. There are four grounds of appeal:

   i) the Tribunal failed to give any consideration to matters of evidence which was central to the appellant's defence;

   ii) the Tribunal introduced factors into its reasoning which were not foreshadowed in the allegations or which derived from the evidence;

   iii) the Tribunal took into account evidentially irrelevant considerations; and

   iv) the Tribunal engaged in wholly speculative fact-finding for which there was no supporting evidence.

9. Before I turn to the grounds, I propose to set out a number of legal propositions applicable to an appeal of this nature.

10. Although acting with a "sexual motivation" is not referenced word-for-word in the GMC Sanctions Guidance it is squarely covered by paras 142-144 (abuse of professional position), paras 147-148 (predatory behaviour) and paras 149-150 (sexual misconduct), all of which are aggravating features warranting an enhanced sanction.

11. In *Basson v GMC* [2018] EWHC 505 (Admin) at [14] I defined acting with sexual motivation[1] as conduct done either in pursuit of sexual gratification or in pursuit of a future sexual relationship. It is alleged that the appellant's conduct in this case fell within the second limb.

12. In *Arunkalaivanan v General Medical Council* [2014] EWHC 873 (Admin) Miss Amanda Yip QC (as she then was) explained at [55] that Tribunals should be careful not to equate inappropriate conduct with sexually motivated conduct and should address the important question as to whether there could be any other explanation for inappropriate conduct. In my previous decision in this case at [26] I explained, however, that the key indispensable ingredient of motivation relates to the individual's state of mind.

13. In *Basson v GMC* I sought to explain that where the court is seeking to determine the state of a person's mind it is undertaking or performing an evaluative function. In that case the question was whether the doctor had touched a patient with a sexual motivation. I said:

> "17. The question for me is whether the Tribunal's finding was legitimately made. In *Edgington v Fitzmaurice* (1885) 29 Ch D 459, Bowen LJ famously said that the state of a man's mind is as much a fact as the state of his digestion. Therefore, in civil proceedings that fact, the state of the man's mind, is to be

[1] In [14] I misspoke and referred to "motive" rather than "motivation". There is a subtle difference between the two concepts. I now take the opportunity of making the correction.

> proved in the usual way by the necessary body of evidence on the balance of probabilities. An appellate challenge to a finding of fact is always highly demanding. However, the state of a person's mind is not something that can be proved by direct observation. It can only be proved by inference or deduction from the surrounding evidence. It has been said that the appellate challenge, where the disputed fact has been proved by inference or deduction, is less stringent than where the challenge is to a concrete finding of fact. In other cases, however, it has been said that the standard is the same.
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> 18. I am prepared to accept that in a regulatory appeal the appellate challenge to a finding of fact derived from inference or deduction is less stringent than a challenge to a concrete finding of fact. Generally speaking, a finding of fact, whether one of a primary concrete nature or one made on the basis of inference or deduction, can only be challenged on appeal where it can be said that the finding is wholly contrary to the weight of the evidence or that there was some fault in the decision-making process that renders the finding unsafe."

14. In *Arunkalaivanan v General Medical Council* Miss Yip QC stated at 48:

> "Mr Hockton submitted that this court is as well-placed as the Panel to decide whether it is proper to draw an inference that Mr Arun's actions were sexually motivated. I agree. This part of the decision-making process does not involve an assessment of the direct evidence but rather a careful weighing of the primary facts and an analysis of whether that leads to the conclusion that Mr Arun was sexually motivated. To that extent, I am not disadvantaged by not having seen the witnesses give evidence. Indeed, my task in looking at this issue is made easier by not having to grapple with the significant dispute about the primary facts in the way that the Panel did."

15. To similar effect in *General Medical Council v Jagjivan & Anor* [2017] EWHC 1247 (Admin) Sharp LJ stated at para 40:

> "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) (*sic, semble 52.21(4))*."

16. I agree with these statements where the specific facts from which inferences are drawn, or the evaluation formed, are undisputed or derive from unchallengeable documents. But where the underlying specific facts themselves are found, and the evaluation formed, following oral evidence in respect of which a credibility assessment has been made, then it seems to me that there must be no less appellate caution applied as would be the case where the challenge is to a primary concrete fact. This much is clear from the judgment of Lord Hodge in *Beacon Insurance Company Ltd v Maharaj Bookstore Ltd* [2014] UKPC 21. He stated:

> 16. In *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372 Lord Hoffmann referred to the advantage that a judge at first instance had in seeing the parties and the other witnesses when deciding questions of credibility and findings of primary fact. He suggested that an appellate court should also be slow to reverse a trial judge's evaluation of the facts and quoted from his earlier judgment in *Biogen Inc v Medeva plc* [1997] RPC 1, 45:
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> > "The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."
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> 17. Where a judge draws inferences from his findings of primary fact which have been dependent on his assessment of the credibility or reliability of witnesses, who have given oral evidence, and of the weight to be attached to their evidence, an appellate court may have to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole. *In re B (a Child)* (above) Lord Neuberger at para 60 acknowledged that the advantages that a trial judge has over an appellate court in matters of evaluation will vary from case to case. The form, oral or written, of the evidence which formed the basis on which the trial judge made findings of primary fact and whether that evidence was disputed are important variables. As Lord Bridge of Harwich stated in *Whitehouse v Jordan* [1981] 1 WLR 246, 269-270:

> "[T]he importance of the part played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, at one end, a straight conflict of primary fact between witnesses, where credibility is crucial and the appellate court can hardly ever interfere, to, at the other end, an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision."
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> See also Lord Fraser of Tullybelton, at p 263G-H; *Saunders v Adderley* [1999] 1 WLR 884 (PC), Sir John Balcombe at p 889E; and *Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)* [2003] 1 WLR 577 (CA), Clarke LJ at paras 12-17. Where the honesty of a witness is a central issue in the case, one is close to the former end of the spectrum as the advantage which the trial judge has had in assessing the credibility and reliability of oral evidence is not available to the appellate court. Where a trial judge is able to make his findings of fact based entirely or almost entirely on undisputed documents, one will be close to the latter end of the spectrum."

17. In this case, where the evaluation of the facts which led to a finding of sexual motivation was heavily influenced by the Tribunal's assessment of the appellant's credibility then, in my judgment, in terms of appellate caution the case lies much closer to the former end of Lord Hodge's spectrum than the latter. The appeal should not be allowed unless it can be shown clearly that the finding is wholly contrary to the weight of the evidence or that there was some fault in the decision-making process that renders the finding unsafe.

18. In the course of his submissions Mr Sutton QC made criticism of the adequacy of the written reasons of the Tribunal. Indeed, as has been seen, the first ground of appeal specifically complain that no reference was made to certain pieces of evidence relied on by the appellant. Mr Hare QC counters this by referring to the well-known cases of *English v Emery Reimbold* [2002] 1 WLR 2409, and *Phipps v General Medical Council* [2006] EWCA Civ 397 which establish the proposition that the Tribunal is under no obligation to record its reasons every point in favour of the doctor in the evidence it has heard and read. To my mind the best recent exposition of this principle was given by Sir James Munby P in *Re F (Children)* [2016] EWCA Civ 546 where he stated:

> 22. Like any judgment, the judgment of the Deputy Judge has to be read as a whole, and having regard to its context and structure. The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable. The judge need not slavishly restate either the facts, the arguments or the law. To adopt the striking metaphor of Mostyn J in *SP v EB and KP* [2014] EWHC 3964

> (Fam), [2016] 1 FLR 228, para 29, there is no need for the judge to "incant mechanically" passages from the authorities, the evidence or the submissions, as if he were "a pilot going through the pre-flight checklist."
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> 23. The task of this court is to decide the appeal applying the principles set out in the classic speech of Lord Hoffmann in *Piglowska v Piglowski* [1999] 1 WLR 1360. I confine myself to one short passage (at 1372):
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> > "The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case … These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2) [of the Matrimonial Causes Act 1973]. An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."
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> It is not the function of an appellate court to strive by tortuous mental gymnastics to find error in the decision under review when in truth there has been none. The concern of the court ought to be substance not semantics. To adopt Lord Hoffmann's phrase, the court must be wary of becoming embroiled in "narrow textual analysis".”

19. It is these standards that I shall apply when I consider the criticisms of the reasoning of the Tribunal.

20. The Tribunal made the following essential findings:

    i) the appellant’s use of a personal remark – “pretty” – to Patient B was out of character. It represented a breach of appropriate professional boundaries;

    ii) it rejected the appellant’s assertion that he had agreed to meet with Patient B outside a clinical setting because of the “anxious tone” in her voice when they spoke on the telephone;

    iii) Patient B had only recently been discharged;

    iv) the appellant telephoned Patient B to meet her in a non-clinical setting;

    v) at the pub the appellant said the words which had previously been found against him and which had not been appealed first time round;

vi) the appellant did not tell his colleagues or his secretary he was going to meet with Patient B;

vii) the appellant drove directly to the pub following the telephone call;

viii) the appellant knew that the meeting in the pub was of a personal nature; and

ix) the appellant remained to have lunch and to discuss things once it became clear that Patient B wanted to discuss her matrimonial difficulties.

21. These findings either derived from agreed facts, or facts previously found but not appealed first time round, or from an assessment of the appellant's credibility. In that latter regard the finding of the Tribunal against the appellant was not favourable. At paragraph 16 the Tribunal held:

> "However, the Tribunal was not convinced of the credibility of Mr Sait's evidence given during the course of these proceedings. Setting to one side his denial of the facts found proved by the previous Tribunal Mr Sait's evidence appeared to the Tribunal to be inconsistent, making new points that had never been raised in any of his previous evidence (such as offering Patient [B][2] an appointment at the hospital or clinic), and gave the impression of being rehearsed and practised. His explanation of his reasoning to meet Patient [B] outside of a clinical setting was due to the 'anxious tone' in her voice. In the judgment of the Tribunal, this was particularly unpersuasive in the circumstances of this case."

22. This led the Tribunal to reach its final conclusion which was expressed thus in paragraph 35 of the reasons:

> "The Tribunal concluded that from the evidence above, on the balance of probabilities, the inference should be drawn that Mr Sait had conducted himself in such a manner in the hope of having a future sexual relationship with Patient [B]. From the findings of the previous Tribunal, and the surrounding evidence including Mr Sait's oral evidence to this Tribunal, the tribunal concluded that Mr Sait had indeed been 'testing the waters' as to whether Patient [B] would be interested in having a future sexual relationship. It noted that Mr Sait had not contacted Patient [B] afterwards, but considered it more likely than not that this was because Patient [B] was not interested in a future sexual relationship."

23. I turn now to the grounds of appeal.

24. Ground 1 asserts that the Tribunal failed to give any consideration to matters of evidence which were central to the appellant's defence. Mr Sutton QC advances seven instances where this is said to have occurred.

[2] In the reasons of the second Tribunal Patient B had become Patient A. I shall stick with her earlier denotation

i) In her undisputed evidence Patient B had said that she had raised the problems she was experiencing in her marriage when she had met the appellant in clinic in the hope that he would be able to offer or direct her to some form of advice or assistance. It is said that there is no reference to this evidence in the Tribunal's findings. I do not agree. It is clearly referred to in paragraph 18 and 19 of the findings. Moreover, the Tribunal explicitly stated that it had regard to all the documentary and oral evidence.

ii) It is said that the Tribunal failed to record the appellant's evidence that he called Patient B in response to her initial call to his secretary. In fact, the Tribunal clearly did record this evidence at paragraph 28 of the findings. In any event, for the reasons I have set out above I am clear that the appellant is estopped from challenging the finding of the first Tribunal that he initiated the meeting.

iii) It is said that the Tribunal failed to record the undisputed written evidence of Dr Thilagarajah to whom Patient B had recounted the events of 9 May 2016 later that year. He stated that Patient B had said that she had rejected the first venue suggested by the appellant because she was not keen to be seen locally and that they therefore went further afield. It is true that this is not mentioned in the findings, probably because the Tribunal regarded it as completely inconsequential. I agree that its omission does not come close to establishing a fatal deficiency in the reasoning of the Tribunal.

iv) It is said that the Tribunal failed to attribute proper weight to the fact that Patient B arrived at the pub bearing a dossier containing about 8 to 10 pages of printouts from her husband's telephone. But this is clearly referred to in paragraph 29 of the reasons. It is said that the Tribunal failed to conclude that this was inconsistent with its "inferential finding" that the meeting had been instigated by the appellant. But that "inferential finding" was an already established fact which the appellant was estopped from challenging.

v) It is said that the tribunal failed to record or give any weight to Patient B's written statement that the appellant suggested that she should consider divorcing her husband "<u>if she was finding her problems too much to bear</u>". It is said that the underlined words were manifestly relevant to a fair-minded appreciation of the undisputed fact that the appellant had indeed made the suggestion that she should consider divorcing her husband. It is true that the Tribunal made no explicit reference to this phrase, but it is clear to me that it was regarded by the Tribunal as inconsequential and throwing no light on the central question. I agree with that assessment.

vi) Similarly, it is said that the Tribunal failed to record or give any weight to Patient B's written statement that the appellant said that she was very pretty and <u>"that she would have no problem finding someone else if she wanted to</u>." Again, it is true that the Tribunal made no explicit reference to the underlined phrase. But again, it is clear to me that the Tribunal considered these words to be inconsequential and throwing no light on the central question. I agree with that assessment also.

vii) It is said that the Tribunal failed to record the appellant's evidence that he told Patient B that the emails were not a matter that he could give advice on and that she should seek help from family and friends as well as her GP and counselling. But this evidence was recorded at paragraph 29 of the findings.

25. Ground 2 asserts that the Tribunal introduced factors into its reasoning which were not foreshadowed in the allegations or which derived from the evidence. Ground 3 asserts that the Tribunal took into account evidentially irrelevant considerations. I shall take these two grounds together.

26. It is said that the tribunal erred by introducing into its reasoning, and taking into account, unpleaded matters namely that the appellant had not told his colleagues or his secretary that he was going to meet with Patient B; that he drove directly to the pub following the phone call; and that he remained to have his lunch and to discuss things after it became clear that Patient B wanted to discuss her matrimonial difficulties. The anti-ambush principle does not require that every single aspect of the surrounding contextual evidence is foreshadowed in the charges or the written evidence. Obviously, in every field of litigation oral evidence will likely flesh out factual context. All of the matters in question were put to the appellant in his oral evidence and he was given a fair opportunity to deal with them. At no point did his representatives seek an adjournment to take instructions or to adduce further evidence. Plainly, the Tribunal discerned no unfairness in the surrounding matters being explored so as to place the charges in context; and I agree with that appraisal.

27. The appellant relies on some remarks made by the Chair of the Tribunal during the oral evidence of the appellant where she, the Chair, said that there is a "cultural thing which… most of us are aware that when a man and a woman have a meal together, and there is perhaps a view on the man's part that there may be a future sexual relationship, that the man pays for the dinner." It is said that these remarks reveal an assumption about cultural norms which were brought to bear in the Tribunal's assessment of the evidence without being foreshadowed in the allegations or the evidence upon which the Tribunal was asked to base its findings and conclusions. It is accepted that this instance of thinking out loud did not find its way into the reasons of the Tribunal.

28. I cannot accept that remarks made by a court during evidence or in dialogue with counsel can, except in a very extreme case, found a basis for impugning a judgment. This was no more than the Chair thinking out loud.

29. Ground 4 asserts that the Tribunal engaged in wholly speculative fact-finding for which there was no supporting evidence. It is said that the Tribunal found that the reason that there was no follow-up after the meeting at the pub was because Patient B was not interested in a future sexual relationship. It is said that this conclusion was unsupported by any of Patient B's evidence. It is suggested that it was calculated to neutralise the exculpatory evidence that there was no attempt on the appellant's part to make contact with Patient B subsequently. I cannot accept this criticism. For what it was worth, and in my opinion it was not very much, the Tribunal formed the view on the evidence that the reason there was no follow-up by the appellant was because that Patient B was not interested in his overtures. That was a legitimate finding for the Tribunal to have made.

30. In my judgment the attacks on the Tribunal's reasoning are a classic example of the syndrome so eloquently described by Sir James Munby P. This was an attempt to engage in narrow textual analysis to seek to demonstrate error when in truth there was none. It was an exercise that dwelt on semantics rather than substance. The overwhelming problem facing the appellant was that the Tribunal just did not believe him. They made a very clear finding as to credibility, which underpinned its factual findings and its ultimate evaluation of the key question. The findings cannot be said to be wholly contrary to the weight of the evidence. In my judgment the reasons of the Tribunal were impeccably formulated and expressed and there is no basis to impugn them.

31. For all these reasons the appeal is dismissed.

32. That concludes this judgment.