Neutral Citation Number: [2021] EWHC 2725 (Admin)

Case No: CO/4574/2020

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

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

Date: 13/10/2021

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

DR OLAKUNLE AROWOJOLU	**Appellant**
- and –	
GENERAL MEDICAL COUNCIL	**Respondent**

- -
- -

Daniel Janner QC (instructed by **Hempsons**) for the **Appellant**
Ivan Hare QC (instructed by **GMC Legal**) for the **Respondent**

Hearing date: **14 May 2021**

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Approved Judgment

Mr Justice Julian Knowles:

Introduction

1. This is an appeal by the Appellant, Dr Olakunle Arowojolu, under s 40 of the Medical Act 1983 (the MA 1983) against the decision of the Medical Practitioners Tribunal (MPT/the Tribunal) on 13 November 2020 to erase his name from the medical register. Although formally an appeal against sanction, the Appellant challenges the MPT's findings of fact as to the credibility of the complainant (Ms A). It is common ground that if I quash the Tribunal's factual determination then the sanction of erasure flowing from it must also be quashed.

2. Ms A's identity is protected by s 1 of the Sexual Offences (Amendment) Act 1992, and no matter relating to her shall during her lifetime be included in any publication if it is likely to lead members of the public to identify her as the person against whom the conduct in question is alleged to have been committed.

3. This is the second appeal by Dr Arowojolu against an MPT determination arising out of Ms A's complaint. In 2019 I allowed his appeal against the factual determinations made by the MPT in July of that year and remitted the entire matter to the MPT for rehearing. At the remitted hearing in November 2020, the MPT gave the direction for erasure which is challenged in this appeal.

Factual background

4. The factual background to the complaint by Ms A is as follows.

5. The Appellant qualified as a doctor in 1982 in Nigeria. He worked as a consultant in Obstetrics and Gynaecology between 1993 and 1995. He moved to the UK in 1995. He worked as a GP registrar and then as a *locum* GP. In 2005 he began working as an out of hours GP at a health centre in Essex. Ms A began working as a receptionist at the health centre about six weeks before the alleged incident with which this appeal is concerned.

6. On the evening of 21-22 July 2013, Ms A was working a night shift. The Appellant was also working late. She was looking at weight loss pills on her phone and fell into conversation with him in the centre's reception area. She said she wanted to lose weight. She said that having had two children, she was concerned about her weight and about her stomach. Two very different versions of what then took place were given by Ms A and the Appellant at the Tribunal hearing. As the Tribunal noted at [65] of its factual determination, they were in 'stark conflict'.

7. Ms A alleged that after that initial conversation in the reception, she looked down at her stomach, and the Appellant then said he would 'have a look' and told her to follow him. He led her into an examination room. She lay down on the table. She said that whilst she was lying there the Appellant, under the guise of conducting an abdominal examination, pressed her stomach under her clothes and with his other arm lifted her body as if she were doing sit-ups. He then put his right hand down the front of her trousers and inside her knickers touching her pubic bone and clitoris with his fingers. At that point, Ms A told him to stop and said several times that she wanted to

get up, but he continued to make her do sit ups and kept his hand down her trousers. She got up, but he told her to lie back down, and said she did so because she was embarrassed and scared. He then touched her left breast over her clothing with his left arm and put his right hand inside her knickers to touch her genitalia again. She said several times that she wanted him to stop and eventually he did so.

8. The Appellant's account was as follows. He said that during the initial conversation with Ms A she had attempted to show him her abdomen and began to lift up her top, but he stopped her and asked her to cover herself. He said the centre's reception area, like most of the common areas, was covered by CCTV. He did not want her to embarrass herself by showing her stomach on CCTV in public. He said it was only because she lifted her top that he offered to examine her. He said would not have done so had she not done this. He therefore asked her that if she wanted him to have a look, and said she would need to go into a consultation room so he could examine her

9. The Appellant maintained that at no time did he put his hands in Ms A's knickers or touch her genitalia in any way. He said that he performed a limited examination of the elasticity of the skin of Ms A's stomach and the tone of her abdominal muscles, and he showed her how to perform sit-ups whilst his left hand was placed on her back and his right hand was on her abdomen. She was not distressed and did not ask him to stop. There was no second examination.

10. It follows that the Appellant's case was a complete denial of Ms A's allegation of improper touching. As the Tribunal rightly noted at [67], there was no scope for mistake or misinterpretation of the events by either party. Rather, either Ms A was lying, or she was telling the truth. It was submitted on behalf of the Appellant that the Tribunal should find Ms A to be a liar and a fantasist.

11. There was evidence about a sequence of telephone calls shortly after the Appellant and Ms A left the consultation room to which the Tribunal attached significance.

12. The CCTV showed them leaving the consultation room at 00.57. Approximately four minutes later, Ms A telephoned her husband. He did not answer and so she texted him. At 01:02, he called her back. During that conversation she told him that the Appellant had touched her inappropriately. There was an issue about how much detail she had given to her husband, but the Tribunal said there was little doubt that within about four minutes of leaving the consultation room Ms A had told her husband that she had been assaulted by the Appellant

13. At 01:05 a driver employed by the centre called reception. The call was recorded. He spoke to Ms A, who was audibly distressed and crying whilst she attempted to deal with the driver's inquiry.

14. As the Tribunal set out at [110]-[112], the Appellant made two telephone calls to Ms A shortly after leaving the centre. The first call, at 01.08, was not answered. Ms A answered the second call but it was not recorded because of a system fault. There was no dispute the call was made, but what was said was in dispute.

15. The Appellant said that he had telephoned Ms A solely to reiterate his advice regarding her need to perform sit-ups. The Tribunal considered that, if true, this was

surprising given that, by his own account, he had already given her that advice and shown her what to do. It noted that his explanation differed in part from what he had told the police, which was that he had telephoned Ms A in order to check she was alright because she was alone in the building and to reiterate his advice regarding sit-ups. The Tribunal said that in his evidence, the Appellant denied that he had telephoned Ms A to check on her because she was alone. He explained that he would not have done this because the fact of Ms A being alone in the surgery was not an unusual matter, as this was necessarily part of her job as the out-of-hours receptionist at the centre.

16. Ms A's evidence was that when he telephoned, the Appellant had said that he 'hoped that he had not stressed her out too much' and then said, '… just keep up with your tummy exercises…'.

17. The GMC's case was that the Appellant telephoned Ms A in an attempt to reassure himself that she had not contacted the police.

18. At [113] the Tribunal said:

> "The Tribunal accepted the evidence of Ms A that Dr Arowojolu had said this and, whereas it did not amount to an admission of having acted in a sexually inappropriate way, it was at the very least a recognition by Dr Arowojolu that he believed that he may have done something to 'stress her out' …"

19. At 01:28, a district nurse telephoned reception and spoke to Ms A. This call was recorded. It was clear to the district nurse that Ms A was upset. She asked her what the matter was, and Ms A replied that the Appellant had touched her, making clear she meant inappropriately. The nurse said that she had a further patient to see but would return to the surgery to see Ms A when she had finished. Later, there was a telephone call from the on-call clinical manager and the district nurse to Ms A whilst she was still on duty. The manager asked Ms A to tell her what had happened. In reply, Ms A gave a detailed account of what she said the Appellant had done.

20. Counsel for the GMC encapsulated its case in her opening to the Tribunal as follows:

> "The GMC's case is that there is no motive for Ms A to have fabricated these allegations about a doctor she barely knew. She reported what had happened quickly, to a number of different people, both people she knew well, her husband, whom you will hear from tomorrow, and those she did not know her well (sic). They all, those calls and her husband, attest to how distressed she was."

The Allegation

21. The Allegation brought by the GMC against the Appellant was as follows:

> "1. On 22 July 2013, you:

a. asked Ms A to show you her stomach in the reception area of the [Healthcare Centre]; *To be determined*

b. performed an intimate examination ('the First Part of the Examination') on Ms A; *To be determined*

c. failed to offer a chaperone prior to, or any time during, the First Part of the Examination. *To be determined*

2. The First Part of the Examination was inappropriate in that Ms A was:

a. a work colleague; *To be determined*

b. suffering from a non-emergent problem. *To be determined*

3. During the First Part of the Examination, you:

a. lifted Ms A's top and exposed her stomach; *To be determined*

b. placed your left hand on Ms A's back and your right hand on her stomach and assisted in manoeuvring her up and down a number of times in a sit up motion; *Admitted and found proved*

c. asked Ms A 'can I just put my hand here?' or words to that effect; Admitted and found proved d. placed your right hand under Ms A's trousers and Underwear, touching her pubic bone; *To be determined*

e. applied pressure to Ms A's pubic bone with the palm of your right hand; *To be determined*

f. moved your left hand lower down Ms A's back; *To be determined*

g. touched Ms A's clitoris with the middle finger of your right hand; *To be determined*

h. placed the two fingers either side of your middle finger of your right hand on either side of Ms A's clitoris; *To be determined*

i. continued to move Ms A into a sit-up position and place your finger on her clitoris after she repeatedly said 'no I want to get up now, I want to stop now,' or words to that effect. *To be determined*

4. After the First Part of the Examination, you said to Ms A to 'lay back down, I will show you how to do an exercise that will help,' or words to that effect. *To be determined*

5. You continued an intimate examination on Ms A ('the Second Part of the Examination') in which you:

a. placed your left hand on Ms A's lower back and your right hand underneath her Underwear; *To be determined*

b. pushed the palm of your right hand against her pubic bone; *To be determined*

c. rested the three middle fingers of your right hand on her clitoris and labia; *To be determined*

d. rubbed Ms A's clitoris and labia with your right hand; To be determined; *To be determined*

e. moved your left hand from Ms A's lower back to her left breast and stroked it; *To be determined*

f. said 'yes, it's nice,' or words to that effect; *To be determined*

g. stopped the Second Part of the Examination only after Ms A has asked you to repeatedly. *To be determined*

6. You failed to make a record of the:

a. First Part of the Examination; *To be determined*

b. Second Part of the Examination. *To be determined*

7. Your conduct as detailed at paragraphs 1 – 5 above was sexually motivated. *To be determined* "

22. In its factual determination of 9 November 2020 the Tribunal found the following parts of the Allegation proved: [1(a)]; [1(b)]; [1(c)]; [3(a)-(e)] and [3(g)-(i)]; [4]; [5] (main paragraph); [5(a)]-[5(g)]; [6]. In relation to [7], it found the following conduct to have been sexually motivated: [1(b)], [1(c)], [3], [4] and [5].

23. It found the following parts not proved: [2] (not proved 'in its entirety'); 3(f); and [7] in relation to [1(a)].

24. On 11 November 2020 the Tribunal considered whether the Appellant's fitness to practice was impaired by reason of his proved conduct. The GMC submitted that it was. It said that he had breached numerous paragraphs of Good Medical Practice (2013 Edition), and that his proven sexually motivated conduct had the potential to seriously undermine confidence in the medical profession. It also said that it was difficult to remediate sexual impropriety.

25. Counsel for the Appellant submitted that he had not had any previous findings against him before or since 2013, and he directed the Tribunal's attention to the 'glowing' professional references from those who were close to Dr Arowojolu and know him well.

26. At [35] the Tribunal said that notwithstanding its finding that the risk of repetition was low, it determined that the Appellant's misconduct was so serious that public confidence in the profession would be significantly undermined and that there would be a failure to uphold standards of professional conduct if a finding of impairment was not made.

27. On 12 November 2020 the Tribunal considered the question of sanction. The GMC submitted that only erasure was the appropriate sanction having regard to the serious nature of the Appellant's misconduct amounting as it did to a sexual assault on a colleague. On behalf of the Appellant, Mr Janner QC submitted that erasure was not inevitable or necessary given the circumstances of this case. He submitted that to alleviate any risk, conditions could be imposed on the Appellant's registration to ensure that there would be no hint of repetition, whether it be a requirement for chaperones or further training. Alternatively, he said the case could properly warrant a period of suspension.

28. The Tribunal considered aggravating and mitigating factors and then considered the various options open to it under the Sanctions Guidance, in ascending order of seriousness. It determined that only erasure was appropriate because the Appellant's misconduct was fundamentally incompatible with his continued registration, and that no lesser sanction than erasure would adequately promote and maintain public confidence in the medical profession, and promote and maintain proper professional standards and conduct for members of that profession. It also made an immediate order of suspension.

Other background

29. In order to understand the issues arising on this appeal, I need to set out some other matters relating to this case.

30. Ms A reported the matter to the police whilst she was still on shift, and the Appellant was arrested by the police on the morning of 22 July 2013. In interview he provided a prepared statement which set out his account of the examination of Ms A. He said that there was a possibility that during the examination his hands may have accidentally come into contact with the waistband of Ms A's underwear, but that his hand had definitely not gone underneath her underwear. There was no possibility that he had inadvertently touched her clitoris. He completely denied any sexual misconduct. He said that he was 'deeply shocked' by Ms A's allegations.

31. He was charged with sexual assault on 16 January 2014.

32. The Appellant stood trial at Basildon Crown Court in October 2014 before Her Honour Judge Lynch QC and a jury. There was a single count on the indictment alleging the sexual assault of Ms A contrary to s 3 of the Sexual Offences Act 2003. On 16 October 2014 he was convicted, and subsequently sentenced to two years' imprisonment.

33. The Appellant appealed against his conviction, and on 1 April 2015 his conviction was quashed by the Court of Appeal: [2015] EWCA Crim 842. He was released on bail, having spent five months in prison. The reasons why his conviction was quashed are not directly relevant to this appeal. They related to some evidence given by a

police officer about a complaint made against the Appellant in 2010 by a patient, and to the way in which the judge had dealt with the Appellant's partial 'no comment' interview in her summing-up. In light of these matters the Court of Appeal held that the conviction was unsafe and ordered a re-trial.

34. When the case was listed for re-trial on 22 February 2016, the prosecution disclosed some unused material which had not been disclosed previously. This caused the trial to be adjourned.

35. The disclosure related to Ms A's claim when she was a teenager that she had been sexually abused by her grandfather over a two-year period around 2002/2003. The matter was investigated by the police, but no charges were brought. The evidence can be summarised as follows.

36. In a letter to her father dated 21 December 2003, when she was 14, and then to the police in an Achieving Best Evidence ('ABE') interview shortly afterwards, Ms A alleged that during the preceding two years her grandfather had subjected her to numerous indecent assaults including rubbing her leg and vaginal area over her clothing; touching her breasts beneath her clothing; and trying to kiss her. She claimed the abuse happened every time she visited her grandparents in Hastings, and in their car. The abuse continued when her grandparents moved to Basildon. She also said that her grandfather had tried to rape her. She alleged that the last incident had been five weeks earlier when she had had a nosebleed and her grandfather went upstairs and sexually assaulted her.

37. Her grandfather denied the allegations and was never charged. In statements provided to the police, her family not only disbelieved her but provided evidence which undermined her claims. Her mother said that her daughter never showed any resentment to her grandfather or tried to stay away from him. Family members were present and nothing unusual happened when she had a nosebleed. Her mother's boyfriend said that Ms A had been lying to her mother, and that the nosebleed incident details she gave were wholly wrong.

38. At the Appellant's first re-trial the jury could not agree. The Appellant was then re-tried, and this time was acquitted by the jury. The proceedings before the Tribunal followed his acquittal.

The MPT and appeal proceedings in 2019

39. Mr Janner's principal submission on the appeal in 2019 was that the Tribunal had been misdirected by its legally qualified Chair on how to approach the evidence concerning Ms A's complaint against her grandfather (the grandfather evidence). Consequently, he said that the Tribunal had failed properly to consider or address this evidence, which was a central part of the Appellant's case. Hence, he argued that the Tribunal's findings of fact could not stand because it did not properly or fairly address the crucial issue of Ms A's credibility, upon which the whole of the case turned.

40. I set out matters in detail in my earlier judgment at [42]-[47], to which reference should be made. The agreed position between the parties had been that in order for the grandfather evidence to have any relevance to the Tribunal's consideration, it would first have to find on at least the balance of probabilities that Ms A's allegation

against her grandfather was a false and untrue allegation. If the Tribunal did not find that it was false and untrue, then it would have no relevance.

41. However, the Chair disagreed and took a different approach. He directed the Tribunal as follows (see my earlier judgment at [44]):

> "Right. Let me tell you the guidance that I propose to give on that, which I think differs from that, I have to say, and then we can perhaps discuss it.
>
> As part of my advice, I would say the third matter, or the matter on which I need to proffer guidance, is the approach which should be taken to the evidence before the tribunal about historic sexual abuse allegations made by witness A, which came to light during the criminal proceedings already referred to. Those allegations have not been determined by a court, but the tribunal has been provided with evidence about the investigation of them, which led to no further action being taken.
>
> Witness A maintained the truth of the allegations in her evidence, whereas the defence assert they demonstrate a propensity on the part of Witness A to make false allegations.
>
> Rule 34 of the Fitness to Practice Rules provides that:
>
> '34(1) The Committee or a Tribunal may admit any evidence they consider fair and relevant to the case before them, whether or not such evidence would be admissible in a court of law.'
>
> I go on to say, quite correctly, no objection has been taken to the admission of this evidence and it is right for the tribunal to consider it as part of the entirety of the evidence it has heard. However, the tribunal should bear in mind that it does not need to determine the truth or otherwise of the historic allegations. It should simply consider the evidence it has before it about these, alongside all of the other evidence, in determining the issues of fact that it does need to decide.
>
> That concludes the part of the advice that I propose to give about that.
>
> That reflects the position set in the criminal case admittedly of *R v Mitchell (Respondent) (Northern Ireland)* [2016] UKSC 55, and is lifted and adapted from paragraph 53"

42. I held this to be a misdirection and accordingly I quashed the Tribunal's factual determination and the sanction of erasure. At [75]-[77] I said that:

> "75. I do not consider that the direction which the Chair gave the Tribunal gave proper assistance to it on this issue, or that it was

> well-founded as a matter of law. I am therefore satisfied that the Appellant's first ground of appeal is sound and that the Tribunal was misdirected about how it should approach the grandfather evidence. I am also satisfied that the Tribunal's reasons show a similar error of law, such that its findings of fact cannot stand.
>
> 76. In my judgment it was not sufficient for the Chair merely to direct the Tribunal that it was 'right' for the Tribunal to consider the grandfather evidence as part of 'the entirety' of the evidence it had heard. That was, in the circumstances, an essentially meaningless direction, as was the Chair's direction that the Tribunal 'should simply consider the evidence it has before it about these, alongside all of the other evidence, in determining the issues of fact that it does need to decide'. These directions did not assist the Tribunal on the issue to which the evidence was relevant, namely, Ms A's credibility. Contrary to the directions which the Chair gave, the Tribunal *did* need to try and determine the truth or otherwise of the historic allegations, because then – and only then – would it have been in a position properly and fairly to have considered the central contention on behalf of the Appellant that Ms A had a propensity for making false allegations against men in positions of authority.
>
> 77. That was not an impossible task. It would have been open to the Tribunal to consider the grandfather evidence and Ms A's evidence and for it to have decided whether it could be sure she was telling the truth. True it is that the Tribunal had not heard, for example, from Ms A's grandfather. But evidential incompleteness is a common feature of bad character evidence in criminal trials. Often, such evidence involves allegations which are not as fully developed in evidence as they would have been had they been themselves the subject of a trial. But that is no impediment to a fact-finder attempting to resolve a contested issue. Had the Tribunal been so directed, for example, it might have concluded that Ms A's evidence about the leopard-skin thong was so outlandish as not to be credible even in the absence of any evidence from the grandfather. It would have been correct for the Chair to have directed the Tribunal that in the event that they were unable to resolve the issue of whether Ms A was telling the truth then the issue went no further; but what he should not have done was to absolve them from even trying."

The MPT's 2020 factual determination in more detail

43. At the hearing the MPT heard live evidence from:

a. Ms A; Mr B, Ms A's husband; Dr Fox, a retired GP and expert witness on behalf of the GMC;

b. The Appellant; the Appellant's wife; and Dr Middleton, a retired GP and expert witness on behalf of the Appellant.

44. The Tribunal also considered a quantity of written evidence.

45. At [21] onwards the Tribunal set out the advice it had received from its legally qualified Chair. This included directions on: the burden and standard of proof; how to approach allegations that the Appellant had 'failed' in some respect; the danger of making assumptions about a complainant's or perpetrator's behaviour in sexual cases; hearsay; inferences; expert evidence; the grandfather evidence and the suggested propensity of Ms A to make false allegations of sexual assault; and the Appellant's good character. As to that, Mr Janner emphasised that the Appellant was a doctor who had been held in high esteem by his colleagues, and in other aspects of his life. All of that I accept.

46. The direction on the burden and standard of proof at [25]-[26] was as follows:

> "25. The GMC brings the allegation and the burden of proving the allegation is on the GMC; there is no burden on the doctor to disprove the allegation and the fact that he has chosen to give and call evidence on his own behalf does not mean that he has taken any burden upon himself.
>
> 26. The Standard of Proof is the 'Balance of Probabilities' – in plain language – Is it more likely than not that the fact alleged is true. The Tribunal in determining whether the allegation has been proved on the balance of probabilities the Tribunal should, where appropriate, have regard to the fact that the more serious the allegation, the less likely it is to have occurred and therefore the evidence should be stronger before the Tribunal concludes it is proved on the balance of probabilities."

47. At [52] the Tribunal set out the points relied on by Mr Janner as showing that Ms A had lied in 2003. At [54] it said:

> "54. It is submitted on behalf of Dr Arowojolu that the alleged falsity of the 2003 allegations is relevant to Ms A's credibility generally and, in particular in relation to the allegations of sexual assault made against Dr Arowojolu because it demonstrates that Ms A 'has a track record' of making false allegations of sexual assault and, in particular, against 'older men in positions of authority [over her]'. Or to put it another way, it is submitted that Ms A has a 'propensity' to make false allegations."

48. The Chair's direction on Ms A's suggested propensity to lie at [55]-[60] was this:

> "55. In considering the evidence in relation to the 2003 incident, the Tribunal must first consider the issue of whether the allegations made by Ms A were false.

> 56. The Tribunal must ask itself whether there is, at the very least, a real possibility that the allegations Ms A made against her grandfather in 2003, and which she has maintained to date, were deliberate lies.
>
> 57. If the Tribunal were to conclude that there was no real possibility that the allegations were false, or, if the Tribunal concluded that it was unable to determine whether there was such a possibility or not, then the 2003 allegations would have no further relevance to the case.
>
> 58. However, if the Tribunal were to conclude that there is a real possibility that it was a deliberate false complaint made against her grandfather, the Tribunal would next need to consider whether this fact shows that Ms A has a propensity or tendency to tell lies.
>
> 59. If the Tribunal were to conclude that Ms A does have propensity or tendency to tell lies this is something the Tribunal should consider when assessing her reliability and credibility in relation to the current Allegation.
>
> 60. However, the issue of the truth or otherwise of the 2003 allegations, is only part of the evidence. The fact that someone may have made a false complaint in the past does not, and cannot, mean that every complaint they make in the future must be false."

49. The Tribunal then turned to its analysis of the evidence and its findings.

50. The Tribunal first set out matters which were not in dispute and summarised the sequence of calls made by Ms A immediately after being with the Appellant in the treatment room, including to her husband. It also set out the evidence that within minutes Ms A had been upset and had told a district nurse on the phone that the Appellant had touched her inappropriately. The district nurse and a clinical manager telephoned Ms A back, and she gave them a detailed account of the events of that night of what she was saying the Appellant had done to her. The account Ms A gave during this call, in the Tribunal's judgement, was 'coherent, detailed, credible and compelling.' As I have said, Ms A reported the matter to the police later that night.

51. At [82] the Tribunal said it would consider the grandfather evidence first, before considering Ms A's evidence in detail. It then set out at [84] the points made by Mr Janner in support of his submission that the Tribunal should conclude that Ms A's 2003 allegation against her grandfather was false.

52. At [85]-[87] it said:

> "85. The Tribunal carefully considered the evidence of Ms A with regard to the 2003 Allegation, the agreed statement of facts in relation to the matters established during the 2003 investigation (a document agreed between both Counsel during the criminal proceeding) and the submissions made by Mr Janner.

> 86. The Tribunal determined that, on the evidence before it, it was unable to reach a definitive conclusion as to the truth or otherwise of the 2003 Allegation either on the balance of probabilities or at all.
>
> 87. The Tribunal did not consider that the matters relied upon by Mr Janner necessarily led to the conclusion that the 2003 Allegation was false."

53. At [88]-[90] it then gave reasons for that conclusion.

54. At [91]-[96] it said:

> "91. The Tribunal acknowledged, given the incomplete picture it had of events in 2003, that it was entirely possible that the 2003 Allegations was false. However, equally, it was entirely possible that they were true.
>
> 92. In these circumstances, the Tribunal did not consider that the 2003 Allegations or the evidence in relation to the same, assisted on the issue of Ms A's credibility with regard to the current Allegation.
>
> 93. Furthermore, the Tribunal considered that even if it had been satisfied that Ms A's 2003 Allegations were false, it would not have found that this established a propensity or tendency to make false allegations. The Tribunal did not accept that there were any significant similarities or parallels to be drawn between Ms A's allegations against her grandfather in 2003 and those allegations made against Dr Arowojolu in 2013.
>
> 94. The only similarity, or parallel, that Mr Janner relied upon was the bare fact that both allegations were made against 'older men in authority'. In the Tribunal's judgement, it would be by no means unusual that the perpetrator of a sexual offence would be a man and in a position of authority over his victim either by reason of age, status or both. Furthermore, the Tribunal considered the differences between the 2003 Allegations and the 2013 Allegations to be stark. In 2003, Ms A was a 14 year-old child, the allegation she made was of constant sexual abuse over a lengthy period of time at the hands of a close family member, namely her grandfather, and in respect of which she did not make any complaint for a considerable period of time.
>
> 95. The 2013 Allegations were made by a mature married 24-year-old woman, and mother of two children employed in a responsible job. The alleged perpetrator, Dr Arowojolu, was a work colleague and a person she barely knew. The allegation Ms A made against Dr Arowojolu related to a single incident of sexual assault and was reported within minutes of its alleged recurrence.

> 96. Accordingly, the Tribunal did not consider that the 2003 Allegation impacted upon its assessment of Ms A's credibility in any way."

55. With regard to the Tribunal's assessment of Ms A as a witness, the Tribunal found her to be both credible and reliable. It said she was an ordinary individual who had given a clear and consistent account of an incident which she said she experienced. The Tribunal said it was unable to identify or detect any obvious motive that Ms A might have had to invent such a serious allegation against a comparative stranger against whom she did not appear to bear any ill will. At [101] the Tribunal concluded that Ms A was a truthful and reliable witness.

56. In relation to the Appellant's evidence, it noted that he was now 60 years-old; a man of good character; a devout Christian; active in his church and community; and a good doctor. It said that he had given evidence and denied putting his hand in Ms A's knickers during his examination, touching her vagina in any way, whether deliberately or inadvertently, or behaving in any sexually motivated way towards her. He maintained that he had simply taken a compassionate interest in someone who appeared to be troubled by the appearance of her stomach and tried to offer reassurance.

57. The Tribunal said it had given careful consideration to the Appellant's evidence, and it accepted that his initial engagement with Ms A in the reception area may well have been borne out of a genuine concern for Ms A and a desire to provide reassurance. However, with regard to that which subsequently occurred in the consultation room and thereafter, the Tribunal said that it preferred the evidence of Ms A.

58. At [106] the Tribunal said that it:

> "… found it difficult to understand why Dr Arowojolu would have considered it necessary, or indeed appropriate, to take Ms A to a consultation room with a view to conducting an abdominal examination and showing Ms A how to perform sit-ups, without at least taking some sort of medical history, asking her whether she exercised, or indeed whether she had performed, or knew how to perform, sit-ups. Or even, asking Ms A whether she wanted him to examine her or show her how to do sit-ups, none of which Dr Arowojolu accepts he did."

59. At [108] and following the Tribunal isolated what it considered to be inconsistencies in the account which the Appellant had given on various occasions, including to the police and in his witness statement and evidence before the Tribunal.

60. At [114] it expressed its overall conclusion:

> "114. The Tribunal, having considered the evidence of Ms A, Dr Arowojolu, the CCTV footage and, in particular, the various recorded telephone calls and Dr Arowojolu's statement to the Police, where there existed significant dispute between the account [sic] respective accounts of Ms A and Dr Arowojolu, it preferred the evidence of Ms A. Accordingly the Tribunal found

the substance of Ms A's account of the events on 22 July 2013, in particular the events in the consultation room, to be true on the balance of probabilities".

61. At [115] onwards the Tribunal then set out its findings in relation to each of the paragraphs in the allegation and its reasons for finding them proved (or not).

Grounds of Appeal

62. Mr Janner settled the following grounds of appeal:

a. Ground 1: the evidence that the complainant had made a serious false allegation that her grandfather had repeatedly sexually abused her over a two-year period when she was 13/14, was overwhelming. A reasonable tribunal, properly. directed, would have held that the complainant Ms A had lied about her grandfather.

Had the tribunal made the decision that the complainant had indeed made a false complaint of sexual abuse by her grandfather, it would have shown her to have a track record as a fabricator of false sexual allegations against older men in authority; and would have seriously undermined her credibility as a witness of truth.

The Tribunal was not directed on the burden and standard of proof which applied in relation to determining the issue in relation to the grandfather's evidence in circumstances where the GMC were not neutral as to the historic allegation but repeatedly asserted and relied upon the truth of the grandfather allegation in opening, with their witness in chief and in closing.

b. Ground 2: the Tribunal failed to rule on the serious fresh allegation made by the complainant in evidence during cross-examination, that her mother had been sexually abused by her father (the complainant's grandfather) also. This allegation further impacted on the veracity of the truth about her allegation against her grandfather, and the complainant's credibility yet the GMC had apparently taken no steps to investigate it despite the complainant's request that they do so.

c. Ground 3: the Tribunal was wrong to conclude that the complainant was a credible and reliable witness.

63. In the event, Mr Janner abandoned Ground 2 and concentrated his submissions on Grounds 1 and Ground 3, which is inter-related to Ground 1.

64. There was no appeal against the sanction of erasure.

Submissions

65. Mr Janner said that the evidence that Ms A had lied about her grandfather was overwhelming and that the Tribunal had significantly misapplied it. He pointed to the fact that the grandfather was not charged; her delay in complaining; the nature of the allegations being implausible, because she said the rooms in which the abuse

happened were not locked, there was a risk of someone walking in, and there was an absence of any concern from family members. He also pointed to lies Ms A told her mother, and that she had claimed for the first time in these proceedings that her own mother had been sexually assaulted by the grandfather. He said Ms A's allegation that there had been an attempted rape by her grandfather when he was wearing a leopard skin thong was a fantasy.

66. Mr Janner said, in summary, that it was beyond the bounds of possibility that the sexual abuse by Ms A's grandfather could have taken place, repeatedly in three locations, over a two-year period without raising at least a suspicion in what was a close and large family. He also relied on a letter she had written to her father making the allegations against the grandfather and the reaction of family members which he said revealed her to be a lying and manipulative teenager who had taken revenge on her mother for clamping down on her during her relationship with her boyfriend. He took me to his cross-examination of Ms A on this issue and emphasised it as one of the particularly telling features of the evidence. I was also shown the agreed facts from the criminal trial which summarised disclosed material, including that Ms A's mother told the police that her daughter had never shown any resentment towards her grandfather or tried to stay away from him.

67. Although the Tribunal held it had tried to resolve the issue, in contradistinction to the first Tribunal, given the weight of the evidence, and the evidence in cross-examination, Mr Janner said that the Tribunal could and should have resolved the issue, and he criticised its holding at [91] that the allegations against the grandfather might, or might not, be true (see above). He said that a reasonable tribunal, properly directed, would have been bound to conclude that Ms A had lied about her grandfather, and that the MPT in this case had wrongly 'ducked' the issue.

68. He said it was significant that Ms A had claimed in cross-examination that she had provided material to the GMC to support her allegation, when none was apparently sought, disclosed or relied upon by the GMC. Also, the importance of making a finding to the Appellant would have been that it would have provided the motive for making the false allegation which the Tribunal said it had been 'unable to identify' (at [97]). Equally, Mr Janner said that a finding that Ms A had told the truth in 2003 would have bolstered Ms A's claim that she had been sexually assaulted by the Appellant in 2013. (I am not sure that proposition is necessarily correct, but it is not something I need to decide).

69. Mr Janner said that the direction on the burden and standard of proof, whilst correct so far as it went, was not sufficiently focussed and did not invite the Tribunal to apply a heightened standard of scrutiny to the evidence: *Casey v General Medical Council* [2011] NIQB 95, [16]-[17].

70. Specifically, he said that the burden of proving that Ms A was telling the truth lay on the GMC, and the Chair should have so directed the Tribunal, because he said the GMC repeatedly asserted and relied upon the truth of the 2003 allegations in advancing its case.

71. In relation to his Ground 3, Mr Janner made a number of forensic criticisms of Ms A's evidence and the Tribunal's approach to it. For example, he said the Tribunal had

failed to give proper weight to other aspects of her evidence which showed her to be lying and incredible.

72. Mr Janner acknowledged the dictum of Leveson LJ in *Southall v General Medical Council* [2010] Fam Law 699, [47] ('… it is very well established that findings of primary fact, particularly if founded upon an assessment of the credibility of witnesses, are virtually unassailable') but, nonetheless, he said this was a case where I could properly intervene.

73. On behalf of the GMC, Mr Hare QC accepted that an appeal under s 40 of the MA 1983 is by way of re-hearing. However, he said that the Tribunal's findings were based on its assessment of the credibility of the witnesses, in particular Ms A and the Appellant, and that as an appellate court I should be slow to intervene because the Tribunal had the advantage of hearing and seeing the witnesses: *General Medical Council v Jagjivan and another* [2017] 1 WLR 4438, [40(iii)]. He said there was no error of approach by the Tribunal, and that its findings should be respected and the appeal dismissed.

74. In relation to Ground 1 and Mr Janner's submission that there was 'overwhelming evidence' that Ms A had lied about the 2003 allegation, (Skeleton Argument, [30]), he said this was effectively a repetition of the matters advanced before the Tribunal. The Tribunal had heard Ms A give evidence and be extensively cross-examined, and the MPT had therefore been able to assess her answers and her demeanour in delivering them. The Tribunal had dealt extensively and in detail with them in its determination at [45]-[54] and [84]. Mr Hare therefore said these points had clearly been at the forefront of the MPT's mind.

75. Mr Hare said that the Tribunal's conclusion that it was unable to reach a definitive conclusion on the truth or otherwise of the 2003 allegation was open to it, not least because it was one of the potential outcomes I had referred to in my first judgment. He said that the Tribunal had provided detailed reasons as to why it did not accept Mr Janner's submissions that the matters relied upon necessarily led to the conclusion that the 2003 allegation was false, and had explained why, even if it had so concluded, it would not have found that Ms A had a propensity to lie. Mr Hare said these were conclusions which were reasonably and properly open to the Tribunal for which there was no basis to interfere.

76. For these reasons, the GMC submitted that there is no substance in Ground 1.

77. As to Ground 2, Mr Hare also relied on *Southall*, supra, and said that Ms A's credibility was a matter for the Tribunal.

78. Ultimately, Mr Hare said that the grounds of appeal amounted to no more than the Appellant disagreeing with the outcome reached by the MPT, but that was no basis for a successful appeal to this Court.

Legal framework

79. The GMC is the statutory regulator for the medical profession, established under s 1 of the MA 1983. Section 1(1A) provides that in exercising its functions, the

overarching objective of the GMC is to protect the public. By section 1(1B), this involves the pursuit of three objectives: to protect, promote and maintain the health, safety and well-being of the public; to promote and maintain public confidence in the medical profession; and to promote and maintain proper professional standards and conduct for members of that profession. One of the GMC's functions is to bring disciplinary proceedings in the MPT against doctors under Part V of the MA 1983 in appropriate cases.

80. It is well-established that an MPT hearing follows a three-stage process, first it hears evidence and makes findings of fact; second, after submissions, it determines whether those facts amount to misconduct and whether the practitioner's ability to practice is impaired; thirdly, thereafter, if a finding of impairment is made, it may impose sanctions including conditions on the doctor's registration, suspension or erasure. An appeal against such a sanction may be brought by the doctor pursuant to s 40 of the MA 1983.

81. Provision is also made in s 40A of the MA 1983 for the GMC to appeal certain decisions of the MPT if they consider that the decision is not sufficient (whether as to a finding or a penalty or both) for the protection of the public (s 40A(3)).

82. The approach of the High Court to such appeals is set out in the CPR. CPR r 52.21 provides:

> "(1) Every appeal will be limited to a review of the decision of the lower court unless -
>
> (a) a practice direction makes different provision for a particular category of appeal; or
>
> (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.
>
> (3) The appeal court will allow an appeal where the decision of the lower court was—
>
> (a) wrong; or
>
> (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.
>
> (4) The appeal court may draw any inference of fact which it considers justified on the evidence."

83. In accordance with CPR r 52.21(1)(a), different provision has been made for appeals under s 40 in Practice Direction 52D:

> "19.1
>
> (1) This paragraph applies to an appeal to the High Court under –
>
> …

> (e) section 40 of the Medical Act 1983;
>
> …
>
> (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."

84. Thus, appeals under s 40 are by way of re-hearing rather than review, the latter remaining the approach to appeals under s 40A. However, as was said in *Fish v General Medical Council* [2012] EWHC 1269 (Admin), [28], whilst an appeal under s 40 is by way of re-hearing, it is a re-hearing without hearing again the evidence. In *R (Dutta) v General Medical Council* [2020] EWHC 1974 (Admin), [21(i)], Warby J (as he then was) said:

> "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."

85. The difference of approach required in appeals by a doctor under s 40 as compared with appeals by the GMC under s 40A was recently considered by the Court of Appeal in *Sastry and Okpara v General Medical Council* [2021] EWCA Civ 623 in a judgment handed down a few days before the hearing in this case.

86. These conjoined appeals concerned sanctions imposed by the MPT on the appellant doctors. The issue before the Court of Appeal was whether the judges on the doctors' appeals at first instance had deferred unduly to the Tribunal's view by approaching the appeals in effect as a challenge to the exercise of a discretion, when they were required to exercise their own judgment as to whether the sanction imposed by the Tribunal was excessive and disproportionate.

87. Having considered a line of authorities beginning with *Ghosh v General Medical Council* [2001] 1 WLR 1915 and concluding with the Court of Appeal's decision in *Bawa-Garba v General Medical Council* [2019] 1 WLR 1929 Nicola Davis LJ, with whom the other members of the Court (Macur and Lewis LLJ) agreed, held at [102] that where a medical practitioner exercises his/her unqualified statutory right of appeal under s 40 of the MA 1983, the correct approach is that:

    a. the jurisdiction of the court is appellate and not supervisory;

    b. the appeal is by way of a rehearing in which the court is fully entitled to substitute its own decision for that of the Tribunal;

    c. the appellate court should not defer to the judgment of the Tribunal more than is warranted by the circumstances;

d. the appellate court must decide whether the sanction imposed was appropriate and necessary in the public interest or was excessive and disproportionate;

e. in the latter event, the appellate court should substitute some other penalty or remit the case to the Tribunal for reconsideration.

88. At [105] and [110], she said that on the question whether the sanction imposed was appropriate and necessary in the public interest, or was excessive and disproportionate, was for the appellate judge to decide exercising his/her own judgment on that question, as opposed to reviewing whether the Tribunal's determination was reasonable.

89. In relation to appeals by the GMC under s 40A, the approach is different. At [107] Nicola Davis LJ said that the Court in *Bawa-Garba* (a 40A appeal) at [67] had identified the approach of the appellate court to the question whether the MPT's decision was wrong, as being supervisory in nature, in particular in respect of an evaluative decision on sanction (ie, one that is multi-factorial in nature). She said the question for the appeal court in such cases was whether the Tribunal's decision fell 'outside the bounds of what the adjudicative body could properly and reasonably decide'.

90. *Sastry and Okpara* was concerned, first and foremost, with the correct appellate approach to sanction. It was not directly concerned with how an appellate court should approach challenges to the Tribunal's findings of fact at the first, determination, stage. However, as to this, the Court's observation at [102] that the appellate court will not defer to the judgment of the Tribunal 'more than is warranted by the circumstances' is important. Where those circumstances are a challenge to the Tribunal's primary findings of fact based in whole or in part on a witness's credibility, there is a clear and consistent line of authority that the appellate court must be cautious before intervening because the Tribunal has had the advantage of hearing and assessing the witnesses, whereas the appellate court has not.

91. In *Gupta v General Medical Council* [2002] 1 WLR 1691, [10], Lord Rodger said:

> "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…"

92. In *Rice v Health Professions Council* [2011] EWHC 1649 (Admin) Lindblom J (as he then was), said at [14]:

> 'A useful summary of the relevant approach as outlined in the authorities is to be found in the judgment of Langstaff J in *Bhatt v General Medical Council* [2007] EWHC 783 (Admin) I accept and adopt the approach outlined in these authorities. In particular, that although the court will correct errors of fact or approach: (i) it will give appropriate weight to the fact that the panel is a specialist tribunal whose understanding of what the medical profession expects of its members in matters of medical practice deserves respect; (ii) that the tribunal has had the advantage of hearing the evidence from live witnesses; (iii) the court should accordingly be slow to interfere with the decisions on matters of fact taken by the first instance body; (iv) findings of primary fact, particularly if found upon an assessment of the credibility of witnesses are close to being unassailable and must be shown with reasonable certainty to be wrong if they are to be departed from; (v) but that where what is concerned is a matter of judgment in evaluation of evidence which relates to police practice or other areas outside the immediate focus of interest and professional experience of the FTPP, the court will moderate the degree of deference it will be prepared to accord and will be more willing to conclude that an error has, or may have been made, such that a conclusion to which the panel has come is, or may be, wrong or procedurally unfair'.

93. Returning to *Fish*, supra, Foskett J said at [29]-[31]:

> "29. I venture to repeat certain quotations from earlier cases that I made in the case of *Chyc v General Medical Council* [2008] EWHC 1025 (Admin) concerning the approach of this court to challenges to findings of fact. I referred in *Chyc* to what was said by the Judicial Committee of the Privy Council in *Gupta v General Medical Council* [2002] 1 WLR 1691 where the following appears at paragraph 10:
>
>> '[T]he obvious fact [is] 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 or 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, 484-488.'

30. The passage from Lord Thankerton's opinion was as follows:

> 'I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus: I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that 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 conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question.'

31. I referred also to *Threlfall v General Optical Council* [2004] EWHC 2683 (Admin), at paragraph 21, where Stanley Burnton J, as he then was, said this:

> ‘Because it does not itself hear the witnesses give evidence, the court must take into account that the Disciplinary Committee was in a far better position to assess the reliability of the evidence of live witnesses where it was in issue. In that respect, this court is in a similar position to the Court of Appeal hearing an appeal from a decision made by a High Court Judge following a trial …’

32. So those are the parameters for considering the issues raised in this appeal in relation to the findings. It is plain that where the conclusion of the FTP is largely based on the assessment of witnesses who have been "seen and heard", this court will be very slow to interfere with that conclusion. Nonetheless, the court has a duty to consider all the material put before it on an appeal in order to discharge its own responsibility, appropriate deference being shown to conclusions of fact reached on the basis of the advantage of having seen and heard the witnesses. Where this court does not feel disadvantaged by not having heard the witnesses, and the issues can be addressed with little emphasis on the direct assessment of the evidence by the Panel, it is in a position to take a different view in an appropriate case.”

94. I referred to *Southall* earlier. Leveson LJ’s *dictum* was expressed in the context of a submission that a witness’s credibility was undermined because of inconsistencies in her evidence.

95. In *Jagjivan*, supra, [40(iii)], the Divisional Court said:

> “(iii) The court will correct material errors of fact and of law … 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)* [2003] 1 WLR 577, paras 15–17, cited with approval in *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] 1 WLR 1325, para 46, and Southall's case at para 47.”

96. Recently, in *Byrne v General Medical Council* [2021] EWHC 2237 (Admin), Morris J said at [10]-[16]:

> “10. I heard substantial argument on the correct approach of the Court on an appeal from a decision of the Tribunal on the facts. This raised a number of particular issues, which I address in the following paragraphs. In this regard I have been referred to the following principal authorities: *Gupta v General Medical Council* [2001] UKPC 61 [2002] 1 WLR 1691 at §10 (citing *Thomas v Thomas* [1947] AC 484 at 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 (citing *Libman v General Medical Council* [1972] AC 217 at 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, and the US case *Anderson v City of Bessemer* (1985) 470 US 564 at 574-57;, and *Khan v General Medical Council* [2021] EWHC 374 (Admin).

(1) The approach of the Court on appeal to a finding of fact, and in particular a finding of primary fact

11. The issue is as to the circumstances in which an appeal court will interfere with findings of fact made by the court or decision maker below. This is an issue which has been the subject of detailed judicial analysis in a substantial number of authorities and where the formulation of the test to be applied has not been uniform; the differences between formulations are fine. I do not propose to go over this ground again in detail, but rather seek to synthesise the principles and to draw together from these authorities a number of propositions.

12. First, the degree of deference shown to the court below will differ depending on the nature of the issue below; namely whether the issue is one of primary fact, of secondary fact, or rather an evaluative judgment of many factors: *Assicurazioni Generali* at §§16 to 20. The present case concerns findings of primary fact: did the events described by the Patient A happen?

13. Secondly, the governing principle remains that set out in *Gupta* §10 referring to *Thomas v Thomas*. The starting point is that the appeal court will be very slow to interfere with findings of primary fact of the court below. The reasons for this are that the court below has had the advantage of having seen and heard the witnesses, and more generally has total familiarity with the evidence in the case. A further reason for this approach is the trial judge's more general expertise in making determinations of fact: see *Gupta*, and *McGraddie v McGraddie* at §§3 to 4. I accept that the most recent Supreme Court cases interpreting *ThomasvThomas* (namely *McGraddie* and *Henderson*

v Foxworth) are relevant. Even though they were cases of "review" rather than "rehearing", there is little distinction between the two types of cases for present purposes (see paragraph 16 below).

14. Thirdly, in exceptional circumstances, the appeal court will interfere with findings of primary fact below. (However the reference to 'virtually unassailable' in *Southall* at §47 is not to be read as meaning "practically impossible", for the reasons given in *Dutta* at §22).

15. Fourthly, 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 *Thomas 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 appears 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."

97. This analysis is entirely consistent with what was said by Girvan LJ in the High Court of Justice in Northern Ireland in *Casey,* supra, [6(a)], upon which Mr Janner cited.

98. Examples of cases where the appellate court has intervened with a Tribunal's findings of fact because they resulted from an assessment of the evidence which was flawed include *Casey*, supra, [16]-[18]; *Dutta*, supra, [38] and [42]; and my recent judgment in *Khan v General Medical Council* [2021] EWHC 374 (Admin), another case of alleged, and denied, inappropriate sexually motivated conduct by a doctor towards female staff, where I concluded at [99] et seq that the Tribunal's findings of fact were flawed and had to be quashed because it had placed undue reliance on the complainants' demeanour when giving evidence in judging their credibility, in contravention of the principles established in *Dutta* and other cases, as well as for other reasons.

Discussion

Ground 1

99. I begin with Mr Janner's submission that the evidence that Ms A had lied about her grandfather was 'overwhelming', and his allied submission that any properly directed Tribunal would have been bound to so find.

100. In my judgment Mr Hare was right to submit that these submissions were in effect, a repetition of all of the matters which Mr Janner had argued before the Tribunal, and which the Tribunal had rejected for the reasons it gave.

101. The Tribunal dealt with Mr Janner's submission at [45] onwards of its determination, and in particular at [52]. In that paragraph it listed all of the forensic points advanced on behalf of the Appellant as to why the allegations about the grandfather could not be true. At [53] it noted Ms A's evidence before the Tribunal that the allegations were true. At [54] it recorded Mr Janner's submission in full, and returned to the matter later in its determination. There is accordingly no doubt that the Tribunal properly understood the issue which it had to determine.

102. The Tribunal's conclusions on this issue were ones of primary fact which depended in large part on its assessment of Ms A's credibility. It follows that I can only intervene on the basis I set out earlier. As I have said, Mr Janner acknowledged the high hurdle he had to overcome if he were to upset the Tribunal's conclusions. In my judgment there is no proper basis to do so, for the following reasons.

103. Earlier I set out the Chair's direction to Tribunal on this question. This mirrored the approach which had been agreed by the parties in the 2019 Tribunal proceedings and which I reflected in my judgment at [48] by reference to Mr Janner's submission, which was that:

> "… the Tribunal should have been directed that it needed to decide whether, on the balance of probabilities, the allegations Ms A had made against her grandfather were false. If the Tribunal concluded that the allegations were false, then it should have been directed to consider whether that proved she had a propensity to make false allegations. If it concluded she did have such a propensity, then it should have been directed to take this into account when judging the truth or otherwise of her allegations against the Appellant, and that it added weight to the defence contention that she was a fantasist."

104. The 2003 allegations against the grandfather were closely examined during the hearing. The MPT had the benefit of observing Ms A give live evidence over two days of the hearing and be properly cross-examined upon it in detail. Mr Janner put all of his points to Ms A, and the MPT was able to assess her answers and her demeanour in delivering them. The MPT also asked its own questions of Ms A after her evidence in chief, cross-examination and re-examination had concluded. It is therefore plain that the Tribunal gave full and careful consideration to the issue.

105. The Tribunal determined that it was not able to reach a definitive conclusion on this issue on the balance of probabilities, or at all. It said at [91] that it was '… entirely possible that the 2003 Allegations was false. However, equally, it was entirely possible that they were true.' Accordingly, it said that the 2003 allegations and the evidence in relation to them did not assist on the issue of Ms A's credibility with regard to the Allegation faced by the Appellant. That was a conclusion which was properly open to the Tribunal, as I said in my judgment on the first appeal at [83]. The MPT set out more or less verbatim between ([45]-[54]) the points which had been advanced on behalf of the Appellant. It summarised them again at [84] in its detailed assessment of Ms A's credibility. At [87]-[90] it gave reasons why the points did not necessarily lead to the conclusion that the allegation was false. Overall, therefore, the determination clearly shows why the Tribunal was not able to reach a conclusion one way or another about the 2003 allegation. There was, accordingly, no error of approach on this question.

106. The Tribunal then went on to consider whether it would have found that Ms A had a propensity to make false allegations if it had concluded that the 2003 allegation was false. It said it would not have so found, and provided reasons for this conclusion ([93]-[95]). The Tribunal did not accept that there were any significant similarities or parallels to be drawn between Ms A's allegations against her grandfather in 2003 and the allegations against the Appellant ten years later in 2013. It said at [94] that the only similarity, or parallel, that Mr Janner relied upon was the bare fact that both allegations were made against 'older men in authority'. In the Tribunal's judgement, it would be by no means unusual that the perpetrator of a sexual offence would be a man and in a position of authority over his victim either by reason of age, status or both.

107. It went on at [94]-[96]

> "94. … Furthermore, the Tribunal considered the differences between the 2003 Allegations and the 2013 Allegations to be stark. In 2003, Ms A was a 14 year-old child, the allegation she made was of constant sexual abuse over a lengthy period of time

> at the hands of a close family member, namely her grandfather, and in respect of which she did not make any complaint for a considerable period of time.
>
> 95. The 2013 Allegations were made by a mature married 24-year-old woman, and mother of two children employed in a responsible job. The alleged perpetrator, Dr Arowojolu, was a work colleague and a person she barely knew. The allegation Ms A made against Dr Arowojolu related to a single incident of sexual assault and was reported within minutes of its alleged recurrence.
>
> 96. Accordingly, the Tribunal did not consider that the 2003 Allegation impacted upon its assessment of Ms A's credibility in any way."

108. This was a conclusion of primary fact which was open to the Tribunal on the evidence it had heard and considered.

109. I also reject Mr Janner's submission that the Tribunal should have been directed on the burden and standard of proof specifically in relation to the 2003 allegation, namely that the GMC bore the burden of proving it was true on the balance of probabilities. The GMC advanced no positive case in relation to it, as Mr Hare made clear in writing and orally (Skeleton Argument, [29]-[30]). The GMC did not advance its case on the basis of the 2003 allegation, which formed no part of its case against the Appellant. The GMC did not accept that the 2003 Allegation was false, and put forward Ms A as a witness of truth, but that is as far as it went so far as the GMC was concerned.

110. Very often in a trial there are a multitude of issues and sub-issues in relation to which no specific direction on the burden and standard of proof is given. It would make legal directions hopelessly convoluted if such directions were required. Save in relation to matters where it has been recognised that a specific direction is required, for example where a defence in law is raised (eg diminished responsibility, where the jury is directed that it is for the defendant to prove it to the civil standard, or self-defence, where the jury is told the prosecution must disprove it to the criminal standard) it suffices for the judge to direct the jury that it is for the prosecution to prove its case beyond reasonable doubt. An MPT should be directed in a similar way. It follows that the Chair's overall direction on the burden and standard of proof sufficed in this case. That direction was, as Mr Hare pointed out, the same as that which was agreed by Mr Janner in the 2019 Tribunal proceedings to be correct. The Tribunal's assessment of the evidence relating to the 2003 allegation formed part and parcel of its overall assessment of the evidence and whether the GMC had proved its case to the civil standard.

111. But even if the Chair had given the direction now contended for by the Appellant, it would not have availed him. That is because of the Tribunal's unassailable conclusion that it would not have found Ms A to have a propensity to make false allegations even it if had concluded that the 2003 allegation was false. Such a direction therefore would not have advanced the Appellant's case.

112. Mr Janner also cited *Casey*, supra, in which Girvan LJ referred to the decision of the House of Lords in *Re CD* [2008] 1 WLR 149. In that case, Lord Carswell made clear that in civil proceedings there were certain situations which called for a heightened or more anxious scrutiny of the evidence. These include the inherent unlikelihood of the occurrence taking place; the seriousness of the allegation to be proved; and where serious consequences could follow from the acceptance of an allegation. Between [22]-[28] Lord Carswell discussed the standard of proof in civil cases, namely the balance of probabilities which, Lord Nicholls of Birkenhead said in *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, 586, requires that a court will be satisfied an event occurred, 'if the court considers that, on the evidence, the occurrence of the event was more likely than not.' Lord Carswell referred to past *dicta* which had caused misunderstanding by suggesting that in some types of civil case a higher standard than the balance of probabilities was required. He reiterated by reference to cases such as *In re H*, supra, pp586-587, *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, [55] (where Lord Hoffmann memorably said that '… some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian'), and *R(N) v Mental Health Review Tribunal (Northern Region)* [2006] QB 468), [62], that there is one standard of proof in civil cases, but that its application was flexible in sense explained by Richards LJ in *R(N)*:

> "… flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."

113. Lord Carswell said at [28]:

> "It is recognised by these statements that a possible source of confusion is the failure to bear in mind with sufficient clarity the fact that in some contexts a court or tribunal has to look at the facts more critically or more anxiously than in others before it can be satisfied to the requisite standard. The standard itself is, however, finite and unvarying. Situations which make such heightened examination necessary may be the inherent unlikelihood of the occurrence taking place (Lord Hoffmann's example of the animal seen in Regent's Park), the seriousness of the allegation to be proved or, in some cases, the consequences which could follow from acceptance of proof of the relevant fact. The seriousness of the allegation requires no elaboration: a tribunal of fact will look closely into the facts grounding an allegation of fraud before accepting that it has been established. The seriousness of consequences is another facet of the same proposition: if it is alleged that a bank manager has committed a minor peculation, that could entail very serious consequences for his career, so making it the less likely that he would risk doing such a thing. These are all matters of ordinary experience,

> requiring the application of good sense on the part of those who have to decide such issues. They do not require a different standard of proof or a specially cogent standard of evidence, merely appropriately careful consideration by the tribunal before it is satisfied of the matter which has to be established."

114. It follows that the Tribunal in this case were directed properly by its Chair on the burden and standard of proof. The point made by Lord Carswell was specifically referred to by the Chair, as reflected in [26] of the determination, which directed the Tribunal that in considering whether the GMC had proved its case, it should have regard to the fact that the more serious the allegation, the less likely it is to have occurred and therefore the evidence needed to be stronger before the Tribunal could conclude it had been proved.

115. Another element of this ground of appeal is that the GMC ought to have made further enquiries of Ms A's mother in relation to the 2003 allegation. Ms A said that her mother had also been abused by the grandfather. There is no basis for Mr Janner's criticism of the GMC. The GMC brought the case in relation to the 2013 allegation on the evidence it presented, and it was not under any duty to make further enquiries about the 2003 allegation, which formed no part of its case. Further, I accept Mr Hare's point that the GMC responded properly to all requests for further information which were made by Dr Arowojolu's defence team. I also bear in mind that this issue first arose before the Appellant's re-trial, and that full disclosure would have been made by the CPS of all matters which tended to undermine its case or assist the defence case in accordance with its duties under the Criminal Procedure and Investigations Act 1996. There is therefore nothing in this criticism.

116. For these reasons, therefore, I reject Ground 1.

117. In relation to Ground 3, and the submission that the Tribunal erred in concluding that Ms A was a truthful and credible witness, in his Skeleton Argument at [44] et seq and orally Mr Janner made a number of forensic criticisms of the Tribunal's decision, for example, that it had wrongly rejected his submission that it was wholly implausible that Ms A, having been assaulted on the examination couch and stood up, would then have laid down again at the Appellant's request. He also said that it had failed to give proper weight to other aspects of her evidence which showed her to be lying and incredible.

118. All of these were matters for the Tribunal to assess as the fact-finder. Whilst there were a number of strands to the evidence, the issue before the Tribunal was, in many ways, a simple one: had the GMC proved on a balance of probabilities that the Appellant touched Ms A in a sexual manner under the guise of conducting a clinical examination? It heard the evidence and gave detailed reasons for concluding that he had. In the absence of any clear error of approach, I cannot properly interfere with its assessment, for the reasons I have given. I cannot say the Tribunal's conclusions were plainly wrong or so out of tune with the evidence properly read as to be unreasonable. This was a case where a young female had gone into a consultation room with a doctor late at night and within minutes of coming out was in a distressed state and had reported to her husband and other staff that she had been touched inappropriately. I therefore reject Ground 3.

Conclusion

119. For these reasons, this appeal is dismissed.