Neutral Citation Number: [2020] EWHC 1896 (Admin)

Case No: CO-4007-2018; CO-4694-2018

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

IN THE MATTER OF AN APPEAL UNDER SECTION 40 OF THE MEDICAL ACT 1983 AND AN APPEAL UNDER SECTION 29 OF THE NATIONAL HEALTH SERVICE REFORM AND HEALTH CARE PROFESSIONS ACT 2002

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/07/2020

Before :

THE HONOURABLE MRS JUSTICE TIPPLES

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Between :

Dr Chandranath Sarkar	**Appellant**
- and -	
The General Medical Council	**Respondent**

The Professional Standards Authority for Health and Social Care	**Appellant**
-and-	
(1) The General Medical Council	**First Respondent**
(2) Dr Chandranath Sarkar	**Second Respondent**

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Marios Lambis (instructed by **MDU Services Ltd**) for **Dr Chandranath Sarkar**
Christopher Knight (instructed by **GMC Legal**) for **The General Medical Council**
Fenella Morris QC (instructed by **Browne Jacobson LLP**) for **The Professional Standards Authority for Health and Social Care**

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date hand-down will be Monday 20 July 2020.

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The Honourable Mrs Justice Tipples DBE :

Introduction

1. On 14 September 2018 the Medical Practitioners' Tribunal ("**the Tribunal**") imposed a four month suspension on the registration of Dr Chandranath Sarkar ("**Dr Sarkar**") as a result of its finding of impaired fitness to practise by reason of misconduct ("**the decision**"). The Tribunal did not consider that a review hearing was required before the period of Dr Sarkar's suspension concluded. The misconduct related to Dr Sarkar's admissions to covertly administering risperidone (an anti-psychotic medication) to his wife via her tea intermittently over a 15 month period.

2. There were two appeals against the decision.

3. The first appeal (CO/4007/2018; "**the First Appeal**")) was issued on 15 October 2018 and was an appeal by Dr Sarkar pursuant to section 40 of the Medical Act 1983 ("**the 1983 Act**") against the sanction of a four month suspension imposed by the Tribunal and seeking a lesser or no sanction. The General Medical Council ("**GMC**") was the sole respondent to that appeal.

4. The second appeal (CO/4694/2008; "**the Second Appeal**") was issued on 23 November 2018 and was an appeal by the Professional Standards Authority for Health and Social Care ("**PSA**") pursuant to section 29 of the National Health Service Reform and Health Care Professions Act 2002 ("**the 2002 Act**") against the same sanction, on the basis that the Tribunal erred in not providing for a review hearing (which the PSA maintained was irrational) and not giving sufficient reasons for the sanction it imposed. The PSA asked the court to vary the order it was appealing and substitute the following order:

   > "… allow this appeal, quash the decision of [the Tribunal] as to sanction (including the decision not to order a review hearing), and: (a) remit the matter to [the Tribunal], with such directions as the Court thinks fit; and (b) in any event, order that the [GMC] and/or [Dr Sarkar] to pay the [PSA's] costs."

5. The GMC and Dr Sarkar were the respondents to that appeal.

6. Therefore, Dr Sarkar wished to quash the decision because he said its practical effect was too harsh and not in line with the purported aims of the Tribunal. The PSA, on the other hand, wished to quash the decision because it said the decision was too lenient.

7. Further, before the PSA had issued its appeal the GMC directed a review of Dr Sarkar under section s35D(4B) of the 1983 Act. The PSA explained (in a skeleton argument dated 11 April 2019) that:

   > "This does not render the [PSA's] appeal academic. This is because both the relief sought and the grounds upon which it is sought go beyond an attempt to secure a review. Further, if this Court accepts that the Tribunal's reasons as to sanction are insufficient as the [PSA] submits, that failing will require rectification before a properly-informed and meaningful review can take place."

8. On 29 January 2019 Lang J ordered that the First Appeal be linked to the Second Appeal. The two linked appeals were listed for hearing on 9 May 2019 with a time estimate of 1 day. In April 2019 all parties filed detailed skeleton arguments in readiness for the hearing. On 8 May 2019 all parties agreed to the terms of a Consent Order in order to dispose of both appeals, which was sealed by the Court on 9 May 2019 ("**the Consent Order**").

9. The recitals to the Consent Order provided that:

> "UPON the Respondents not objecting to the disposal of these proceedings for the reasons set out in Schedule 1; AND UPON the Appellant in proceedings CO/469[4]/2018 [the PSA] seeking an order that [the GMC] and [Dr Sarkar] pay its costs of the appeal in those proceedings, to be summarily assessed if not agreed; AND UPON [the GMC] and [Dr Sarkar] seeking an order that there be no order as to costs;"

10. Schedule 1 to the Consent Order provided that Dr Sarkar and the GMC did not object to the disposal of the proceedings for the following reasons, namely:

> "It is agreed, in the interests of the effective and efficient disposal of the issues in these proceedings, that each of the appeals should be allowed in order that the issue of sanction, which is disputed by each of the appellants on contrasting grounds, might be resolved on the basis that the matter be remitted for reconsideration of the issue of sanction on the basis of the findings as to facts and impairment already made."

11. Pursuant to the terms of the Consent Order, it was agreed and ordered that:

    a. both appeals be allowed;

    b. the decision of the Tribunal to impose as a sanction a suspension order of four months, without any further review by it of Dr Sarkar's fitness to practise, be quashed;

    c. the matter be remitted to a differently constituted panel of the Tribunal to make a fresh decision as to sanction and "without limiting in any way the normal exercise of the Tribunal's powers, the panel considering the case is directed to specifically consider this consent order and the grounds of appeal filed in proceedings CO/4007/2018 and CO/4694/2018"; and

    d. the court would determine the appropriate order as to costs and make any summary assessment of the amount payable. The Consent Order contained a timetable for the service of written submissions, and then directed that the papers would be placed before a judge for written determination.

12. I note from the terms of the Consent Order that the parties did not agree that the court's decision on costs should await the outcome of the remitted hearing before a differently constituted panel of the Tribunal.

13. The court has received the following written submissions on costs in accordance with the directions set out in the Consent Order, namely from:

a. the PSA from Fenella Morris QC dated 10 May 2019, together with a costs schedule dated 15 May 2019 claiming £18,152.96;

b. Dr Sarkar from Mr Marios Lambis dated 24 May 2019;

c. the GMC from Mr Christopher Knight dated 6 June 2019; and

d. the PSA in reply from Ms Fenella Morris QC dated 19 June 2019.

14. The PSA's written submissions make it clear that it is seeking an order that the GMC pay its costs of the Second Appeal. It is not seeking any order for costs against Dr Sarkar in respect of the Second Appeal.

The issue in dispute

15. The issue I have to decide is whether under CPR Part 44.2 the GMC should be ordered to pay the PSA's costs of the Second Appeal.

Conclusion

16. The conclusion I have reached is that, in the circumstances of this case, it would be wrong to order the GMC to pay the PSA's costs. Rather, the appropriate order is that there should be no order for costs in respect of the Second Appeal. My reasons are set out in detail below.

The parties' submissions on costs

17. There is no dispute between the parties that CPR Part 44.2 applies. CPR Part 44.2(2) provides that: "If the court decides to make an order about costs – (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but (b) the court may make a different order."

18. The PSA seeks an order (pursuant to CPR Part 44.2(2)) that the GMC pay its costs of and incidental to the Second Appeal. The PSA say this is the correct order for costs because:

a. The PSA succeeded in obtaining the relief sought in the Second Appeal. The PSA relies on two points. First, the decision was quashed. Second, the appeal succeeded "as a result of a failing on the part of [the GMC], through one of its committees, the costs incurred are an unavoidable consequence of that failing and the costs order should reflect that": see *PSA v (1) General Pharmaceutical Council and (2) Onwughalu* [2014] EWHC 2521 (Admin), per Cox J at [49]".

b. It is a fair reflection of the circumstances and the conduct of the parties leading to the PSA commencing the Second Appeal. The PSA relies on three points. First, the GMC failed to exercise its own right of appeal against the Tribunal under section 40A of the 1983 Act. The PSA was the only body empowered to appeal the decision under section 29 of the 2002 Act, and did so in the public interest, when no other body would or could do so. Second, on 12 October 2018 the GMC made a direction

for a review of Dr Sarkar's fitness to practise. However, the PSA did not know this when it lodged its appeal against the decision, as the GMC had failed to tell the PSA or Dr Sarkar. Third, the GMC refused the PSA's without prejudice offer on costs made on 24 April 2019 that "[the GMC's] liability for [the PSA's] costs be limited to those that were incurred in bringing the appeal (which comprised initial advice to [the PSA], the preparation of the appeal papers and the court fee for bringing the appeal)".

19. For the purposes of summary assessment, the PSA provided a statement of costs dated 15 May 2019 claiming £18,152.96 (including VAT).

20. Dr Sarkar seeks an order (pursuant to CPR Part 44.2(2)(b)) that there be no order for costs in both appeals. Paragraph 4 of Dr Sarkar's written submissions say this:

> "In accordance with the general rule in CPR Part 44.2(2)(a), Dr Sarkar, being the successful party in [the First Appeal], could argue that he should be awarded the costs of and incidental to this appeal. However, Dr Sarkar accepts that in the light of the successful appeal lodged by [the PSA] in [the Second Appeal] and for the reasons it sets out in its submission on costs, the appropriate and proportionate order in respect of costs is that there be no order."

21. The GMC says that the proper order in the circumstances of these appeals is that there be no order as to costs.

22. The GMC submit, first, the PSA was not the successful party on the Second Appeal. Rather, the PSA's appeal was allowed "because of the competing arguments about the appropriate sanction it was agreed to be a more efficient and appropriate use of public resources that [the Tribunal] reconsider the issue of sanction itself" and "not because all parties agreed that [the Tribunal] erred in a particular way". Second, the Tribunal is, necessarily, independent of the GMC (see *GMC v Michalak* [2017] 1 WLR 4193, SC at [20]). Where the GMC is a respondent to a PSA appeal simply as the statutory body responsible for the Tribunal, the position of the GMC is no different to the position of an inferior court or tribunal in judicial review. In those cases, it is well-established that the ordinary rule is that no order for costs will be made against the court or tribunal unless it has actively opposed the appeal: see *R (Davies) v Birmingham Deputy Coroner* [2004] 1 WLR 2739 ("***R (Davies)***") at [47]. The position in CPR Rule 42.2(2)(a) is departed from, as it should be here. Third, the GMC was always neutral, and took no steps to oppose the appeal. Further, the GMC decision to review of Dr Sarkar's fitness to practise (which was directed under section 35D(4B) of the 1983 Act) is irrelevant, as is the PSA's without prejudice offer in respect of costs, which was made too late (ie two weeks before the hearing, and after the PSA and GMC's skeleton arguments had been filed).

23. In reply to the GMC's submissions, the PSA maintains it was the successful party in the Second Appeal. Second, the GMC is wrong, in the circumstances of this case, to draw a parallel between the GMC and an inferior Tribunal whose decision is being challenged. This is because PSA submits that:

    a. The GMC's role in these proceedings was not simply to decide whether it should take an active role to resist the challenge or remain neutral. Rather, the GMC's role was, in addition to that, "to consider whether it should exercise its statutory power

to commence an appeal in its own capacity against the decision pursuant to section 40A of the Medical Act 1983". It is therefore not correct for the GMC to argue that "it is no different to the position of an inferior court or tribunal in a judicial review".

b. The GMC's decision not to commence an appeal in its own specific statutory capacity signifies only its decision within that part of the statutory scheme. The PSA has (as Parliament intended should be the case) taken a different position and appealed against the decision in the public interest. In such circumstances, it is not open to the GMC to claim neutrality in the appeal and seek to avoid the consequences in costs where, as here, the decision is quashed and the matter remitted. Further, the PSA's appeal only became necessary once the GMC had decided not to exercise its power of appeal. The GMC took an active decision: it was not neutral.

c. Further, in *R (Davies)* the Court of Appeal made it clear that, even where an inferior court/tribunal has taken a neutral position, there can be important considerations that would nevertheless justify an adverse costs order.

24. Third, the Tribunal's independence from the GMC is irrelevant to the issue of costs. The PSA say that, if the GMC's argument is right, then:

a. The GMC, to the extent it can be said to be independent of the Tribunal, can never be liable for costs in an appeal brought by the PSA against the Tribunal's decision, which obviously cannot be true.

b. The only party who could bear responsibility for the PSA's costs in a successful appeal would be the registrant who was the subject of the decision to which the appeal relates. The PSA says that is not consistent with a statutory scheme that allows the High Court to consider whether decisions made by statutory regulators (and for which those regulators are to be responsible) are sufficient for the protection of the public.

c. The PSA is the meta-regulator in respect of the whole range of health and social professions. It is funded by contributions made by all those bodies. It would be unfair for the GMC to avoid responsibility for costs arising from its failings in this case and thereby effectively pass them to the other professions.

Further developments

25. Following the filing of written submissions the parties have informed the court of two matters. First, *PSA v (1) GMC (2) Hilton* [2019] EWHC 2192 (Admin) ("***Hilton***") a decision of Freedman J in August 2019. Second, the outcome of the remitted hearing, which was heard by the Tribunal on 9 October 2019.

Hilton

26. In *Hilton* Freedman J made no order for costs against the GMC. The GMC explained in a letter to the court dated 14 August 2019 that:

"That case similarly involved the GMC not opposing an appeal brought by the PSA, where the PSA's appeal was allowed, and where Freedman J accepted the submissions of the GMC that it was not liable for any of the PSA's costs, at paragraph 9 in particular. The submissions made by the GMC were substantively the same as in the present case, and there was no material difference in the factual context. The GMC would respectfully submit that the same approach should be adopted."

27. In relation to costs in that case, Freedman J explained:

"[2.] The Appellant [the PSA] is partially the successful party. It has succeeded in the sense that there now will be a sanction for the misconduct. It has not succeeded in that it argued on impairment, but the court has imposed a warning only. The court rejected the third ground about inadequacy of reasons, but this did not add significantly to the costs.

[3.] The question is what order should be made as between the Appellant and the Second Respondent to reflect the fact that the warning challenge succeeded, but the impairment challenge failed …

[9.] I make no order against the First Respondent [the GMC]. It has taken no part in the appeal, as it was entitled so to do on the facts of this case. It did not have a duty to make the appeal in the circumstances of this case. I accept that it is independent of the Tribunal and that in the circumstances of this case and that if there was a failure of the Tribunal, it is not responsible for this on the facts of this case. In this regard, I accept broadly the submission set out at paragraph 4 of the submissions of Mr Knight for the First Respondent, not as matters of general import for all cases, but as regards the instant case. In any event, even if the First Respondent was responsible for the decision of the Tribunal, if the Tribunal had been made a party to the proceedings and had not opposed actively the appeal, then it is usual for no order as to costs to be made against the Tribunal. The position is no different here by reason of the fact simply because the First Respondent had the power to initiate the appeal and elected not to do so. Here too the court takes into account the fact that the First Respondent has a public function, and in deciding not to bring the appeal on warning, it did not act unreasonably.

[10.] The Appellant seeks to invoke matters of general principle in this regard. This decision rests on the particular features in this case and not on general principle. The decision is not intended to have any application beyond the facts of the instant case…"

28. On 2 December 2019 Males LJ refused the PSA permission to appeal in *Hilton* for the following reasons:

"There may be scope in another case for the Court of Appeal to consider where liability for costs should fall as between the PSA and the GMC when there is a successful appeal against a finding of no impairment to practise but the GMC has declined to take action itself. However, in this case it appears that the GMC had no power to appeal against the failure to issue a warning, the only issue on which the PSA succeeded before the judge, while the PSA's appeal on impairment failed. In those circumstances, the point of general principle on which the PSA relies in this case does not arise and the judge's decision on costs was within the broad scope of the discretion entrusted to him. This was, as he said, a decision on the particular facts of this case."

29. It is clear that *Hilton* was a decision on its own facts. Further, the wider point of principle the PSA were seeking to argue in the Court of Appeal was who should pay the costs of an appeal against a decision of the Tribunal, in circumstances where the PSA has successfully appealed a finding of no impairment, and the GMC has declined to take action.

Determination of sanction – remitted hearing

30. The remitted hearing before a differently constituted panel to determine sanction took place on 9 October 2019 and the Tribunal's determination on sanction was given on 11 October 2019. The Tribunal reminded itself that its role was "to consider only questions of what, if any, sanction should be imposed on the doctor's registration based on the findings of the 2018 Tribunal, both at the facts and impairment stages". The sanction sought by the GMC was erasure on the basis that Dr Sarkar's misconduct was "so serious it was fundamentally incompatible with continued registration". The GMC did not apply for a review. Dr Sarkar invited the Tribunal to find that it was not necessary to impose any sanction at all in respect of his registration. The PSA was not a party to the remitted hearing. However, the Tribunal was aware of the PSA's position as the Tribunal had before it the PSA's grounds of appeal.

31. The Tribunal concluded that erasure of Dr Sarkar's registration was disproportionate in the circumstances, and that a suspension of Dr Sarkar's registration for three months was the appropriate and proportionate sanction.

32. Further, the Tribunal considered whether to direct a review (in the light of the PSA's position on the Second Appeal) and determined that a review would serve no useful purpose and was not required. The Tribunal explained at paragraph 57 of its determination:

    "In considering whether to direct a review, the Tribunal had regard to all of the documentary evidence. In the light of the mitigating factors in this case, together with the fact that Dr Sarkar has demonstrated sufficient insight and remediation to satisfy the Tribunal that he poses minimal risk of repeating his behaviour, and has continued to practise without any concerns since May 2017, the Tribunal determined that a review would serve no useful purpose in this case. It therefore determined that a review is not required."

33. Therefore, Dr Sarkar was successful in reducing the sanction which had been imposed on him.

Further submissions

34. The court was informed of the outcome of the remitted hearing before the Tribunal and the decision of the Court of Appeal in an email from the GMC dated 13 December 2019, which was copied to the PSA's solicitors.

35. The GMC's email contained the following further submissions from the GMC:

    "The [GMC] submits that the subsequent outcome of the case before [the Tribunal] following remittal is therefore relevant to the court's consideration on costs as it supports

> the GMC's position prior to the Appellant's appeal, namely that the outcome of the original [Tribunal] was not wrong nor insufficient to protect the public….
>
> Whilst that decision [in *Hilton*] explicitly did not determine the general point of principle, it made it clear that (whatever the view ultimately taken on that generic issue) there are cases which, on their own facts, do not admit of an order for costs being made against the GMC. *Hilton* was such a case and the [GMC] submits that this decision is relevant to the determination on costs in this appeal as it is again facts specific and on the basis of those facts is another case on whose facts costs should not be awarded in favour of the [PSA] against the [GMC], whatever the view taken on the generic point of principle (as to which the court is referred to the [GMC's] previous submissions).
>
> The subsequent outcome of [the Tribunal] remitted hearing supports the [GMC's] approach to the appeal in this case, in that the [GMC] was neutral in their stance and agreed to the remittal only on the basis of expedition in the face of two contested appeals (between the [PSA] and [the GMC & Dr Sarkar] in CO/4694/2018 and between [Dr Sarkar] and [the GMC] in CO/4007/2018)."

36. The PSA responded to this in an email dated 2 January 2020 and submitted that *Hilton* was limited to its own facts and the decision of the fresh Tribunal in October 2019 was irrelevant. The PSA invited the court to determine the issue of costs upon the basis of the submissions initially set out.

37. The papers were placed before me to determine the question of costs in July 2020.

Discussion

CPR Part 44.2(2): Was PSA the successful party?

38. The PSA maintains that on the Second Appeal it was the successful party. It is correct that the PSA was successful to the extent that it was agreed between all parties that the Second Appeal should be allowed, and the matter remitted to a differently constituted panel of the Tribunal.

39. However, the Second Appeal was linked to the First Appeal and cannot be considered in isolation from the First Appeal. The compromise the parties reached in advance of the hearing on 9 May 2019, which is recorded in the Consent Order, was also that the First Appeal be allowed, and the matter be remitted to a fresh Tribunal. To that extent, Dr Sarkar was also successful.

40. Further, given there were two appeals, and the PSA and Dr Sarkar were each seeking different and opposite outcomes in terms of sanction, it does not seem to me that the PSA should be characterised as the successful party on the Second Appeal. This is because:

    a. the GMC and Dr Sarkar did not object to the Second Appeal being allowed for the reasons set out in Schedule 1 to the Consent Order, which expressly recognised that Dr Sarkar and the PSA were disputing the issue of sanction on "contrasting grounds"; and

b. the PSA did not establish on the Second Appeal, and the Consent Order does not recognise, that the decision not to provide for a review hearing was wrong.

41. Strictly speaking I do not think the outcome of the remitted hearing before the differently constituted Tribunal is relevant to the question of costs I have to decide. Indeed, if the parties had thought this was relevant, the question of costs could have been postponed by agreement in the Consent Order until the determination of sanction was known. It is fair to say that it has taken some time for the papers to be put before a judge of the Administrative Court to decide the question of costs. However, that delay means that I do know what the outcome of the remitted hearing was. The fresh Tribunal reduced the sanction imposed on Dr Sarkar and refused to direct a review. I take comfort from that decision as Dr Sarkar was successful in reducing the sanction which had been imposed on him. The position of the PSA that the sanction of erasure should have been imposed, or review directed, was not adopted by the Tribunal. That outcome corresponds with the conclusion that I have reached, namely that it is not correct to characterise the PSA as the successful party in relation to the Second Appeal.

42. Therefore, in my view, this not a case where the PSA can seek an order that the GMC should pay its costs on the basis of the general rule set out in CPR Part 44.2(2)(a), and the appropriate order is, as the GMC contends, no order for costs.

43. However, if I am wrong about that, then I need to deal with the other arguments advanced by the PSA as to why the GMC should pay it costs. In order to deal with these arguments it is necessary to set out more of the statutory framework and background in relation to the PSA and the GMC.

The PSA and its right of Appeal

44. The PSA is a body corporate established pursuant to section 25(1) of the 2002 Act. By virtue of section 25(2) of the 2002 Act, its general functions are: (a) to promote the interests of patients and other members of the public in relation to the performance of their functions by various regulatory bodies and by their committees and officers; (b) to promote best practice in the performance of those functions; (c) to formulate principles relating to good professional self-regulation and to encourage regulatory bodies to conform to them; and (d) to promote co-operation between regulatory bodies. The regulatory bodies in question include the GMC: see section 25(3) of the 2002 Act.

45. The over-arching objective of the PSA in exercising its functions is protection of the public and this was the reason for the creation of the PSA: *Council for the Regulation of Health Care Professionals v GMC & Ruscillo* [2005] 1 WLR 717 per Lord Phillips MR at [60].

46. The PSA, in carrying out its statutory functions under the 2002 Act is entirely funded by the regulatory bodies it oversees, which in turn are funded by members of the regulated health and care professions.

47. The decision on sanction was a "relevant decision" within the meaning of section 29(2)(a) of the 2002 Act. Pursuant to section 29(4) of the 2002 Act, the PSA may refer a case to the

High Court where it considers that: "the decision is not sufficient (whether as a finding or a penalty or both) for the protection of the public".

48. By section 29(4A) of the 2002 Act, consideration of whether a decision is sufficient for the protection of the public involves consideration of whether it is sufficient: (a) to protect the health, safety and well-being of the public; (b) to maintain public confidence in the profession concerned; and (c) to maintain proper professional standards and conduct for members of that profession."

49. Where a case is referred to the High Court, it is to be treated as an appeal: see section 29(7) of the 2002 Act. Under section 29(8) of the 2002 Act, the court may:

> "(a) dismiss the appeal,
> (b) allow the appeal and quash the relevant decision,
> (c) substitute for the relevant decision any other decision which could have been made by the committee or other person concerned, or
> (d) remit the case to the committee or other person concerned to dispose of the case in accordance with the directions of the court, …
> and may make such order as to costs … as it thinks fit."

50. The court may allow an appeal where the decision is wrong or there has been a serious procedural or other irregularity such that it is not possible to determine whether the decision as to sanction was not sufficient for the protection of the public. This may include a failure to provide adequate reasons for a decision: *CRHP v (1) GDC (2) Marshall* [2006] EWHC 1870 (Admin) at [31]-[32].

The GMC, the Tribunal and the GMC's right of appeal

51. The GMC is a statutory body with responsibilities, amongst other things, for the regulation of the medical profession in the United Kingdom. The over-arching objective of the GMC in exercising its statutory functions is the protection of the public: section 1(1A) of the 1983 Act.

52. On 31 December 2015 the Medical Practitioners Tribunal Service ("**the MPTS**") was established as a statutory committee of the GMC (section 1(3)(g) of the 1983 Act) and has statutory responsibility for the facilitation of Medical Practitioner Tribunals Proceedings. The MPTS remains part of the GMC, but is operationally separate. The fact it is independent of the GMC was recognised in *GMC v Michalak* [2017] 1 WLR 4193, SC at [10]. Likewise the Tribunal is a statutory committee of the GMC (section 1(3)(h) of the 1983 Act) and it is also independent of the other functions of the GMC. This is not the same as the relationship between the Fitness to Practise Committee and the General Pharmaceutical Council which Cox J found were not independent of each other in *PSA v (1) General Pharmaceutical Council (2) Onwughalu* at [49].

53. The Tribunal's functions are set out in section 35D of the 1983 Act and, when the Tribunal finds that a registrant's fitness to practise is impaired, it may impose one of the sanctions set out in section 35D(2), which includes: "(b) direct that his registration in the register shall be suspended (that is to say, shall not have effect) during such period not exceeding twelve months as may be specified in the direction". On the facts of this case the Tribunal

exercised its power under this sub-section to direct the suspension of Dr Sarkar from registration for a period of four months. This decision was subject to a right of appeal to the High Court under section 40(1)(a) of the 1983 Act, which Dr Sarkar exercised in relation to the First Appeal.

54. The GMC also has a right of appeal against a decision of the Tribunal under section 40A of the 1983 Act which provides, in part:

> "(1) This section applies to any of the following decisions by a Medical Practitioners Tribunal – (a) a decision under section 35D giving - … (ii) a direction for suspension, including a direction extending a period of suspension; …
> (2) A decision to which this section applies is referred to below as a "relevant decision".
> (3) The General Council may appeal against a relevant decision to the relevant court 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.
> (4) Consideration of whether a decision is sufficient for the protection of the public involves consideration of whether it is sufficient – (a) to protect the health, safety and well-being of the public; (b) to maintain public confidence in the medical profession; and (c) to maintain proper professional standards and conduct for members of that profession.
> (5) The General Council may not bring an appeal under this section after the end of a period of 28 days beginning with the day on which notification of the relevant decision was served on the person to whom the decision relates.
> (6) On an appeal under this section, the court may – (a) dismiss the appeal; (b) allow the appeal and quash the relevant decision; (c) substitute for the relevant decision any other decision which could have been made by the Tribunal; or (d) remit the case to the MPTS for them to arrange for a Medical Practitioners Tribunal to dispose of the case in accordance with the directions of the court, and may make such order as to costs … as it thinks fit."

55. Therefore, under section 40A(3) of the 1983 Act the GMC has right to appeal a Tribunal's decision to the High Court "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". This is a power to appeal. It is not a duty or obligation to do so.

56. Section 40B of the 1983 Act provides for notification to be given to the PSA if the GMC has appealed. Section 40B(1)(b) prevents the PSA from appealing pursuant to section 29 of the 2002 Act where the GMC has appealed. Section 40B(2) permits the PSA to become a party to the appeal where the GMC appealed, which is what happened in *GMC v Jagjivan* [2017] 1 WLR 4438 QBD, Div Ct ("***Jagjivan***").

57. In *Jagjivan* the Divisional Court provided, so far as material, the following summary in relation to section 40A appeals:

> "(i) Proceedings under section 40A of the 1983 Act are appeals and are governed by CPR Pt 52. A court will allow an appeal under CPR Part 52.2193) if it is "wrong" or "unjust because of a serious procedural or other irregularity in the proceedings in the lower court"…
> (iii) The court will correct material errors of fact and of law: see [*Raschid v General Medical Council* [2007] 1 WLR 1460] at para 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 the advantage of seeing and hearing …

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

(vi) However, there may be matters, such as dishonesty or sexual misconduct, where the court "is likely to feel that it can assess what is needed to protect the public or maintain the reputation of the profession more easily for itself and thus attach less weight to the expertise of the Tribunal …" …;

(viii) A failure to provide adequate reasons may constitute a serious procedural irregularity which renders the Tribunal's decision unjust …".

58. In this case the GMC did not appeal the decision. The PSA says that the GMC should have done so and, if the GMC had decided to appeal, then the PSA would not have had to exercise its right of appeal under section 29 of the 2002 Act, and thereby incur the costs associated with pursuing the Second Appeal.

59. I do not know why the GMC did not appeal the decision. I do not have any evidence about this in the papers before me. I certainly do not have any evidence to show that it was unreasonable on the part of the GMC not to pursue an appeal against the decision under section 40A(3) of the 1983 Act. Further, the decision of the Divisional Court in *Jagjivan* makes it clear that the High Court will approach "with diffidence" an appeal against sanction in a case such as this.

60. In these circumstances, I do not accept the PSA's submissions that, because the GMC could appeal the decision but did not, it should bear the costs of the Second Appeal simply because the PSA, in the exercise of its public function, took a different view of the decision, and decided that it was one that should be appealed.

61. Further, on the evidence that I do have, namely the outcome of the proceedings after they had been remitted to a differently constituted Tribunal, it seems to me that the GMC's decision not to appeal against the decision was justified. This is because in October 2019 the fresh Tribunal reduced the suspension imposed on Dr Sarkar from a period of four months to three months, and did not direct a review.

62. Therefore, this is not a case where the PSA has successfully appealed a decision of Tribunal in relation to sanction and, as a result, obtained a more serious sanction before the fresh Tribunal.

R (Davies) v Birmingham Deputy Coroner

63. The GMC is a respondent to the Second Appeal in its capacity as the statutory body responsible for the Tribunal. The GMC has taken a neutral position in relation to the Second Appeal (see, for example, paragraph 1(2) of its skeleton argument). The party opposing the Second Appeal was Dr Sarkar.

64. In these circumstances, I agree with the submissions of Mr Knight that, as the statutory body responsible for the Tribunal, the position of the GMC is no different to the position of an inferior court or tribunal in a judicial review. It is well established in those cases that the ordinary rule is that no order for costs will be made against the court or tribunal unless it has actively opposed the appeal. In *R (Davies)* the position was explained by Brooke LJ at [47] as follows:

> "[47] It will be apparent from this judgment that the answers to the questions I posed in para 3 above are:
> (1) the established practice of the courts was to make no order for costs against an inferior court or tribunal which did not appear before it except when there was a flagrant instance of improper behaviour or when the inferior court or tribunal unreasonably declined or neglected to sign a consent order disposing of the proceedings;
> (2) the established practice of the courts was to treat an inferior court or tribunal which resisted an application actively by way of argument in such a way that it made itself an active party to the litigation, as if it was such a party, so that in the normal course of things costs would follow the event;
> (3) if, however, an inferior court or tribunal appeared in the proceedings in order to assist the court neutrally on questions of jurisdiction, procedure, specialist case law and such like, the established practice of the courts was to treat it as a neutral party, so that it would not make an order for costs in its favour or an order for costs against it whatever the outcome of the application;
> (4) there are, however, a number of important considerations which might tend to make the courts exercise their discretion in a different way today in cases in category (3) above, so that a successful applicant, like Mr Touche, who has to finance his own litigation without external funding, may be fairly compensated out of a source of public funds and not be put to irrecoverable expense in asserting his rights after a coroner, or other inferior tribunal, has gone wrong in law, and [where] there is no other very obvious candidate available to pay his costs."

65. This case falls into category (1) identified by Brooke LJ in *R (Davies)*. For the reasons identified above, I do not consider there is any basis for the PSA to complain or criticise the GMC for not appealing the decision pursuant to section 40A of the 1983 Act. In these circumstances, given the GMC's neutral stance in relation to the Second Appeal, there is no basis to depart from the general rule that there should be no order for costs against the GMC.

66. I do not accept the PSA's argument that this means the GMC can never be liable for costs in an appeal brought by the PSA against a decision of the Tribunal. It is plain from *R (Davies)* that there are circumstances in which an inferior court or tribunal can be liable for costs: see categories (2) and (4) identified by Brooke LJ.

Other points

67. This conclusion also means that the PSA's without prejudice offer referred to in paragraph 18 above, does not assist it in relation to seeking costs against the GMC. Likewise, the PSA's point that, after the decision, the GMC informed the PSA that it had directed a review under section 35D(4B) of the 1983 Act, does not provided any foundation for any costs to be awarded against the GMC. This is because it was never the PSA's case that, if it had been aware of the decision to review, it would not have brought the appeal. Indeed, in its skeleton argument in April 2019, the PSA was at pains to point out that, even though the GMC had directed a review, the appeal was not academic.

Order

68. The order I have therefore made in relation to the costs of the First and Second Appeals is: (a) there be no order for costs in the First Appeal; (b) the PSA's application for costs against the GMC in the Second Appeal is dismissed; and (c) there be no order for costs in the Second Appeal.