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CO/1727/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2021

Before :

MR JUSTICE KERR

- -

Between :

DR BASHIR AHMEDSOWIDA **Appellant**

- and -

GENERAL MEDICAL COUNCIL **Respondent**

- -
- -

Mr Martin Forde QC and Mr Gary Summers (instructed by **Direct Access**) for the **Appellant**
Mr Peter Mant (instructed by **General Medical Council**) for the **Respondent**

Hearing date: 7-8 December 2021

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE KERR

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 and time of hand-down is **4pm** on **21 December 2021**

Mr Justice Kerr :

Introduction

1. On 16 April 2021, a tribunal of the Medical Practitioners Tribunal Service (**the tribunal**) decided that the name of the appellant (**Dr Sowida**) should be erased from the medical register and imposed an immediate suspension from practice order. Dr Sowida challenges those decisions. They were based mainly on findings of serious misconduct amounting to dishonesty. The tribunal found that his fitness to practise was impaired by reason of misconduct and that nothing less than erasure would be a sufficient sanction to protect the public.

2. Dr Sowida's appeal is brought on six grounds. In summary, they are that the tribunal (i) misapplied the tests of dishonesty in *Ivey v. Genting Casinos (UK) Ltd (t/a Crockfords Club)* [2018] AC 391; (ii) made a procedurally unfair late amendment to the charges; (iii) made inconsistent findings of fact; (iv) impermissibly "cumulated" distinct findings of misconduct; (v) at the impairment stage, lowered the test of dishonesty to that of recklessness; and (vi) at the sanction stage, wrongly approached the issue of insight into dishonesty.

3. The appeal is brought under section 40 of the Medical Act 1983. I can dismiss the appeal, or allow it but only if the decision below was wrong or unjust because of a serious procedural or other irregularity. If I allow it, I can quash the decision, substitute any direction the tribunal could have made, or remit the case for reconsideration. The appeal is a rehearing but without hearing the evidence again. The court will assume, except for good reason, that the tribunal knew its business and will not strive to find otherwise by elevating semantics over substance or applying narrow textual analysis.

4. The court's judgment is a secondary one, affording the due amount of deference to the tribunal's expertise and the advantage it has of having seen and heard the witnesses. Particular deference is due to judgments about how best to protect public confidence in the profession. Challenges to findings of impairment or as to the appropriate sanction are therefore to be approached with diffidence. Findings of primary fact, particularly if dependent on credibility, are virtually unassailable, absent any error of law or principle or approach.

Facts in Outline

5. Dr Sowida was born in Kabul in 1972. He is a British citizen. He studied medicine and graduated from the Ibne-Sina Balkh Medical School, Balkh University, in Afghanistan in 1996. From 2007 to 2009 he undertook his foundation years in this country at hospitals in Redditch and Sunderland. He then went to Northern Ireland and started specialty training with the Northern Ireland Medical and Dental Training Agency (**NIMDTA**) in August 2010. His "responsible officer" there was Professor Keith Gardiner.

6. After a year at a maternity hospital in Belfast where he completed his "ST1" (specialty training, first stage), he was posted to Antrim Area Hospital for his ST2, the second stage, from August 2011. There, things did not go well for him. In November 2011,

he was excluded from practising while concerns about his work were looked into. He did no clinical work and spent about three years under investigation.

7. Dr Sowida undertook locum postings from January to April 2014 at two hospitals in the Midlands, George Eliot Hospital and Heartlands Hospital, working first in Trauma and Orthopaedics (**T&O**) and then in T&O and Medicine. The investigation at Antrim Area Hospital then concluded with a final written warning from his employer there, in May 2014. In June 2015, that was reduced on appeal to a "formal warning", to expire in July 2015.

8. By then, Dr Sowida was working (from April 2014 to August 2015) at Kettering Hospital as a senior house officer (**SHO**) in T&O and surgery. He was still subject to the training regime of the NIMDTA. His employment by the Northern Health and Social Care Trust (**NHSCT**), which operates Antrim Area Hospital, formally ended in August 2014.

9. In January 2015, he submitted an "inter deanery transfer" (**IDT**) request. He wanted to move to England and put his negative experiences working in Northern Ireland behind him. He undertook locum work at North Durham Hospital as an SHO in Obstetrics and Gynaecology (**O&G**) (August to November 2015) and at Sheffield Teaching Hospital, also in O&G (December 2015 to 2 February 2016).

10. At some point before 4 February 2016 (as the tribunal later found), a CV in Dr Sowida's name was drafted (**the first CV**). He provided information for it, but did not draft all of it himself. It included errors about when and where he obtained his medical qualification; more importantly to the tribunal later, it wrongly stated that he had been employed at Antrim Area Hospital as a specialty trainee in T&O from 4 August 2011 to 3 December 2012.

11. From February to July 2016, Dr Sowida did intermittent locum work at Kettering Hospital. On 6 August 2016, he applied for a job at Worcester Royal Hospital (**Worcester Royal**). His application (**the first application**) repeated the errors about obtaining his medical qualification, but these were not, subsequently, found to amount to serious misconduct. He discussed the first application with Professor Gardiner on 18 August 2016. He did further locum work for Bedford Hospitals NHS Trust in September and October 2016.

12. On 25 October 2016, a recruitment agency submitted the first CV, on Dr Sowida's behalf, to Worcester Royal. It included the incorrect information already mentioned. He then worked as a locum in O&G at Worcester Royal from November 2016 to February 2017, before moving to another locum posting at North Devon District Hospital, until at least April 2017. After that, from 24 July 2017 he became a regular employee at Worcester Royal.

13. His time there did not last long. Three instances of failing to follow the instructions of a supervising consultant during caesarean section operations were raised against him in his first two months. The tribunal made findings about these incidents, as they were later raised as misconduct issues. I will call them the **first**, **second** and **third incidents**. The findings were disputed by Dr Sowida. They were to the following effect.

14. The first incident, on 18 August 2017, was failing to carry out requests from Dr Nishitika Jaiswal to use a "diathermy" to stop bleeding of the patient's abdomen and to perform a lower, not higher, uterine incision. Dr Sowida, the tribunal found, ignored Dr Jaiswal's offer to take over delivery of the baby, which made the delivery more difficult and caused more than anticipated blood loss to the patient.

15. The second incident took place shortly before 1 September 2017 (written up in notes on 1 September). The tribunal found that during an assessment of Dr Sowida's skills by Dr Caroline Fox, she advised him to perform a "blunt dissection" rather than a "sharp dissection", but Dr Sowida performed a sharp dissection. Dr Fox later wrote in the notes that while a sharp dissection was not dangerous to the patient, Dr Sowida had said he always used the sharp dissection technique and had not followed her instruction.

16. The third incident must have occurred shortly before an email sent by Dr Alexandra Blackwell on 7 September 2017, referring to it. The tribunal later accepted her account that Dr Sowida should have obeyed, but did not obey, her instruction to cease adjustments to suturing because the patient was in pain and discomfort and it was better to stop removing suturing with the aim of improving its placement in the quest for a good cosmetic result, even though the suture placement was not perfect.

17. On 14 September 2017, Dr Sowida met Dr Rachel Duckett, the clinical director for O&G at Worcester Royal, to discuss concerns about his performance. The tribunal found that at that meeting Dr Sowida falsely stated that he had done three years' work in O&G since 2010 and that he had completed speciality training stages ST1, ST2 and ST3, rather than just ST1 in O&G, as was the case. Dr Duckett asked him to provide details of his training posts and training in O&G.

18. At the meeting, Dr Sowida said he wished to resign from his post so he could rejoin his national training programme from 1 December 2017. Dr Duckett stated that he would have to give contractual notice in writing. He then did so. On 17 September 2017 (as appears from Dr Duckett's email of 19 September), Dr Sowida emailed Dr Duckett confirming that he wished to resign from his post as of 2 November 2017. They had a discussion and Dr Duckett "formally accepted" his resignation, as she confirmed in her email of 19 September.

19. This was followed up by email requests on 21 and 27 September 2017, asking for the information to be provided the next day. Dr Sowida did not provide the information sought. On 6 October 2017, the divisional medical director at Worcester Royal, Dr Andrew Short, emailed Dr Sowida asking for a meeting. No meeting took place. On 27 October 2017, Dr Duckett asked him to meet her in her office. He sent her an email the same day saying: "unfortunately you were busy [sic] to meet me, and I have left a message to the directorate office … to let you know of my attendance".

20. The tribunal later found that he had deliberately avoided meeting Dr Duckett, who had been available and waiting for him in her office. On 1 November 2017, Dr Sowida was in email correspondence with Dr Short. The tone of Dr Sowida's correspondence was becoming contentious and anxious. Among other things, he said in that email "I have continually been trying to arrange an appointment with you via your secretaries and HR, but to no avail!!!". However, the tribunal later found that Dr Sowida had made no genuine attempt to meet Dr Short and, indeed, was avoiding a meeting with him.

21. The next day, 2 November 2017, Dr Sowida's resignation from his post at Worcester Royal took effect. Two weeks later, he met his responsible officer based in Northern Ireland, Professor Gardiner, as he was still subject to the training jurisdiction of the NIMDTA. The tribunal found that he told Professor Gardiner, incorrectly, that concerns had not been raised with him about his performance or conduct until after his resignation and that the concerns had only been raised by one person.

22. From mid-November 2017 to February 2018, Dr Sowida worked as a locum at North Devon District Hospital. In March 2018, he submitted a job application (**the second application**) and a further CV (**the second CV**) to the Birmingham Women's and Children's NHS Foundation Trust (**the Birmingham Trust**). The application was for a junior clinical fellow post at Birmingham Women's Hospital. The tribunal later found that both the second application and the second CV contained incorrect statements.

23. Specifically, the tribunal found that in the second application, Dr Sowida wrongly stated that his "responsible officer" for training purposes was the North Devon District Hospital and did not declare that he was a trainee with NIMDTA. As for the second CV, the tribunal found that he incorrectly stated that had been employed by North Devon District Hospital from 5 August 2016 up to March 2018; that he failed to mention his employment at Worcester Royal; and that he did not declare that he was a trainee with the NIMDTA.

24. Dr Sowida's statements in the first application and the first CV were challenged by the NIMDTA's education manager, Ms Denise Hughes, on 3 May 2018. She put to him that there were inaccuracies in them. Dr Sowida's response was that that the inaccuracies "could have been due to clerical, procedural and technical mistakes / on occasion reliance on memory".

25. As the NIMDTA's enquiries into the accuracy of information provided by Dr Sowida continued, on 15 May 2018 he emailed Professor Gardiner, still his responsible officer for training purposes, stating that "on 18th August 2016, the day of my ARCP [Annual Review of Competence Progression] to which I was strictly being instructed by (Prof. Gardiner and Dr Murnaghan) to refrain from divulging any related information in relation to the investigation conducted by AAH [Antrim Area Hospital] and NIDMTA" [sic]. The tribunal later found that Dr Sowida had not been so instructed.

26. On 25 July 2018, Dr Sowida secured the appointment he sought at the Birmingham Women's Hospital, as a junior clinical fellow in O&G. The events described above were investigated by the GMC, and other events of lesser importance which I have not included in the above account, which concentrates on the most important events.

27. Eventually, charges were brought arising from the events I have outlined and others. The charges were set out in 56 paragraphs, many divided into numerous sub-paragraphs containing separate allegations. The charges were detailed and labyrinthine. They were not structured (as in my opinion they should have been) so as to set out all aspects of each allegation in one place and following the chronological order in which the alleged offences were committed.

28. The charges came before the tribunal in difficult circumstances. The hearings were, for the most part, conducted in person over many days, despite lockdowns and Covid

related restrictions. The hearings took place in March, June, October and (most without the parties present) December 2020; and in January and April 2021.

29. Both parties were represented by counsel. Various doctors including those mentioned above gave evidence for the GMC. Dr Sowida produced a detailed witness statement, gave oral evidence was cross-examined. He denied the charges though he did not deny the authenticity of what was written in the relevant documents deployed against him. He contested the accuracy of some contemporary statements about him made by others in the documents.

The Tribunal's Decision

30. The tribunal comprised the legally qualified chair (Mr Angus Macpherson), the lay member (Mr Paul Curtis) and the medical member (Dr John Garner). The hearings were held in public. Various procedural applications were dealt with; one, to which I shall return, is relevant to this appeal. The tribunal's determination on the facts was given on 21 January 2021. Its determination on impairment of fitness to practise was provided on 13 April 2021; and on sanction, on 16 April 2021.

31. The determination on the facts ran to 89 pages and 247 paragraphs, with many sub-paragraphs, sub-sub-paragraphs and bullet points. It was nothing if not thorough. Each of paragraphs 24 and 247 had 56 sub-paragraphs corresponding to the 56 paragraphs (with their own sub-paragraphs) of charges. Paragraph 24 stated the extent of what was admitted. Paragraph 247 stated the extent of what was found proved or not proved. The most important findings of fact were as I have set them out above, omitting most of what was not found proved or found proved but, later, found not to amount to serious misconduct.

32. As for dishonesty, the tribunal set out the tests derived from in *Ivey v. Genting Casinos (UK) Ltd* [2018] AC 391 (paragraph 30). Very broadly, they found that in each of the instances I have set out above where false information was provided, Dr Sowida was responsible for providing that information, knew it was false, hoped thereby to gain advantage or avoid disadvantage in various ways explained in the tribunal's reasoning, and acted in a manner that ordinary decent people would consider dishonest.

33. The decision on impairment of fitness to practise comprised 68 paragraphs. The tribunal considered the authorities on findings of dishonesty, remediation remorse or lack of it and risk of repetition of the misconduct found proved. At paragraph 12, they noted that while Dr Sowida had not disputed his role in providing documents that had gone out in his name, he did not accept that he had deliberately tailored the documents to put himself in a better light, nor that he was dishonest. They noted his counsel's assertion that he deeply regretted that full and accurate information was not given in the applications or CVs.

34. Dr Sowida's counsel, Ms Rosalind Scott-Bell, submitted that the first, second and third incidents had not generated any disciplinary proceedings; while the missed meetings had been arranged informally and in one instance during Dr Sowida's annual leave. He regretted not attending the meetings. She submitted that there was minimal risk of repetition and that he had kept his skills and knowledge up to date through a difficult time. Mr Lee Fish, for the GMC, submitted that Dr Sowida's conduct was deplorable and merited erasure.

35. After referring to various authorities including *Schodlok v. GMC* [2015] EWCA Civ 769 (to which I shall need to return), the tribunal stated at paragraph 21 that it would make its decisions on misconduct by going through the paragraphs of the allegations that were found proved "in clusters according to their subject matters". Secondly, they said, having in mind the judgment of Beatson J [sic – LJ] in *Schodlok*:

> "in respect of any paragraphs of the allegation which were not found to amount to serious misconduct, the Tribunal determined to consider whether it would be appropriate to cumulate them alongside other paragraphs of the allegation which have been found proved and, if so, to determine whether, in those circumstances, a finding of serious misconduct should be made."

36. They then went through the charges that were found proved, including those involving dishonest conduct, and stated in each case whether they found that the conduct was "serious misconduct" or merely "misconduct" that was not serious. In the instances I have outlined above, other than the submitting of the first application, the finding was that the misconduct was serious. In other instances, the finding was that there was misconduct but it was not serious.

37. In relation to the first CV, the wrong information about his professional history was not greatly relevant to the appointment and "although Dr Ahmedsowida was reckless in the way he completed the First CV, not caring sufficiently as to the accuracy of the contents, and, therefore, dishonest and in breach of paragraph 71 of GMP, his dishonesty in this regard falls short of amounting to serious misconduct." However, the wrong information about his time at Antrim Area Hospital was serious misconduct (paragraph 28). The same findings were made in relation to the second CV (paragraphs 31-32).

38. As for the application for a job at Birmingham Women's Hospital, Dr Sowida had got his date of birth wrong by four years and although he was "reckless in the way he completed the job application to the Trust in this regard, not caring sufficiently as to the accuracy of the contents, and therefore dishonest", that dishonesty fell short of being serious misconduct. However, falsely identifying his responsible officer as North Devon District Hospital rather than Professor Gardiner in Northern Ireland, and failure to declare that he was a NIMDTA trainee, was serious misconduct (paragraphs 34-36).

39. As for the employment at Worcester Royal, the tribunal decided (paragraphs 37-47) that the first incident (failing to carry out a diathermy to stop bleeding) was serious misconduct. The second incident (carrying out a sharp dissection) was "part of his training" and "not … sufficiently serious to warrant a finding of serious misconduct". The third incident (continuing to adjust suturing when told not to) was serious misconduct. Two other more minor aspects of his work while at Worcester Royal (not included above) were not serious misconduct.

40. The failure to provide requested information to Dr Duckett, giving details of previous posts and training in O&G, was serious misconduct. Failure to meet her on 27 October 2017 was not serious misconduct, the request for a meeting being informally conveyed. However, it was serious misconduct to lie to her in an email afterwards about the reason for not having met her. It was also serious misconduct to have written a dishonest email to Dr Short on 1 November 2017 falsely claiming to have tried to arrange meetings with

him. Dr Sowida's interactions with Dr Gardiner in November 2017 and May 2018 were found to be dishonest and to amount to serious misconduct (paragraphs 48-50).

41. The tribunal then listed at paragraph 51, as bullet points, its 15 findings of serious misconduct, most involving dishonesty, a few involving misleading by omission (a "failure to declare"), one involving non-provision of requested information to Dr Duckett and three involving failure to follow instructions. The second incident (carrying out a sharp dissection rather than a blunt dissection) was said to amount to serious misconduct when "considered cumulatively" with the failures to follow instructions in the case of the first and third incidents. It would not in isolation have been serious misconduct.

42. The tribunal then reasoned (paragraph 54) that while Dr Sowida accepted the tribunal's decision, he did not accept that he dishonestly gave false and misleading information on six separate occasions. He had also in the proceedings "challenged the accuracy" of written evidence noted at the time by independent persons, which he had not challenged at the time (paragraphs 55 and 56). While professing "remorse" through counsel, he had not done so in contesting the charges, nor in a "reflective piece" or "further oral testimony".

43. After considering various testimonials and certificates, the tribunal found that while his dishonesty was not necessarily irremediable (paragraph 63), there was "really no evidence that he has begun a change in attitude or in any way attempted to remediate his shortcomings … he has not developed any insight into his misconduct" (paragraph 64). By behaving dishonestly and failing to follow instructions from his seniors he had breached "fundamental tenets" of the profession and his fitness to practise was impaired (paragraphs 66-68).

44. That was on 13 April 2021. The tribunal gave its decision on sanction three days later on 16 April, the 39th and final day of the proceedings. By then, Dr Sowida had produced a "reflective piece", of seven pages, "to demonstrate my insight, remorse and associated remedial actions". It was carefully researched and fully documented, with footnotes. He recognised the need for doctors to be "open and honest" about qualifications and experience when applying for posts. He accepted "discrepancies/inaccuracies" in information he provided.

45. Dr Sowida then stated that he accepted he was:

> "careless the way I had provided the information in relation to the application and CV and recognise that the information was inputted was erroneous in a number of respects as I have outlined in my statement to GMC on the 11/02/20 and also in my cross-examination on the 8/10/20 respectively. However, the errors were not motivated by dishonesty. I would however repeat that I deeply regret that full, clear and accurate information was not contained in either the application or the CV."

46. He was "appalled in hindsight how many mistakes there are"; and:

> "after considering each of the tribunal's determinations, I have an understanding as to why the dishonesty is found, whilst reflecting whether the actions have affected the trust of the patients my colleagues. By gaining comprehension regarding the seriousness and depth of the effect these mistakes have on the patient, the healthcare team, and my profession in general, I will make sure that accepting mistakes would

> not mean that I am only doing this because this is what others want to hear from me. As a response and a preventative measure, I will devise a strategic action plan which I can implement in the future to refrain the same mistakes from happening again."

47. The rest of the reflective piece was a detailed account of that plan, addressing each aspect of the tribunal's determination, intended to help him become scrupulously accurate in providing information and to follow instructions. The tone was one of humility. He hoped by implementing this plan to regain trust, he said. He attached testimonials to his good character and professional integrity; the observations in them, he said, "contrast … to those which have been made in current allegation". He ended with:

> "I do deeply regret the various comments have been made in relation to inaccuracies and discrepancies in the information provided, sense of professionalism and dishonesty against me."

48. Ms Scott-Bell then pleaded for her client not to be erased from the medical register. She submitted (in the tribunal's summary at paragraph 13) that:

> "it is Dr Ahmedsowida's case that these errors and inaccuracies were not intentional nor done dishonestly. … Dr Ahmedsowida was not given the opportunity to demonstrate his insight by accepting that he provided misleading information, but that he had no intention to be dishonest."

49. Mr Fish, for the GMC, advocated erasure. He criticised the lateness of the reflective piece. On the subject of dishonesty, he submitted (in the tribunal's summary at paragraph 7 of the decision on sanction) that Dr Sowida:

> "does not accept the fundamental findings of the Tribunal in relation to his dishonesty. Although this is his right, Mr Fish submitted that it is difficult in that context to conclude that Dr Ahmedsowida demonstrates any insight today."

50. Assessing the submissions (at paragraph 30), the tribunal commented among other things that Dr Sowida "has not apologised for his dishonesty; he does not accept that he behaved dishonestly". The tribunal then reviewed its findings again, in some detail. They then turned to the reflective piece, noting its lateness. At paragraphs 47-49 they said this:

> "47. … the reflective statement represents a start on the process of remediation. Dr Ahmedsowida has set out principles which could lead to remediation, how they relate to some of the findings and his attitude to them. But it does not address his dishonesty.
>
> 48. The overriding difficulty which Dr Ahmedsowida faces in this case is that essentially it is a case of dishonesty. The Tribunal has found that Dr Ahmedsowida has behaved dishonestly in making applications for employment at Worcestershire Royal Hospital and at the Trust, he has been dishonest in responding to inquiries about his time in Worcestershire Royal Hospital. He has sought to cover up that dishonesty in an interview with Dr A. He has sought to sidestep it by his application for employment at the Trust by further dishonesty. In the view of the Tribunal, he did not attempt to set the record straight when he was at the Trust in later 2018. As he has never accepted his dishonesty, he has never sought to explain it. By the same token, he has never sought to explain the inaccuracies and inconsistencies which the

> Tribunal has found were occasioned by his dishonesty. He has simply apologised for them.
>
> 49. In the absence of any acknowledgment of his dishonesty, the Tribunal is bound to conclude and does conclude that he has shown no real insight into his misconduct. It must be on that basis that the Tribunal must turn to consider sanction."

51. They then considered available sanctions in ascending order, in the usual way, culminating with rejection of a suspension order. They then said they went on to consider the sanction of erasure. This is not really necessary, though it is always done, no doubt for the sake of form. The rejection of the second highest sanction in the ascending order, suspension, meant they must have already decided on erasure. In any case, they reiterated that erasure was only possible sanction.

52. In a short supplemental determination the same day, the tribunal decided that their order should be effective immediately. They took account of the submissions. These included Ms Scott-Bell's submission that the bar is set high where (as was the GMC's position) an immediate order was sought on public interest grounds alone and not on the ground that an order is necessary to protect the public. The tribunal decided to impose an immediate order of suspension, commenting simply that "the public interest in this case outweighs that of the doctor" (paragraph 9).

Grounds of Appeal

First ground: misapplying the tests of dishonesty

53. Mr Martin Forde QC, for Dr Sowida, submitted that on numerous occasions the tribunal misapplied the tests in *Ivey v. Genting Casinos (UK) Ltd* by concluding that his subjective state of mind was "dishonest" before considering the second test, i.e. whether the conduct would be considered dishonest by ordinary decent people. He submitted that this flaw tainted the findings of dishonesty in the case of charges 5,13a-b, 26, 32, 37, 43, 48, 52 and 56.

54. These are the charges in respect of which the tribunal used language along the lines used, for example, at paragraph 120 of the determination on the facts, when addressing charge 13a, which accused Dr Sowida of (among other things) knowingly providing false information to both Worcester Royal and later to the Birmingham Trust (regrettably, wrapped up in the same charge, charge 13a):

> "Where the Tribunal has found that Dr Ahmedsowida included information outlined in any of those paragraphs which was not true, and which he knew to be untrue, it has found that he had formed a dishonest state of mind on the basis that he was deliberately including information with the intention of misleading a reader as to his past history. Further the Tribunal has found that ordinary decent people would regard such actions as dishonest."

55. The criticism is that the words "it has found that he had formed a dishonest state of mind on the basis that" constitute a finding of dishonesty already, at the first stage of the two stage *Ivey* test. To give one more example, when addressing charge 13b, which accused Dr Sowida of (among other things) dishonestly failing to declare in the second CV his employment at Worcester Royal and that he was a trainee with the NIMDTA from August 2010 to March 2018, the tribunal said this at paragraphs 136 and 137:

> "Paragraph 13(b) in respect of paragraph 9(d)
>
> 136. Found proved. The Tribunal found that Dr Ahmedsowida was deliberately hiding the fact that he was employed by the Hospital by stating that he was employed at the material time at North Devon District Hospital and not correcting that erroneous statement by proper disclosure of his employment at the Hospital. It further found that he did so to protect himself from scrutiny as to what had happened at the Hospital. The Tribunal found that that was a dishonest state of mind and further that ordinary decent people would regard such actions as dishonest.
>
> Paragraph 13(b) in respect of paragraph 9(e)
>
> 137. Found proved. The Tribunal found that Dr Ahmedsowida was deliberately hiding the fact that he was a trainee at the NIMDTA by making it appear that his traineeship was in North Devon and not correcting that erroneous impression by proper disclosure of the fact that he was a trainee at the NIMDTA. It further found that he did so to protect himself from inquiries with NIMDTA which would have resulted in a discovery as to what had happened at the Hospital. The Tribunal found that that was a dishonest state of mind and further that ordinary decent people would regard such actions as dishonest."

56. Mr Forde complains that the tribunal repeatedly, as in those examples, referred to Dr Sowida's "dishonest state of mind" having therefore already concluded that he was acting dishonestly before applying the second part of the test. He also said that the reasoning supporting the findings of dishonesty was inadequate.

57. A further complaint (which I shall examine under ground 5) is that the tribunal on several occasions equated "recklessness" with dishonesty, regarding Dr Sowida as "fixed with responsibility" for content within the first application and the second application which he had not personally written, but which was either supplied by others or electronically "propagated" from earlier versions of the documents.

58. Mr Peter Mant, for the GMC, submitted that the criticism was no more than one of linguistic infelicity and that the tribunal had well understood and applied the two stage test in the *Ivey* case. He accepted that in a paragraph such as 120, the words "he had formed a dishonest state of mind on the basis that" should have been omitted, so that the sentence would have read:

> "Where the Tribunal has found that Dr Ahmedsowida included information outlined in any of those paragraphs which was not true, and which he knew to be untrue, it has found that he was deliberately including information with the intention of misleading a reader as to his past history. Further the Tribunal has found that ordinary decent people would regard such actions as dishonest."

59. Reminding me that I must avoid narrow textual analysis and read the decision in a common sense way, Mr Mant submitted that the findings of dishonesty proceeded from a correct application of the two stage tests and were unassailable findings of fact. Were it otherwise, the tribunal would not have proceeded at the end of each paragraph to refer to the standards of ordinary decent people.

60. Subject to the occasions where the tribunal referred to recklessness, which I shall consider under ground 5, I accept Mr Mant's interpretation of the determination on the facts and uphold the findings of dishonesty. It was unfortunate that the tribunal confusingly referred to a "dishonest" state of mind at the first stage of the test, when

what it was considering was Dr Sowida's subjective state of mind about the facts, i.e. whether he believed the information he was imparting was untrue.

61. But the passages relied on do not show a misunderstanding and misapplication of the two stage test; on the contrary, it is clear from a fair reading of the decision as a whole that the tribunal well understood the test and its two separate stages. Nor was the reasoning supporting the findings of dishonesty inadequate. The tribunal provided detailed explanations of what it found Dr Sowida's motives to be, namely to gain advantage in various ways, or avoid a disadvantage such as (for example) his past at Antrim Area Hospital catching up with him.

62. I would add that I have considered the exchanges with counsel that took place on the *Ivey* case and the law relating to dishonesty (day 21, 15 October 2020, unpaginated transcript, court bundle B, pages 1222-1226). These help to explain the subsequent repeated premature use of the phrase "dishonest state of mind" in the determination on the facts; but they also reassure me that the tribunal did not misunderstand and misapply the law on dishonesty. I therefore reject the first ground of the appeal.

Second ground: making a procedurally unfair late amendment to the charges

63. In ground 2, Dr Sowida submits that there was a serious procedural irregularity when the tribunal amended charges 9-13 inclusive after hearing closing submissions. The submissions were heard on 15 October 2020. The tribunal deliberated without the parties present in the week of 14 December 2020. The parties were recalled (after prior notice in writing of the reason) on 18 January 2021 to consider what the chair called an "anomaly" in relation to charges 9 and 10; and a "knock-on anomaly" in relation to charges 11, 12 and 13.

64. The tribunal proposed to amend those charges under rule 17(6) of the Fitness to Practise Rules, which govern matters of procedure. It provides that if "at any time it appears to the [tribunal] that .. the allegation or the facts … should be amended; and … the amendment can be made without injustice, it may, after hearing the parties, amend the allegation in appropriate terms."

65. The tribunal heard submissions from the parties. Mr Fish proposed terms of amendment. Ms Scott-Bell opposed any amendment, saying it would be procedurally unfair because Dr Sowida would have presented his case differently if charges 9-13 were modified as the tribunal proposed. The tribunal rejected Mr Fish's proposed amendments and rejected also Ms Scott-Bell's submission that no amendment should be made. It decided to amend those charges in a manner of its own composition.

66. In paragraph 23 of the determination on the facts, they said:

> "23. The Tribunal determined to amend paragraphs 9, 10, 11, 12 and 13 of the Allegation having ascertained that the paragraphs of the Allegation which alleged failures on the part of Dr Ahmedsowida were not properly pleaded. The Tribunal determined to do so to make sure that the case against Dr Ahmedsowida was properly presented. It was satisfied that it would cause no injustice to Dr Ahmedsowida to amend the Allegation. The Tribunal's full decision is included at Annex F."

67. The substance of the amendments was as follows. There were four charges alleging that Dr Sowida failed to declare information that ought to have been declared. All four related to the application to Birmingham Trust in March 2018:

(1) Charge 9d asserted failure to declare in the second CV Dr Sowida's prior employment at Worcester Royal.

(2) Charge 9e asserted a failure to declare in the second CV that Dr Sowida was a trainee with the NIMDTA from August 2010 to March 2018.

(3) Charge 9f asserted a failure to declare in the second CV that Dr Sowida had been excluded from "your post at NIMDTA" (i.e. from Antrim Area Hospital) from 21 November 2011 to 31 July 2014.

(4) Charge 10f asserted a failure to declare in the second application that Dr Sowida was a trainee with the NIMDTA from August 2010 to March 2018.

68. These were all, obviously, allegations of knowingly concealing relevant information that Dr Sowida did not want the Birmingham Trust to know about. The sting of the charges was that he wanted to sanitise his past, leaving out inconvenient facts that might induce the Birmingham Trust not to offer him a job. Standing back, all that is clear enough. It was also the GMC's case that deliberately omitting these relevant matters from the second CV and second application was dishonest.

69. To express that case properly in the wording of the charges, the tribunal decided to re-label what had been charge 13 as charge 13a and to create a new charge 13b directly addressing the case on dishonesty in the four cases where the doctor's alleged offence was one of omission rather than commission. The new charge 13b stated:

> "Paragraphs 9d-f and 10f were dishonest by reason that the facts and matters which you did not declare were true and you had an obligation to declare them when submitting the second CV and the second application to the Trust [Birmingham Trust] for employment."

70. In Annex F to the determination on the facts, the tribunal gave its reasons for making the amendments and finding that they could be made without injustice. It found that no unfairness would arise from the amendments because Dr Sowida would always have been aware that dishonesty was alleged against him in relation to the failures to disclose information, not just where he positively gave out false information.

71. Mr Forde submitted that the amendments were unfair as they denied Dr Sowida "the opportunity to present his case in a way which directly responded to the charges as the panel ultimately considered them". He submitted that amendments during the tribunal's deliberations should be confined to "rare exceptional cases", of which this was not one. The amendments, he suggested, were critical to the findings of guilt leading to erasure.

72. For the GMC, Mr Mant submitted that the amendments merely corrected the original wording which had nonsensically characterised the omitted information as "untrue" whereas it was true and it was that truth that should have been disclosed. There was never any doubt what the substance of the GMC's case was. Dr Sowida knew the case he had to meet: that he had been under an obligation to disclose that information and had dishonestly not done so.

73. The lateness of the amendments did not necessarily mean they were unjust, as acknowledged by Lindblom LJ in *Professional Standards Authority v. Health and Care Professions Council and Doree* [2017] EWCA Civ 319, at [56]:

> "[t]here will … be cases where a late amendment of the allegations … will be justified, even after the evidence has been heard and findings of fact have been made."

74. I accept the GMC's submissions on this issue. The drafting of the charges left much to be desired, but as a matter of substance it was clear both before and after the amendments that the four offences of omission were asserted as matters involving dishonesty on Dr Sowida's part. He did, indeed, know the case he had to meet. I agree with the tribunal's determination that the amendments could be made without injustice and I reject the second ground of the appeal.

Third ground: making inconsistent findings of fact

75. In this ground of appeal, Dr Sowida submits that the tribunal made "serious procedural errors by making inconsistent determinations". This submission relates to the issue of responsibility for the content of the first application to Worcester Royal in August 2016 and the second application to the Birmingham Trust in March 2018. To understand the argument, it is necessary to explain the tribunal's findings on various charges.

76. Charge 6g alleged that Dr Sowida completed the application form for the first application in which he completed the declaration at the end of the form "which confirmed that the information which you had provided was true and complete". Charge 11a then alleged (among other things) that he included information in the first application "as outlined in paragraph 6a-g that was untrue".

77. The cryptic reference back to "6…g" meant that Dr Sowida stood accused of falsely stating in the declaration he completed that the information in the application form for the first application was true and complete when, in fact, that information was not true and complete. Charge 12a then went on to allege that he knew it was not true and complete: "[y]ou knew that the information included in the … First Application as outlined in paragraph 6a-g was untrue".

78. Charge 13a (as it became after the amendments) then alleged, again cryptically, that Dr Sowida's "actions as described at paragraphs 6 … were dishonest by reason of paragraphs 11 and 12". By that meandering route Dr Sowida, therefore, stood accused not only of falsely stating that the information in the declaration at the end of the form for the first application was true and complete; but also of doing so dishonestly.

79. It would have saved many people much valuable time if that accusation had been contained in a single numbered charge along the lines: "you falsely and dishonestly stated in the declaration at the end of the form you completed for the first application to Worcester Royal Hospital that the information in the form was true and complete when in fact it was not".

80. The same accusation is made in mirror image form in the case of the declaration at the end of the application form for the second application to the Birmingham Trust in March 2018, by the same circuitous route; see charges 10i, 11d and 12d, the detail of which I will spare the reader, combined with charge 13a again. Dr Sowida was thereby

accused of falsely and dishonestly stating in the declaration at the end of the form he completed for the second application that the information in the form was true and complete when in fact it was not.

81. What then were the tribunal's findings about those two accusations? The tribunal discussed responsibility for the content of the form for the first application at paragraphs 37-44 of its determination on the facts. Dr Sowida said he did not complete it personally; it was completed and submitted by his wife or a Ms Lorraine Charlton, a ward manager at the hospital in Sunderland where he had worked. Even so, he admitted (through counsel) completing the application form.

82. The tribunal did not accept that admission. It revisited its note "[a]dmitted and found proved" against the relevant charges when listing them at paragraph 24 of the determination on the facts. After discussing the content, the manner in which the form was filled in and submitted electronically, statements Dr Sowida later made when the accuracy of the form was challenged, and the lateness of his evidence that his wife or Ms Charlton had filled in the form, the tribunal concluded at paragraph 42 that Dr Sowida had been the "guiding hand" for the way the form was completed.

83. The tribunal reasoned that the salient information must have come from him; and he alone had the motive to mislead in the hope of getting the Worcester Royal job. He had provided the information in respect of his employment including restrictions on practice imposed on him. The inaccurate information about his qualifications and degree was derived from his original NIMDTA application of February 2010 which he had signed; and "he is fixed with having provided that information" though it was completed by the hand of another.

84. The tribunal found that he did not complete the rest of the application. The tribunal stated its conclusion in relation to the charges as follows. Paragraph 6g was not proved: "the Tribunal did not find that Dr Ahmedsowida completed the First Application in this respect". I think that must mean he did not complete the declaration at the end of the job application form. That indicates that they accepted that a recruitment agency or his wife or Ms Charlton did.

85. In relation to the second application of March 2018, the tribunal's reasoning was much the same. It was set out at paragraphs 76-86 of its determination on the facts. His was the guiding hand. Inaccurate information about his training history, qualifications and date of birth was inserted by another but Dr Sowida was "fixed with having provided that information" (paragraphs 81(e) and (f)). Charge 10i, though admitted, was not proved because "the Tribunal did not find that Dr Ahmedsowida completed the Second Application in this respect".

86. Mr Forde submitted that once the tribunal had found Dr Sowida had not personally completed substantial parts of the forms for the first and second applications, including the declarations at the end of them, the tribunal should have found "not proved" all charges consequential on that finding. The tribunal, he argued, had sought to "cherry pick" items in the forms for which responsibility was attributed to Dr Sowida, apparently on the basis of recklessness.

87. It made no logical sense, Mr Forde contended, to exonerate Dr Sowida from personal responsibility for the declarations, yet find him responsible for the incorrect content

preceding them. The first and second applications (and the first and second CVs) were "the proverbial dog's breakfast", perhaps because English is not Dr Sowida's mother tongue, and were not properly checked. But, importantly, he did not himself verify the correctness of the content; nor was there any evidence that any of the supporting documents were false or falsified.

88. For the GMC, Mr Mant submitted that there was no logical difficulty about finding Dr Sowida responsible for some parts of the content of the forms for the first and second applications, but not other parts. He relied on the reasoning supporting the findings to the effect that Dr Sowida's was the "guiding hand" in the two applications and, indeed, the first and second CVs, which were subjected to the same forensic examination and "nuanced" findings as the two application forms.

89. For my part, I have no difficulty with the tribunal's analysis of the evidence leading to the conclusion that Dr Sowida was responsible for parts of the forms for the first and second applications, but not other parts of them. The tribunal was entitled to decide that he determined to a large extent what information of substance would go in the forms even though someone else and not he entered that information on a computer and submitted it electronically.

90. The declaration of truth at the end of each of the two forms is not attributed to him, but the content of much of what was being verified was entered at his direction and under his control. Contrary to Mr Forde's submission, that he did not personally complete the declarations of truth does not mean he must be exculpated from providing, to the person who did, the information that was verified, in so far as that information was false and known to him to be false.

91. Other less important information that was false or inaccurate – his qualification history and date of birth, for instance – was derived from his original 2010 application to the NIMDTA. The tribunal found that he was "fixed with" having provided that information because it had ultimately originated from him. The notion of being "fixed with" responsibility for information is different from the *Ivey* test of dishonesty at the first stage, where the court enquires into the subjective state of mind of the accused.

92. The finding that Dr Sowida was "fixed with" having provided certain information may be analytically sound but is not the same as the first stage of the two stage dishonesty test. Casual and reckless indifference to the truth may evidence a subjective belief that certain matters stated are untrue, for it may be relevant to whether a professed belief in their truth is genuinely held (see Lord Hughes JSC's judgment in *Ivey* at [74]). But casual and reckless indifference to the truth is not itself the first stage of the test.

93. Whether or not that point is significant is best considered under ground 5, below. For present purposes, I content myself with the observation that the tribunal did not condemn as dishonest Dr Sowida being the ultimate source of (or being "fixed with" responsibility for) false items of information in the forms for the first and second applications, except to the extent that the tribunal found the information in question was false and that he knew it was false: see the tribunal's findings on charge 12a through to 12d (and, in relation to the first and second CVs, 12b and 12c), at paragraphs 100-119.

94. I therefore do not find any substantive vice (subject to ground 5 of the appeal, to be considered below) in the tribunal's inapt use of the expression "fixed with having provided" certain information. For those reasons, I reject the third ground of the appeal.

Fourth ground: impermissibly "cumulating" distinct findings of misconduct

95. Dr Sowida's fourth ground is that the tribunal was wrong "to cumulate findings of misconduct on some [charges] to make a determination of serious misconduct on others". This contention arises from passages in the tribunal's determination on impairment. At paragraph 19, they cited extracts from *Schodlok v. GMC* [2015] EWCA Civ 769, in the judgment of Vos LJ at [63], of Beatson LJ at [72] and of Moore-Bick LJ at [73], agreeing with Vos LJ's judgment.

96. The tribunal did not say for what proposition they regarded *Schodlok* as authority. But after leaving behind the exposition of applicable legal principles and turning to the facts, they said at paragraph 21 (as noted above) that they would consider whether in the case of any non-misconduct matters "it would be appropriate to cumulate them alongside other paragraphs of the allegation which have been found proved and, if so, to determine whether, in those circumstances, a finding of serious misconduct should be made."

97. At paragraphs 37-40 of the determination on impairment, the tribunal decided that the first incident (failing to carry out requests from Dr Jaiswal to use a "diathermy" to stop bleeding of the patient's abdomen and to perform a lower, not higher, uterine incision) was serious misconduct; that the second incident (failing to follow Dr Fox's instruction to perform a blunt, not sharp, dissection) was misconduct but not serious misconduct; while the third incident (disregarding Dr Blackwell's instruction to cease adjustments to suturing) was serious misconduct.

98. The tribunal then said this at paragraph 40:

> "… the GMC charged these 3 matters [*i.e. the first, second and third incidents*] in one paragraph of the Allegation and … they all concern Dr Ahmedsowida's failure to follow the instructions of supervising colleagues. In those circumstances, the Tribunal concluded that as the GMC has presented the case in this way, it should have been clear to Dr Ahmedsowida that any adverse findings by the Tribunal on these matters could be cumulated when considering misconduct. The Tribunal has concluded that it is fair to do so. On this basis, it has found that Dr Ahmedsowida's failure to follow the instructions of Dr C when considered alongside his failure to follow the instructions of Dr B and Dr D, amounts to serious misconduct."

99. Mr Forde submitted that the tribunal fell into error on at least four counts: it failed to understand that Beatson LJ's judgment was wholly *obiter* on the issue of cumulation; that it was unsupported by Vos and Moore-Bick LJJ; that it was a "tentative and very preliminary view", as Beatson LJ put it; that it had not been clear that the GMC had sought cumulation as its case on impairment; and nor were there a large number of findings, only a small number.

100. Further, Mr Forde argued that the cumulation was unfair because it amounted to characterising as misconduct "generalised conduct" which is not "specifically particularised". He relied in that regard on the judgment of Her Honour Judge Alice Robinson in *Oyesanya v GMC* [2017] EWHC 2825 (Admin) who, after commenting on *Schodlok* at [110]-[111], said at [112] that:

> "generalised concerns about the doctor's behaviour, even if supported by evidence of specific incidents, could not properly found a finding of misconduct and impairment unless that formed the subject of a specific charge against the doctor."

101. Mr Mant, for the GMC, responded to this ground of appeal by submitting that it was of no consequence because it only affected the characterisation of a single charge out of many, namely charge 15b which related to the second incident; because the tribunal's approach was not barred by authority and was consistent with Beatson LJ's *obiter* comments in *Schodlok*; and because it was inconceivable that the outcome of the case overall would have been any different had that charge been treated as non-serious misconduct.

102. Turning to my reasoning and conclusions, I start by considering the decision in *Schodlok*. The MPTS tribunal had found four serious misconduct matters and six non-serious misconduct matters proved. Vos LJ explained (at [17]-[18]) that the court would consider four issues. The third was whether the panel had been right to find the doctor's fitness to practise impaired as a result of the instances of serious misconduct that were proved.

103. The fourth, which was to be considered within the rubric of that third issue, was:

> "whether it is open to a fitness to practise panel to conclude on the basis of a series of findings of non-serious misconduct that they collectively constitute serious misconduct".

The court was not asked to consider and did not consider whether it was open to a panel to elevate to "serious" misconduct a matter that in isolation would be non-serious, where that matter is considered alongside another matter which in its own right constitutes serious misconduct.

104. Vos LJ's actual decision, with which Moore-Bick LJ agreed, on the fourth issue (considered as part of the third issue) was at [62]: "I do not think it was open to the Panel in this case to bring in findings of non-serious misconduct in relation to the treatment of staff apart from Mr Marshall to feed its finding that Dr Schodlok's fitness to practise was impaired." The panel had, impermissibly, done that and its decision could not stand.

105. In that context, his further comment was, at [63]:

> "I do not think that we should opine on the theoretical possibility that, in a particular case on different facts, a series of non-serious misconduct findings could, taken together, be regarded as serious misconduct. For my part, I would not think that the possibility of taking such a course in a very unusual case on very unusual facts should be ruled out, but I would prefer to leave the argument for a case in which such facts were said to arise. In the normal case, I do not think that a few allegations of misconduct that are held individually not to be serious can or should be regarded collectively as serious misconduct."

106. Beatson LJ's view was less tentative. At [70] and [71], he said:

> "70 … I am less sceptical than he is about whether a series of non-serious misconduct findings could, when taken together, be regarded as serious misconduct which impairs a doctor's fitness.

> 71. I consider that, notwithstanding the virtual unassailability of the findings of primary fact and assessments of the credibility of witnesses by the specialist Fitness to Practise Panel, this is a case in which the appeal from the Panel should be allowed. This is because, for the reasons my Lord has given, the Panel … took into account its findings of non-serious misconduct in determining whether Dr Schodlok's fitness to practise was impaired".

107. To those observations from the Court of Appeal, the tribunal might have shown greater respect than they did. Rightly, they did not attempt to decide the point left open by the Court of Appeal and no more will I. But it is clear that they did not properly understand *Schodlok*. There was no mention of Beatson LJ's view being tentative and very preliminary, as well as (in a minority) less sceptical than that of Vos LJ with whose judgment Moore-Bick LJ agreed.

108. Nor was there any comparison with the factual position in *Schodlok*; nor any consideration of whether the facts were exceptional here. Nor did the tribunal consider properly whether the GMC had sought as part of its case to cumulate a large number of findings of non-serious misconduct so as to elevate the misconduct to the level of being serious. That was, it seems to me, not the GMC's case.

109. The tribunal appeared to regard Beatson LJ's *obiter* observations as providing them with carte blanche to cumulate charges considered in clusters. That approach is not supported by *Schodlok* or any other authority cited to me. While the situation is different from that in *Oyesanya* because, in this case, the concerns were not merely generalised but specified, there was no clear foundation in authority for the cumulation exercise undertaken.

110. I agree with Mr Forde that the tribunal failed to consider whether there was a large number of non-serious misconduct findings making up a series. The charge elevated to serious misconduct (charge 15b) was one in a series of only three. Moreover, the other two (charges 15a and 15c) were not the subject of findings of non-serious misconduct but of serious misconduct. The cluster was too small and the other two components of it were not the right ones.

111. The cumulation exercise, if permissible at all, is supposed to involve the cumulation of non-serious with other non-serious misconduct findings; not of one non-serious misconduct finding with two findings of misconduct that is serious in its own right. In the latter context, there is no good reason to cumulate; the quality of the conduct is already correctly expressed, without the need for any cumulation.

112. In the present case, as in *Schodlok*, there was no "last straw" as where a series of minor incidents, relatively trivial in themselves, when taken together is too serious to dismiss as not capable of impairing fitness to practise. There was nothing analogous to the series of minor niggling fouls in a football match, eventually cumulated to merit a yellow card, or even ultimately a red one.

113. Wherever the boundary lies between permissible and impermissible cumulation (which I do not attempt to decide), it is clear that the tribunal misapplied *Schodlok* by wrongly placing this case on the far side of that boundary. It ought not to have elevated charge 15b to the level of serious misconduct. Whether that matters, in the context of the tribunal's findings overall, I will consider later in this judgment.

Fifth ground: at the impairment stage, lowering the test of dishonesty to that of recklessness

114. The fifth ground of appeal is that the tribunal wrongly diluted the test of dishonesty and treated findings of recklessness as findings of dishonesty. This arises from three paragraphs in the tribunal's determination on impairment. The first is paragraph 28, where the tribunal addressed the first CV. That was the CV drafted before 4 February 2016 and used to support the first application, made in August 2016, seeking a job at Worcester Royal. In paragraph 28, the tribunal stated that the first CV (with my italics):

> "contained slightly different information as to Dr Ahmedsowida's degree than that set out in the NIMDTA form dated 1 February 2010. It was not necessarily taken therefrom. Moreover, it discloses the fact that Dr Ahmedsowida was working in General Surgery in Moscow (Zhokovsky) between 13 February 1999 and 1 January 2002. The fact that he was qualified as a doctor at that time may therefore be discerned from the document itself. Although Dr Ahmedsowida does not state the date of his degree with any accuracy, his failure to do so does not appear to have had a motive. Further, it is most unlikely that in 2017, when the First CV was submitted to Worcestershire Royal Hospital for a locum appointment, the date and place of his degree would have been of much relevance to the appointment. By then he had completed his foundation years and his first year of specialty training. *The Tribunal has therefore determined that, although Dr Ahmedsowida was reckless in the way he completed the First CV, not caring sufficiently as to the accuracy of the contents, and, therefore, dishonest and in breach of paragraph 71 of GMP, his dishonesty in this regard falls short of amounting to serious misconduct.*"

115. The tribunal cross-referenced that finding to paragraphs 56, 91, 106 and 123 of its determination on the facts, where (as Mr Mant accepts) the same conduct was found dishonest. That conduct was the "non-serious misconduct" parts of what was found false in the first CV, i.e. the false information about Dr Sowida's degree and qualifications. At paragraph 123, the tribunal stated:

> "Dr Ahmedsowida stated that he was studying for an MBBS between January 2003 and August 2007 in Balkh Medical University (Moscow), when he had been awarded his MD in Balkh University, Afghanistan in 1996. In part, he was dishonestly maintaining the untruth which he had entered in his NIMDTA application dated 1 February 2010 which he signed. Further, by placing Balkh University in Moscow, he was making it more difficult for the reader of the First CV to make enquiries about his degree, and in particular the date of the award."

116. The next use of the term "recklessness" is found in paragraph 31 of the determination on impairment. That is the corresponding part of the determination examining the second CV, used in March 2018 to support Dr Sowida's application to the Birmingham Trust for a junior clinical fellow post at Birmingham Women's Hospital. The tribunal stated at paragraphs 30 and 31 (with my italics again):

> "30. The false information as to Dr Ahmedsowida's degree (paragraph 9(a) of the Allegation). The Tribunal had regard to paragraphs 92, 109 and 125 of its determination on the facts. For similar reasons to those set out above in relation to paragraph 7(a) of the Allegation, the Tribunal does not find that Dr Ahmedsowida's dishonesty in this regard amounted to serious misconduct.
>
> 31. The false date of birth (paragraph 9(b) of the Allegation). The Tribunal had regard to paragraph 92, 110 and 126 of its determination on the facts. The Tribunal did not consider that Dr Ahmedsowida's statement that he was born on 1 January 1976, as opposed to 1972,

> will have been made with the intention of securing himself a locum position in 2017. His actual date of birth was registered with the GMC at that time. *The Tribunal has therefore determined that, although Dr Ahmedsowida was reckless in the way he completed the First CV [sic] in this regard, not caring sufficiently as to the accuracy of the contents, and therefore dishonest and in breach of paragraph 71 of GMP, his dishonesty falls short of amounting to serious misconduct."*

117. I note that "the First CV" should have read "the Second CV". These findings corresponded to the non-serious misconduct parts of what was found false in the second CV. The cross-references to paragraphs 92, 109, 110, 125 and 126 of the tribunal's determination on the facts, are to the passages therein where, as Mr Mant accepts, the same conduct was found dishonest. Thus, at paragraphs 125 and 126 of the determination on the facts, the tribunal stated:

> "125. Found proved. Dr Ahmedsowida was dishonestly maintaining the untruth which he had entered in his NIMDTA application dated 1 February 2010 which he signed which stated that he was awarded an MBBS on 1 January 2003. He had been awarded his MD in Balkh University, Afghanistan in 1996.
>
> …..
>
> 126. Found proved Dr Ahmedsowida was dishonestly maintaining that he was born on 1 January 1976."

118. The third and final use of the term "recklessness" complained of relates to the conduct found to be false but non-serious misconduct in the second application, i.e. the application in March 2018 to the Birmingham Trust. At paragraph 34, the tribunal stated (my italics again):

> "34. The false date of birth (paragraph 10(d) of the Allegation). The Tribunal had regard to paragraphs 82, 95, 115 and 130 of its determination on the facts. The Tribunal did not consider that Dr Ahmedsowida's statement that he was born on 1 January 1976, as opposed to 1972, will have been made with the intention of securing himself a position at the Trust. His actual date of birth was registered with the GMC at that time. *The Tribunal has therefore determined that, although Dr Ahmedsowida was reckless in the way he completed the job application to the Trust in this regard, not caring sufficiently as to the accuracy of the contents, and therefore dishonest and in breach of paragraph 71 of GMP, his dishonesty falls short of amounting to serious misconduct.*"

119. Again the cross-references to paragraphs 82, 95, 115 and 130 of the tribunal's determination on the facts, are to the passages therein where, as the GMC accepts, the same conduct was found to be dishonest. The language used at paragraph 130 is the same as that used in paragraph 126, quoted above.

120. In the light of the thrice repeated reference to Dr Sowida being "reckless … and therefore dishonest", Mr Forde's complaint is of dilution of the standard of dishonesty to a test where dishonesty is established by proving that the words used in between apply: "in the way he completed the job application to the Trust in this regard, not caring sufficiently as to the accuracy of the contents". That is, of course, not the law.

121. Mr Forde submits that recklessness was not pleaded, therefore Dr Sowida could not properly respond to the charges where reckless was found and that this was a serious procedural irregularity; cf. *Professional Standards Authority for Health and Social*

Care v. Nursing and Midwifery Council and Macleod [2014] EWHC 4354 (Admin), per Andrews J at [39]-[40]. It was not relevant that the conduct found to be reckless was not classed as serious misconduct. The recklessness findings were a wrong assessment of Dr Sowida's state of mind.

122. Mr Mant's response was not to defend the incongruity of importing the standard of recklessness at the impairment stage. He submitted simply that while the conduct found reckless at the impairment stage had been found dishonest in the determination of the facts, that same conduct was found not to be serious misconduct. The error was in Dr Sowida's favour, was not material, could not have affected the outcome and should be treated as a mere linguistic infelicity, remembering that narrow textual analysis was to be avoided.

123. I am troubled by the tribunal's proposition, repeated three times, that Dr Sowida was "reckless … and therefore dishonest" because of the way in which he completed the first CV, the second CV and the job application to Birmingham Trust, "not caring sufficiently as to the accuracy of the contents". The language used at the stage of determining the facts is harsher. The clear findings about the same conduct are of deliberate deception amounting to dishonesty. That language cannot be reconciled with the language used at the impairment stage.

124. I am not willing to overlook the difference between dishonesty and recklessness on the basis that it is just a slip or a linguistic infelicity. I am left with the possibility that the true reasoning in the determination of the facts may be that Dr Sowida was dishonest because, as stated at the impairment stage, he was not careful enough about ensuring the accuracy of the contents of the first and second CVs and the form for the application to the Birmingham Trust.

125. Whether that matters depends on whether it could have affected the outcome, a question I will consider shortly after addressing the sixth and final ground of appeal. The fifth ground is made out in the sense that there is a clear error in the tribunal's reasoning.

Sixth ground: at the sanction stage, wrongly approaching the issue of insight into dishonesty

126. The final ground of appeal is that the tribunal made "serious errors in their determinations on sanctions", wrongly approaching the issue of dishonesty. It was contended that their treatment of Dr Sowida's reflective piece was flawed because they said it did not address the issue of dishonesty whereas, manifestly, it did. And, it was submitted, the tribunal was wrong to determine that the absence of any acknowledgment of dishonesty meant the tribunal were bound to conclude that Dr Sowida had shown no real insight into his misconduct.

127. Dr Sowida also contended that the tribunal had erred by wrongly failing to weigh in the scales not just the public interest in maintaining public confidence in the profession but also the public interest in (per Lord Hoffmann in *Bijl v. GMC* (Privy Council, 2 October 2001) at [13]:

> "not … feeling it necessary to sacrifice the career of an otherwise competent and useful doctor who presents no danger to the public in order to satisfy a demand for blame and punishment."

128. I have set out above the main features of the decisions on impairment and sanction. At the impairment stage, the tribunal noted that Dr Sowida had dishonestly given false and misleading information on six occasions and that he had challenged the accuracy of contemporary accounts, not challenged at the time. They found an absence of insight despite remorse expressed through counsel. There was, I reiterate, no reflective piece at that stage, though Dr Sowida had started work on it and it was available three days later.

129. At sanction stage, Mr Fish referred to Dr Sowida's "right" not to accept the "fundamental findings … in relation to dishonesty". His submission implied that exercising that right must be at the expense of making it "difficult … to conclude that Dr Ahmedsowida demonstrates any insight today". Put the other way round, the submission would require him to forego his right not to accept the findings of dishonesty, to help persuade the tribunal that it was remediable.

130. The tribunal noted the absence of an apology for the dishonesty found proved, which Dr Sowida could not offer because he did not accept that he had acted dishonestly (see paragraph 30 of the determination on sanction). The reflective piece, they said (paragraph 47) was a start but "does not address his dishonesty". That was true in one sense: that he did not address the issue of dishonesty by admitting to it.

131. At paragraph 49, the tribunal noted that Dr Sowida had expressed remorse about and apologised for the inaccuracies and inconsistencies but that he had not explained them, only apologised for them. They went on to say explicitly (accepting the substance of Mr Fish's submission) that "[i]n the absence of any acknowledgment of his dishonesty", the tribunal was "bound to conclude that he had shown no real insight into his misconduct".

132. Mr Forde emphasised that, while erasure is a likely outcome in dishonesty cases, it is not automatic. Dr Sowida had accepted the tribunal's findings, subject to his right of appeal against them. He had apologised for his wrongdoing. He could do no more. The tribunal had failed to give credit for the considerable insight he had shown in the reflective piece, though without compromising his right of appeal.

133. The tribunal had not seriously considered suspension; it had only paid "lip service" to the idea, Mr Forde suggested. Its decision to erase was in part founded on erroneous reasoning which was the subject of the earlier grounds of appeal. Dr Sowida's problem had been "attitudinal" in nature and remediable. He presents no danger to the public. The sanction of suspension would be a proportionate substitution for that of erasure, submitted Mr Forde.

134. Although there were 29 authorities in the bundle, my attention was drawn at the end of the hearing to certain further cases, conveniently analysed in the decision of Julian Knowles J in *Al Nageim v. GMC* [2021] EWHC 877 (Admin). I invited further brief written submissions on that case and the others analysed in it, including Mostyn J's decision in *Towuaghantse v. GMC* [2021] EWHC 681 (Admin), where he had in turn analysed and commented on other cases that appeared to me relevant.

135. Mr Forde submitted that *Al Nageim* was distinguishable; it was a case of "blatant dishonesty" as accepted in the appeal. There were no subtle findings on, for example, mixed authorship of documents as in this case. Here, "[t]he maintenance of his position

should not have been seen as demonstrating a lack of insight". There would be "rare and exceptional cases where the dishonesty is so blatant and egregious that maintaining innocence and then conceding dishonesty could have a bearing on insight rather like cases where no discount for a guilty plea is given because the evidence of guilt is overwhelming". This was not such a case, he submitted.

136. For the GMC, Mr Mant submitted that erasure was appropriate and necessary. The Sanctions Guidance referred to erasure as appropriate in cases where dishonesty is "persistent and/or covered up". This was such a case. Further, there would have to be compelling evidence of insight. Instead, there was a lack of insight. It was for the tribunal to judge the level of insight as it had had the benefit of hearing the evidence and could measure it against the later written evidence in the reflective piece.

137. Further, Mr Mant submitted, there was no real acceptance in the reflective piece that Dr Sowida's actions were dishonest and "no analysis of what caused him to act dishonestly". The tribunal were right to approach the assessment of insight on that basis; see, e.g. *Irvine v. GMC* [2017] EWHC 2038 (Admin), per Holroyde J (as he then was) at [83]. And any insight shown in the reflective piece was insufficient to justify a more lenient sanction (see, e.g. *Farah v. GMC* [2008] EWHC 731 (Admin), per Sullivan J (as he then was) at [21]).

138. The tribunal was not obliged, Mr Mant pointed out, to refer to the decision of the Privy Council in the *Bijl* case. That was a case of "honest failure", not dishonesty. There was nothing to support Dr Sowida's proposition that the tribunal overlooked the weight to be given to the mitigating features and the desirability of his career surviving if that could happen without unacceptable damage to public confidence in the profession. The wrongdoing here was too serious for that.

139. In his written submissions after the hearing, Mr Mant contended by reference to *Nicholas-Pillai v GMC* [2009] EWHC 1048 (Admin), per Mitting J at [27] and *Al Nageim* at [124]-[125] that a doctor's attitude to events giving rise to the adverse findings is relevant to insight; that giving false evidence, particularly knowingly advancing a false case on primary facts, makes it more difficult to demonstrate insight; and that lapse of time between the fact finding and subsequent stages is relevant to the practitioner's capacity to develop insight.

140. Mr Mant accepted that the tribunal had not, in the present case, stated in terms that Dr Sowida had lied when giving his evidence. He submitted, however, that such was the "inevitable consequence of the findings that it made". Thus, he said he did not personally complete the documents and did not intend to mislead, yet the tribunal found that he deliberately provided untrue information that was untrue intending to mislead prospective employers.

141. Mr Mant went on to submit that Dr Sowida had maintained that the content of the emails to Drs Duckett and Short was true and that the tribunal had found otherwise and that he had knowingly given a false account in those emails; and that Dr Sowida had disputed the accuracy of contemporaneous notes and denied making any false statements; while the tribunal found that the notes were accurate and that he had deliberately provided information that was untrue.

142. Mr Mant did not support the concept of "blatant dishonesty" developed by Mostyn J in *Towuaghantse* and applied by Julian Knowles J in *Al Nageim*. He said it was enough that the doctor had, as he submitted, lied to the tribunal. He submitted that his position was supported by Holroyde J's judgment in *Irvine v GMC* at [83] and that of Nicola Davies LJ giving the judgment of the court in *Sastry v GMC* [2021] EWCA Civ 623 at [117].

143. I come to my reasoning and conclusions. I start by gratefully adopting the exposition of the relevant case law in the numerous judgments, most recently that of Julian Knowles J in *Al Nageim*, Mostyn J in *Towuaghantse* and Nicola Davies LJ in *Sastry*. I do not think it would assist if I were to add to that by reiterating the citations from other cases in those expositions. The latter judgment is of major importance as a broad and general account of the nature of the right of appeal under section 40.

144. The judgments in *Al Nageim* and *Towuaghantse* are more directly relevant to the sixth ground of appeal and, in particular, the issue of insight and remediation in a case where dishonesty is not accepted and an appeal against a finding of dishonesty is pursued. I readily acknowledge that there are indications of support for Mr Mant's position in some of the cases, notably those cited by him (*Sastry*, *Nicholas-Pillai* and *Irvine*) and also in Yip J's decision in in *Yusuff v GMC* [2018] EWHC 13 (Admin), at [18] (cited without enthusiasm by Mostyn J in *Towuaghantse* at [69]).

145. However, in those cases, the procedural fairness issue to which Mostyn J drew particular attention in *General Medical Council v Awan* [2020] EWHC 1553 (Admin) at [37]-[38] (reiterated in *Towuaghantse* at [67]-[68]) appears to have been either not fully argued or not fully analysed. I respectfully agree with Mostyn J's formulation of the principle in *Towuaghantse* at [63]:

> "it is not procedurally fair for a registrant to face the risk of enhanced sanctions by virtue of having robustly defended allegations made against him before the MPT, or before another court."

146. As Mostyn J made clear, the principle is organically derived from the judgment of Lord Scott in *Misra v. General Medical Council (GMC)* [2003] UKPC 7, from whose opinion at [17] Mostyn J (at [64]) quoted. I do not think the principle is sophisticated or complicated. It is just ordinary due process. Contesting the charges, even robustly, should not be treated of itself as evidence of lack of insight; something more must be shown. A finding that blatant lies were told to the tribunal is one possibility. A long hiatus between the fact finding, and impairment and sanction stages may be a contributing feature.

147. I would not go as far as to accept Mr Forde's submission that only in rare and exceptional cases should conceding dishonesty have a bearing on insight and remediation. Unfortunately, cases of blatant lying and knowingly advancing a false case of primary fact are not all that rare in the professional discipline jurisdictions.

148. Another way of looking at the issue is to ask whether in substance the tribunal has fallen into the trap of finding that a practitioner's fitness to practise is impaired because he has disputed that very proposition by not admitting to the dishonesty found against him; or, to use different words but similar reasoning, whether the practitioner "admits the

primary facts but defends a proposed evaluation of those facts in the impairment phase" (*Towuaghantse* at [72]).

149. I cannot accept Mr Mant's submission to the effect that inconsistency between facts found by the tribunal and evidence given by the doctor to the tribunal, not readily explicable as mistaken, is sufficient in itself to found a lack of insight finding through non-acceptance of the dishonesty. That submission does not meet the constitutional point that the doctor has a right to procedural fairness and in particular an unimpaired right of appeal, which would be eroded if the GMC's stance were accepted. The right of appeal is "unqualified" (per Nicola Davies LJ in *Sastry* at [102]).

150. In the present case, I have concluded that Dr Sowida did face the jeopardy of a more serious outcome because of having contested the charges and because of the manner in which he contested them. I accept that there was a gap of about three months between the fact finding stage and the impairment and sanction stage. In *Al Nageim*, the gap was nine months and the allegations related to events longer ago than in this case. During the three month hiatus, Dr Sowida was working in a coronavirus ward during a period of partial lockdown.

151. I do not consider that this case can be equated with *Al Nageim*. There, the allegations were of far more serious dishonesty, including a fraudulently obtained financial gain of over £40,000 received from an NHS body over a period of 27 months. The tribunal had made clear findings of lies told during the doctor's evidence to the tribunal on five occasions. Here, there are no such findings.

152. There was no proper examination by the tribunal of the quality of the evidence given by Dr Sowida, as distinct from his resistance to and refusal to admit the charges. There were some findings about his credibility, but those were mixed with other findings accepting large parts of his evidence; notably, on the issue of mixed authorship of misleading documents and extant source material finding its way from earlier documents into later ones.

153. Mr Mant was driven to invite me to *infer* that the tribunal must have been satisfied that Dr Sowida had lied in evidence, without the tribunal having to go to the trouble of saying as much. I do not think that is enough. Mr Mant then relied mainly on statements found by the tribunal to have been made *at the time*, forming the subject of the charges, and the veracity of which Dr Sowida affirmed during his evidence, not surprisingly since he could not otherwise have denied the charges.

154. I find it clear from the determinations that the tribunal held against Dr Sowida that he had not accepted, and therefore not apologised for, being dishonest; see paragraphs 30 and 47-49 of the determination on sanction. At the earlier impairment stage, he had "challenged the accuracy" of written evidence noted at the time (impairment determination, paragraph 54). He had not, the tribunal noted, expressed "remorse" in the course of contesting the charges nor (yet) in a reflective piece (paragraphs 55-56).

155. In my judgment, Mr Fish's submission mentioned above, accepted in substance by the tribunal, necessarily entailed the proposition that to show insight, Dr Sowida would have to admit to the dishonesty found. Had he done so, Mr Forde would have been unable valiantly to strive (largely but not wholly unsuccessfully) to persuade me that his client was not dishonest. He would have been met with his client's own admission

of dishonesty to the tribunal. His right of appeal against the finding of dishonesty would, in practice, be illusory.

156. The tribunal's assessment of the evidence of dishonesty was not without its difficulties, as demonstrated by the success of the fourth and fifth grounds of appeal. The misplaced invocation of recklessness, in particular, is of concern. Could it have had some influence on the tribunal's deliberations on impairment and sanction? That issue is best considered in the context of what remedy, if any, I should grant. I uphold the sixth ground and turn to consider that question.

Conclusions and Disposal

157. The appeal has exposed three errors in the determinations which I have already identified: (i) erroneous treatment of charge 15b relating to the second incident as serious misconduct; (ii) the findings of recklessness in the provision of certain information in the first and second applications and in the second CV, at impairment stage, undermining the findings of dishonesty in respect of the same conduct, at the fact finding stage; and (iii) holding against Dr Sowida his refusal to admit to dishonesty, at the impairment and sanction stage.

158. It follows that the decisions on impairment and sanction cannot stand unless I am entirely satisfied, all other things being equal, that the tribunal's decision would inevitably have been the same even if it had not made these errors (*R. (Smith) v North Eastern Derbyshire Primary Care Trust* [2006] 1 WLR 3315, per May LJ at [10]). After careful reflection, I am not so satisfied.

159. A tribunal reconsidering the matter unburdened by those errors could well reach the same conclusion that erasure is the only appropriate sanction. Dr Sowida may have something of a mountain to climb because of the principle famously stated by Sir Thomas Bingham MR (as he then was) in *Bolton v Law Society* [1994] 1 WLR 512, 519, that personal mitigation counts for less than in other contexts because of the imperative need to uphold and maintain public confidence in the profession.

160. It is, however, possible that a different conclusion may be reached, as it was in *Towuaghantse*, where a second tribunal decided to impose a four month suspension after remission back from this court (a decision subject to a pending appeal). The tribunal in this case commented that Dr Sowida's dishonesty was not necessarily irremediable. I think it is right that the impairment and sanction determinations should be reconsidered in the light of this judgment. I will therefore remit the proceedings to the Medical Practitioners Tribunal Service.

161. I propose to make an order setting aside the finding of impairment and the sanction of erasure and directing that the impairment and sanction stages of the proceedings should be reconsidered, on the footing that (i) charge 15b should be treated as non-serious misconduct; (ii) the conduct found reckless at the impairment stage should not, in fairness to Dr Sowida, be treated as dishonest conduct; and (iii) the decisions on impairment and sanction must be taken without reference to or taking into account Dr Sowida's decision to contest the allegations made against him or the manner in which he contested them.