Neutral Citation Number: [2021] EWHC 434 (Admin)

Case No: CO/3198/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/02/2021

Before:

THE HONOURABLE MRS JUSTICE FOSTER DBE

- -

Between:

DR UDO MUSA ALIU	**Claimant**
- and -	
GENERAL MEDICAL COUNCIL	**Defendant**

- -
- -

DR UDO MUSA ALIU
(IN PERSON)
Mr PETER MANT instructed by the GENERAL MEDICAL COUNCIL

Hearing dates: 24 FEBRUARY 2021

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JUDGMENT

MRS JUSTICE FOSTER DBE

INTRODUCTION

1. On 20 August 2020, the Medical Practitioners Tribunal ("the Tribunal") of the General Medical Council ("the GMC"), directed that Dr Udo Musa Aliu's name should be erased from the Medical Register on grounds of impairment because of deficient professional performance.

2. This is an appeal as of right under section 40 of the Medical Act 1983 ("the Act") brought by Dr Aliu against that Tribunal decision and against the finding that his name should be erased from the Register. At the hearing before me Dr Aliu represented himself with the aid of documentation, including appeal materials, which he had drafted himself. Mr Mant of counsel appeared for the GMC. I am grateful to both for their courteous submissions.

3. The foundation of the charge of inadequate professional performance and the subsequent hearing before the Tribunal was a Performance Assessment of Dr Aliu by a team of independent Assessors, and indeed his complaint on this appeal is centred on what he asserts are deficiencies in that Assessment process, and the failure to accept his arguments thereon by the Tribunal. Performance Assessments are conducted in accordance with Schedule 1 of the Fitness to Practise Rules (2004) and Schedule 4 (section 5) of the Act.

BACKGROUND

4. In 1983 Dr Aliu qualified MB BS in Lagos and has worked in Nigeria and the Gambia. He began as a general surgeon in the UK in 1997 and worked in the Republic of Ireland. He became a fellow of the Royal College of Surgeons in Ireland in 2001. The Surgical Royal Colleges of Great Britain and Ireland granted him a Certificate of Completion of Basic Surgical Training in 2007. He has described himself as "technically retired" having already reached the age of 65 but was keen to continue to practice general surgery at a middle grade level.

5. Dr Aliu has a history of some regulatory involvement. Conditions were placed on his registration. The conditions were removed in April 2010 and he continued to practice from that time until some further Interim conditions were imposed upon him in August 2017 by the Interim Orders Tribunal (the "IOT") of the Defendant.

6. In that period between April 2010 and August 2017, Dr Aliu worked in several junior and locum surgical roles in various places in the UK. He has been placed in short term employment by 10 different locum agencies since August 2015, for example he held eight separate appointments from August 2015 to August 2016 which ranged in duration from a few days long to 2 months.

7. The present proceedings were brought about by a referral on 13 April 2017 from the Mid Yorkshire Hospitals NHS Trust which had contracted Dr Aliu to work as a locum registrar in general surgery for four days at the Pinderfields Hospital, Wheatfield ("Pinderfields"). They asked him to leave after one day due to serious concerns raised about his clinical competence. Dr Aliu had other placements, each of less than a week from the end of April to the end of August 2017 variously at Scunthorpe General Hospital, North Manchester General Hospital, Arrowe Park, and Clatterbridge Hospital Birkenhead.

8. An appraisal of Dr Aliu led by Mr Anthony Peel reported on 7 August 2017 in respect of two patients treated by Dr Aliu on 10 April 2017 at Pinderfields. It concluded that the care afforded to them by him fell seriously below the expected standard. Dr Aliu was accordingly required by his regulator to undertake a performance assessment.

9. The IOT made an Order for Interim Conditions. A review was carried out by the MPTS and on 19 February 2018 the Order of the IOT was maintained. Likewise, on 9 August 2018 the Tribunal determined to continue the Interim Order.

10. Dr Aliu meanwhile challenged the continuation of the Interim Order (CO/3314/2018). On 12 October 2018, the GMC applied to extend it (CO/3999/2018) and that application was granted by Lane J, who refused Dr Aliu's appeal. Two costs orders were made against Dr Aliu by Lane J and Dr Aliu made submissions on them in the course of this appeal which I deal with below. Further extensions to the Interim Order were by made by consent.

PERFORMANCE ASSESSMENT AND THE CHARGE OF IMPAIRMENT

11. Whilst initially refusing to undergo the Performance Assessment in March 2018, Dr Aliu later consented. It took place on 10 and 11 August 2018. Dr Aliu said he was confident of being assessed at the ST 4 – ST 5 level, namely middle grade registrar, in general surgery. In fact, the assessors agreed he would be assessed at a somewhat lower level as a general surgeon working at the level of a Specialist Registrar years 2-3, the level at which he worked, ST 2 – ST3 3. The Assessment was comprised of a number of core areas of competence including:

"Domain 1" -Knowledge Skills and Performance

a. Maintaining Professional Performance;

b. Assessment;

c. Clinical Management;

d. Operative/Technical Skills;

e. Record keeping;

"Domain 2"

Safety and Quality (not graded)

"Domain 3" - Communication, partnership and Teamwork and "Domain 4" - Maintaining Trust

f. Relationships with patients.

g. Working with Colleagues

And

h. A Knowledge Test

12. The Guidance to Assessments provide by the GMC explains part of the assessment's purpose thus

"The GMC's statutory purpose is to protect, promote and maintain the health and safety of the public by ensuring proper standards in the practice of medicine. Our fitness to practise procedures focus on whether a doctor's fitness to practise is impaired to such an extent that we need to take action on their registration. This means that we are looking to see whether the issues are so serious that the doctor's registration should be restricted or removed – in effect, whether the doctor should be prevented from working, or allowed to work only under certain conditions."

And as including (among other tests):

"A **Knowledge Test** made up of single best answer questions. The questions are chosen to reflect, as closely as possible, the work the doctor actually does in practice, they can also be tailored to the doctor's grade and any areas of specialisation. Each question has a list of possible answers and the doctor is asked to choose which answer they consider to be the single best answer. A time limit will be given.

An **OSCE (Objective Structured Clinical Examination)** during which the doctor is presented with scenarios chosen to reflect their background and experience. The scenarios are designed to test the doctor's practical skills, clinical method, and interpersonal skills. Each scenario is set up in a different room or at a different 'station' and is designed to last approximately seven minutes. The test can use medical models and equipment and role players as both patients and colleagues."

13. The Assessment was carried out by independent assessors; two were medically trained, one was a layman.

14. The results of the Assessment were that Dr Aliu's professional performance was judged to be:

i) As to (a), (b), (c), (d) (e) and (f) in paragraph 11 above, unacceptable.

ii) As to (g) a cause for concern.

iii) In respect of (h) the Knowledge Test, a score of only 36.67% was recorded whereas the standard set score was 63.77%.

15. A detailed report was compiled following the Performance Assessment which was passed to the GMC. Almost immediately after the Assessment it was recommended by the Assessment team to the GMC, on an interim basis, that Dr Aliu should not carry out any interventional procedures without direct supervision.

16. It was solely in respect of the results of the Assessment that the GMC brought the Fitness to Practice proceedings against Dr Aliu. The Tribunal expressly stated it had before it, evidence only in respect of the Performance Assessment and had no material relating to the circumstances of the referral to the GMC.

17. The Assessment report on which the allegation of deficient professional performance was based set out a detailed methodology and explanation of the approach. It contained a narrative as to the conduct of the Assessment and recorded that whilst generally Third-Party Interviews were considered useful, none of the four Consultant Surgeons from hospitals where Dr Aliu had worked, had accepted an invitation to be interviewed. The report also set out the particular questions asked of Dr Aliu in respect of various scenarios or "stations" where his knowledge was tested, and the area of competence to which each referred.

18. The hearing of the allegation of impaired fitness to practice, based upon Dr Aliu's deficient professional performance, was held in June and July 2019 before a legally qualified chairman a medical member, and a lay member. The Tribunal heard from the GMC Performance Assessment Officer, and each of the three Assessors who had assessed Dr Aliu. Dr Aliu cross-examined them and gave evidence and made submissions himself. At Dr Aliu's request witnesses were recalled to examine further his arguments concerning documentary integrity.

19. The Determination on the facts and the reasons were promulgated on 12 June 2020. Thereafter, at a hearing in accordance with Rule 17(2)(l) the Tribunal decided on the basis of the facts which it had found proved, that Dr Aliu's fitness to practise was impaired by reason of deficient professional performance.

20. On 20 August 2020 at a sanction's hearing the Tribunal concluded that his name should be erased from the register. Further, pursuant to Rule 17 (2) (o), they made an immediate Order of suspension pending appeal on the grounds that Dr Aliu posed a risk to patients, in order to maintain public confidence in the profession, and to uphold standards.

LEGAL FRAMEWORK

21. Section 1(1A) of the Medical Act 1983 ("the Act") provides that in exercising its functions, the over-arching objective of the GMC must be to protect the public. By section 1(1B), this involves the pursuit of three objectives:

    (a) to protect, promote and maintain the health, safety, and well-being of the public;

    (b) to promote and maintain public confidence in the medical profession; and

(c) to promote and maintain proper professional standards and conduct for members of that profession.

22. Appeals under section 40

40.— Appeals

(1) The following decisions are appealable decisions for the purposes of this section, that is to say—

(a) a decision of a Medical Practitioners Tribunal under section 35D above giving a direction for erasure, for suspension
or for conditional registration or varying the conditions imposed by a direction for conditional registration;

(4) A person in respect of whom an appealable decision falling within subsection (1) has been taken may, before the end of the period of 28 days beginning with the date on which notification of the decision was served under section 35E (1) above, or [section 41(10)] below, appeal against the decision to the relevant court.

…

(7) On an appeal under this section from a Medical Practitioners Tribunal, the court may—

(a) dismiss the appeal;

(b) allow the appeal and quash the direction or variation appealed against;

(c) substitute for the direction or variation appealed against any other direction or variation which could have been given or made by [a Medical Practitioners Tribunal]; or

(d) remit the case to the MPTS for them to arrange for [a Medical Practitioners Tribunal] to dispose of the case in accordance with the directions of the court,

and may make such order as to costs… as it thinks fit.

23. It is well settled that this Court is required to ask, as reflected in (CPR rule 52.21(3)), whether the decision of the Tribunal was:

(i) wrong; or
(ii) unjust because of serious procedural or other irregularity.

Case Law

24. The test to be applied by this court on an appeal under section 40 was succinctly stated in *Meadow v General Medical Council* [2007] QB 462. at [197] of that case by Auld LJ:

"On an appeal from a determination by the GMC whatever label is given to the section 40 test, it is plain from the authorities that the court must have in mind and give such weight as is appropriate in the circumstances to the following factors.

(i) The body from whom the appeal lies is a specialist tribunal whose understanding of what the medical profession expects of its members in matters of medical practice deserve respect.

(ii) The tribunal had the benefit, which the court normally does not, of hearing and seeing the witnesses on both sides.

(iii) The questions of primary and secondary fact and the overall value judgment to be made by the tribunal, especially the last, are akin to jury questions to which there may reasonably be different answers."

25. More recently the principles applying to section 40 and section 40A appeals were summarised and applied in *GMC v Jagjivan* [2017] EWHC 1247 (Admin), a section 40A case, at paras. 39-40. The Divisional Court described the

" … well-settled principles developed in relation to section 40 appeals (in cases including: *Meadow v General Medical Council [2006] EWCA Civ 1390; [2007] QB 462* ; *Fatnani and Raschid v General Medical Council [2007] EWCA Civ 46; [2007] 1 WLR 1460* ; and *Southall v General Medical Council [2010] EWCA Civ 407; [2010] 2 FLR 1550*) …"

Relevantly:

"i) ... A court will allow an appeal under CPR Part 52.21(3) if it is 'wrong' or 'unjust because of a serious procedural or other irregularity in the proceedings in the lower court'.

...

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

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

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

...

vii) Matters of mitigation are likely to be of considerably less significance in regulatory proceedings than to a court imposing retributive justice, because the overarching concern of the professional regulator is the protection of the public."

26. Dr Aliu argues particularly that he was entitled to a fair hearing before his regulator and did not receive one. If I were to find that the Tribunal had not afforded him a fair hearing, then this would likely constitute a procedural or other irregularity entitling the court to intervene under CPR 52. Similarly, if as he argues, there was collusion or a lack of probity in the Assessors, and/or, that in all the circumstances, the sanction imposed upon him was disproportionate, that would fall within the test as set out and the Court could intervene. This Court will be much more cautious in disturbing conclusions of fact however, and diffident concerning matters of professional judgment.

DR ALIU'S CASE

27. Dr Aliu's complaints about the outcome of his hearing before the Tribunal fall broadly under the following heads:

    i) a challenge to the determination on the facts because it was made without audio or video recordings of the Assessments

    ii) a challenge to the adequacy of the Assessment, which is argued to be incomplete and rushed, it should have been conducted over a number of days, rather than a period of, in total, 10 hours.

    iii) Some serious assertions of collusion, bias, and fabrication between the Medical Assessors

    iv) the failure as part of the Assessment to visit any hospital where he had worked, or to observe him working in a real hospital which rendered the Assessment unfair

    v) The results themselves are not credible in Dr Aliu's eyes.

28. As to penalty,

    i) the erasure and suspension sanctions imposed are disproportionately harsh since he had already been suspended for some 36 months.

    ii) This suspension meant Dr Aliu had no contact with patients from 30 August 2017 to the hearing, so remediation and appraisals were not possible

    iii) Dr Aliu challenges particularly the finding that he lacks insight

29. Dr Aliu invites the Court to set aside the finding of impairment and to replace it with the finding that he is able to practice in some different capacity under guidance and the direction of a very senior and experienced consultant as he has done in the past.

30. For the GMC Mr Mant's submits that the appeal is hopeless. Dr Aliu repeats arguments he made unsuccessfully to the Tribunal and he cannot spell out any arguable basis for allowing the appeal. The Tribunal carefully considered the evidence before them, he says, applied the correct burden and standard of proof and gave cogent clear reasons for their decisions at each stage. The Assessment process is a tested and tried methodology; the Assessors made adjustments to seek a fair view of Dr Aliu's abilities and he defends the decision of erasure from the register as inevitable in all the circumstances.

THE DECISIONS UNDER CHALLENGE

31. At the beginning of their long and detailed Determination the Tribunal specifically recorded that Dr Aliu was challenging before them both the procedure adopted by the Assessors and their integrity. Having heard the oral evidence of all the witnesses, they recorded that Dr Aliu was at times contradictory in his evidence and, although not setting out to mislead, he had become fixed upon his concerns and could not accept he was wrong. The Tribunal could not accept Dr Aliu's recollections of the Assessment which were at odds with the evidence and the recollections of all the Assessors. They held in terms that one of the Assessors, of whom Dr Aliu had a particularly disapproved, and whose integrity he had attacked, had convinced them as an honest witness. The Tribunal summarised the conclusion on the reliability of the persons involved in assessing Dr Aliu by saying that they found the Assessors to be "honest, credible and fair."

32. The Determination begins by setting out the results of certain applications concerning evidence and the recalling of witnesses. One of those was the granting of Dr Aliu's application to recall the three GMC Performance Assessors. The Application is dealt with in detail in an Annexe to Determination. The Tribunal then deal at length with each of the factual complaints and assertions, made by Dr Aliu and makes reasoned rejections of them all.

33. The Tribunal went carefully through each of the findings made in the Assessment Report. It reminded itself it had found the Assessment to have been properly compiled, and the Assessor witnesses to be honest. It was satisfied that the conclusions of the Assessment reflected the Assessors honest professional judgment. It then turned to consider whether the GMC had proved that the Assessors were correct in their assessments.

34. Thereafter follows a very detailed analysis of each of the domains of the Performance Assessment, the findings made, and the evidence from the Assessor witnesses.

35. The Tribunal accepted every one of the conclusions of the Assessors and that they provided evidence of impairment of fitness to practice save in respect of record-keeping, which failures were not sufficiently grave in their judgment to constitute unacceptable performance.

CONSIDERATION

Fact Determination and Impairment

36. Before me Dr Aliu placed particular emphasis upon the fact that he had no faith in the Assessment model to test his abilities. He repeated in this court the arguments he had made to the Tribunal. He emphasised he believed it was quite unfair to judge his performance without seeing him in an actual hospital - which, given his suspension since 2017, was not possible.

37. It was clear to me, as it had been to the Tribunal, that Dr Aliu in no way accepts the marks and assessments that were given for his performance.

38. Dr Aliu made a further sustained attack here on the integrity of the Assessors and of the Assessment. These are very serious allegations to make. He raised however, no error of approach at all nor failure in the Tribunal's reasoning, nor could he point to any unsustainable factual conclusions. The essence of his case was disagreement.

39. The Determination clearly shows that the Tribunal carefully enumerated each of his factual and judgment challenges and considered them. For example, Dr Aliu gave evidence that there had been no discussion between him and the Assessors about the level at which should be assessed. All the Assessors, however, said that they had done so. The Tribunal, in preferring the consistent evidence of the individual Assessors, who each remembered there had been a discussion, and having found Dr Aliu an unreliable (albeit innocently so) witness, were in my judgment perfectly entitled to reach this conclusion.

40. Dr Aliu raised detailed challenges as to the timings of the judgment sheets compiled and also time allotted the exercises he undertook. The Tribunal listed carefully to the objections made by Dr Aliu to, in particular, one of the Medical Assessors. The evidence from all of them - one of whom was very experienced- made clear the timetables were flexible and that Dr Aliu had in fact been given more time than is generally allowed to complete tasks at the various OSCE stations.

41. I have carefully read the Determination and the underlying Assessment documentation. There is nothing whatsoever in the materials to suggest there was any error at all in the Tribunal's approach or conclusions on these matters.

42. There is absolutely no foundation in the facts for the slur on the integrity of the Assessors.

43. As an example of the complaints made to the Tribunal and repeated in his appeal documents, Dr Aliu had interpreted ditto marks on a handwritten timetable as meaning that one of the assessors had not as he stated, attended a number of the assessment stations. Comparison with other documents showed that the use of ditto marks was not indicative of presence or absence. The Tribunal held, there was nothing in Dr Aliu's suspicions. They were correct to do so.

44. Likewise, he had suspicions about note-making and circling of answers – again, directed at one particular Assessor. However, the unequivocal, and as the Tribunal found, wholly reliable, evidence of the other Assessors made plain these actions were appropriate and without any sinister import.

45. No aspersions whatsoever could properly be cast on the participation of the challenged Assessor, in my judgment, nor on the integrity of the Assessment overall.

46. Certain mistakes that were alleged to lack bona fides, (for example, the misdating of a document), were all analysed by the Tribunal which concluded it was:

> "quite satisfied that there were no sinister implications."
>
> And the documents had been handled:
>
> "in a manner that was open and transparent."
>
> There is nothing to suggest this was a conclusion that could be impugned in this appeal.

47. As stated, Dr Aliu in terms, refused to accept before the Tribunal (or before me) that he had scored as low as he did, particularly in the Knowledge Test, or that the computer-generated results were a true reflection of his achievement. Following evidence as to the long-established process, used over years to assess doctors, and having heard evidence of the individual tests, the Tribunal found none of the errors or fairness failures asserted by Dr Aliu. These conclusions cannot be impugned on appeal.

48. They stated they were reassured that the low score in the knowledge test was accurate by the fact that this score was consistent with his strikingly poor performance in the rest of the assessment.

49. Regrettably, in my judgment, the challenges to fairness, integrity and accuracy appear to have been stimulated by Dr Aliu's disbelief in the result of the Assessment. It is telling that at his second interview during the Assessment but before having the results, Dr Aliu is recorded as saying he was satisfied with how the Assessment had been conducted, he expressed his gratitude to the Assessment team feeling they had undertaken the role very well. He said he had been made to feel at ease and the assessors had not been hostile.

50. As to the failure as part of the Assessment to visit any hospital where he had worked, or to observe him working over a much longer period, the arguments that Mr Aliu makes in this appeal were again, arguments that he put to the Tribunal.

51. They said as follows:

> "25. The Tribunal heard evidence that a full performance assessment usually includes third party interviews, observation of clinical practice and examination of a doctor's clinical records. It heard that it was not possible to carry out these exercises in this case because the doctors invited to take part in the third-party assessment either did not agree to take part in the process or did not respond. It was not possible to examine Dr Aliu's records or observe him in practice, because he had not practised since August 2017. The Tribunal heard that the Assessors increased the number of OSCE stations from 10 to 14 to ensure that the assessment included a fair sample of Dr Aliu's work."

52. In other words, the passage of time as well as the fact of his suspension to protect the public, had made a meaningful *in situ* examination both impossible, but also of no real use in assessing current skills. Steps taken to ensure that Dr Aliu was not disadvantaged were not limited to the increase in stations: as noted, although he believed he should be tested at the level of ST4 or ST5 trainee, it was decided to test him at the lower level of ST2 or ST3 trainee - which was the level at which he had been practising. He failed badly, even at that lower level. It is not irrelevant to the question of insight, and the Tribunal noted, that he had assessed his own abilities above the level at which they were objectively assessed to be.

53. Mr Mant, appearing for the GMC put his response to the arguments on the absence of videos or audio of the Assessment succinctly in his skeleton argument thus:

> "The law does not require disciplinary allegations to be proved with "audio" or "video" evidence. The Tribunal properly based its findings on the oral and documentary evidence before it. The standard of proof was the balance of probabilities (see General Medical Council (Fitness to Practise) Rules 2004, r. 34(12)).
>
> There is no requirement that a performance assessment must always include a site visit or a records review. It is a matter of discretion for the Assessors to decide the appropriate instruments of assessment in each case. There was no site visit or records review here because the Registrant had not practiced since 2017. The assessors increased the number of OSCE stations to ensure that the assessment included a sufficient sample of the Registrant's work."

In my judgment this is a complete answer to Dr Aliu's complaint that he was not observed in a hospital setting nor, that it was intrinsically unfair that he was not filmed when being assessed.

54. In my judgment Dr Aliu is re-running in this appeal the arguments which he failed to make good before the Tribunal. There are no errors of principle in the decisions of the Tribunal, nor could it be said that they are "wrong" in the sense expressed in the case law. As the principles set out above make very plain, questions of fact and inference are particularly difficult to challenge in an appeal of this nature. Dr Aliu has raised no grounds on which I could set aside of the factual and inferential conclusions of the Tribunal.

55. Further and importantly, in a case of this nature, numerous issues of clinical judgment arise. It is clear from the Determination of the Tribunal that in the course of questioning during the hearing, Dr Aliu was asked about his clinical responses to the Assessment team. The Tribunal made the following (among many similar) findings:

> "86. The Tribunal found that even though Dr Aliu showed some basic knowledge of how to manage an acutely unwell surgical patient his overall management of such patients was poor, which could lead to adverse clinical outcomes including mortality in real life situations.
>
> …

96. Dr Aliu said that he had inserted a number of chest drains during his career. He had not inserted one into a real patient since 2003 but had been on a refresher course in 2014 and received a certificate.

97. The Tribunal found Dr Aliu's account to be both confused and confusing. It came to the conclusion that Dr Aliu had little understanding of how to insert the chest drain, how he should have dealt with the trocar and how he should have clamped the tube. The Tribunal found that he tried to justify his technique and complained that he did not have adequate equipment. The Tribunal also found that he did not appreciate the potentially serious consequences of his actions in real life situations."

56. Issues of clinical judgment are, by reference to the principles set out, supremely matters within the knowledge and expertise of the Tribunal. Their questions of Dr Aliu descended throughout into clinical matters, and the answers he gave informed their expert clinical views both orally and from the report they made.

57. No appealable errors of approach or principle arise in my judgment, from their careful evidence-based assessment of Dr Aliu's knowledge.

Impairment

58. The appeal against the findings of the Tribunal as to Dr Aliu's impairment faces an impossible hurdle.

59. The Tribunal set out correctly and in some detail their approach. The following is at paragraph 27 of the Impairment Determination:

"The Tribunal found that the results of some of the OSCE scenarios included in the performance assessment were of particular concern that could put patients at risk in a real-life situation. The Tribunal was particularly concerned by the following examples.

a) During a trauma assessment OSCE scenario (No 3) Dr Aliu attempted to move a patient with suspected spinal injury. This could have resulted in permanent disability.

b) During a testicular torsion OSCE scenario (No 6) Dr Aliu failed to diagnose testicular torsion in a timely fashion which would have led to delayed treatment and subsequent loss of the affected testicle.

c) At OSCE station 8 Dr Aliu inserted a chest drain in a way that was potentially dangerous to patient safety and fell far below the standard expected of a surgical registrar.

d) During a post-operative small bowel anastomotic leak assessment and management OSCE scenario (No 10) Dr Aliu failed to understand that the patient might need more fluids to mitigate the risk of becoming hypotensive.

e) At OSCE station 14, Dr Aliu failed to follow the principles of basic life support. His technique would put a patient at risk of death."

60. The judgment that Dr Aliu's fitness to practice was impaired cannot be impugned.

Erasure

61. The previous extract from the Impairment determination is important context for the decision on erasure. The Tribunal also recorded as follows:

> "91. Further, the Medical Assessors told the Tribunal that they were so concerned about Dr Aliu's performance that they felt duty bound to immediately inform the GMC to protect the public. They reported their concerns in the following terms:
>
> > "Not only were his skills lacking … his understanding of the procedure was very poor. The potential risks posed to patients led the assessors to write an interim report to the GMC Fitness to Practise Department suggesting that Dr Aliu should not be allowed to undertake interventional procedures without direct supervision."
>
> 92. They also noted that:
>
> > "In inserting a chest drain into a MEDmeat station, his [Dr Aliu] practise was dangerous and risked serious injury and potential loss of life if it was a real-life situation. The team felt he also lacked insight into his failings and the fact that what he was doing was very dangerous."

62. The Assessors' Report contained the following synopsis of Dr Aliu's performance during the Assessment:

> "Although the team assessed Dr Aliu as a junior registrar, when forming their opinion, they considered whether he could work at a more junior level. Dr Aliu was:
>
> • unable to correctly fill out a discharge summary
>
> • unable to prescribe or transcribe simple drug doses
>
> • unable to perform BLS safely and effectively
>
> • unable to communicate appropriately with patients
>
> • unable to assess and perform basic resuscitation on an acutely unwell patient
>
> The above are all competencies the team would expect of someone who had just graduated from medical school at the beginning of foundation year 1 and as such it is the team's opinion that Dr Aliu should not practice as a doctor. Importantly his lack of insight into his own ability could compromise patient safety if he were practising at any level.
>
> Dr Aliu's comprehension of basic questions, both from the assessment team and from patients, was poor and his responses were often either unrelated to the question or inadequate. The team were concerned that there was either a language or cognitive

component to this lack of understanding."

63. As I have held, the Tribunal were entitled to accept the conclusions of the Assessors. They were unequivocal in their criticisms.

64. The Tribunal recorded that Dr Aliu did not at any point accept his low score in the Knowledge Test, nor that the computerised results truly reflected his performance. Having examined and rejected the multiple challenges to the honesty, integrity and competence of the Assessment and the Assessors, the Tribunal were perfectly clear that the results were reliable: namely that Dr Aliu had scored below the 25th centile in all 14 OSCE stations.

65. The Tribunal was thus faced with compelling evidence of a doctor whose standard of practising presented serious risks to the public. Furthermore, he did not accept that the standard of his performance was as described.

66. The evidence before them included the following from the Assessment report:

"Having completed his assessment on the previous day Dr Aliu was asked about the level that he felt confident practising at. He said that he would feel confident working at the level of a specialist registrar, years 3-5 (SI1-20, SI2- 21, SI2-23). Given that the assessors had felt it necessary to produce an interim report for the GMC documenting serious concerns about Dr Aliu performing interventional procedures, they noted that the doctor's comments represented severe lack of insight into his own abilities."

67. The Tribunal accepted that remediation was possible in principle, but that Dr Aliu failed to show any evidence of insight into his deficient performance indeed could not accept his performance in the assessment was poor. He did not accept the Tribunal's finding of fact. They held, unsurprisingly, that the absence of evidence of remediation stemmed from his belief that his performance was in truth acceptable. He did not accept the requirement to remediate from this low level.

68. When considering erasure on 20 August 2020 the Tribunal took into account Dr Aliu's submissions that he had engaged with the regulatory process and there was no evidence before this Tribunal that he had ever harmed a patient during his career. They also recalled, however, that one of the Assessors had opined that Dr Aliu would not even pass a medical school final examination given the level of performance observed during the Assessment.

69. It is inevitable that the Tribunal concluded that the breadth and depth of his clinical deficiencies was too great for imposing conditions as he urged - and urges again before me. No conditions could adequately protect the public. The Tribunal similarly rejected a suspension.

70. The Tribunal held that Dr Aliu showed a persistent lack of insight into the seriousness of his actions and the consequences, (paraphrasing the Sanctions Guidance) and concluded the deficiencies in performance together with the lack of insight and failure to remediate was fundamentally incompatible with his continued registration.

71. The GMC expressed their submission on the erasure Direction as follows:

> "The decision to direct erasure was not disproportionate having regard to the extent of the Registrant's deficiencies and his complete lack of insight. The fact that the Registrant was the subject of an interim suspension order cannot be a reason for imposing a lesser sanction in circumstances where erasure was deemed necessary in the public interest. The considerations that apply when imposing an interim order are not the same as those that apply when imposing a substantive sanction after factual allegations have been proved and a doctor's fitness to practise has been found to be impaired.
>
> Whilst the interim suspension may have prevented the Registrant from having direct clinical involvement with patients, it cannot explain his failure to accept any of the assessment findings or his lack of insight into the need for remediation. The suspension would not have prevented the Registrant from engaging in reflection, attending courses, seeking a mentor, shadowing a colleague, or undertaking any similar activities."
>
> I agree.

CONCLUSION

72. In the light of the unchallengeable findings of the Tribunal, it is quite unarguable that this appeal could succeed, whether as to the decision as to impairment, or as to erasure.

73. Erasure was in my judgment, an unappealable sanction on the facts of this case given the duty of the Defendant to protect the public and to uphold the good name of the profession.

74. This appeal is accordingly dismissed.

Costs

75. The challenge to the cost's decisions made against Dr Aliu are not for this court. The decisions were decisions of the High Court and ought to have been the subject of appeal to the Court of Appeal, had a challenge to them been desired.