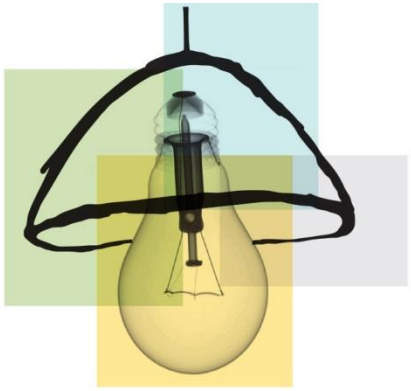

Regulatory Newsletter Autumn 2018 Part 1

A registrant's retirement has no bearing on impairment

In *General Optical Council v Clarke [2018] EWCA Civ 1463*, the Court of Appeal held a review panel had been correct to decide that a registrant's retirement did not count in his favour when considering whether his fitness to practise remained impaired.

We covered the High Court decision in this case in our Summer newsletter 2017 part 1 (*Clarke v General Optical Council [2017] EWHC 521 (Admin)*). In that case, the High Court held that a review panel had taken an incorrect approach to the fact of a registrant's retirement when deciding to erase him from the register. The case has now been heard by the Court of Appeal.

Mr Clarke, an optometrist, failed to refer a patient for further investigation into defects in his vision, and the patient lost his sight. Disciplinary proceedings were instigated by the General Optical Council. Before the hearing of the Fitness to Practise Panel in June 2015, Mr Clarke wrote to the GOC, admitting the allegations and making it clear that he understood the gravity of his failings. He explained he had sold his business, retired and did not intend to practise again. He did not attend the hearing, nor was he represented. The panel concluded that Mr Clarke remained a risk to the public and his fitness to practise was impaired. Noting that Mr Clarke had retired and no longer intended to practise, the panel said a 12 month suspension would give Mr Clarke a period of reflection and the opportunity to consider whether he still wished to cease to practise and, if not, to complete the necessary Compulsory Education and Training (CET).

In a witness statement provided to the review panel in June 2016, Mr Clarke reiterated that his business had been sold and that he did not intend to work again as an optometrist. He requested that he be allowed to come off the register with an agreed undertaking that he would never practise as an optometrist again. However, the GOC sought Mr Clarke's erasure and the review panel agreed. The review panel found Mr Clarke's fitness to practise was still impaired and took into account that there was no evidence before it to show that he had undertaken any CET. It went on to say it would not be a "logical approach" to take no further action, given its finding of impairment, and determined that Mr Clarke should be erased as the only means of protecting patients and/or maintaining public confidence in the profession.

Mr Clarke appealed, arguing that the finding of impairment was wrong and the sanction of erasure unnecessary, disproportionate and unfair. The High Court upheld his appeal. First, the High Court criticised the decision of the review panel to take Mr Clarke's failure to undertake any CET into account against him. It said that the wording of the first panel decision was that he was not required to undertake CET if his decision to retire was one to which he was committed. The High Court held that Mr Clarke was entitled to place weight on that statement. Secondly, the High Court noted that in considering impairment, the review panel had ignored the likelihood of repetition. In Mr Clarke's case there was simply no likelihood of repetition as he had sold his practice and retired.

Further, the High Court held that the risk posed to the public going forward was something a review panel had to take into account and, in order to do this, it could not ignore a person's retirement as a factor, even if it were not determinative. Accordingly, the High Court held that the review panel's decision was wrong as to both impairment and sanction.

The GOC appealed the decision to the Court of Appeal. Shortly before the hearing, the GOC agreed to accept Mr Clarke's wish to withdraw from the register and the Court of Appeal was not asked to make any further order as to sanction. Therefore the only question for the Court of Appeal was whether the High Court had been correct to substitute a decision of no impairment. The GOC argued that, as the Opticians Act 1989 refers to an optometrist's "fitness to practise" being impaired, a judgment on impairment must be made by reference to whether, if permitted to practise, the optometrist would be fit to do so without restriction, not on the basis of whether the optometrist in fact proposes to continue to practise. The GOC also pointed out that, in the absence of a finding of impairment, the only available sanction is a warning. The GOC argued that this would mean that an optometrist voicing an intention to retire could avoid a finding of impairment, but then later change his mind and resume practice, or seek work as an optometrist abroad. It could also mean that an optometrist could escape a finding of impairment by insisting that they had abandoned the particular area of practice that gave rise to the complaints against them.

The Court of Appeal agreed that the statutory language was crucial, with its focus on "impairment of fitness to practise". Definitions of "fitness" given in the Oxford English Dictionary include "qualified or competent" and "the state of being morally fit". "Fitness to practise" in the context of the Act, the Court of Appeal said, must depend on matters such as these, rather than whether the individual in question intends to practise. Accordingly, the Court of Appeal held that the fact that an optometrist no longer intends to practise cannot have any bearing on whether their fitness to practise is impaired within the meaning of the Act.

Further, the Court of Appeal said that where an optometrist is intending to continue to work, likelihood of repetition may well be relevant to his fitness to practise. Where misconduct is "highly unlikely to be repeated" in the course of continuing practice, that points towards fitness to practise. However, where repetition is improbable merely because the optometrist will no longer be practising, that is not indicative of fitness to practise. If anything, the Court of Appeal said, ceasing practice may point in the opposite direction, since the optometrist's skills could deteriorate with lack of use.

Accordingly, the Court of Appeal held that the review panel had been entitled to make a finding of impairment in Mr Clarke's case. It was, the Court of Appeal said, open to the panel at the impairment stage to take the view that his retirement did not count in his favour and the fact that he had not undertaken CET was of relevance. The cessation of practice and absence of CET could each be thought to suggest that Mr Clarke's skills as an optometrist had reduced since the original hearing, the Court of Appeal held. Consequently the Court of Appeal quashed the decision of the High Court and reinstated the finding of impairment.

Panel not obliged to pause before deciding on sanction in case of voluntarily absent doctor

In *Sanusi v General Medical Council [2018] EWHC 1388 (Admin)*, the Court held it would "rarely be unfair" for a panel to proceed straight to a decision on sanction rather than pausing to invite the attendance of a doctor who has voluntarily absented himself.

Various clinical concerns were raised about Dr Sanusi. He was dismissed by his employing hospital and referred to the GMC. He then applied for a post with Rotherham NHS Foundation Trust, but he failed to disclose that he had been dismissed from his previous post as the result of clinical concerns. When Rotherham discovered this, it withdrew the post it had offered him. He then took up another hospital post in Doncaster, followed by a trainee GP post until he was suspended on an interim basis by the GMC.

In response to a letter from the GMC setting out the allegations made against him, Dr Sanusi made a detailed response, and provided two testimonial letters from his supervisors in Doncaster. In preparation for a hearing before a fitness to practise panel of the Medical Practitioners Tribunal Service, Dr Sanusi was asked for a list of documents that he wished to be included in the hearing bundle. He did not respond directly to this request, but rather sent the GMC's caseworker a substantial number of documents on a piecemeal basis. These included appraisal documents, a peer review from 2015, certificates of courses completed, letters of appreciation from former patients and a testimonial

letter from his clinical supervising doctor at the GP practice where he had been undergoing training.

The panel hearing proceeded in Dr Sanusi's absence, although he submitted a 28 page statement. In relation to possible mitigation, the documents put before the panel only included the two testimonial letters from the Doncaster doctors, and not the further materials that Dr Sanusi had sent to the GMC's caseworker. The panel found the thrust of the charges proved, including dishonesty in relation to his interview with Rotherham. It held that his fitness to practise was impaired. In relation to sanction, the panel concluded that there was no evidence of any meaningful insight, acknowledgement of fault or steps taken towards remediation. It concluded that erasure was the appropriate remedy.

Dr Sanusi appealed. He accepted that the panel had been justified to proceed in his absence, but argued that the panel should have paused briefly before embarking on the sanction stage of the process to ask him whether he wished to attend before taking the draconian step of erasing him from the register. The Court disagreed. It noted that the cases cited by Dr Sanusi in support of his submission predated the Court of Appeal decision in *GMC v Adeogba (2016)*. The Court noted that in *Adeogba* the Court had emphasised that fairness to the doctor was a "prime consideration" and confirmed that what fairness demands is a question of fact in each case. However, the Court said that in the context of the disciplinary jurisdiction exercised in the case of doctors, it would "rarely be unfair" for a panel to proceed straight to sanction, rather than pausing to invite the attendance of a doctor who has voluntarily absented himself.

Dr Sanusi also sought the Court's permission to adduce additional evidence which he contended was relevant to mitigation. These included: (1) the documents that he had sent to the GMC caseworker, (2) other documents in existence at the time of the panel hearing, and (3) documents created after the hearing took place. The Court declined to admit the documents in the second and third categories, agreeing with the GMC that to do so would confer an unfair advantage on a doctor who attempted to get a different result from that of the panel hearing by appealing.

However, that left the question as to whether the process before the panel had been unfair because it made its decision on sanction without seeing those documents which were already in the GMC's possession. The Court rejected the GMC's submission that it had been under no duty to inform the panel about the documents in its possession. It did not accept the GMC's suggestion that such a duty would be inconsistent with the statutory scheme or unduly onerous to the GMC, or other regulators.

First the Court held that there was a duty of candour which applies in applications made without notice, and also in cases where public bodies place evidence before a court in a public law hearing. There was, the Court held, some analogy between those types of cases and Dr Sanusi's professional disciplinary proceedings. Second, the Court noted that the GMC had been represented and that it is a normal part of a legal representative's functions when appearing against an absent party, even if that party is voluntarily absent, to consider and communicate to the panel points that might have been made by that party. At its simplest, the Court said that this duty means taking reasonable steps to avoid any inadvertent misleading of the panel, which can occur by omission as well as by positive act, such as by not informing the panel of relevant matters or not correcting a misapprehension on the part of the panel. The Court noted that the extent of the legal representative's duty will vary from case to case and is fact sensitive. It is conditioned by factors such as the applicable procedural rules, the obligation to engage with the process, whether the absent party is aware of the proceedings, is engaged with them and is legally represented.

The Court also said that in cases where the panel has a legally qualified chair, he or she would do well to check with the party that is present that the panel is, so far as that party is aware, in possession of all relevant facts, whether favourable or unfavourable to the party providing the information. In the future, the Court said that when a panel is seised of a potential erasure case and has a legally qualified chair, it would expect the chair to ensure that the panel has all the materials it needs when considering sanction, particularly when the doctor is not present and proceedings may well lead to termination of the doctor's career. Further, the Court held that the GMC and its advisers should always take whatever steps are reasonable to put relevant documents in its possession before the panel, and the GMC's advocates should check that documents in the GMC's possession are readily available and relevant mitigation is provided to the panel, especially if it is known that an absent doctor has requested that that happen and more particularly still if the absent doctor is unrepresented.

Drawing these conclusions together, the Court decided that the mitigation documents that Dr Sanusi had sent to the caseworker should have been placed before the panel. However, the Court then considered whether the outcome would or might have been different had the panel been aware of the missing material. The Court concluded that the documents would not have made a material difference. The charges were serious, had been found proved and Dr Sanusi's statement demonstrated a lack of acceptance of responsibility. The materials he wished to be considered were, for the most part, tangential and unrelated to the subject matter of the charges. His appeal was dismissed.

Another case worth noting on the question of adjournments is the case of *Hussain v General Pharmaceutical Council [2018] EWCA Civ 22*. In that case, Lord Justice Peter Jackson said that in the case of registrant who represented herself at her hearing, with the assistance of her husband, the panel "might have done better to consider adjourning after announcing its decision on impairment". That would have "offered an unrepresented registrant in distress the opportunity to ask for time." The fact that she did not ask for an adjournment herself did not, he said, relieve the panel of its own obligation to assess the matter. He also said that, whether or not the panel adjourned, it would have been better if the panel had explicitly warned the registrant that it was considering imposing the ultimate penalty. However, he held that the panel had not been obliged to adjourn and Mrs Hussain's procedural challenge in this respect failed.

Registrant anonymised in an application to the Court for an extension of an interim order

In *Nursing and Midwifery Council v D [2018] EWHC 498 (Admin*), the Court held that it was appropriate to anonymise the name of the registrant in an application to the Court for an extension of an interim order. The Court was satisfied that any report of the details of the case or any reporting of the identity of the registrant would "risk disclosing identifying details of the person referred to as Patient A". The article 8 rights of Patient A and Patient A's entitlement to confidentiality were therefore engaged. Further, it was satisfied that there was a very realistic prospect that the fitness to practise panel would see fit to make an anonymisation order. Therefore, it was appropriate for the Court to sit in private to hear the application for an extension, both because the case concerned confidential information and because it was in the interests of justice not to pre-empt the decision that the panel would take if and when the case proceeded to a final hearing. For the same reason, the Court ordered that the identity of the registrant and any witness connected with the proceedings should not be disclosed, nor appear in any report or transcript of the proceedings. The order for an extension was also duly granted.

Clarification of correct test on appeal against sanction

In *Fernando v General Medical Council [2018] EWHC 1204 (Admin)*, the Court held that the sanction of erasure was not excessive or disproportionate for a doctor who had abused his position of trust and been dishonest.

Dr Fernando was a urologist. The GMC charged him with several allegations of misconduct. One of the charges related to a decision in September 2016 of the New Zealand Health Practitioners Disciplinary Tribunal to cancel Dr Fernando's registration in New Zealand after the Tribunal determined that he had taken advantage of his medical position to gain access to his wife's medical records and then lied to District Health Board officials about what he had done. Another charge alleged that Dr Fernando had made a number of abusive and threatening telephone calls to a family member and her friend. He was also charged with failing to report to the GMC that he had been convicted of a common assault of his wife by pushing her onto a bed, chasing her downstairs and hitting her repeatedly with a slipper, as well as with the fact of the conviction itself. In addition, he was charged with failing to co-operate with a police enquiry into an allegation of harassment. A panel of the Medical Practitioners Tribunal Service found a number of the charges proved and it erased Dr Fernando's name from the register. He appealed against the sanction.

The Court first had to decide: what is the correct question to be asked by the Court in an appeal against sanction? The Court rejected the argument that the correct test is whether the sanction is outside the range of reasonable penalties or clearly wrong. Instead, and with reference to the decision of the Supreme Court in *Khan v General Pharmaceutical Council (2017)*, the Court determined that the question it had to answer was whether the sanction applied was appropriate and necessary in the public interest, or was excessive and disproportionate. If the sanction was the latter, then the decision could be said to be wrong.

In Dr Fernando's case, the Court concluded that it could not be said that the sanction was wrong in the sense of being excessive or disproportionate. Dr Fernando had abused a position of trust by using his status as a doctor to obtain information from others to which he knew he was not entitled. The abuse of a personal position carries particular weight and seriousness under the MPTS Sanctions Guidance, the Court noted. Furthermore, he was involved in an offence involving violence, albeit at the lower end of the scale of seriousness. Moreover, there was dishonest behaviour involved in the matter giving rise to his removal in New Zealand and the panel had been entitled to take account of the sanction imposed by the New Zealand Tribunal and the relevant facts giving rise to it, which were not disputed by Dr Fernando. Dr Fernando had also demonstrated a persistent lack of insight into the seriousness of his actions. Whilst the Court noted that one or two of the charges taken on their own might not have rendered it necessary or appropriate to uphold erasure, it held that the range of charges proved, the period of time over which the conduct was committed, the number of other people affected by his conduct and the lack of insight shown by Dr Fernando meant that the panel was clearly right in considering erasure was a necessary and appropriate sanction.

Dr Fernando had also argued that the panel had failed to take into account or evaluate the relevant mitigating factors in deciding the appropriate sanction, such as his good standing in the profession and his charitable work. Reliance was placed on the case of *O v NMC (2015)* in which it was said that, where there are only two possible candidates for the appropriate sanction, namely suspension or strike off, "it is critical that all the available mitigation is considered at the stage of considering suspension, as well as when considering striking-off" (see our newsletter of Spring 2016). Dr Fernando argued that the case of *O* imposed a requirement on the panel to consider mitigation factors at both the suspension stage and separately at the erasure stage and that, in his case, the panel had failed to do this. The GMC argued that it was necessary to look at the whole of the panel's determination and its approach to mitigating factors, and not just to a section at a time.

The Court held that the decision in *O* was one based on its facts, and there were several factual differences between that case and Dr Fernando's. In *O*, the panel had failed to analyse the mitigating factors at the suspension stage or at all. In contrast in Dr Fernando's case, the Court held that the panel had set out the mitigating features to which it had regard at the beginning of its determination on sanction, and then proceeded to consider each of the potential sanctions in turn and, in so doing, took account of mitigating factors at each stage, although not all of them at each stage. Further, it was clear that the panel had dealt with mitigating factors at various stages of its reasons up to this point. Where it was clear from a proper reading of the panel's determination that the panel had properly taken the mitigating features of the case into account and also evaluated them, as the panel in Dr Fernando's case had, then it was, said the Court, a "counsel of perfection" to expect the panel to set out the relevant mitigating factors mechanistically and repeatedly at every stage of its analysis.

Further, in the case of *O*, the panel had acknowledged that Mrs O had demonstrated insight and so it should be expected that the mitigating factors to which insight was relevant had some substance and should be properly evaluated. However, the Court held that in a case such as Dr Fernando's, where the panel had already found a distinct lack of insight and/or where the mitigating factors had been considered and rejected, it may reasonably be inferred that the panel considered that there was little or no weight to be attached to those factors. It would, the Court held, be otiose in those circumstances for the panel to consider at the suspension, or erasure stage, a mitigating factor which it had already rejected. In addition, the Court held that on a fair reading of the determination, the panel had taken proportionality into account in coming to its final conclusion, and not as an afterthought having already determined the sanction.

Finally, the Court noted that Dr Fernando had been keen to highlight that there were unusual personal stressors in his case which led him to act as he did. The Court said that it had no doubt that it was very stressful for him to go through a divorce which may have involved the loss of contact with his son. However, the Court held that "difficult and acrimonious divorces and bitterly contested childcare proceedings are sadly not unusual. What is unusual is that a senior medical professional should proffer that as an excuse for inexcusable conduct."
Dr Fernando's appeal was dismissed.

SDT's decision to refuse a stay on the grounds of ill health upheld

In *Lindsay v Solicitors Regulation Authority [2018] EWHC 1275 (Admin)*, the Court held that a Solicitors Disciplinary

Tribunal had been correct to refuse a stay of proceedings on the grounds of ill health.

Mr Lindsay, a solicitor, was alleged to have obtained funding from an investment scheme in circumstances where it was improper to do so, had failed to co-operate with the SRA's subsequent investigation and had given false and misleading responses. He was found guilty by a Solicitors Disciplinary Tribunal and struck off. His co-director was suspended indefinitely. Mr Lindsay appealed on the grounds that the proceedings had been procedurally unfair because the SDT had refused all attempts to stay the proceedings on the grounds of ill-health.

Mr Lindsay first raised his medical condition before a case management hearing, when he applied for an adjournment on the basis that he was too ill to attend. His application was refused, but he was ordered to authorise disclosure of his GP and medical records. He duly provided a letter from his cardiologist which described his history of heart disease and he then agreed to comply with a case management direction that he be examined by a consultant cardiologist acting as the SDT's expert. Professor Hart examined Mr Lindsay and concluded that he would be able to cope with participating in the proceedings, instructing representatives and attending the hearing. However, adversarial cross examination should be avoided. He also recommended that, as Mr Lindsay's symptoms appeared to be dominated by a severe stress/anxiety reaction triggered by the onset of the SDT proceedings, he be examined by a consultant psychologist or psychiatrist who might be able to give recommendations for stress management. Mr Lindsay refused to undergo such an examination, despite a case management direction ordering him to. He then made an application for a stay of the substantive proceedings which was refused, with the SDT holding that based on the medical reports, there was nothing to prevent the hearing taking place provided the panel hearing the application offered reasonable adjustments. The SDT had given Mr Lindsay the opportunity to obtain further medical evidence, but he had chosen not to cooperate.

Mr Lindsay then applied for that application to be re-heard on the grounds of a new report from a consultant psychiatrist that he had instructed personally, Dr Saleem. Dr Saleem opined that preparing for and attending the hearing could lead to considerable stress for Mr Lindsay and might lead to life-threatening cardiac events. The SDT refused the application as Dr Saleem had not specifically addressed Mr Lindsay's ability to participate in the proceedings, his ability to instruct legal representatives, his ability to give evidence and be cross-examined and what reasonable adjustments might be required. It noted that Mr Lindsay had not participated in the proceedings in any meaningful way (for example by providing an Answer to the allegations), nor seen the psychiatrist nominated in the SDT's case management direction. Nonetheless, the SDT would make reasonable adjustments during the period of the substantive hearing.

The day before the SDT proceedings began, Mr Lindsay sent an email stating that he would not attend and a further email on the day of the hearing itself stating that he was not fit to attend, but that he would now be willing to be examined by an independent psychiatrist. The SDT determined that Mr Lindsay was voluntarily absent and it was in the interests of fairness and justice to proceed with the substantive hearing. Mr Lindsay was kept informed of the progress of the proceedings and he sent further emails stating that he was not well enough to attend, but provided no evidence in support. He did, however, provide lengthy written submissions on mitigation and costs before the SDT resolved to strike him off the Roll.

The Court hearing the appeal concluded that the SDT had correctly directed itself at each stage on the law and principles to be applied to Mr Lindsay's various applications for an adjournment or stay on the grounds of ill-health. The SDT had recognised that he suffered from a serious cardiac condition, which was potentially life threatening and which was potentially exacerbated by his symptoms of anxiety and stress. However, whilst under a duty of fairness to Mr Lindsay, the SDT was also under a duty to ensure that the disciplinary proceedings were effective, as it is in the public interest that action be taken against solicitors facing serious charges of misconduct and dishonesty. The SDT had rightly asked the question whether and to what extent Mr Lindsay could participate in the proceedings, despite his ill-health. Mr Lindsay had not addressed this question and nor did the doctors he instructed to provide medical reports on his behalf. The Court concluded that the SDT had been correct to require independent medical advice on Mr Lindsay's condition, from approved medical practitioners. The independent cardiologist concluded that his cardiac condition did not prevent him from participating in the proceedings. The Court noted that Mr Lindsay unreasonably refused to comply with the direction that he be assessed by an independent psychiatrist, which could only have assisted him.

The Court also observed that the SDT had concluded that an experienced panel should be able to manage the situation, by ensuring that Mr Lindsay was given regular

breaks and allowed to withdraw if appropriate. The SDT had procedures for attendance by video link which would have allowed Mr Lindsay to stay at home and Mr Lindsay could also have instructed legal representation. Moreover, his numerous, lengthy emails showed he was able to engage himself with the proceedings energetically and defend himself with vigour when necessary and he was also able to make written submissions on mitigation and costs during the hearing. The Court therefore concluded that Mr Lindsay was physically and mentally capable of making written submissions to the SDT in response to the allegations against him. It was telling, the Court held, that he had not complied with the requirement to file an Answer to the allegations, nor had he submitted a witness statement. In the Court's view, the reason for these failures was that Mr Lindsay did not want the proceedings to go ahead, not that he was too unwell. The Court also held that the SDT had been entitled to be sceptical of his apparent change of stance regarding seeing an independent psychiatrist on the first day of the hearing, as this would have necessitated an adjournment and resulted in wasted costs and delay. An adjournment was also strongly opposed by Mr Lindsay's co-director, because of the damaging effect of the delay.

In all the circumstances, the Court held that the SDT had been entitled to conclude that Mr Lindsay was absenting himself voluntarily. Accordingly, the SDT's exercise of its discretion in deciding not to stay or adjourn the disciplinary proceedings was lawful and Mr Lindsay's appeal was dismissed.

Panel did not need to defer to decision of overseas regulator when deciding on sanction

In *Fopma v General Medical Council [2018] EWHC 714*, the Court upheld the decision to erase a doctor who had previously been convicted of the sexual assault of a patient aged under 16 in the Netherlands and then lied about the fact of the conviction on an application form to join the GMC's Specialist Register.

Dr Fopma was convicted of an offence of sexual touching of a female patient under the age of 16 whilst she was sleeping in 2004. In the same year, Dr Fopma made an application to join the GMC's Specialist Register. He answered "no" to the questions on the application form which asked whether he had ever been convicted of an offence by a court of law in any country, or whether there was any reason why he would not be entitled to a certificate of good standing from the regulatory authority in any country in which he had worked. He continued to practise until an anonymous person emailed his employing hospital in 2015 to suggest that he had a criminal record in Holland.

In response to proceedings by the GMC, Dr Fopma admitted the fact of the conviction, that the answers on the application form for the Specialist Register had been untrue and that he had failed to notify the GMC of his conviction since 2004. He also accepted that his conduct was misleading and dishonest. A fitness to practise panel of the Medical Practitioners Tribunal service found his fitness to practise impaired and struck him off the register. Dr Fopma appealed against the panel's decisions on impairment and sanction.

The Court held that the appeal against impairment had no hope of success and was dismissed. As to sanction, Dr Fopma argued that the panel had failed to give due weight to the decisions of the Dutch appeal court and the Dutch regulator which had decided not to prohibit Dr Fopma from practising. The Court noted that the factors that the panel had identified as potentially favourable to Dr Fopma had not included reference to the Dutch decisions and, therefore, if those were decisions that ought materially to have influenced the panel, there might be some merit in Dr Fopma's ground of appeal.

Taking first the criminal court's decision, the Court held that the decision in relation to what criminal sanctions were required to satisfy the principles of the Dutch criminal law was of no material significance to an MPTS panel in considering the appropriate sanction in the UK for its regulatory purpose of upholding the reputation of the profession and protecting the public in relation to doctors registered with the GMC.

As for the decision of the Dutch regulator, the Court noted that there were two stages to this. First, in 2016, the Dutch regulator had declined to follow the GMC which suspended Dr Fopma on an interim basis pending the final hearing before the MPTS. The Court noted that Dr Fopma had behaved differently with his Dutch regulator in that he had been full and frank with them. Further, he had not, since the criminal complaint had arisen, sought to practise medicine in the Netherlands. For these reasons, the Court held that the MPTS panel had not been required at the sanction stage to defer to the decision by the Dutch regulator not to follow the interim suspension imposed in the UK.

Secondly, in 2007, the Dutch regulator had decided to close the case against Dr Fopma and not bring any disciplinary proceedings. This decision was also made in circumstances where Dr Fopma had been frank in his dealings with the regulator, including an admission that he had not given disclosure of what had happened in the Netherlands to his then current employer in the UK. The Court therefore held that in the particular and somewhat unusual circumstances in which the Dutch regulator had closed the case against Dr Fopma, there was no reasonable basis for holding that the MPTS panel ought to have been influenced by the Dutch regulator's decision towards a less severe sanction than it otherwise judged to be necessary and appropriate.

The Court dismissed all of Dr Fopma's alternative arguments in relation to sanction, including one on lapse of time between the commission of the sexual offence and the time of the MPTS panel hearing. The Court held that although the sexual offending had become historic, the more prolonged and therefore serious was his ongoing dishonesty to his regulator.

Dr Fopma's appeal was dismissed.

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