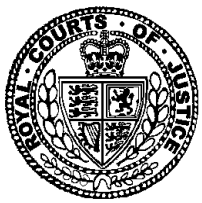

Neutral Citation Number: [2024] EWHC 2272 (Admin)
Case No: AC - 2024 - BHM - 000105

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

Birmingham Civil and Family Justice Centre
33 Bull Street,
Birmingham, B4 6DS

Date: 09/09/2024

Before:

Mr. Justice Eyre

- -

Between:

SHAH ALI

Appellant

- and –

THE GENERAL MEDICAL COUNCIL

Respondent

- -
- -

Rad Kohanzad (instructed on a **Direct Access basis**) for the **Appellant**
Peter Mant (instructed by the **General Medical Council**) for the **Respondent**

Hearing date: 26th July 2024
Further written submissions: 31st July 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.00am on 9th September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE EYRE

Mr. Justice Eyre:

Introduction

1. The Appellant qualified as a doctor in 2013. He has had a number of dealings with the Respondent's fitness to practise procedures. This is his appeal against a determination ("the Determination") of the Medical Practitioners Tribunal ("the Tribunal") made on 28th February 2024 that his name be removed from the Medical Register because his fitness to practise was impaired by reason of misconduct in the form of dishonesty.

2. On 12th December 2019 the Appellant was convicted of dangerous driving in respect of an incident which had occurred on 22nd August 2018. On 23rd April 2020 the Appellant received a suspended sentence in respect of that offence.

3. The allegations which led to the Determination arose out of a statement ("the Declaration") which the Appellant made in June 2020 in answer to a question on a Disclosure and Barring Service Declaration Form ("the Form"). The Declaration was made as part of the Appellant's application to the Bringing Back Staff programme. That was a programme which sought to return staff to the NHS to address the consequences of the Covid-19 pandemic. On 7th June 2020 the Appellant returned the Form to Natalie Burbidge who had been seconded to that programme.

4. The Appellant answered "yes" to question 7 on the Form which asked:

> "Are you currently subject to a fitness to practise investigation and/or proceedings of any nature by a regulatory or licensing body, which may have a bearing on your suitability for the position you are applying for?"

5. The Form said:

> "If you have ticked YES, please provide the reasons given for the investigation and (where applicable) the details of any warnings, conditions or sanctions (including limitations, suspension or any other restrictions) that apply to your professional registration and, the name and address of the regulatory or licensing body concerned"

6. In the space provided for providing that information the Appellant said:

> "I am not subject to any current/new fitness to practice investigations and/or proceedings. I am subject to ongoing GMC Conditions for 24 months, this is after non-specific GMC investigation and Performance Assessment that led to a prior 6-month suspension. Please see MPTS listings including attached conditions."

7. The second sentence of that answer referred to the conditions imposed as a result of the Appellant's earlier dealings with the Tribunal. The case against the Appellant related to the first sentence. The Respondent contended that what the Appellant said there was untrue because he was subject to an investigation arising out of the dangerous driving conviction and sentence. The Respondent said that the Appellant knew that the statement was untrue and having made it with that knowledge he was acting dishonestly.

8. The Tribunal was also engaged in reviewing the finding that the Appellant's fitness to practise had been impaired by reason of his conviction for dangerous driving.

9. The hearing addressing the findings of fact and the issue of whether there was impairment of the Appellant's fitness to practise lasted from 9th to 31st October 2023. On 24th October 2023 at the conclusion of the first part of that hearing the Tribunal found that the Appellant's answer to question 7 was untrue; that it had been made knowingly; and that his actions had been dishonest. On 31st October 2023 it found that the Appellant's fitness to practise was impaired by reason of the misconduct in the form of dishonesty. There was a further hearing lasting from 26th to 28th February 2024 at which the issue of sanction was considered. At the end of that hearing the Tribunal concluded that the only appropriate sanction was that of erasure of the Appellant's name from the Register.

The Grounds of Appeal.

10. The Appellant initially acted in person and at that stage he advanced four grounds of appeal. He subsequently instructed Mr Kohanzad and amended grounds were submitted. The Respondent takes no objection to that amendment. Of the seven amended grounds two were abandoned before me and the remaining grounds are:

"Ground 1

The Tribunal erred in concluding that:

(i) it was untrue for the Appellant to state that he had not been subject to any current/new fitness to practise investigations and/or proceedings and/or to sign confirming the truth of the Form;

(ii) the Appellant knew that he was subject to an ongoing General Medical Council fitness to practise investigation;

(iii) the Appellant's statement and confirmation of the truth of the Form were dishonest.

Regulations 4 & 5, General Medical Council (Fitness to Practise) Rules Order of Council 2004 (the Order) do not allow for an investigation upon conviction and the imposition of a custodial sentence. Rule 5 dictates that upon the imposition of a custodial sentence, the allegation has to be referred directly to the MPTS.

Ground 2

The Tribunal erred in failing to resolve whether or not the Appellant told Ms Burbidge in March 2020 of his dangerous driving conviction and the GMC9s involvement in the matter.

Ground 3

The Tribunal erred in failing to require the allegations to be sufficiently specified in advance of the hearing and/or failed to adjourn the hearing once it became clear what the allegations were.

Ground 5

The Tribunal erred in victimising the Appellant by virtue of section 27 Equality Act 2010. The Appellant did a number of protected acts during the course of the hearing and, in part, as a consequence was considered to have an attitudinal issues. In so doing, the ET victimised the Appellant

Ground 7

The Tribunal erred in failing to apply any weight whatsoever to the Appellant's submissions. The Tribunal did not, for example, mention the remedial work that the Appellant had carried out in relation to their consideration at Stage 3."

The Factual Background: (a) The Previous Fitness to Practise Proceedings.

11. The Appellant has been involved with the GMC's fitness to practise procedures on a number of occasions.

12. In July 2018 the Appellant's fitness to practise was found to be impaired by reason of deficient professional performance. The deficient performance was found to have been in respect of the Appellant's assessment and clinical management skills and in his relationships with patients and with colleagues.

13. There was a further fitness to practise hearing in July 2019. At that time the Appellant's fitness to practise was found to be impaired not only by reason of the deficient professional performance but also by reason of misconduct taking the form of dishonesty. The Appellant was found to have been dishonest in two respects. The first was when making representations in relation to a job application. The second was in allowing false submissions to be made on his behalf at a tribunal hearing in relation to an interim order. The tribunal considering those matters had directed the suspension of the Appellant's name from the Medical Register on the ground of misconduct and on that of deficient professional performance.

14. That suspension was reviewed in January 2020 and the tribunal hearing the review concluded that the Appellant's fitness to practise was no longer impaired by reason of misconduct but that it did remain impaired by reason of the deficient professional performance. That tribunal lifted the suspension but placed conditions on the Appellant's registration for a period of 24 months. Those conditions were revoked at a review hearing on 24th January 2022 at which the tribunal found that the Appellant's fitness to practise was no longer impaired by reason of deficient professional performance.

15. In the meantime, on 22nd August 2018, the Appellant had been involved in a driving incident. The criminal proceedings flowing from that incident resulted in the Appellant's conviction on 12th December 2019 for dangerous driving. On 23rd April 2020 the Appellant received a suspended sentence of imprisonment for that offence.

16. The criminal proceedings led to fitness to practise proceedings in which a six-month suspension order was imposed on 17th December 2021. The Appellant appealed that decision but subsequently withdrew his appeal and the suspension order came into effect on 5th July 2022 when the appeal was withdrawn. The suspension flowing from the criminal sentence was reviewed at hearings on 22nd December 2022 and 18th March 2023. On each occasion the suspension was extended. The Appellant appealed each of those extensions and the appeals were heard together by HH Judge Mithani KC sitting as a High Court judge. Judge Mithani handed down his judgment dismissing both appeals on 29th September 2023.

The Factual Background: (b) The Declaration and the Events leading up to it.

17. It is necessary to step back in time in order to set the Declaration in context.

18. The driving incident was on 22nd August 2018 and on 20th March 2019 the West Midlands Police informed the GMC that the Appellant was being investigated for the offence of dangerous driving.

19. On 11th April 2019 Hazel Carr of the GMC's fitness to practise team spoke to the Appellant on the telephone and followed that conversation by sending him a letter

under cover of an email. In his evidence before the Tribunal the Appellant disputed the accuracy of Miss Carr's note of the conversation and said that he had not been able to open the attachment to the email. In due course the Tribunal found as a fact that the Appellant had opened the attachment to the email and also proceeded on the basis of the substantial accuracy of Miss Carr's attendance note.

20. In her attendance note Miss Carr said:

> "I called Dr Ali to advise that we had been contacted by West Midlands Police who had told us that they were investigating him for dangerous driving.
>
> I advised that I would e mail him a letter to confirm that there was a GMC investigation open and that he needed to provide details of his employers. He confirmed that he was not working as he had been suspended by the GMC..."

21. In the email Miss Carr said:

> "I attach a letter advising of the investigation..."

22. The attached letter consisted of a brief covering letter accompanied by five pages of standard form information. In the covering letter Miss Carr said that the letter (sc the accompanying information) set out information "about the investigation" and that she was "managing the investigation".

23. The attached information was headed "About the Investigation" and included sections entitled "what we're investigating", "what to expect during the investigation", "representation during an investigation", and "revalidation during the investigation".

24. The Appellant was convicted on 12th December 2019 and on 19th December 2019 he emailed Miss Carr informing her of the conviction. Miss Carr replied on 7th January 2020 saying:

> "Thank you very much for sending me this information I will add this to the case file as, even though you are not currently practising, our investigation is still ongoing.
>
> I would be grateful if you could let me know as soon as you have a sentencing date. We will await the outcome of the sentencing before we complete our investigation"

25. Measures to address the Covid-19 pandemic were taken in the Spring of 2020. Those measures included the Bringing Back Staff programme. In March 2020 the Appellant completed an online survey form in relation to that programme. On 26th March 2020 there was an exchange of emails between the Appellant and Miss Burbidge with a view to arranging a telephone conversation. That conversation took place on 28th March 2020 and, as I will explain below, the Appellant and Miss Burbidge gave different accounts of what was said. There was a further exchange of emails on 30th March 2020 and in replying to an email from the Appellant, Miss Burbidge said:

> "Thank you for interest in returning to practice and for providing some information on a pending court case. We have put your request on hold until you can confirm court outcome and nature of issue. Once you have done so we will reconsider your application to return to practice and confirm next steps."

26. The Appellant was sentenced on 23rd April 2020 and on 25th April 2020 he emailed Hazel Carr. The middle portion of the email gave the Appellant's explanation of the offence and set out the terms of the sentence. The email began and closed as follows:

> "For the last couple of years, I have not been working as a doctor. Given the coronavirus pandemic, and having a couple of years of HDU/PICU experience plus one short ITU placement as a doctor, I am keen to return to work as a doctor.
>
> ...
>
> Please let me know of forms I may need to complete and what happens next in relation to the GMC. I will be representing myself if there is an MPTS hearing"

27. Miss Carr replied on 5th May 2020 saying:

> "Thank you very much for updating me on the sentencing. There is nothing further you need to do as far as I am aware.
>
> We will now apply to the court for the certificate of conviction.
>
> In the meantime if you do decide to appeal this conviction could you let me know so that I can include this fact on our investigation file."

28. The Appellant completed the Form on 6th June 2020 although it was part of his case to the Tribunal that this was an updating of a draft he had initially prepared in March 2020. The Form contained the Declaration in the terms I have set out above. The Form was sent to Miss Burbidge by email on 7th June 2020. In the first substantive paragraph of the email the Appellant said:

> "Further to previous emails and conversation, and being aware of time and needing to ensure suitable placement if offered, I wanted to take this opportunity to provide some further details relating to conditions attached to my GMC registration and a criminal conviction for a single driving offence as attached in a draft disclosure statement. I was hoping for a response from the MPS whom are likely to ask me to reduce the length of the attached statement and remove various sections but it is an honest and extensive summary and disclosure. An updated statement will hopefully be provided soon. Please do not hesitate to ask me for further information."

29. There then followed two lengthy passages of text. The first was headed "GMC Conditions" and listed the conditions which had been placed on the Appellant's registration. The second was headed "Driving Conviction" and said:

> "Further to the attached, on 28th April 2020, I received a 9 months suspended for 2 years sentence after being found guilty of dangerous driving. Additionally, I was ordered to do 180 hours unpaid work, pay a fine, court costs and received a driving ban till next summer.
>
> My conviction relates to an incident in August 2018, where I was involved in an altercation with a motorist in an empty car park at Highbury Park in Birmingham.
>
> I was accused of being involved in a road rage incident, where I drove my car at the plaintiff's car and made contact with wing mirror, before driving away without stopping or exchanging insurance details. It was accepted by the CPS I did stop and the footage shows me driving away at 5mph, their was a lot of questionable evidence like wing mirror was involved and my statement there was no contact was not relevant, as I admit I accelerated in the empty car park from 5mph to 12 mph. The judge refused to consider the full law especially in relation to defence and driving away from harm, as he was aware of GMC outcomes and ongoing difficulties, but not content.
>
> My recollection of the incident is that the plaintiff was speeding up the access road into the car park, where they almost collided with my vehicle through a careless turning manoeuvre. I was parked stationary in the middle of the car park, well away from the

road. There was a 20 minutes stand-off, and noticed that the other driver was intoxicated. When he went to the back of his car to get his dogs out, I drove away but he threw projectiles, then ran up to me in a fit of road rage and failed to repeatedly kick my car, as I accelerated turning further away from him. I then stopped and got out of my car, and was walking back to him with a bystander, but in retaliation the other driver then set their dogs on me.

I was contacted by the police two months later to investigate the incident, I no longer had dashcam footage. I highlighted the attempt of a head-on collision and had a voluntary interview under caution. The other driver had more witnesses and a case was brought against me (after I also complained of concerning conduct of one of the police officers whom then contacted the GMC and DBS service after finding out I had complained to the IOPC plus called me to be abusive, all prior to the CPS then making a delayed decision to charge me last year), this went to trial where disputed witness testimony was brought against me. My solicitor at the last minute informed me she had not secured an expert witness and I had a barrister doing his first driving case.

I intend to appeal my conviction when funds allow, but right now my main priority is to resume my career in medicine. In the meantime, I will humbly comply with the terms of my sentence and use the community service to continue to give back to society and make a difference in any small way that I can."

The Issues before the Tribunal.

30. In relation to the allegation of dishonesty there was no dispute that the Appellant had sent the Form to the Bringing Back Staff team nor was there any dispute as to the contents of the Form nor as to the terms of the Declaration. The Tribunal had to determine whether the Declaration was untrue; whether the Appellant knew that it was untrue; and whether he had been dishonest in making the Declaration. Having addressed those issues it would have to consider whether the Appellant's fitness to practise had been impaired by misconduct and, if so, what sanction should be imposed.

31. The Appellant raised a number of matters in the witness statement which he submitted to the Tribunal. This ran to 104 closely typed paragraphs and covered 28 pages. It is a document which is far from easy to follow. Large parts of it are concerned with irrelevant matters and the Appellant used abbreviations and references to other matters which serve to confuse the picture. It is an unfocused document advancing assertions which are in a number of instances inconsistent with each other. However, the following contentions were advanced in that statement:

    i) That the Appellant had originally completed the Form, including the wording of the Declaration, in March 2020. The Form had not been sent then and the statement said that when the Appellant revised it in June 2020 he failed to check it properly and had left in the assertion that he was not subject to any new investigation through an oversight.

    ii) That the Declaration was not untrue. This was said to be because at the time he returned the Form the Appellant had not received from the GMC the letters under rule 4 or rule 5 of the General Medical Council (Fitness to Practise) Rules 2014 ("the Rules") which would have been needed as the start of an investigation. Therefore, it was correct to say that there was no ongoing investigation.

iii) That in the telephone conversation in March 2020 with Miss Burbidge of the Bringing Back Staff team the Appellant had explained about his dangerous driving conviction and the forthcoming sentencing hearing. The Appellant said that he had told Miss Burbidge that he expected the GMC to commence an investigation against him but had been told that the potential actions of the GMC were irrelevant because he was not being considered for a position as a doctor.

iv) That "in early 2020 [the Appellant] honestly believed [he] had two GMC issues. First, from a GMC formal investigation ended prior to tribunal July 2019 and that I had potential FTP investigation for driving pending since March 2019 depending on the outcome of future sentencing" and in respect of which he would receive letters under rule 4 of the Rules (paragraph 41 of the statement).

v) That, rather than having given false information or having concealed matters, the Appellant had in fact disclosed more than he needed to and that there had been "over-disclosure".

32. In addition, as already noted, the Tribunal was also concerned with reviewing the Appellant's suspension on the basis of the impairment of his fitness to practise flowing from the dangerous driving conviction and sentence.

The Determination.

33. The Determination ran to 90 pages. It began with the Tribunal's determination on the facts. It summarized the allegation and the evidence before setting out the Tribunal's analysis of the evidence and its findings. That exercise culminated in the findings that the Declaration was untrue; that the Appellant had known that it was untrue; and that the Appellant had been dishonest as a consequence.

34. The Tribunal then addressed the impairment of the Appellant's fitness to practise flowing from the finding of dishonesty. It again summarized the submissions and concluded that the Appellant's actions amounted to misconduct and that his fitness to practise was impaired because of that. At the same stage in the Determination the Tribunal considered whether the Appellant's fitness to practise remained impaired by reason of the dangerous driving conviction. In doing so the Tribunal noted the findings of earlier tribunals and the Appellant's submissions. It concluded that the Appellant's fitness to practise remained impaired principally because of the view which it took as to the Appellant's level of insight. Having reached that conclusion the Tribunal continued the order of suspension for a further six months.

35. Then, the Tribunal considered the appropriate sanction. It recorded the competing submissions and then summarized the matters which it regarded as aggravating and mitigating factors. Having done that it went sequentially through the possible sanctions concluding that erasure was appropriate and proportionate and that no other sanction was adequate. That approach was again substantially influenced by its assessment in respect of the Appellant's level of insight.

36. Finally, in a series of annexes the Determination set out the reasons for the Tribunal's rulings on a series of applications which the Appellant had made in the course of the proceedings.

The Approach to be taken to the Appeal.

37. The appeal is brought as of right under section 40 of the Medical Act 1983 and is subject to the rules in CPR Pt 52. The approach to be taken in such cases has been considered in a number of authorities. The starting point is now to be found in *Sastry v General Medical Council* [2021] EWCA Civ 623, [2021] 1 WLR 5029 where Nicola Davies LJ delivered the judgment of the court. It is to be remembered that in *Sastry* the court was primarily concerned with an appeal against the sanction imposed. At [102] Nicola Davies LJ said:

> "Derived from *Ghosh* are the following points as to the nature and extent of the section 40 appeal and the approach of the appellate court: (i) an unqualified statutory right of appeal by medical practitioners pursuant to section 40 of the 1983 Act; (ii) the jurisdiction of the court is appellate, not supervisory; (iii) the appeal is by way of a rehearing in which the court is fully entitled to substitute its own decision for that of the tribunal; (iv) the appellate court will not defer to the judgment of the tribunal more than is warranted by the circumstances; (v) the appellate court must decide whether the sanction imposed was appropriate and necessary in the public interest or was excessive and disproportionate; (vi) in the latter event, the appellate court should substitute some other penalty or remit the case to the tribunal for reconsideration."

38. In addition, I have had regard to Hill J's summary of the legal framework as set out in *Shabir v General Medical Council* [2023] EWHC 1772 (Admin) at [10] – [18] drawing in turn on the judgments of Collins Rice J in *Sawati v General Medical Council* [2022] EWHC 283 (Admin) and of Morris J in *Byrne v General Medical Council* [2021] EWHC 2237 (Admin). As Hill J said at [12]:

> "The degree of deference shown to the court below will differ depending on the nature of the issue below, namely whether the issue is one of primary fact, of secondary fact, or rather an evaluative judgment of many factors. The governing principle remains that set out in *Gupta* at [10], such that the starting point is that the appeal court will be very slow to interfere with findings of primary fact of the court below: *Byrne* at [12] and [13]."

39. Save in respect of the conversation between Miss Burbidge and the Appellant, which I will address below, the Determination did not depend on the Tribunal making findings of primary fact. Rather the exercise for the Tribunal involved the drawing of inferences in circumstances where there was little dispute as to the underlying factual position albeit that account had to be taken of the Appellant's oral explanations when considering the inferences which could safely be drawn. The Appellant's challenge to the Determination is largely as to the legitimacy of the conclusions reached and of the inferences drawn and as to the proper legal analysis of the Rules coupled with a procedural challenge.

40. It follows that the degree of deference which is to be accorded to the Tribunal is reduced. I am nonetheless to have regard to the benefits which the Tribunal had by virtue of its specialist nature and by reason of having heard extensive oral evidence and submissions.

Ground 1: The Challenge to the Findings that the Declaration was untrue and was made knowingly and dishonestly.

41. In support of this ground Mr Kohanzad submitted that when question 7 on the Form asked whether the Appellant was "currently subject to a fitness to practise investigation" that was a reference to an investigation under rule 4 of the Rules. The

Appellant was not subject to such an investigation and, therefore, the answer which was given was true.

42. In summary, Mr Kohanzad's argument was that a question asking about a fitness to practise investigation in a formal document must be interpreted as being a reference to formal fitness to practise investigations. The investigation of registrants such as the Appellant was governed by the Rules and by the Medical Act 1983 and any question about such an investigation was to be interpreted by reference to those. Here on a proper interpretation of the Rules either there was no investigation when a conviction resulted in a custodial sentence with the consequence that there was to be a direct reference to a tribunal or an investigation only began when the registrant was informed the process provided for in rule 5 was underway. The Appellant was familiar with the procedures under the Rules and had not received any notification that the rule 5 process was underway. Therefore, the Appellant was correct in saying that he was not subject to an investigation. Alternatively it was not open to the Tribunal to conclude that he knew the Declaration was untrue.

43. Mr Kohanzad based his contentions on the difference between the terms of rules 4 and 5. Rule 4(1) provides for an allegation of an impairment of fitness to practise to be considered by the Registrar. Rule 4(2) provides for the Registrar to refer the allegation to a medical and lay Case Examiner. However, by virtue of rule 4(4) the Registrar could carry out such investigations as he regarded as appropriate before making such a reference. In addition, rule 7(2) provides that the Registrar should carry out such investigations as he found appropriate for consideration of the allegation by the Case Examiners. Those, Mr Kohanzad submitted, were the investigations which were contemplated by question 7. He contrasted those with the procedure under rule 5(1) which provides that where a conviction results in a custodial sentence the allegation is to be referred "directly" to the Medical Practitioner Tribunal Service with a view to arranging for consideration by a tribunal. For the purposes of question 7 "investigation" was to be an investigation by the Registrar and there was no scope for such an investigation in the circumstances faced by the Appellant in June 2020. Mr Kohanzad also invoked section 35CC of the Medical Act 1983 and contended that this provided that rules should in turn provide for the investigatory role of the Investigation Committee to be carried out by the Registrar and that was what the Rules did.

44. Mr Mant countered this argument by saying that even if question 7 was to be read as being a reference to an investigation under the Rules and even if the Rules were to be read strictly the Appellant was still subject to such an investigation when the Rules are properly interpreted. In that regard he submitted that "directly" in rule 5(1) refers to the route to be taken, namely that in those circumstances there is no need for reference to Case Examiners. The use of that word is not to be seen as meaning that the rule 5 procedure is not an investigation. Mr Mant also invoked the 1983 Act. He prayed section 35C in aid saying that there was no provision there for direct reference to a tribunal. In any event the reference to an investigation in question 7 is not, Mr Mant submitted, to be seen as a reference to an investigation as defined in the Rules. Instead it is to be read as being a reference to an investigation in the lay sense. When that reading is applied then it is clear that the Declaration was untrue because investigations were underway and that the Appellant knew that it was untrue if only because he had received correspondence from the GMC about the investigations.

45. The question, therefore, is what is meant in question 7 by "a fitness to practise investigation". I note that although the question also refers to "proceedings" no argument based on that word was advanced to the Tribunal and Mr Kohanzad is right to say that the question for the Tribunal was whether the Declaration was false by reference to an investigation.

46. Question 7 is to be interpreted in its context and having regard to its purpose. When that is done I have no doubt that the words "a fitness to practise investigation" are to be interpreted widely. The effect of a positive answer to the question is to trigger the requirement to give further information so that the recipient of the Form can consider the position. A person who has ticked the "yes" box is then to give details of the reasons for the investigation; further information about warnings and related matters; and the name and address of the regulatory body which is undertaking the investigation. It is also significant that the question is followed immediately by the explanation "this may include any fitness to practise investigation and/or proceedings of any nature that are being undertaken by a regulatory or licensing body in any other country". That explanation, of itself, makes the contention that an "investigation" has to be an investigation under the Rules untenable. In addition, as Mr Mant submitted, it would be verging on the nonsensical to read the question as requiring a positive answer whenever a rule 4 investigation was underway but as meaning that a negative answer was appropriate in the interval between the receipt of a custodial sentence triggering a reference to a Tribunal and the making of the reference (or even the notification to the registrant that a reference will be made) even if the person answering the question knew that such a reference would necessarily follow from the conviction. Such an interpretation would be wholly contrary to the purpose of the question.

47. When the situation is viewed realistically it is clear that the Appellant was subject to an investigation at the time of the Declaration and that he had been subject to a rule 4 investigation at least since the letter of 11th April 2019. There was no need for a formal invocation of rule 4 to begin the investigation. The investigations were continuing at the time of the Declaration. The fact that the custodial sentence which the Appellant had received meant that a reference to a tribunal was inevitable with the consequences that the rule 4 procedure was superseded and that there would be no need for further exploration of the background was immaterial. There had been repeated correspondence with the Appellant about that and the conclusions that he knew of the investigation and that he knew that it was untrue to say that there was not an investigation were correct.

48. Even if I am wrong in my interpretation of question 7 and the reference to "a fitness to practise investigation" is to an investigation under the Rules the Declaration was nonetheless untrue. Such a reference must be to the process under the Rules generally and not just to an investigation under either rule 4(4) or rule 7(2). Part 2 of the Rules is entitled "Investigation of Allegations". That part includes not just the procedures under rules 4 and 5 but also the arrangements for consideration by the Investigation Committee (rule 9) and for the taking of undertakings (rule 10) or the giving of warnings (rule 11). The heading of Part 2 would not be relevant if the point in issue was the proper interpretation of the Rules. But that is not the issue here. Instead the issue now is the proper interpretation of question 7 on the Form and the fact that Part 2 as a whole is described as dealing with investigations is of assistance in interpreting

what "investigation" means in that question even if the question is to be seen as referring to the Rules.

49. Therefore, the Tribunal was right to hold that the Declaration was untrue and that the Appellant knew that it was untrue. The challenge to the Tribunal's conclusions in those respects falls away. Whether the Tribunal was also entitled to find the Appellant was dishonest depends on whether its approach was flawed in the respects alleged in ground 2 and I now turn to those.

Ground 2: The alleged Failure to resolve a Conflict between the Evidence of the Appellant and of Miss Burbidge.

50. The Appellant had addressed his conversation with Miss Burbidge in his witness statement at paragraphs 34 – 39. There the Appellant said that he had told Miss Burbidge that it was likely that the GMC would commence proceedings against him arising out of the dangerous driving conviction and that Miss Burbidge had said that this was irrelevant to the matters with which she was concerned.

51. In her witness statements Miss Burbidge gave a markedly different account of that conversation. She described the Appellant as being reluctant to provide details of the criminal proceedings and said that matters had been left on hold pending the outcome of those proceedings. There was no suggestion in Miss Burbidge's statements that there had been discussion of a potential GMC investigation and still less that she had said that such an investigation was or would be irrelevant.

52. The Appellant cross-examined Miss Burbidge at length. The Appellant put to Miss Burbidge that they had discussed his dangerous driving conviction and that Miss Burbidge had been critical of the GMC to the extent of saying "Fuck the GMC". Miss Burbidge denied that and the other elements of the Appellant's cross-examination robustly.

53. It is apparent that at a number of points in his cross-examination by counsel for the GMC the Appellant did not appear to engage with the questions and at other times he sought to introduce matters which the GMC's representative thought were irrelevant. At other points the Appellant questioned the relevance of the questions he was being asked. There were a number of somewhat angry exchanges and as a result the cross-examination was a disjointed exercise. However, in the course of that evidence the Appellant maintained that in the March 2020 conversation Miss Burbidge had used those words.

54. There was, therefore, a marked difference between the evidence of the Appellant and of Miss Burbidge as to their dealings.

55. The Appellant contends that the Tribunal failed to resolve the dispute as to what was said between him and Miss Burbidge. Mr Kohanzad accepted that it was not necessary for the Tribunal to resolve every peripheral factual dispute but contended that this dispute related to a significant matter and that the Tribunal's conclusion could not stand in light of the failure to address it.

56. For his part Mr Mant, on behalf of the Respondent, sought to minimise the relevance of this dispute. He said that the crucial findings were those that it was untrue for the Appellant to say that he was not subject to any current or new fitness to practise

investigation and that the Appellant had known that the Declaration to that effect was untrue. Mr Mant submitted that the findings that the Appellant had been dishonest and that his fitness to practise was impaired thereby had followed inevitably from those findings. In those circumstances, he submitted, it had not been necessary for the Tribunal to make a finding on this dispute.

57. I agree with the Appellant that the dispute as to what had been said between him and Miss Burbidge was a significant issue and one which was material to the central questions in the proceedings below. If the Appellant's account of that conversation was correct it would mean that he had been open about the prospect of a GMC investigation with the Bringing Back Staff team from the outset in March 2020 and, more significant, that he had been told that the team was not concerned about the potential for such an investigation flowing from the conviction. This would, in turn, throw light on the making of the Declaration in June 2020. That Declaration was made to the Bringing Back Staff team. Acceptance of the Appellant's account of those matters would have been relevant to his assertion that the terms of the Declaration arose from his failure properly to check a draft he had prepared earlier. That, and the contention that he had told that any GMC investigation was irrelevant to the Bringing Back Staff team, would also be relevant to the issue of whether the Appellant had been dishonest. That is particularly so in circumstances where he attached details of his conviction and sentence and of the conditions arising from the earlier fitness to practise proceedings to the Form. There can be no suggestion that the Appellant was trying to conceal his conviction or sentence from the Bringing Back Staff team. In addition, it is relevant that question 7 was asking about matters "which may have a bearing on your suitability for the position you are applying for". In those circumstances an assertion by Miss Burbidge that the Bringing Back Staff team was not concerned about GMC investigations was potentially relevant to the honesty of the answer. At the very least acceptance of the Appellant's account of the March 2020 conversation would have meant that the terms of that conversation and the Appellant's understanding as a result of that would need to be considered by the Tribunal when it was addressing whether he had been acting honestly or dishonestly. If the untrue Declaration related to a matter which the Appellant believed was irrelevant in circumstances where that belief was due to what the Appellant had been told by the body to whom the Declaration was being made there would be real scope for debate as to whether it could properly be found to have been made dishonestly. Even if there were found to have been dishonesty a finding that the Appellant's version of the conversation was correct would be relevant to the consideration of the gravity of his conduct.

58. It was, therefore, necessary for the Tribunal to resolve the dispute between the evidence of the Appellant and that of Miss Burbidge. The questions are, therefore, whether a finding was made and, if so, whether adequate reasons were given for the finding.

59. The Tribunal did not set out a finding in express terms. The Determination does not contain an express statement to the effect of saying that there was a dispute about what was said in the conversation and that the Tribunal preferred the account of the Appellant or of Miss Burbidge for expressly stated reasons. In those circumstances it is necessary to consider whether a fair reading of the Determination shows that there was nonetheless a finding and identifies the reasons for it.

60. In *Shabir* Hill J summarised the law in respect of a tribunal or judge's duty to give reasons. Hill J drew on the analysis undertaken by Morris J in *Byrne v GMC* [2021] EWHC 2237 (Admin) which in turn summarised the effect of the decisions of the Court of Appeal in *Southall v GMC* [2010] EWCA Civ 407 and *English v Emery Reimbold & Strick* [2002] EWCA Civ 605, [2002] 1 WLR 2409. At [18] Hill J explained the position thus:

"As to the duty to give reasons:

(i) The purpose of a duty to give reasons is to enable the losing party to know why they have lost and to allow them to consider whether to appeal: *English v Emery Reimbold & Strick* [2002] 1 WLR 2409 at [16] and *Byrne* at [24].

(ii) It will be satisfied if, having regard to the issues and the nature and content of the evidence, reasons for the decision are apparent, either because they are set out in terms or because they can readily be inferred from the overall form and content of the decision: *English* at [26] and *Byrne* at [24];

(iii) There is no duty on a tribunal, in giving reasons, to deal with every argument made in submissions: *English* at [17]-[18];

(iv) In a straightforward case, setting out the facts to be proved and finding them proved or not will generally be sufficient both to demonstrate to the parties why they have won or lost and to explain to any appellate tribunal the facts found: *Southall* at [56] and *Gupta* at [13];

(v) Where the case is not straightforward and can properly be described as exceptional", the position will be different: a few sentences dealing with "salient issues" may be essential: *Southall* at [56];

(vi) Specific reasons for disbelieving a practitioner are not required in every case that is not straightforward: *Byrne* at [119]; and

(vii) Where a Tribunal's stated reasons are not clear, the court should look at the underlying materials to seek to understand its reasoning and to identify reasons which cogently justify the decision. An appeal should not be allowed on grounds of inadequacy of reasons unless, even with the benefit of knowledge of the evidence and submissions made below, it is not possible for the appeal court to understand why the tribunal reach the decision it did: *English* at [89] and [118] *Byrne* at [27]."

61. In those cases the court was concerned with whether adequate reasons had been given for the decision under challenge. However, the need for the court or tribunal whose decision is under challenge to have given adequate reasons is in part because without such reasons the appeal court cannot understand why the decision was reached. As Lord Phillips MR said delivering the judgment of the court in *English v Emery Reimbold & Strick* at [19]:

> "… if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision."

62. Such understanding is necessary in part because the appellate court needs to know the reasons which the lower court or tribunal took into account and which caused it to make the decision. It is also necessary because the appellate court needs to know that the lower court or tribunal has determined all the material issues. If that has not been done the decision under challenge cannot stand. I emphasise that it is only necessary for the material issues to be determined but I have already explained why I accept that the dispute as to the conversation between the Appellant and Miss Burbidge was a material issue. The contention is that the Tribunal failed to address and to resolve that issue.

63. It was not necessary for the relevant finding and the reasons for it to be stated formulaically. It would have been sufficient if on a fair reading of the Determination the finding and the reasons for it were apparent. Indeed, the court can go further than that. It will be sufficient if consideration of the Determination in the light of the evidence before the Tribunal and the submissions made to it enables this court to understand what it did and why (see *Shabir* at [18(vii)] and *Byrne* at [27]) and so to identify a finding on this issue and the reasons for it even when neither the finding nor the reasons were articulated. The findings and the reasons can be inherent and the court is to look to the reality of the matter. As Lord Phillips said at the conclusion of the judgment in *English v Emery Reimbold & Strick*:

> "...an unsuccessful party should not seek to upset a judgment on the ground of inadequacy of reasons unless, despite the advantage of considering the judgment with knowledge of the evidence given and submissions made at the trial, that party is unable to understand why it is that the judge has reached an adverse decision."

64. However, that exercise cannot be without limits and a degree of caution is needed. The obligations on a court or tribunal to grapple with the disputes on material issues; to reach conclusions on such issues; and to have identifiable reasons for the conclusions reached are important ones and the compliance with them has to be real. As I have already noted the need for reasons to be given is in part so that an appeal court and the parties can determine whether the lower court or tribunal has complied with the first two of those obligations. The role of this court on the appeal is not to construct a finding which was not made nor to formulate reasons which would have justified such a finding but which were not the reasons of the Tribunal.

65. Here the Tribunal summarised the cross-examination of Miss Burbidge and the relevant part of the Appellant's evidence at paragraph 46 of its Determination on Facts saying:

> "The Tribunal noted that in his cross examination of Ms Burbidge, Dr Ali had asserted that she had stated '*fuck the GMC'* in her telephone conversation with him which is what '*endeared her'* to him. Ms Burbidge had vehemently denied this and had been visibly shocked by the accusation. She had responded to state '*that is an outright lie'*. She stated that she would never use such profanity and it was inconceivable that she would speak like this in a professional telephone call to someone that she did not know. Dr Ali had further asked Ms Burbidge why she had placed his application on hold, and she had responded to say that she had concerns about his suitability for roles. Ms Burbidge had further stated that she had felt that Dr Ali lacked openness and transparency when he spoke of the previous regulatory findings against him and also his conviction. She stated that in her initial call with Dr Ali in March 2020, she had decided to place his application on hold as he wanted to give careful thought to the disclosures he would make. Dr Ali did not deny this and stated that it was after this initial call with Ms Burbidge in March 2020 that he completed the application/survey which he submitted. He stated that he had also commenced completing the DBS declaration Form in March 2020, which he thereafter submitted. His position was that he had not sought to hide anything, had completed the Form to the best of his knowledge and belief and in fact had provided '*over disclosures'* in his documents."

66. That passage occurred near the start of the Tribunal's treatment of the issue of whether at the relevant time the Appellant "knew that he was subject to an ongoing General Medical Council fitness to practise investigation". That treatment began at paragraph 44 with the Tribunal saying that it was considering "whether … [the

Appellant] knew that he was subject to an ongoing GMC fitness to practise investigation". The analysis ended at paragraph 61 with the finding that when he made the Declaration the Appellant knew that he was subject to such an investigation.

67. It appears that in paragraph 46 the Tribunal was taking account of the points made by the Appellant in the course of cross-examining Miss Burbidge as an indication of his knowledge of the GMC investigation. The Tribunal does not appear at that point in the Determination to be considering the question of whether the Appellant believed that such an investigation was regarded as irrelevant by the Bringing Back Staff team.

68. There was a further reference to Miss Burbidge at paragraph 65 of the Determination where the Tribunal was considering whether the Appellant knew that the Declaration was untrue. It noted there the Appellant's evidence that he had referred to the preliminary investigation in his conversations with Miss Burbidge and Dr Marwick but that he had not been able to evidence this because recordings of the calls had not been provided. It is to be noted that the Tribunal was not at that point saying that there was no evidence of those matters but was instead recording the Appellant's explanation of why he had not been able to provide evidence substantiating his account of the conversations.

69. There was no other reference to Miss Burbidge in the Determination.

70. The Determination contains repeated criticisms of the Appellant's evidence and of the explanations he advanced but on analysis a number of those were made in reference to particular issues rather than in relation to the differing accounts of the Appellant and Miss Burbidge. Thus:

    i) At paragraph 60 the Tribunal said that it "did not consider [the Appellant's] evidence to be cogent or plausible". However, that was in the context of the Appellant's challenge to the note which Miss Carr had made of her telephone conversation with him on 11th April 2019 and of the Appellant's submissions as to the meaning of the emails sent by Miss Carr. It is of note that in the balance of paragraph 60 the Tribunal explained why it rejected the challenge to Miss Carr's attendance note doing so by reference to inherent probability.

    ii) Similarly, at paragraph 69 the Tribunal said that it could not reconcile the Appellant's explanation that the Declaration was the result of a typing error with the other explanation he had given which was that he did not know that he was subject to an investigation.

    iii) There was a more general criticism of the reliability of the Appellant's evidence at paragraph 72 of the Determination. The Tribunal said:

    > "Overall, the Tribunal was concerned about the quality of the evidence that Dr Ali had provided and his various defences and stances on why he had made the statement as contained within paragraph 1(a). Those variances made his evidence unreliable and lacking in cogency and credibility. It had already found proved that on 6 June 2020, Dr Ali knew that he was subject to an ongoing investigation. It further took the view, that on balance, and on the evidence before it, Dr Ali knew that the statement he made as set out in paragraph 1(a) included information which was untrue."

> The first sentence of that passage is expressed in general terms but it has nonetheless to be seen in context as an explanation of the finding that the Appellant knew that the statement which he had made was untrue.

71. The Tribunal's treatment of the question of whether the Appellant had made the Declaration dishonestly was expressed in very short terms at paragraphs 79 – 81 of the Determination. In essence the Tribunal said that for the Appellant to say that he was not subject to an investigation when he knew that he was subject to one and when he knew that his statement to the contrary was untrue was necessarily dishonest by the standards of ordinary decent people.

72. Mr Mant accepted that the Determination did not contain an express finding on the conflict between the accounts of the Appellant and Miss Burbidge. He submitted that when the Determination is read as a whole and particularly when account is taken of the strong rejection of aspects of the Appellant's evidence and the criticism of his credibility the court can infer that the Tribunal rejected the Appellant's account of the March 2020 conversation and preferred that of Miss Burbidge.

73. In support of that submission Mr Mant referred to the Tribunal's statement in paragraph 70 that it "took the view that the `defences' put forward by [the Appellant] lacked cogency, were contradictory and not plausible". Mr Mant submitted that this was a finding of general application.

74. I am not persuaded by that interpretation of those words in paragraph 70. The paragraph read as a whole is:

> "The Tribunal also considered that the word '*new'* was an addition that Dr Ali would have made to the statement, having thought about it, as it was not sought by the question box 7 of the Form. Dr Ali had not just omitted to mention any current/ongoing fitness to practise investigation but had specifically denied its existence at that time, in making the statement '*I am not subject to any current/new fitness to practise investigations and /or proceedings'*. The Tribunal took the view that the 'defences' put forward by Dr Ali lacked cogency, were contradictory and not plausible. It considered and acknowledged that Dr Ali had made detailed disclosures albeit including his own narrative on their legality and veracity. The disclosures were of the conditions on his registration, his dangerous driving conviction and sentence, however those were also publicly available. It considered that any ongoing investigation would not be public knowledge. It also considered the GMC's position that Dr Ali's motivation in not disclosing or in denying an ongoing/current fitness to practise investigation was to maximise his employment opportunities. The Tribunal noted that Dr Ali's response to this was evasive and instead he focused on the Form not being an application as it was never submitted [to DBS] or paid for. The Tribunal considered that not disclosing, or denying, an ongoing/current fitness to practise investigation could strengthen his application for a clinical role."

75. The paragraph is part of the Tribunal's analysis of whether the Appellant knew that the Declaration was untrue and the words on which Mr Mant relied must be seen in that context and cannot be read as an omnibus rejection of all the arguments advanced by the Appellant.

76. It is clear that the Tribunal was generally unimpressed by the Appellant's evidence. The tenor of paragraph 46 of the Determination suggests that the Tribunal regarded Miss Burbidge's evidence as credible. I have reflected on whether that paragraph can properly be seen as going beyond that and as amounting to a finding rejecting the

Appellant's account of the conversation and preferring that of Miss Burbidge. I have concluded that it cannot be read as having that effect. In that regard the contrast between the treatment of the dispute about the March 2020 conversation and the treatment, at paragraph 60, of the issue as to the reliability of Miss Carr's telephone note is striking. In the latter instance there was a clear finding the reasons for which were given. There is no equivalent to that in paragraph 46 which instead records the competing evidence. The words "it was inconceivable that she would speak like that in a professional telephone call to someone that she did not know" is a paraphrase of Miss Burbidge's evidence and not a finding as to the inherent likelihood or otherwise of the Appellant's account.

77. It is relevant that the Tribunal's summary of the Appellant's cross-examination of Miss Burbidge occurs in its consideration of whether the Appellant knew he was under investigation by the GMC. The Tribunal made reference to the conversation for the purpose of demonstrating that the Appellant was aware of the GMC investigation. That is a different matter from the question of whether the Appellant believed that the investigation was irrelevant for the purposes of the Bringing Back Staff exercise.

78. The Appellant's submission is not an attractive one given that the Tribunal had to find its way through a quantity of irrelevant material advanced by the Appellant. Moreover, the Tribunal's task was hampered by the lack of clarity in the Appellant's submissions and by the fact that he advanced a number of mutually inconsistent (and, indeed, directly contradictory) lines of argument. In addition, it is likely that if the Tribunal had addressed the conflict between the Appellant's account and that of Miss Burbidge it would have preferred the latter. Further, the Appellant's contention that he was told that the dealings with the GMC were irrelevant because he would not be given a medical post is hard to reconcile with the fact that on the Form he put "doctor" in the box for "job applied for".

79. I am nonetheless driven to the conclusion that even on the most benevolent reading of the Determination and even when full account is taken of the context this ground is made out. The only realistic reading of the Determination is that the Tribunal failed to appreciate the potential significance of the Appellant's case as to what had been said between him and Miss Burbidge and that it failed to make a finding on that issue. It follows that the Tribunal failed to address and to make a finding on a significant matter of dispute the resolution of which was material to the decision on the allegations. In those circumstances this ground of appeal succeeds. As a consequence ground 1(iii) also succeeds in that it was not open to the Tribunal to make a finding that the Appellant was dishonest without having resolved this issue.

Ground 3: Specification of the Allegation and/or a Failure to adjourn the Hearing.

80. Although expressed as arising out of an error by the Tribunal this ground amounts to an assertion that the proceedings were unjust because of a procedural irregularity. The irregularity is said to have been either the failure to require further specification of the allegation in advance of the hearing or a failure to adjourn the hearing on discovering the nature of the allegation. In his skeleton argument Mr Kohanzad said:

> "The Appellant understood that the allegations related to an alleged failure to mention his earlier GMC matters, that resulted in his suspension and then conditions, which were still in place on 6 June 2020. The Appellant had not understood that the allegations related to a failure to disclose the GMC FTP investigation into his dangerous driving conviction

> because he did not understand that he was subject to a GMC FTP investigation, per Ground 1. It was only at the hearing that the Appellant, for the first time, realised the nature of the allegation. The Appellant was disadvantaged by this because there were documents, which were potentially relevant to the allegations, which were not before the Tribunal. For example, various iterations of the Form were not before the Tribunal."

81. The assertions made in that passage were written on instructions but they were not supported by any statement from the Appellant either as to his understanding or as to the alleged disadvantage. The contention that the Appellant did not understand the case he had to face until the hearing and was disadvantaged thereby does not accord with the history of the proceedings leading up to the hearing before the Tribunal and at the hearing itself.

82. The Case Examiners' decision to refer the case to the Tribunal was made on 7th April 2022 and a copy of the reasoned decision was sent to the Appellant on 11th April 2022. The reasoning covered a number of matters but it made it clear that one of the allegations against the Appellant was that he had been subject to a GMC investigation at the time of making the Declaration; that the investigation had arisen out of the dangerous driving conviction; and that in failing to disclose that investigation the Appellant had made a false declaration. It is of note that the response from the Appellant recorded in that decision includes an assertion that he was not under investigation.

83. The Appellant submitted a witness statement to the Tribunal. As already noted this statement ran to 104 closely typed paragraphs and covered 28 pages. It addressed a number of matters several of which were not relevant to the proceedings before the Tribunal. At paragraphs 31 – 66 the Appellant addressed what he characterized as "this over-disclosure investigation". It is apparent from that part of the statement that the Appellant was aware that the allegation against him was that at the time of the Declaration he was subject to a GMC investigation flowing from the dangerous driving proceedings and that he had not disclosed this. The Appellant addressed that allegation in the statement saying in part that as he had disclosed the criminal proceedings there was no need for him to make further disclosure. In addition, the Appellant foreshadowed, at paragraph 65, the argument he advanced later in cross-examination, namely that at the time of the Declaration he had not been subject to a GMC investigation because he had not been served with notice of an investigation under either rule 4 or rule 5 of the Rules.

84. It is of note that in his cross-examination of Daniel Gore, the GMC's investigation officer, the Appellant mounted a sustained attack based on his (the Appellant's) contention that there had been no investigation at the time of the Declaration. In the course of that cross-examination the Appellant made repeated references to the need for letters under rule 4 or rule 5 to trigger an investigation. That cross-examination was on the second day of the hearing. In the course of that cross-examination and when the Appellant was pressing Mr Gore as to when the start date of the investigation was the Tribunal chair asked (transcript day 2 line 31) as to the relevance of that point. The Appellant replied saying that the point was "crucial" and the start date of the investigation was the date from when in completing the forms he would "have to inform anyone that a GMC investigation had started". The Appellant also raised, although rather more shortly, the issue of the start date of the investigation in his cross-examination of Dr Sarah Marwick.

85. It is possible that at an early stage in the matter the Appellant may have believed that the allegation against him was of a failure to disclose earlier GMC investigations arising out of matters other than the criminal proceedings. It is hard to see what basis there was for such a belief. However, even if that had been the Appellant's belief at an early stage in the proceedings it cannot have persisted after his receipt of the Case Examiners' decision and the terms of his witness statement and the line taken in cross-examination show that it was not his belief at the time of the hearing.

86. The transcript shows that some time was taken up on the first day of the hearing with argument about a potential amendment of the allegation against the Appellant. The terms of the amendment do not appear clearly from the transcript but there is no suggestion that it changed the case in the respect which the Appellant now alleges and still less was it said that as a consequence the hearing should have been adjourned.

87. In those circumstances there was no procedural irregularity on the part of the Tribunal in failing to order greater specification of the allegations or in proceeding with the hearing when it did. Still less than it can be said that there was injustice to the Appellant in that course. It is apparent that the Appellant was able to and did address the allegation based on his failure to disclose the investigation arising from the criminal proceedings.

Ground 5: The alleged Victimisation of the Appellant.

88. Section 27 of the Equality Act 2010 prohibits victimisation. It is unlawful victimisation to subject another person to a detriment because that other person has done a protected act. In order for there to be a finding that there was victimisation it is necessary to identify the relevant protected act and the detriment to which the person was subjected and for the subjection to the detriment to have been because of the protected act.

89. Ground 5 was expressed in the most general of terms. As it was developed the contention was that the Tribunal had treated the allegations which the Appellant had made of racist bias and behaviour on the part of the GMC and others as an indication that he lacked insight and had "attitudinal issues". The Tribunal treated those matters as relevant to its findings on impairment and sanction. It was said that the Appellant's allegations of racist conduct on the part of others were protected acts by virtue of section 27(2)(d) of the Equality Act. By treating those allegations as indicative of a lack of insight the Tribunal was subjecting him to a detriment because he had made the allegations and that, the Appellant contended, was unlawful victimisation.

90. There was only limited further particularisation in Mr Kohanzad's skeleton argument but he did refer to more passages in the Determination in the course of his oral submissions. However, care is needed to read those passages in their context and having regard to the structure of the Determination and of the Appellant's submissions to the Tribunal. Thus some of the passages to which Mr Kohanzad referred were not findings by the Tribunal but its recital of the findings made by other tribunals and, similarly, a passage described in the skeleton argument as a finding by the Tribunal is in fact part of the submissions which the Appellant made to the Tribunal.

91. The Tribunal did record at various points the Appellant's allegations that various of the bodies with which he had dealings had been influenced against him by racist bias. In addition to the passage reciting a number of allegations which I will quote below the allegations were noted at the following stages:

i) In Annex D the Tribunal recorded its reasons for dismissing the Appellant's submission, made at the close of the GMC's case, that the allegation should be dismissed for want of evidence. In the course of doing so it summarised the submissions which the Appellant had made and which had included:

"6. Dr Ali stated that the Tribunal would have heard, throughout his various submissions, his concerns regarding the GMC's racism and that '*the case would only go forward due to the colour of his skin'*. He further referred to the Rule 7 and 8 letters which highlighted that the GMC pandemic guidance was not applied equally to all and should have been followed despite the colour of their skin. He further stated that through hearing the GMC's case, it was quite clear that a pandemic occurred and so he stated that '*naturally the pandemic guidelines should be applied to all doctors regardless of colour, creed, caste and other legally protected characteristics'*

7. Dr Ali submitted to the Tribunal that, given the allegation before it, based on the Disclosure Barring Service declaration form, '*you have a doctor trying to leave the profession and GMC adding a nail in the coffin by adding NHS England into the accusation'*. He submitted that was not the original allegation before him on which his original written statements were based. He stated that such action on part of the GMC was to ensure that there were consequences for him."

ii) At the beginning of its analysis of the evidence for the purposes of the determination on the facts the Tribunal said:

"26. In the Tribunal's view, Dr Ali's evidence was largely unfocused and didn't clearly address the relevant issues that the Tribunal had the task to determine. Dr Ali's approach was to make various allegations against the GMC, stating that it had acted without propriety, had been racist towards him and other BAME doctors, had acted in bad faith and was *'unfit for purpose'*. He stated 'For the GMC to have preferentially accept *'White Privileged' complaints more-so if internal, whilst reducing FTP [fitness to practise thresholds] against BAME doctors.'* Dr Ali's accusations, statements and comments on such matters were not confined to the current allegations but encompassed his historic dealings with the GMC and previous MPT hearings and findings.

27. Dr Ali alluded to there being a conspiracy against him and collusion amongst the GMC staff and GMC witnesses which led the GMC to have made these allegations against him and in bringing the matter to an MPT hearing. He stated that the GMC had been *'fishing for another complaint'*. His view was that all the actions against him emanated from his initial *'whistleblowing actions'* from 2014 and the protected disclosures he had made. He further referred to the Judge who had sentenced him for the dangerous driving conviction, which followed a jury trial in the Crown Court as being prejudiced against him. He stated, '*I did undermine an angry racist Judge Bond, by pointing out the predicted compensation claim already occurred and was tempted to do everything the Judge was accusing me of, so I could be put in prison as that is nicer than the GMC whom will not consider issues once but multiple times, as has and is occurring'* The Tribunal did not entertain these views as they were not relevant to the task before it on the given allegations"

iii) When addressing the appropriate sanction the Tribunal noted the following submission made by the Appellant:

> 19. "Dr Ali submitted that the GMC had engaged in *'smoke and mirrors'* and referred to experiencing difficulties with the GMC based on his race. He stated that he was *'not white'* and asserted that this had caused him difficulties.
>
> 20. Further, Dr Ali stated that he did not have access to Legal Aid as GMC Tribunals are not-registered and not-funded by the public purse. He stated that he was not represented or provided with a defence which *'naturally leads to insight abuse by another all-white panel'*. He argued that any challenge is regarded as a '*lack of insight regardless of common-sense, justice or fairness'."*

92. Although the Tribunal noted those allegations it is necessary to consider the findings which it made and how they contributed to its decisions. The Appellant's insight was considered by the Tribunal at three points in the Determination.

93. When considering whether the dishonesty which it had found caused the Appellant's fitness to practise to be impaired the Tribunal said:

> "61. The Tribunal remained concerned with Dr Ali's evidence, the focus of which remained on his counter allegations against the GMC, Ms Burbidge, Dr Marwick, rather than on his own insight into the finding of dishonesty. Dr Ali continued to refer to the Form as an 'enquiry' at a 'pre-application stage' for 'voluntary work in a call centre' to minimise the seriousness of his actions. There was no evidence before the Tribunal that Dr Ali had understood the gravity of the dishonesty or the link between his actions and the finding or its significant impact on upholding and maintaining professional standards in the medical profession. Whilst Dr Ali had conceded impairment on 'public confidence' and referred to 'honesty' being a 'serious issue' there was no other evidence of reflection on his part. The Tribunal considered that Dr Ali had also not displayed sufficient insight. It took that view that, due to insufficient insight, also insufficient reflection and a lack remediation on Dr Ali9s part, there remained a risk of repetition."

94. In its consideration of whether there was a continuing impairment of the Appellant's fitness to practise by reason of the dangerous driving conviction the Tribunal said:

> "121. Overall, The Tribunal considered the totality of the evidence. It considered that the conviction was remediable despite it being denied. There had been a significant period of time since Dr Ali's fitness to practice was first found impaired due to his conviction. This was time he could have utilised to reflect, develop insight and remediate to deal with any future risk of repetition. It had not seen any meaningful recognition of its serious and grave nature from Dr Ali, it had found that he still showed significantly limited insight on the wider circumstances that led to the conviction, and it had not developed sufficient strategies to combat a risk of repetition. Overall, it had not allayed the concerns of the previous reviewing Tribunal.
>
> 122. The Tribunal also remained concerned that a significant proportion and focus of Dr Ali's evidence was on making counter allegations against others, such as:
>
> - Dr Ali referred to HHJ Mithani's judgment being altered at the influence of Ms Roberts, part of the GMC's. He stated that the draft judgment initially handed down was different to the finalised one.
> - Dr Ali's continued to detail his '*GMC difficulties'* emanating from his initial whistleblowing in 2014. Dr Ali also detailed that the GMC were racist towards him and referred to a previous GMC counsel's racist treatment of him.
> - Dr Ali referred to 'last minute' changes of allegation/s by the GMC and not granting the disclosures he sought under the Freedom of Information and Subject Access Requests.

- Dr Alli referred to the GMC/MPT not applying Rule 12 and Rule 21 correctly previously.
- Dr Ali referred to *'this case has been taken worse than killing someone, by the GMC'*.
- Dr Ali maintained that the GMC were prosecuting him twice - referring to 'double jeopardy' an issue dealt with in his appeal by HHJ Mithani KC.
- Dr Ali referred to his performance assessment, which was part of the initial MPT case in 2019. He stated that it involved 'marks which had been changed' on purpose.
- Dr Ali stated that in line with the CEO for GMC's view, '*the Medical Act 1983 provided far too much flexibility and cases like this get confusing when they get separated when they then get pulled back together'*.
- Dr Ali maintained that the issue of insight and remediation was not for this Tribunal.
- He referred to the Tribunal as a '*supposedly specialist medical Tribunal'*.

123. The Tribunal took the view that Dr Ali's strong views that this Tribunal did not have the remit to consider the issues of upholding public confidence and maintaining professional standards had shown his 'entrenched lack of insight' and a 'serious attitudinal issue'. It considered that in light of the counter allegations that Dr Ali had made listed above, Dr Ali's entrenched lack of insight and attitudinal issues, which had also been highlighted by the previous reviewing Tribunal, had worsened and were deep-seated. It considered that this was in line with Dr Ali referring to himself having a '*changed personality*' and becoming more '*stubborn*'. It considered that Dr Ali had not discharged the burden on him to persuade the Tribunal that his fitness to practice was no longer impaired by his conviction.

95. Finally, when it was considering the appropriate sanction the Tribunal included the following in its summary of aggravating factors.

> "31. The Tribunal further considered the inherent seriousness of Dr Ali's criminal conviction which was reflected in the Crown Court Judge's sentencing remarks where Judge had stated that Dr Ali had used his vehicle as a weapon and placed Mr P's life in danger. Dr Ali had referred to the incident as a '*freak incident*'. The Tribunal had found that Dr Ali's insight to be significantly limited and that he had not developed sufficient strategies to combat a risk of repetition. It had found Dr Ali to have an entrenched lack of insight and a serious attitudinal issue, which it had considered were deep-seated and had worsened since the previous reviewing Tribunal's decisions. In his further submissions, Dr Ali continued to minimise the gravity of the circumstances behind the conviction. The Tribunal considered that this continued to show a lack of reflection and insight. Dr Ali also continued to make counter allegations and focused on his perceived failings of others.
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> 32. The Tribunal considered that the lack of insight continued despite the passage of over three months since its impairment decision, during which Dr Ali had also seen the judgment of HHJ Mithani which clearly identified how Dr Ali could demonstrate remediation and insight despite denying the criminal offence. The Tribunal considered such continued lack of insight on both the dishonest conduct and criminal conviction, to be an aggravating feature in this case."

96. When those passages are read properly and in context a number of points emerge. First, that the Appellant was alleging not just that his treatment by the GMC and by earlier tribunals had been influenced by racist bias but also that such bias had affected his treatment by others including the courts. Second, the allegations of racism were only a part of the matters to which the Tribunal referred and only part of the

allegations which the Appellant had made and they were by no means treated by the Tribunal as being the most significant part of those matters. Finally, and crucially, the finding that the Appellant lacked insight was not based on the fact that he had made allegations of racism but that he had focused on the alleged racism and had regarded it as relevant to the matters before the Tribunal. The concern was not that he had made such allegations but that he remained focused on them rather than on his own conduct. This is particularly apparent in the passage where the Tribunal was addressing the continuing impairment flowing from the dangerous driving conviction but was also present in the other passages. The Tribunal took particular account of the fact that the Appellant had continued to refer to the allegations rather than facing up to the gravity of the criminal conviction. That was a matter which had been determined by a jury and where the judge's sentencing remarks had made clear the serious nature of the conduct. It follows that even if the making of the allegations is properly to be seen as a protected act the Appellant was not being subjected to a detriment for having done that act. The finding of a lack of insight was made not because the Appellant had alleged that others were racist but because he had focused on that allegation without addressing his own conduct or the consequences of the findings which had been made and which the Tribunal was bound to regard as having been properly made.

97. It follows that ground 5 has no substance and is to be dismissed.

Ground 7: The alleged Failure to have regard to the Appellant's Submissions.

98. This ground can be disposed of briefly.

99. The Appellant contends that the Tribunal failed to have any regard to his submissions. The ground was maintained in that form in Mr Kohanzad's skeleton argument and in his oral submissions with the Tribunal's alleged failure to have regard to the remedial work being advanced as an example of this general failure.

100. A wholesale failure by the Tribunal to consider the Appellant's submissions would clearly have meant that the Determination could not stand but it is evident that there was no such wholesale failure. It is apparent that the Tribunal took care in seeking to identify the points being made by the Appellant and to address them. That was not an easy task given the voluminous and unfocused nature of those submissions. I have addressed above the Tribunal's approach to the conflict between the evidence of the Appellant and Miss Burbidge but it is apparent that there was no wholesale failure to have regard to the Appellant's case. Even in relation to the example on which the Appellant relies as illustrative of this failure the point has no substance. It is clear that the Tribunal took account of the mitigating factors put forward by the Appellant in relation to the sanction. Those matters included the remedial work and the Tribunal noted the counselling and psychological work which the Appellant had undergone and the positive references which had been received. The Tribunal noted those matters in short terms but it was entitled to do so. Similarly, it explained in brief but adequate terms why it attached only limited weight to these matters. The Tribunal's approach in that regard cannot be criticised and this ground fails.

Conclusion.

101. It follows that the appeal succeeds on grounds 1(iii) and 2 but fails on grounds 1(i) and (ii), 3, 5, and 7. It was common ground before me that a finding in the Appellant's favour on ground 2 would necessitate remission of the matter for

reconsideration by a tribunal and, subject to submissions on the form of order, that is the order which will be made.