CO/3596/2017

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IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

THE ADMINISTRATIVE COURT

The Rolls Building

Thursday, 15th March 2018

Before:

MR JUSTICE ANDREW BAKER

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B E T W E E N :

FOPMA — Appellant

- and -

GENERAL MEDICAL COUNCIL — Respondent

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MR A MUSTAKIM (instructed on a Public Access basis) appeared on behalf of the Appellant.

MR R DUNLOP (instructed by the General Medical Council) appeared on behalf of the Respondent.

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J U D G M E N T

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JUSTICE ANDREW BAKER:

1. The appellant, Dr Emke Fopma, appeals to this court under s.40 of the Medical Act 1983 against a decision of a panel tribunal of the Medical Practitioners Tribunal Service (the 'MPTS') to impose the sanction of erasure in relation to findings it made that certain serious misconduct on his part impaired his fitness to practise.

2. In my judgment, the disposal of this appeal does not give rise to any new point of principle or any matter of practice or approach of any general significance. It turns simply on the particular facts of the case before the tribunal in June of last year. In those circumstances and having come to a clear view as to the correct disposal of this appeal, I have chosen to give judgment straight away so that Dr Fopma and the respondent, the General Medical Council, know where they stand.

3. The principles to be applied by the court sitting as an appellate court under s.40 are well-known. They have recently and helpfully been collected in the context, in fact, of appeals brought by the General Medical Council under s.40A of the 1983 Act, in *GMC v Jagjivan and PSA* [2017] EWHC 1247 (Admin), a decision of the divisional court.

The facts

4. These may be relatively shortly stated. I take them from the formal record of determinations of the tribunal. Dr Fopma qualified as a doctor in Holland in 1991 and practised there until July 2001, although for a period of eighteen months or so in the mid-1990s he was also registered here with the GMC. Between July 2001 and March 2003, when Dr Fopma returned to the Netherlands, he worked in Scotland.

5. In May 2003 an allegation arose in relation to Dr Fopma's work at the Meander Medical Center in the Netherlands of sexual touching of two female patients under the age of sixteen whilst they were sleeping. Dr Fopma was prosecuted as a result by the criminal authorities in the Netherlands. On 15 September 2004 he was convicted of a criminal offence in relation to each of the two complainant patients.

6. Dr Fopma appealed those convictions. Just over a year later, on 10 October 2005, the appellate court in Amsterdam acquitted him in relation to one patient, but upheld a conviction in relation to the other. He was sentenced to six months' imprisonment suspended for two years. In February 2007 a further appeal by him against the remaining conviction was rejected by the Supreme Court of the Netherlands.

7. I have been told, although there is no evidence before me of this and there is no application to adduce fresh evidence on the appeal in any event, that Dr Fopma has much more recently sought to initiate some further process of review, challenge or appeal available to him in the Netherlands. That is not something that was before the tribunal. In the absence of evidence at all or an application, if there had been evidence, on well-founded grounds, to adduce fresh evidence on this appeal, that is not something I can take into account either.

8. On 26 October 2004 Dr Fopma made an application to join the GMC Specialist Register in the UK. In that application form there was a standard character declaration section to be completed by all applicants. The applicant completing the form was specifically instructed to provide full details of any affirmative answer to any of the character declaration questions. In that regard in particular, the form stated that if the applicant had been convicted of any offence in a court of law, the applicant had to provide the date of conviction, name and address of the court and details of any penalty imposed to enable the GMC as regulator to make further enquiries and follow up as it felt might be appropriate.

9. That section of the form concluded with the clearest possible statement of the consequences of a failure to provide accurate answers to the character declaration questions in these terms:

> "You should be aware that if you fail to provide accurate and truthful information, we may refuse, suspend or erase your registration."

10. The character declaration questions asked, amongst other things, whether Dr Fopma had ever been convicted of any offence by a court of law, whether he had ever had a complaint against him upheld in his duty as a doctor in any country, whether there were any proceedings pending against him or other matters of which he was aware that might lead to his registration in his home country being removed, suspended or restricted in any way, and whether there was any reason why he would not be entitled to a certificate of good standing from the regulatory authority in any of the countries where he had worked since he qualified as a doctor. To all four questions, he answered no. All four answers were, as he admitted before the tribunal, untrue, known by him at the time to be untrue, misleading and dishonest.

11. The inference from the timing is inescapable, in my judgment, that Dr Fopma's GMC Specialist Registration application in October 2004 was completed, and was completed in that dishonest way as found by the tribunal, in order to seek to continue his medical career in the UK at a time when the criminal proceedings continued to be pending against him in the Netherlands, making it, for obvious reasons, in practical terms impossible for him to be working in the Netherlands.

12. On the basis of, amongst other things, Dr Fopma's successful entry on the GMC's Specialist Register by reference to that application, he practised in Scotland until October 2007 when he transferred to the orthopaedic department at Jersey General Hospital in the Channel Islands. He worked there as a consultant orthopaedic surgeon until resigning in December 2015.

13. That resignation followed an anonymous email to the hospital suggesting that he had the criminal record in Holland that indeed he had, as I have described. The medical director at the hospital in Jersey, having checked the information asserted by the anonymous email with the Meander Medical Center in Holland, decided, as it seems to me was inevitable, at least as an initial or interim measure, to exclude Dr Fopma from the Jersey hospital, upon which he tendered his resignation and the matter was then referred to the GMC.

The decision

14. In the normal way, the tribunal's relevant record of its determinations contains two separate parts: firstly, explaining the tribunal's conclusions on the question of impairment and secondly, having determined impairment, to set out its reasoned determination as to sanction.

15. Again in the usual way, those separate aspects of the tribunal's determinations were dealt with in separate stages of the tribunal procedure, the tribunal handing down to Dr Fopma

and his then representatives the conclusion as to impairment before moving on to consider sanction. Dr Fopma, as then advised, took no active part and through his representatives made no submissions to the tribunal in relation to sanction.

16. The tribunal's decision in relation to impairment starts by setting out the detailed conduct said to amount to or potentially to amount to serious misconduct on Dr Fopma's part. It recited first the original convictions in the district court of Utrecht, the sentence imposed by that court in September 2004, then the appeal court ruling in Amsterdam a year later and the sentence imposed by that court.

17. It recited that the offences of which Dr Fopma had been convicted by the first instance court and also the single offence of which he remained convicted after the appeal would be matters constituting criminal offences here if they had been committed in England and Wales. It then recited charges that Dr Fopma had:

> "failed to notify the GMC without delay that you had been charged with the criminal offences detailed...
>
> [and] failed to notify the GMC without delay that you had been convicted of the criminal offences detailed..."

18. It then recited the matter of the false answers on the Specialist Registration application form.

19. In every respect, and to this extent at least to give Dr Fopma credit, all charges were admitted and therefore found proved. Those charges, therefore, included, as I have indicated by quoting the failure to notify charges, not only that the application form had contained knowing and dishonest falsehoods, but also that there had been failures to notify the GMC here as the relevant regulator for the purposes of Dr Fopma's practise since 2004, that is to say independently of the question of positive false statements in the application form. In relation to those accepted charges of failures to notify, Dr Fopma also accepted before the tribunal and it found proved that his conduct was at the time misleading and dishonest.

20. After then reciting the background from which I took my summary of the facts, the tribunal turned to the question of impairment. It summarised, so far as I can see entirely fairly, submissions made to it on the one hand on behalf of the GMC and on the other hand on behalf of Dr Fopma by his then representative, a Jersey legal practitioner whom the tribunal had permitted pursuant to their rules to act as advocate for Dr Fopma at the hearing.

21. The tribunal then turned to its own conclusions, correctly identifying at the outset that the issue of impairment was one for the tribunal to determine exercising its own judgment and that the question arose in the context of its primary purpose, which is to uphold the overarching statutory objective set by the 1983 Act to protect and promote the health, safety and well-being of the public, to promote and maintain public confidence in the medical profession and to promote and maintain proper professional standards and conduct for members of that profession.

22. The tribunal accepted and proceeded upon the basis of the facts of the offence of which Dr Fopma remained and today remains convicted, namely that in his professional position as a doctor, he had indecently touched a young patient whilst she was recovering in hospital with a broken leg and concussion. She had been a victim in a vulnerable position of which Dr Fopma took advantage. As the Amsterdam court had said in sentencing Dr Fopma:

> "It is precisely in this kind of situation and surroundings that patients must be able to trust their fellow human beings to ensure that nothing stands in the way of their moral and physical safety."

23. The tribunal concluded that the offence was extremely serious and displayed a clear breach of the trust expected and required of a doctor. The tribunal said it was mindful that Dr Fopma continues to maintain his innocence. They concluded, however, that they were not in a position to and would not go behind the facts that had given rise to the conviction.

24. I did not understand there to be any challenge on appeal, so far as it went, to that conclusion. To my mind, it was entirely open to the tribunal and correct of it to proceed on the material that was before it on the basis that indeed Dr Fopma had sexually assaulted the 15 year old patient in the way charged against him in the Netherlands.

25. The tribunal continued that it:

> "was concerned that he appears not to have reflected, meaningfully, on the damage caused to the reputation of the medical profession by the fact of his conviction."

26. In all those circumstances, the tribunal determined that his fitness to practise was indeed currently impaired by reason of his conviction.

27. As it seems to me, in those circumstances, the tribunal was proceeding and was entitled to proceed on the basis both that Dr Fopma had actually committed the gross breach of trust by way of the sexual assault on the young female patient and also, even if it be the case, as he continued to protest, that that was not so, he had not grasped the seriousness of the damage to the reputation of the profession resulting from the fact of his conviction.

28. In those circumstances, as it seems to me, the finding that fitness to practise was currently impaired by reason of the sexual offence and his conviction for it was correct, even though that took place in 2004 or, if one goes from the date of the appeal judgment, 2005 and the tribunal was considering the matter as at 2017.

29. In those circumstances, it is not necessary for the purposes of this appeal to consider whether Mr Dunlop is correct on behalf of the GMC to submit as he did that the nature of the underlying sexual misconduct was in effect bound to lead to a finding of impairment, however long after the fact it first came before a tribunal. In that regard, he referred me in particular to *Yeong v GMC* [2009] EWHC 1923 (Admin), particularly at [48] and [50]-[51].

30. In relation then to the dishonest conduct, the tribunal took some care to review the specific guidance such as existed in the various editions potentially relevant of the GMC's Good Medical Practice (the 'GMP'). Having done so, they concluded, it seems correctly, that at the time of the criminal proceedings in 2004 and the appeal in 2005, there was not as such in the GMP a specific and explicit duty articulated to report criminal convictions to the GMC as regulator and that the terms in which such specific and explicit articulation of a duty to report has subsequently existed in later editions of the GMP meant that those did not apply because the criminal proceedings in relation to Dr Fopma had commenced before those later editions came into effect. However, it was accepted by Dr Fopma and on his behalf that it was wrong of him as a UK doctor regulated by the GMC to hide the conviction, notwithstanding the lack of a specific, explicitly stated, duty to report.

31. The tribunal concluded, and there is no basis upon which in this court I could second-guess this assessment of the specialist tribunal, that it was self-evidently the case that a doctor in

Dr Fopma's position should have reported his criminal convictions, as they occurred, to his regulator. They agreed with Dr Fopma's own acceptance in his evidence to the tribunal that his conduct in failing to inform the GMC of his convictions was dishonest.

32. They dealt with a particular submission made on Dr Fopma's behalf that as regards the Specialist Register application form, he had received certain legal advice in Holland as to the current effectiveness of his initial convictions whilst his appeal was pending. For that matter, it may be that would also have been as to the effectiveness of the conviction upheld on first appeal whilst the second appeal was pending. This was said to affect the proper conclusion to be drawn as to honesty, dishonesty or, at all events, degree of dishonesty in the positive false answers given on the application form.

33. The tribunal concluded that regardless of any such legal advice, on the evidence they had, including Dr Fopma's own evidence, he knew full well he was signing declaration answers which contained false statements. One only has to glance at the series of questions asked to appreciate that even if, which is at best questionable, the legal advice he told the tribunal he had received might have impacted upon how correctly to answer the question as to whether there had ever been a conviction of an offence by a court of law, it could not possibly excuse the other false and dishonest answers.

34. The tribunal concluded that his actions in falsely completing the form were a clear breach of the honesty and integrity expected of doctors. They concluded that the motivation in making those dishonest declarations was to obtain the Specialist Registration and on the back of that to obtain and retain employment.

35. They concluded that the totality of the dishonest conduct, both the failure to disclose irrespective of the application form and the application form answers themselves, constituted serious misconduct.

36. They considered then whether that was serious misconduct impairing Dr Fopma's fitness to practise. They had careful regard to the main reasons summarised in the Fifth Shipman Report by Dame Janet Smith why a tribunal would find fitness to practise had been impaired and specifically reminded themselves of the decision of *Cohen v GMC* [2008] EWHC 581 (Admin) in relation to findings of impairment.

37. That case in particular, as also reiterated in *Yeong* at [21], emphasises, as Mr Mustakim for Dr Fopma before me today has emphasised, the prospective, forward-looking nature of the assessment of fitness to practise that is required. That is to say, impairment is not to be judged by reference, on its own, to the seriousness or otherwise of the misconduct that in any given case may be more or less historic, but by reference to its impact on the matter of fitness to practise as things stand when the tribunal is called to consider the issue.

38. That said, however, and as Mr Dunlop emphasised again by reference to the decision in *Yeong*, the question of impairment when dealing with, at all events, sexual abuses of doctor/patient trust (and matters of dishonesty he submitted would be similar in kind), the tribunal must bear in mind that a key aspect of its overarching aim is to uphold the reputation of the profession. A finding of impairment is the gateway to the jurisdiction to impose sanctions.

39. Put the other way round, a failure to find impairment in any given case, whilst warnings as to future conduct can still be issued, is tantamount to an indication on behalf of the profession that conduct of the kind in question need not have regulatory consequences. If that, depending on the nature of the conduct in question, would itself be an unacceptable

conclusion, then that can in any given case be a sufficient basis in itself to justify or indeed compel a conclusion of impairment.

40. In any event, in this case the tribunal went on to find as follows:

> "The tribunal had regard to Dr Fopma's oral evidence in which he acknowledged that he would have had no intention of disclosing his conviction if the anonymous email had not been received by the Hospital. The tribunal was of the view that Dr Fopma's actions were borne out of self-interest to keep and maintain his employment, without meaningful insight into the impact of those actions on patients, the public or the reputation of the profession. As such, Dr Fopma's misconduct cannot be said to have been remediated.
>
> The tribunal also determined that, whilst Dr Fopma was unlikely to repeat the conduct which led to this hearing, this was primarily because of the effect that it has had upon him rather than reflection and insight into the conduct itself and its effect on the reputation of the medical profession.
>
> The tribunal determined that Dr Fopma's conduct breached fundamental tenets of the profession and brought the medical profession into disrepute. It also concluded that the public interest would not be upheld if a finding of impairment was not made in this case."

41. Those assessments were, of course, assessments by a tribunal that had heard from Dr Fopma and been able to make a judgment about him in person. They are assessments which the appeal before me today has given me no basis to criticise or second-guess.

42. Whilst Mr Dunlop cited this case to me in the context of sanctions, the justifiability of the tribunal's conclusion in this case that in those circumstances Dr Fopma's fitness to practise was currently impaired by reason of his dishonesty is to my mind well-supported by the decision in *GMC v Theodoropoulos* [2017] EWHC 1984 (Admin). In that case, a consultant ophthalmologist had dishonestly amended his entry on the medical register to claim and present himself as possessing a licence to practise. The resulting dishonestly amended certificate was then used by him in application for employment as a locum.

43. The observations of Lewis J in that case, especially at [36], [38] and [43]-[46], as to the absolute importance of integrity on the part of medical practitioners in relation to matters of their own qualifications and registration, and as a result in relation to applications to be employed, seem to me to be entirely apposite in the present case. Though, hence its citation to me by Mr Dunlop, the observations were in the context of the question of sanction, it follows from them and the disposal of that case in favour of the appellant GMC substituting erasure for the tribunal's decision only to suspend that there can be no possible criticism of this tribunal's decision in this case that Dr Fopma's dishonesty impaired his fitness to practise.

44. To the extent, therefore, that the appeal before me did challenge the determination that fitness to practise was impaired, although to be fair to him Mr Mustakim pressed that ground of appeal more lightly than he pressed the appeal against sanction, it seems to me the appeal has no hope of success, is not well-founded and it is dismissed.

45. Mr Mustakim's primary focus, as I have just indicated, was upon the tribunal's decision as to sanction. In that regard, the tribunal made clear that it had approached the matter by reference to the May 2017 Sanctions Guidance published jointly by the GMC and the

MPTS. There is no suggestion that they were approaching the matter incorrectly by deriving guidance from that document.

46. By para.3 of the guidance, tribunals are enjoined to base decisions on the standards of good practice established in the GMP and on the advice given in the guidance. Of course, that does not mean that the sanction in any given case could properly be mandated as such by the guidance. It does, however, mean, as this tribunal plainly did, that tribunals when considering questions of sanctions must treat the steer as to appropriate sanctions provided by the advice set out in the guidance as an authoritative steer.

47. The tribunal stated that throughout its consideration of the matter, it took account of the overarching objective that I have already mentioned and sought to apply the principle of proportionality, balancing Dr Fopma's personal interests with the public interest. They recited the aggravating and mitigating factors they had identified and taken into account:

> "12. The tribunal gave careful consideration to the aggravating and mitigating factors present in Dr Fopma's case.
>
> 13. In mitigation the tribunal had regard to the following factors:
>
> • The lapse of time since the incident which led to Dr Fopma's conviction;
>
> • There was no evidence to suggest that Dr Fopma had repeated the actions which led to his conviction; it appears to have been an isolated incident;
>
> • Dr Fopma admitted fully the facts alleged against him;
>
> • He also made an apology to the GMC at the start of his oral evidence which the tribunal considered to be a genuine expression of remorse;
>
> • He had undertaken a Masters degree in Health and Economics Management and certain courses on ethics and decision making since December 2015;
>
> • There were no previous fitness to practise proceedings, either in the UK or abroad;
>
> • No other professional or work related concerns had been raised;
>
> • The tribunal accepted testimonial evidence to the effect that Dr Fopma was a competent surgeon who was well respected by patients and colleagues. However, it noted the conclusion of paragraph 124 of the SG which states that *"Evidence of clinical competence cannot mitigate serious and/or persistent dishonesty"*. Furthermore, insofar as the tribunal also received testimonial evidence relating to Dr Fopma's honesty, it balanced that character evidence with the dishonesty admitted and found proved in this hearing.
>
> 14. The tribunal balanced the mitigating factors against what it considered to be the aggravating factors in this matter:
>
> • The conviction was for a sexual offence on a vulnerable 15 year old patient who was sleeping in hospital following an operation;
>
> • There was an abuse of Dr Fopma's position as a doctor in carrying out the offence and a grave breach of the trust that is placed in doctors;

• Having been convicted, Dr Fopma's response was to hide the conviction by failing to declare it to his regulator;

• Further, Dr Fopma made a conscious and deliberate decision to make false declarations in his application to join the Specialist Register, only weeks after he was convicted;

• There was persistent dishonesty by Dr Fopma which began in 2004 and which continued for a period of around 11 years. Dr Fopma would not have voluntarily disclosed the conviction, and accepted that he would have carried on working, if not for the receipt of the anonymous email in 2015."

48. Having identified those factors in that way, the tribunal adopted the standard approach also recommended by the Sanctions Guidance of considering its options "bottom up", starting with whether it could even be a case in which it was appropriate to take no action, moving then to consider, having answered that question in the negative, whether the overarching objective was sufficiently served or would be sufficiently served by the imposition of conditions on Dr Fopma's registration before moving in turn to suspension and then erasure.

49. Whilst I did not understand there to be any challenge to the conclusions that neither no action nor the imposition of conditions was sufficient, so that the focus of the appeal was whether the tribunal erred in proceeding all the way to erasure, it is worth pausing just to record the way in which the tribunal expressed themselves in reaching those two prior conclusions.

50. As regards taking no action, they concluded that doing so would be:

> "neither sufficient, proportionate nor in the public interest... such a decision would be wholly inadequate as there were no exceptional circumstances to justify taking no action."

51. They thus concluded, it seems to me plainly correctly, that it would take something quite exceptional in the particular circumstances of a case for no action to be justified in relation the type of misconduct involved in this case.

52. In relation to the possibility of imposing conditions, they concluded that it would not be possible to formulate workable or appropriate conditions to protect the public interest and maintain public confidence in the profession and stated that:

> "Conditions would not address the serious findings made regarding Dr Fopma's conviction for sexual assault and his persistent dishonesty in failing to disclose his conviction to the GMC, particularly given the lack of any meaningful insight by Dr Fopma."

53. As regards suspension and in turn then erasure, the tribunal decided as follows:

> "20. The tribunal then went on to consider whether suspending Dr Fopma's registration would be appropriate and proportionate.
>
> 21. The tribunal was mindful that there had been no repetition of the behaviour which led to Dr Fopma's conviction and that there may not be a significant risk of repetition. However, as it has already determined, this is primarily because of the effect that it has had upon him rather than reflection and insight into the conduct itself and its effect on the reputation of the medical profession.

22. Furthermore, the tribunal had regard to the serious nature of the conviction, namely an offence against a vulnerable 15 year old patient who was recovering in hospital after an operation. The tribunal was of the view that Dr Fopma had abused his position of trust as a doctor in order to commit the offence, and that such abuse was extremely difficult, if not impossible, to remediate.

23. The tribunal also considered Dr Fopma's misconduct in failing to declare his conviction to the GMC and the dishonesty in relation to his application for Specialist Registration. It determined that Dr Fopma's actions constituted persistent dishonesty over a number of years which breached a fundamental tenet of the profession. This breach was motivated by Dr Fopma's desire to obtain and retain employment, and was self-serving. It would have continued indefinitely had Dr Fopma's conviction not been revealed to the Medical Director at Jersey.

24. Since that time, and during the period leading to this hearing, Dr Fopma does not appear to have reflected meaningfully on the damage caused to the reputation of the medical profession.

25. Dr Fopma's conviction, and his misconduct thereafter, are fundamentally incompatible with continued registration and the tribunal therefore determined that suspension was neither an adequate nor a proportionate response to protect patients and maintain public confidence in the profession.

Erasure

26. The tribunal had regard to paragraph 109 of the SG concerning factors which may indicate that erasure is appropriate. It considered that the following factors were present in this case:

"a. A particularly serious departure from the principles set out in Good medical practice where the behaviour is fundamentally incompatible with being a doctor.

b. A deliberate or reckless disregard for the principles set out in Good medical practice and/or patient safety.

c. Doing serious harm to others (patients or otherwise), either deliberately or through incompetence…

d. Abuse of position/trust …

e. Violation of a patient's rights/exploiting vulnerable people…

f. Offences of a sexual nature…

…

h. Dishonesty, especially where persistent and/or covered up…

i. Putting their own interests before those of their patients…

j. Persistent lack of insight into the seriousness of their actions or the consequences."

> 27. In relation to Dr Fopma's conviction, the tribunal also had regard to paragraph 116 of the SG, and noted that the purpose of the hearing was *"not to punish the doctor a second time for the offences they were found guilty of"*. However, it also bore in mind its responsibility to maintain the high standards and good reputation of the profession.
>
> 28. Dr Fopma's conviction was for a sexual offence, and the tribunal therefore gave further regard to paragraph 150 of the SG, which states:
>
> *"Sexual misconduct seriously undermines public trust in the profession. The misconduct is particularly serious where there is an abuse of the special position of trust a doctor occupies, or where a doctor has been required to register as a sex offender. More serious action, such as erasure, is likely to be appropriate in such cases."*
>
> 29. The tribunal determined that Dr Fopma's misconduct constituted dishonest behaviour which was persistent, and was intended to cover up the fact of his conviction. It noted paragraph 128 of the SG, which states:
>
> *"Dishonesty, if persistent and/or covered up, is likely to result in erasure..."*
>
> 30. The tribunal concluded that both Dr Fopma's conviction and his misconduct, as discrete and separate matters, would each give rise to a sanction of erasure. Taken together, those matters led the tribunal to the conclusion that erasure was the only means of protecting the public.
>
> 31. Accordingly, the tribunal determined to direct that Dr Fopma's name be erased from the Medical Register."

Discussion

54. With respect to Mr Mustakim, who settled the grounds of appeal and initial skeleton argument in this case, the challenge to the determination that erasure was the sanction required and appropriate in this case was initially somewhat diffuse and unfocused. To his credit, it may be that Mr Mustakim in preparing for the hearing and in seeking to respond to the respondent's skeleton argument settled by Mr Dunlop recognised exactly that. His submissions today, if I may say so, have been most helpfully focused, following also a more focused reply skeleton in the form of further written submissions.

55. Although he numbered them slightly differently, as I take them he raised effectively six grounds of particular challenge to the tribunal's conclusion. Firstly, he submitted that the tribunal had failed to give due weight to the decisions respectively of the appeal court in Amsterdam and the Dutch regulator not to prohibit Dr Fopma from continuing to practise as a doctor.

56. I have already quoted the set of factors favourable or potentially favourable to Dr Fopma that the tribunal said that they had identified. They did not include any express reference to those decisions not to prohibit Dr Fopma from being entitled to continue to practise. If, therefore, those decisions were decisions that ought materially to have influenced the tribunal, there might be merit in this ground of appeal.

57. Taking first the criminal court, it does appear from the record I have, which I understand was also before the tribunal, that at the sentencing stage the Dutch public prosecutor did apply for an order from that court barring or provisionally barring Dr Fopma from employment as a doctor. The criminal court concluded, that is in circumstances where it

was imposing a suspended sentence of imprisonment, that a conditional ban from employment imposed by it as a criminal court would be a punishment too far.

58. As it seems to me, that decision of a criminal court in relation to what criminal sanctions were required to satisfy the principles, whatever precisely they may be, of the Dutch criminal law in relation to sentencing crime is of no material significance to an MPTS tribunal 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.

59. Turning then to the Dutch regulator, there appear to have been two potentially relevant stages. Recently in the context of the matters in this case, that is to say in July 2016, the regulator declined to follow the lead of the GMC in this country, which had by then temporarily suspended Dr Fopma pending the disciplinary process resulting in the tribunal decision now before me. It did so because Dr Fopma's dealings with the Dutch regulator had been quite different from his dealings with the GMC. It appears that he had at all times been full and frank with the Dutch regulator. What is more, he had not, since the original criminal complaint had arisen, sought to practise medicine in the Netherlands.

60. Whilst still recording that the original conduct and the failure to disclose his conviction to the GMC in the UK were serious matters, the Dutch regulator decided that from its point of view, striking Dr Fopma off the Dutch register would be an overwhelmingly unreasonable sanction. It therefore applied what it referred to as a hardship clause in its governing law or regulation so as to depart from the principle of following a foreign restriction upon his registration.

61. It seems to me that it would be most odd for a tribunal of the MPTS in this jurisdiction to be required at the stage of imposing a final sanction to have to defer or take any particular account of a refusal by the Dutch regulator, for reasons entirely peculiar to the doctor's dealings with that regulator, not to follow an interim suspension that had been imposed in this jurisdiction.

62. That brings me to the second of the two stages, but the earlier chronologically. It appears, as recited in the much more recent Dutch regulatory letter of July 2016, that in 2007 the Dutch regulator had decided to close any case against Dr Fopma arising out of the original underlying sexual misconduct and criminal conviction and not to bring any disciplinary proceedings.

63. The upshot of that decision, namely that there were no active disciplinary proceedings against Dr Fopma in the Netherlands, was reflected in a letter dated 3 October 2007 from the Dutch regulator addressed "to whom it may concern" confirming Dr Fopma's clean registration in Holland. The background to that, however, reveals that it does not constitute and should not have been regarded by the tribunal as constituting any material support for the proposition that the tribunal should have had second thoughts about imposing the sanction of erasure.

64. The background to that decision, as Mr Dunlop was able to demonstrate from the underlying material such as the court has it, was this: in late April 2007, following the Supreme Court decision in the Netherlands upholding the remaining conviction against Dr Fopma, he was the subject of a regulatory inspection and meeting. He made full disclosure to the Dutch regulator of the fact that he had not given disclosure of what had been happening in the Netherlands to his then current employer in the UK. This was at the time when he was still working in Scotland.

65. It is not entirely clear whether that disclosure also extended to disclosure that he had not even told the GMC as his UK regulator. Certainly there is no hint that it extended to disclosure that in order to obtain the Specialist Registration with the GMC under which he was practising, he had made deliberately false statements by reference to what in fact had been happening in the Netherlands.

66. The report of the regulatory inspection meeting records Dr Fopma as indicating that his failure to be frank with the then employer in the UK was making him feel very uncomfortable and he did not know exactly what to do. The inspector is recorded as having indicated that he could not give Dr Fopma any advice and Dr Fopma should reflect on the subject himself.

67. In circumstances where Dr Fopma thus had been at all events relatively frank in his dealings with the inspector and thus the Dutch regulator, he was not presently seeking employment as a doctor in the Netherlands, and it was made clear to him that he must not seek employment in the Netherlands without further conversations with the regulator in relation to the underlying criminal conduct and conviction, a decision was made to take no action.

68. It is perhaps not necessary to the judgment that this court needs to make to come to any final view as to the appropriateness of that response or the terms in which in October 2007 the Dutch regulator in effect issued an unqualified certificate of good standing in relation to Dr Fopma. I do say, however, that it is somewhat concerning to see that even if understandably the Dutch regulator regarded it a matter for Dr Fopma to decide what he would or would not do to rectify the discomfort he reported as feeling because of his dishonesty in the UK, the Dutch regulator did not regard the disclosure to it, as his regulator for an ongoing registration in Holland, of his dishonesty in relation to his employment as a physician in this country as a matter of rather greater concern.

69. Be that as it may, the basis upon which the Dutch regulator in fact was dealing with Dr Fopma, as I have described, and the particular and somewhat unusual sense in which in fact it had closed any case on him, seems to me to mean that again there is no reasonable basis for supposing that the tribunal ought to have been influenced by that towards a less severe sanction than it otherwise judged to be necessary and appropriate.

70. Accordingly, on this first ground of challenge, whilst the lack of particular reference to this aspect of the matter by the tribunal in its determination means that I cannot be sure whether they overlooked it or took it into account but made of it something similar to what I have made of it, it does not give rise to a well-founded ground of appeal.

71. Secondly, Mr Mustakim relied heavily on the lapse of time, that is to say the lapse of time principally between the commission of the sexual offence and the resulting prosecution and conviction as upheld on appeal ultimately in 2005 and the dishonesty in the October 2004 application form, and the time at which sanction fell to be considered by the tribunal here last summer.

72. It seems to me that there is no basis for the suggestion, the tribunal having specifically identified that factor as mitigating and as having been taken into account, that it has not been properly taken into account. Apart from anything else, an insuperable difficulty for Dr Fopma in the combined circumstances of his original offending and his prolonged dishonesty in relation to it (and I shall come back to that second observation) is that the more time that went by, in one sense the more he could say that the sexual offending had become historic, but on the other hand the more prolonged and thus serious had become his ongoing dishonesty to his regulator about it.

73. Thirdly, Mr Mustakim submitted that the tribunal had given inadequate weight to matters of rehabilitation or remediation. The matters relied upon, however, are again the matters expressly identified by the tribunal as having been mitigating factors and having been taken into account. It is not the case on the particular facts of this matter that the only possible reasonable conclusion in the light of those matters is that a sanction short of erasure was appropriate.

74. In those circumstances, the tribunal having properly identified the features of the case in question and said that they had been taken into account, there is no basis, in my judgment, for concluding that they had not been given due and appropriate weight.

75. Fourthly, Mr Mustakim took me through and emphasised the very positive content of a series of character testimonials, both from direct colleagues and wider professional colleagues of Dr Fopma's and also indeed from patients and referring GPs.

76. I have some difficulty in assessing how far that testimonial evidence in truth goes in circumstances where, although a lot of it (not necessarily all of it) indicates that it was provided with knowledge of the matters alleged against Dr Fopma, it is far from clear even in relation to those pieces of evidence whether they are written by character referees who understand the allegations against Dr Fopma to be well-founded, particularly in relation to the original sexual offending. It may well be that the source for the testimonial witnesses' understanding of what was before the tribunal came from Dr Fopma himself, he, of course, continuing to maintain that it did not happen.

77. In any event, again, that testimonial evidence has been explicitly identified as a mitigating factor in favour of Dr Fopma and was taken into account by the tribunal. As regards references in that evidence to the honesty and integrity of Dr Fopma as experienced by those witnesses, the tribunal observed that they had to balance that with what they had found in relation to the dishonesty on Dr Fopma's part in his dealings with the GMC as his UK regulator. It seems to me there is no basis for criticising that balancing comment.

78. In those circumstances, as with the previous elements of Mr Mustakim's appeal submissions, it does not seem to me possible to say that any tribunal properly understanding its functions and reaching reasonable decisions had to conclude that the testimonial evidence was such as to tip any balance between erasure and suspension in favour of Dr Fopma. There is, in those circumstances, no basis, in my judgment, for the submission that I can hold that the relevant evidence was given insufficient weight by this tribunal.

79. Fifthly, Mr Mustakim submitted that the finding of the tribunal, which undoubtedly formed a significant element both of its original conclusion as to impairment and its conclusion that the dishonesty here was such as on its own to have rendered erasure the only proper sanction, that the dishonesty was persistent.

80. However, as developed, that boiled down to a submission (a) that in truth there was but a single dishonest act, namely providing the false answers on the application form, and (b) repeating a submission that had been made at the impairment stage before the tribunal that since there was no explicit specific duty to report stated in the GMC's GMP then in force, the failure to report the conviction should be regarded as somewhat less serious than it might otherwise have been.

81. In my judgment, reflecting again on the observations of Lewis J in the *Theodoropoulos* case, this having been the particular context in which Mr Dunlop cited it to me, there is nothing in those submissions. The dishonesty here was fundamental to the registration that Dr Fopma enjoyed in this country and by reference to which he conducted his practise as a doctor

between late 2004 and December 2015 when he resigned in Jersey. The dishonesty in relation to the Specialist Registration form, if it stood alone, therefore, would not be correctly characterised as isolated, but was dishonesty with lasting consequences by reference to which in effect Dr Fopma was exercising his professional registration for upwards of a decade.

82. In any event, the failure to disclose, even if there had never been a Specialist Registration application form submitted, was ongoing throughout that period, as Dr Fopma plainly, it seems to me, appreciated throughout. In those circumstances, in my judgment, there is nothing whatever in the suggestion that the tribunal erred in finding that the dishonesty was persistent.

83. Mr Mustakim in relation to this fifth submission also, and quite rightly, submitted that erasure is not necessarily inevitable in every case in which there is a finding of dishonesty. He referred me to, and Mr Dunlop accepted the validity of, the observation of Blake J in *Atkinson v GMC* [2009] EWHC 3636 (Admin) at [13].

84. Precisely in line, however, with that observation, the extensive dishonesty in this case, persisting for a long period and going to the heart of Dr Fopma's entitlement to be practising as a doctor and his relations with the GMC as his regulator, is the sort of dishonesty in relation to which, with respect, it would have been surprising to this court if the tribunal had not concluded that erasure was required. Certainly, its conclusion that erasure was required cannot be said to be flawed.

85. Finally then, sixthly, Mr Mustakim made a submission that erasure was likely to result in undue hardship to Dr Fopma. In that regard, I agree with Mr Dunlop that the submission was essentially one of personal mitigation, attracting in this context rather less weight than perhaps such submissions do in the sentencing context in relation to criminal sanctions, because of the primary object of the tribunal's sanction regime, namely the public interests represented by promoting the overarching objective.

86. In any event, I also agree with Mr Dunlop that the evidence that was before the tribunal (and although other things have been mentioned to me, I repeat again I have no additional evidence, let alone any application pursuant to the normal approach to fresh evidence to admit it on appeal) was limited to unsurprising indications that Dr Fopma's family, especially his children, have found all of this extremely upsetting and that it will and may have financial consequences.

87. It seems to me that matters of that kind go nowhere close to establishing that the sanction of erasure, otherwise plainly called for on the tribunal's primary findings, would represent some undue hardship to Dr Fopma.

88. For completeness on that aspect of the matter, reference was made in the grounds of appeal and the skeleton arguments to Art.8 of the European Convention on Human Rights. Suffice as to that to say that I agree entirely with the observations of Warby J in *Okpara v Nursing and Midwifery Council* [2016] EWHC 1058 (Admin) at [47]-[49]. In short, it is not clear that Art.8 is engaged at all, but if it is and the sanction in the particular case is otherwise properly and proportionately imposed pursuant to the 1983 Act after due regard for the Sanctions Guidance, then any resulting interference in Art.8 rights will be a reasonable and proportionate interference to serve a fundamental public interest. Therefore, Art.8 will not give rise to an entitlement to challenge a sanction otherwise properly and appropriately imposed.

89. For all those reasons and on the particular facts of this case as carefully examined, in my judgment, by the tribunal in this case, this appeal is dismissed.

MR JUSTICE ANDREW BAKER: Yes, Mr Dunlop.

MR DUNLOP: I'm grateful, my Lord. The GMC asks for its costs. I hope you have a costs schedule from us.

MR JUSTICE ANDREW BAKER: Yes. I won't get carried away by its relatively modest amount, but I will say immediately that in comparison to many costs schedules one sees, perhaps particularly when one sits in this building a lot, it is, if I may say so, pleasingly moderate. So subject to anything Mr Mustakim has to say, I would have thought that costs should follow the event and I'm minded to find the costs sought reasonable.

Mr Mustakim, any particular observations on either principle or quantum?

MR MUSTAKIM: No, my Lord.

MR JUSTICE ANDREW BAKER: Well, I'm very grateful for your assistance, gentlemen.

The dismissal of the appeal will carry with it an order for costs in favour of the GMC. The costs in question are at such a level that I am in fact content to award them in the sum claimed, that is to say £7,137.20. That seems to me to be an eminently reasonable, indeed, if anything, pleasingly modest, sum. I am grateful to the GMC for their ability to deal with the matter without imposing a heavier financial burden through costs on Dr Fopma.

Thank you very much.