The Queen on the Application of Stephane Alhy v General Medical Council

CO/1536/2011

High Court of Justice Queen's Bench Division the Administrative Court

8 July 2011

[2011] EWHC 2277 (Admin)

2011 WL 2748456

Before: Her Honour Judge Belcher (Sitting at as a High Court Judge)

Friday, 8th July 2011

Representation

Mr Pascal (instructed by Davies Gore Lomax) appeared on behalf of the Claimant.

Mr Hare (instructed by General Medical Council) appeared on behalf of the Defendant.

Judgment

Her Honour Judge Belcher:

Introduction

1 This is a statutory appeal under section 40 of the Medical Act 1983 . By this appeal Dr Stephane Alhy challenges the decision of 21st January 2011, made by the General Medical Council's Fitness to Practice Panel in which he was found guilty of misconduct and the Panel ordered erasure from the Register. Being an appeal under section 40 there is no dispute that the appeal in front of me takes place by way of rehearing. It is nevertheless helpful to set out the structure against which that hearing takes place.

2 There are a number of authorities to which I was referred. Parts of them are very conveniently set out in Mr Hare's skeleton and there is no dispute that these are the legal principles which apply. It is for Dr Alhy to demonstrate that the Panel's decision was wrong.

3 As regards finding of misconduct and impairment, the authorities are clear and they are clear to the effect that the court must have in mind and give such weight as is appropriate in the circumstances to the following factors. Firstly, the body from whom the appeal lies (that is of course the Fitness to Practise Panel) is a specialist Tribunal, whose understanding of what the medical profession expects of its members in matters of medical practice deserves respect. Normally, but not relevant in this case, it would be a matter for the court to recognise that the Tribunal had had the benefit of hearing and seeing witnesses on both sides. That does not apply in this case, where matters before the Panel were dealt with on paper and without the benefit of any oral testimony.

4 The third matter which it is said that the court must take into account and bear in mind are that questions of primary and secondary fact and the overall value judgment to be made by the Tribunal, especially the last, are akin to jury questions to which there may reasonably be different answers. That is taken from paragraph 197 of the judgment of Auld LJ in the case of Meadow v General Medical Council [2006] EWCA Civil 1390 and also reported at [2007] 1 QB 462 .

5 That same point is made in the authorities when considering the issue of sanctions and in particular in the case of *Rascid v General Medical Council [2007] 1 WLR 1460 and [2007] EWCA Civil 46* and in the judgment of Laws LJ, with whom the other judges agree. He refers to two strands which were shown in the learning prior to the 1st April 2003. That learning related to appeals from the General Medical Council to the Privy Council which was the appropriate route of appeal at that time. With effect from 1st April 2003 the route of appeal was changed and appeals now lie to the Administrative Court but in Rascid it was found that the reasoning of the earlier decisions equally applied to the new regime, not least because the new regime was effectively identical. Laws LJ states that there are two strands that are relevant from the previous authorities and therefore still apply. One differentiates the function of the Panel or Committee in imposing sanctions from that of a court imposing retributive punishment. The other emphasises the special expertise of the Panel or Committee to make the required judgment.

6 Dealing with the first of those strands, Laws LJ refers to the case of Gupta and cites from the judgment in that case the following:

> "It has frequently been observed that, where professional discipline is at stake, the relevant committee is not concerned exclusively, or even primarily, with the punishment of the practitioner concerned."

The quote later points to the fact that:

> "The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price."

The Panel is concerned therefore with the reputation or standing of the professional as well as issues of the findings of fact but it is concerned with those matters rather than punishment of the doctor.

7 There is also cited within Rascid case the case of *Marinovich v General Medical Council([2002] UKPC 36)* in which I am reminded that it has been said many times that the Professional Conduct Committee is the body which is best equipped to determine questions as to the sanction which should be imposed in the public interest for serious professional misconduct. Those of course are references to the former body but are equally applicable to the Fitness to Practise Panel.

8 In paragraph 20 of his judgment in the Rascid case Laws LJ pulls those strands of learning together and said this:

> "These strands in the learning then, as it seems to me, constitute the essential approach to be applied by the High Court on a section 40 appeal. The approach they commend does not emasculate the High Court's role in section 40 appeals: the High Court will correct material errors of fact and of course of law and it will exercise a judgment, though distinctly and firmly a secondary judgment, as to the application of the principles to the facts of the case."

9 Therefore I must correct any material errors of fact and law and I must then exercise a judgment, though distinctly and firmly a secondary judgment as to the application of the principles to the facts of this case.

10 Despite two extensions of time having been granted in this case, for the filing of the grounds of appeal, the primary submission put forward by Mr Pascal today was not contained in the perfected grounds of appeal. That he told me, very fairly and properly, was his primary and best point. Having discussed the matter with Mr Hare, who told me he was quite clear that he was in a position to deal with those matters notwithstanding that he was not on notice of them, I granted leave to amend the grounds and the grounds have been amended and in paragraph 18A of the new ground reads as follows:

> "When giving its reasons the Panel failed to explain to the appellant so that he and others interested in the outcome could clearly understand why it had decided to impose a sanction that was more onerous than that imposed in France by the French courts and the ODM, the latter body having taken no action when the Panel was under a duty to give such reasons."

The ODM is the equivalent to General Medical Council in France.

11 The facts in this case are not in dispute and I propose to adopt Mr Hare's helpful summary of those from his skeleton. Having said that I do not in any way mean to suggest Mr Pascal's summary was not equally helpful but it was simply longer and since there is no dispute I propose to adopt the shorter of the summaries.

12 Dr Alhy was convicted of two offences in relation to the deaths of his patients. In relation to a patient, Jupin who died on 21st January 2000 Dr Alhy was convicted of non assistance to a person in danger. That was based on his decision to delay surgery on that patient. Pausing there, it is right to point out that is not an offence known to English law.

13 In relation to the second patient Fleureau who died on 11th February 2000, Dr Alhy was convicted of gross negligence manslaughter for failing to monitor the patient between the 6th and 11th February 2000 which delayed his diagnosis of peritonitis.

14 Dr Alhy was originally convicted in September 2006 by the Magistrates at Chatres and was sentenced to 12 months' imprisonment, suspended, a 4000 Euro fine and was ordered to pay damages to the victims' families. Dr Alhy's appeals against conviction were dismissed by the Court of Appeal at Versailles in May 2008, although at that point his sentence was varied, in that the fine was reduced to 2000 Euros and he was banned from practising as a surgeon for 3 years. He was not therefore prevented from practising as a general physician.

15 Dr Alhy appealed again to the Supreme Court and in March 2009 the Supreme Court rejected his appeals against conviction but upheld the manslaughter charge on a different basis from that in the Court of Appeal. At no stage did Dr Alhy inform the General Medical Council of his convictions. The French Ordre de National de Médicins (which I have already referred to and continue to refer to as ODM) informed the General Medical Council of Dr Alhy's ban from practising surgery on 27th October 2009, some 7 months after his criminal proceedings were concluded and his final challenge to the convictions was dismissed. In June 2010 the French Court of Appeal ruled that its judgment should not appear in the publicly accessible records.

16 There is no dispute between counsel as regards the general position of the law as to the obligations on the Panel to explain their decisions. Those obligations are limited by two factors. Firstly, the Panel is not required to explain in terms why it preferred the testimony of any individual witness over another, a matter plainly which has no relevance here, since the Panel heard no oral evidence. The second factor which is derived from a number of cases, the case of Gupta ; the case of Southall and the case of Phipps v General Medical Council — the latter two cases not being before me but there is no dispute about the general principles which are these. When looking at the reasons given by a Fitness to Practise Panel, the court is not looking for an explanation of the sort that one might expect to be provided by a judge in the Chancery Division. It is also the case that, when considering reasons, the entire circumstances of the case need to be considered and not just what is set out in the determination. In other words the matter is not looked at in isolation and that is the basis on which a full transcript of the proceedings is made available to the doctor in question. Therefore the matter can be considered as a whole. As I say there is no dispute about that.

17 Based on that Mr Hare submits that the issue, when considering the reasons issued by the Panel is: Was the person to whom the decision was directed (in this case, of course, Dr Alhy) able to understand why the Fitness to Practise Panel arrived at the decision at which it arrived? That of course is as it should be, not least in circumstances where there is a right of appeal. If the person cannot understand the decision, then plainly they would not be able to decide whether or not to appeal. That therefore, subject to the points urged on me by Mr Pascal which I am about to come to, is the starting point and the test to date based on the authorities.

18 I put it in that way because Mr Pascal, by his amended grounds and the submissions he has made to me, effectively urges me to take those tests a step further. He submits that the Panel

should give reasons and state in clear and simple terms why it is imposing a significantly different and more onerous sanction than that imposed by the ODM. He submitted it could be set out in numbered points: The reason we are giving the penalty is the following reasons: 1, 2, 3. That, he submits, is a duty which arises either by extrapolation from Article 56(2) of the Directive 2005/36/EC of the European Parliament and of the Council ("the Directive"), that being a Directive dated 7th September 2005 on the recognition of professional qualifications. In the alternative, he submits that arises out of a duty of fairness to give full and proper reasons as to why there is a departure from the decisions or penalty imposed by the foreign authority in this case, the French courts and the ODM. It is right to say he does not go so far as to say that the penalty imposed by the General Medical Council has to be the same as that imposed by the Member State but he submits that there must be clear and proper explanation and reasons given for departing from that.

19 As I have mentioned the Directive relates to the recognition of professional qualifications. Its purpose is that if you have the appropriate professional qualification in one EU Member State, you should be able to practise that profession elsewhere in the European Union. Mr Pascal accepts that the Directive is not directly concerned with discipline but he submitted that in passing it is indirectly concerned with the recognition of disciplinary matters in other Member States. I shall come to that shortly.

20 The Directive is at tab 6 in the authorities bundle provided to me. I do not have the full Directive which I am told is very bulky but I have what is agreed are the relevant parts. I was taken first of all to recital 3 which reads as follows:

> "The guarantee conferred by this Directive on persons having acquired their professional qualifications in a Member State, to have access to the same profession and pursue it in another Member State, with the same rights as nationals is without prejudice to compliance by the migrant professional, with any non discriminatory conditions of pursuit which might be laid down by the latter Member State provided that these are objectively justified and proportionate."

Article 4 of the Directive headed "Effects of Recognition" provides as follows:

> "The recognition of professional qualifications by the host Member State allows the beneficiary to gain access in that Member State to the same profession as that for which he was qualified in the home Member State and to pursue it in the host Member State under the same conditions as its nationals."

Mr Pascal accepts that the effect of that recital and, in particular, of Article 4 is that once Dr Alhy was registered in England and Wales he was bound by the rules of the General Medical Council, something which is perfectly proper and recognised by those Articles.

21 Mr Pascal took me also to recital number 8 and Article 11 . Recital 8 provides:

> "The service provider should be subject to the application of disciplinary rules of the host Member State having a direct and specific link with the professional qualifications, such as the definition of the profession, the scope of activities covered by a profession or reserved to it, the use of titles and serious professional malpractice which is directly and specifically linked to consumer protection and safety."

22 In recital 11, about two-thirds of the way through the recital there is the following:

> "The general system for recognition, however, does not prevent a Member State from making any person pursuing a profession on its territory subject to specific requirements due to the application of professional rules justified by the general public interest. Rules of this kind relate, for example, to organisation of the profession, professional standards, including those concerning ethics, and supervision and liability."

It is plain from those recitals that the migrant is subject to discipline in the host State when registered there. There is no dispute, therefore, that Dr Alhy fell under the discipline of the General Medical Council once registered here as a doctor.

23 Mr Pascal however relies upon Article 56 and in particular subparagraph (2). Subparagraph (1) provides:

> "The competent authorities of the host Member State and the home Member State shall work in close collaboration and shall provide mutual assistance in order to facilitate application of this Directive. They shall ensure the confidentiality of the information which they exchange."

It plainly imposes an obligation to exchange information to facilitate registration and other matters arising in relation to the migrant professional between both the host State and the home State.

24 Subparagraph (2) provides:

> "The competent authorities of the host and home Member States shall exchange information regarding disciplinary action or criminal sanctions taken or any other serious specific circumstances which are likely to have consequences for the pursuit of activities under this Directive."

The paragraph then goes on to provide that that obligation is subject to data protection legislation and I do not need to read that.

25 The final part of the s however provides as follows:

> "The home Member State shall examine the veracity of the circumstances and its authorities shall decide on the nature and scope of the investigations which need to be carried out and shall inform the host Member State of the conclusions which it draws from the information available to it."

26 As has become clear in the course of this hearing, that particular paragraph is difficult to construe when applied to facts both of this case and of other hypothetical cases, as will become clear in the course of giving my judgment.

27 Mr Pascal advised me, and I make it plain there is no evidence of this, that his instructions are that the view the ODM takes of that particular paragraph is that the effect of the Directive is that the General Medical Council could only have applied a sanction the same or less than that in France. They apparently also take the view that the re-investigation and reassessment of events in France is inappropriate on the basis that those matters have already been undertaken by the French authorities. I am invited to say a few words about that view. My initial response to Mr Pascal was that what the ODM thinks is irrelevant and that, at least for today's purposes, it is my view on the law which counts although I appreciate my view is, of course, subject to higher courts should the matter proceed elsewhere.

28 The first point I make is simple. That is absolutely on the face of it not what the Directive says. In my judgment, it would be astonishing, given the whole purpose of the European Union, with collaboration between Member States who nevertheless retain their national identities and autonomy in significant respects, for there to be a Directive creating a hierarchy between the professional bodies of the different Member States. Such a hierarchy would vary depending on which Member State happens to be the home Member State. I will give some examples. If, for example, a doctor whose home State is England and Wales and who is registered there but was also registered and practising in France, committed the offence of failing to assist a person in danger, in France, then he would clearly be subject to criminal penalty under French law and the matter which in my judgment would plainly have the potential to be relevant to the ODM.

29 However that is not an offence in English law and, therefore, the only issue which could arise in the General Medical Council would be whether the facts disclosed an impairment of Fitness to Practise. As a simple conviction taken in its own right, the General Medical Council could impose

no penalty. It could not, in my judgment, be right to say that the ODM could not impose any sanction because the home Member State could not impose any sanction on the basis that was not a criminal offence in the UK.

30 During the course of submissions an example was put forward relating to the situation if Dr Alhy now wanted, for example, to apply to register and practise in Germany. It was submitted that would mean that Germany would have to apply the French sanction over the UK sanction if the construction submitted or argued for is right. That, in my judgment, would be a very strange state of affairs, particularly if the analogy is taken further. Suppose a third country State, such as Germany, is faced with two identical situations where one doctor whose home State is France and one whose home State is England and Wales have in fact committed identical offences, offences recognised in both those jurisdictions. If the argument in support of this paragraph of the Directive is correct, the position facing the German authorities in relation to those two doctors, would be that in relation to the French doctor, they would have to consider and apply the decision of the ODM, whereas in relation to the English doctor they would have to apply and consider the decision of the General Medical Council. Those decisions which may, of course, be different as illustrated in this case, albeit I recognise that the differences here arise out of factual differences. Nevertheless the point is a good one: the General Medical Council might impose a different penalty to that that which the ODM imposed on its member.

31 The argument contended for would require Germany to apply, in those circumstances or to consider, the French decision in relation to the French doctor and the English decision in relation to the English doctor and, apparently, to ignore in the process its own regulations for those purposes. I have to say that if such an astonishing position was intended, then it would have been a matter not for implication from a poorly drafted paragraph in a Directive dealing with other matters, but would, in my judgment, have been the subject of full careful debate and an express provision to that effect in a Directive dealing with those matters. If something so fundamental was intended, I would have expected it to be spelt out very clearly and I am not satisfied that is a proper construction or matter to derive from that paragraph of the Directive.

32 In fairness to Mr Pascal, he does not put his case as highly as the ODM apparently regards that Directive paragraph. His case is rather different. He submits that there has to be some consistency of approach and that that is the underlying objective of the Directive. He further submits that the effect is that where the host State is aware of sanctions imposed, or the authorities in the host State are aware of sanctions imposed (in this case in France), if they are going to depart from that they should be under a duty to explain and justify why they have taken a different view.

33 He further submits, that even without the Directive, based on tests of Wednesbury reasonableness, it would be right in the circumstances here, where the foreign authority has looked at all the facts first, that it should be incumbent upon the Panel to explain why it has taken a different view. He further submitted that if I am with him on that, then I should declare the decision was wrong and either impose some other sanction or remit the matter back for reconsideration with appropriate directions. In effect Mr Pascal is inviting me to add to the body of case law which I have already referred to as to what is required in terms of reasons from the Panel by saying that if a Panel wants to impose a different decision or outcome from a decision imposed by a foreign authority, it should explain why directly. That, he says, achieves some consistency with the French position and is reasonable, rational and a clear and judicial approach. He submits it should be recognised that the matter has been dealt by a fellow European body.

34 In response to that, Mr Hare submits that firstly the challenge depends upon the argument that the Directive creates a presumption that the home State has primary responsibility for disciplinary matters and only then would the host State have to attach particular weight to the home State's regulations or sanction. I have already made it clear that I do not accept that it could be construed from the Directive that the home State has primary responsibility for disciplinary matters. It is very difficult to understand what the paragraph means. There are circumstances in which it would be very easy to construe it as having a sensible practical purpose, particularly if there were transgression in the host State and, before it was investigated, the migrant had returned to his home State. The fact that it is difficult to construe does not of itself mean that it should be capable of the construction put forward by Mr Pascal and, of course, if it is impossible to construe, it may have no proper or relevant meaning at all.

35 Mr Hare submitted that it was important to consider the institutional differences between the decisions being taken in France and the decisions taken by the General Medical Council and that of itself, he submits, underlies why the submission of the need to explain a difference in reasons cannot be right. He submitted that the relevant authorities in France were plainly operating in different jurisdictions and dealing with different issues. He submits the situations are different institutionally, in the sense that the decisions made by the French courts in this case or, indeed, by a combination of the French criminal courts and ODM, (in the sense that ODM, I am invited to assume, has decided to take no further action), is of course very different to the way in which these matters would be regulated in this country. The French courts in this case have been involved in professional discipline in that they, of course, imposed the suspension from practising surgery for 3 years as part of the penalties, a power that the English courts do not have.

36 Whilst relying on that as an example of showing why it would be wrong to say that the principle of primacy to the Home State must apply on the basis that one is not comparing like with like, Mr Hare also relies on that as showing the difficulties that would be presented in terms of reasoning if it were necessary for the Fitness to Practise Panel to consider and set out detailed reasons as to why it was departing from the underlying decision of the foreign regulatory body. To do that properly would, in my judgment, of necessity involve understanding the reasons why the foreign authorities have reached their decisions.

37 Mr Hare submitted that the General Medical Council would not be in a position, nor is it any part of its remit to require it to be in a position to understand why the foreign authorities have taken the precise steps that they have taken. The General Medical Council could not form a view, he submitted, on the precise interrelationship of the French criminal courts and the ODM, or as to why the court decided to impose the sentence it did and as to why the ODM decided to do nothing. He submitted that we in this court have no idea as to that and the General Medical Council could not have known, at the time of the hearing, the extent to which the French courts or the ODM took account of arguments made in mitigation on behalf of the Defendant in the criminal proceedings.

38 The purpose of sanctions imposed by the General Medical Council is an entirely different to the purpose of sanctions in criminal proceedings in this country, where there are punitive and rehabilitative elements of sentence. The purpose of sanction by the General Medical Council is not retribution; the purpose of their sanction is to protect the public and to protect the medical profession as a whole, as is made clear in Rascid . This is also set out clearly in the indicative sanctions guidance for the Fitness to Practise Panel issued by the General Medical Council, where it is made clear at page 6 paragraph 17 (at C3 in the bundle):

> "The Court of Appeal in Rascid made it plain that the functions of the Panel are quite different from those of the court imposing retributive punishment."

The judgment goes on to say that the General Medical Council should be able to take action in relation to the registration of a doctor in the interests of the public, namely the particular need to protect the individual patient and the collective need to maintain the confidence of the public in their doctors. A number of judgments have made it clear that "the public interest" includes the protection of patients, the maintenance of the public confidence in the profession, declaring and upholding proper standards of conduct and behaviour, issues which, certainly in this jurisdiction, go further than the question of punishment for offences in the criminal courts.

39 The point that Mr Hare makes is that it simply is not appropriate, therefore, to consider in detail the circumstances of the punishment by the foreign body or authority, and therefore it cannot be appropriate or proper to expect there to be full reasons for explaining why the decision of the General Medical Council is different. As I have already said, he relied on that in two respects. The first was to show that it was wrong in principle to say that the home State should have primacy, and I accept that submission. Secondly Mr Hare also relies on it in the context of the reasoning process itself.

40 In the course of Mr Pascal's submissions I made the same point to him but in a slightly different way. I suggested to him that if it were required that the General Medical Council should have to explain reasons for departing from the sanction or penalty of a foreign authority, that would require the General Medical Council to investigate the penalty decision- making process of the relevant fellow European body and that they would not be competent to do so.

Notwithstanding they have a Panel lawyer to assist them, the members of the Panel are not lawyers and, in any event, the Panel lawyer (him or herself) is unlikely to have knowledge of the issues arising in foreign jurisdictions or indeed of the issues which have arisen in this case as to the interrelationship between the powers of the criminal courts in France and the powers and the functions of the ODM.

41 Mr Hare drew to my attention that of course the difficulties which are identified in this particular case might be significantly more difficult if dealing with other jurisdictions with very different legal and regulatory history and who are also Member States. That, in my judgment, is a fair and proper point to be made.

42 In reply to these matters, Mr Pascal submitted that would be a very easy matter to resolve; that the information required could be obtained from the ODM; that in future, if I accept his submissions and give the direction he seeks, it would be obvious to those appearing in front of the Panel what information was needed and that they would be able to obtain it and make it available from the relevant authorities so that it would be available for the General Medical Council.

43 Having considered matters carefully, I am not persuaded by that submission. It seems to me it carries the danger of requiring there to be an investigation of the penalty decision-making process in another jurisdiction, something which I am not satisfied is properly part of, or ought properly to be part of the remit of the Fitness to Practise Panel. Their job is to assess matters in accordance with the General Medical Council's statutory purpose and good medical practice. Their purpose in holding hearings is to establish what the facts are in a particular case, to consider whether they support a finding of misconduct or impairment to practise and, if so what the appropriate sanction should be. They plainly must be informed by the appropriate facts. Those may of course, as they did in this case, include the facts of the convictions or the underlying facts in the French jurisdiction. But it does not seem to me to require that they need to understand why particular penalties were imposed, penalties which may have had punitive elements, in circumstances where it is not their job to issue punishment. To require them to have to give detailed reasons for departing from the decision of another body would, in my judgment, require investigative steps far beyond their remit, powers and competencies and, in my view, is unnecessary in any event.

44 The reasons given by the Panel in this particular case are not challenged save to the extent that I have already dealt with in this judgment. That is unsurprising, in that they are very full and very clear and they go through the appropriate processes. What they do not do is explain why the penalty they arrive at is different from the French penalty. In my judgment, however anyone reading this decision is able to surmise that explanation in any event. It was suggested that, for example, the German authorities, if they needed to do so, would not be able to resolve the matter. However it is plain from reading the decision that the General Medical Council was considering not simply the convictions in France but was also considering and dealt with fully, fairly and separately the question of the failure by Dr Alhy to report his convictions to the General Medical Council. That, of course, was not a matter that was being dealt with by the regulatory bodies in France.

45 There have also been submissions about the impact of lack of insight in this sense. It is plain from the decision of the General Medical Council that they took into account what they considered to be a lack of insight by Dr Alhy, in that following conclusion of the criminal process, he continued to maintain his innocence and refused to recognise the errors as they were found to be by the French criminal courts. Indeed, as I understand it, he maintains that to the present day. That, of course, is a matter for him but he has been found guilty by the criminal courts in France and those matters have been upheld through the process of appeals through two appellate courts. This court is of course obliged to recognise those convictions in France, as indeed was the General Medical Council.

46 In my judgment, as I made clear in the course of submissions, there is a significant difference between maintaining innocence during the currency of the criminal process and continuing to maintain innocence after the criminal process has concluded. There may be very good reasons for maintaining innocence throughout the criminal process. In this jurisdiction there might be technical matters which could provide a defence to some offences, and I assume there might be similar situations abroad. Indeed, in the course of the French proceedings it is clear that one of the appellate courts found as a fact that Dr Alhy did not cause direct harm but found that he was

grossly negligent. That is plainly a finding that was different from the court below. He was entitled to maintain his innocence in the course of seeking to challenge matters in the criminal courts. He is, of course, entitled to maintain his innocence after the criminal proceedings are concluded. But by doing so, it is inevitable that it will follow that he is not prepared to accept the matters found against him or to take any appropriate action in relation to them, or to consider the risks which might arise from them as to the future. Those are matters which it is plain the General Medical Council Fitness to Practise Panel took into account. It is quite clearly set out in their reasoning and is something they took into account when considering sanctions, and properly so.

47 Mr Pascal submitted that the General Medical Council was not in a position to assess what the position of ODM was in relation to insight or alleged lack of insight. He submitted they could quite simply have been asked. But of course ODM has chosen to take no action and we simply do not know whether they have at any time had any information before them to suggest a lack of insight. At best, they plainly knew of the appeals process but, in my judgment, there is a significant difference between maintaining innocence prior to conviction or prior to the final resolution of the criminal process and maintaining innocence thereafter. That is certainly a difference that is recognised in this jurisdiction and the lack of insight is a matter recognised by the General Medical Council. The discussion highlights the difficulty that, if questions were to be raised with the ODM as to what they regarded as lack of insight, that may then invite discussion as to what that insight is, at what stage in the process it is considered to arise, whether prior to criminal process being completed or thereafter, and itself give rise to issues and investigative matters which may not be capable of proper resolution. In my judgment, those matters are plainly beyond the remit and competency of those who comprise the Fitness to Practise Panel. I mean that in no pejorative way but I recognise that they are not lawyers and, even if they were, they would be lawyers qualified in this jurisdiction, possibly of course qualified in others but not as a requirement of their appointment.

48 It will be plain from what I have said that I do not accept the submission that it is necessary for the Fitness to Practise Panel to specify reasons, whether numbered or otherwise, for imposing a decision or sanction different to that imposed by a body or bodies in another Member State. The issue, it seems to me, is whether the reasons given in this State are such that the doctor or others reading the decision understand what the decision against the doctor is. Was the person to whom the decision was directed able to understand why the Fitness to Practise Panel arrived at the decision they did? In my judgment, the answer to that question is plainly “yes”. Full reasons were given, with a full explanation, and all matters were addressed in a logical and thorough procedure. Accordingly, I reject the primary submission made by Mr Pascal in this case.

49 I can then move on very briefly to the second and third points in the appeal. The second point, which is summarised in Mr Pascal's skeleton at paragraph 3.1, is that when determining the question of whether or not Dr Alhy had been guilty of misconduct when he failed to notify the General Medical Council of his convictions and when considering the question of sanction, the General Medical Council failed adequately or at all to consider the extent to which Dr Alhy was entitled to rely on the ODM's duty to notify the General Medical Council of the outcome of the French criminal proceedings. I reject that ground of appeal. In my judgment, it was irrelevant that the ODM had a duty to notify the General Medical Council of the outcome of the French criminal proceedings. There was a personal obligation on Dr Alhy under the regulations of the General Medical Council to advise them himself. He was not in a position to know when the ODM would advise the General Medical Council and this is a matter that he should have dealt with under his own personal obligation. The delay in fact was some 7 months The French appeals process was exhausted in March 2009 and it was not until October that the ODM in fact notified the General Medical Council. Had he acted in accordance with his personal obligations, the General Medical Council would have been notified very much sooner. I regard that ground of appeal as having no merit at all.

50 The third ground of appeal is that the General Medical Council was wrong to impose the sanction of erasure because to do was disproportionate and/or in breach of convention rights. Mr Pascal fairly recognised this was his weaker point, in so far as he recognised it is extremely difficult to attack sanctions, or more difficult to attack sanctions, not least because of the list of authorities including Rascid which make it clear that the court must make a secondary judgment and be aware of the expertise of those dealing with these matters on specialist expert Panels.

51 I have referred already to the reasoning of this Panel. I do not propose to go through it page by page. What is plain, in my judgment, is that the Panel went through correct procedures and, in

particular, in relation to sanctions, started with the lowest sanctions and went through them in ascending order. That order being “No action” as the first possibility, to impose conditions for up to 3 years as the next possibility, thirdly, to impose suspension for up to 3 months and, fourthly erasure. The Panel went through each of those. It consulted the indicative sanctions guidance on each of those as is clear from the decision, and it went through and identified the relevant factors as it went through the process. It is not suggested to me that it did not. The real suggestion is that by reason of being so different from the French sanctions, that of itself imports that the sanction was inappropriate and disproportionate. I reject that and I am satisfied that the Fitness to Practise Panel took into account all relevant matters and is in a far better position, as a specialist Panel, to consider matters such as the impact on the profession as a whole, the impact of the failure to report convictions and the impact of the lack of insight and matters of that sort. Accordingly it, follows from what I have said that this appeal fails in its entirety.

52 There is a point I should have mentioned earlier in this judgment. I have made it clear that I felt that if the Directive intended that the Panel or Board had a duty to explain a difference in opinion that could have been spelt out in the Directive. Similarly, a similar rule could have been spelt out in either the Medical Act or the 2004 rules concerning proceedings in front of the Fitness to Practise Panel.

53 For all those reasons this appeal fails.

54 HER HONOUR JUDGE BELCHER: Yes Mr Pascal?

55 MR PASCAL: Would you grant permission to appeal?

56 THE DEPUTY JUDGE: On what grounds?

57 MR PASCAL: With some hesitation, real prospect of success in relation, or the basis that this in some senses untried waters, untested waters but perhaps more forcefully on the second limb as a compelling reason because the particular circumstances of this case are unusual and do raise quite an interesting and potentially important point in relation to the way the General Medical Council should deal with doctors who have already been dealt with in their own countries.

58 THE DEPUTY JUDGE: Permission to appeal is sought on two bases. Firstly, that there is a real prospect of success on the basis these are untried waters and very fairly Mr Pascal said he put that forward with some hesitation. I have to say I do not regard there being any real prospect of success. That is perhaps unsurprising but this is not a situation where I have found the points difficult. This is a case where it seems to me that there is no real prospect of success. In the alternative Mr Pascal submits there is a compelling reason for allowing permission to appeal because the particular circumstances are unusual and raise potentially an important point about how the General Medical Council should deal with doctors who have already been dealt with in their home countries. I accept that might potentially be an important point but it does not seem to me that it is an important point which reads to be considered in circumstances where I consider that there is not real prospect of success in the appeal as a whole. For those reasons, therefore, I decline the request for permission to appeal. I will of course fill out the appropriate form. Now that leaves costs.

59 MR HARE: My Lady before we get to that there was just one point I noted very early on in your judgment when you referred to Rascid incorporating the jurisprudence from the Privy Council and the switch from the Privy Council and I may have misheard it but I think I heard your Ladyship say “has been transferred to the Divisional Court”.

60 THE DEPUTY JUDGE: I did. It is not right, is it?

61 MR HARE: To the Administrative Court but that was the only point.

62 THE DEPUTY JUDGE: Thank you. You are absolutely right. Of course if there is an appeal I will be asked to check in any event. You are quite right if I said Divisional Court I certainly did not think I was sitting in the Divisional Court.

63 MR HARE: My Lady I do apply for the General Medical Council's costs. We say in principle we are entitled to them given that the appeal has been rejected on all grounds. The presumption in the CPR is that you would assess them summarily. I do not know if you want to hear from my learned friend on the matter on principle before we get to the matter of quantum or if you are

happy for me to deal with that now?

64 THE DEPUTY JUDGE: I am happy to proceed to quantum. He can address me on principle but I will be surprised if he has a great deal to say.

65 MR HARE: You have a copy I think of our statement of costs.

66 THE DEPUTY JUDGE: Yes. Before you do so … (Pause).

67 MR HARE: There were three points very briefly that I wished to make about the quantum. The first point is, as your Ladyship will see there has been a division of labour, as it were, between Miss Richardson who did the witness statements which your Ladyship saw before the FPP, grade A, who dealt with documents on my instructions and various attendances which you see on the first page and over to the second but that in relation to attendance today the General Medical Council has, we say very properly, sent a grade D trainee solicitor along, a newly qualified solicitor, and those of course constitute a significant number of hours. That is the first point.

68 The second point in relation to my own fee in relation to the documents and of course that is really the skeleton argument. As your Ladyship has appreciated within that skeleton argument I had to deal with a number of matters which were not in fact pursued, in particular the request for the forms of relief which we say were not available but as your Ladyship will have seen, took some time to address and indeed today, not all of the grounds that were contained within the original perfected grounds and skeleton argument were pursued with any enthusiasm and your Ladyship has found that at least one of them was indeed a ground which had no merit.

69 The final point we make and of course this is not conclusive in any way. We accept that the appellants are likely to have greater costs in any event because they have to bring the appeal. Nonetheless this is not a case where there has been a very large bundle to produce and it is noticeable, as your Ladyship may have—

70 THE DEPUTY JUDGE: I have not seen their schedule for costs.

71 MR HARE: It is a little over £16,000, not quite double but almost double the General Medical Council's costs. We say that is a further indication, although of course it does not resolve the matter that the General Medical Council's costs are proportionate and therefore I would invite you my Lady to assess them in the sum of £8,766.60.

72 THE DEPUTY JUDGE: Thank you very much.

73 MR PASCAL: Just two matters on quantum. Just in relation to attendance at hearing, we have the one hearing today, shown as 10 hours.

74 THE DEPUTY JUDGE: It is not quite as much as that. I suspect there is waiting time and so on in that.

75 MR PASCAL: Travelling time.

76 THE DEPUTY JUDGE: Well travelling and waiting time is actually included below so in fact there is 12 hours which it is not going to be, is it. No.

77 MR O'HARE: I am not suggesting a counter figure unhelpfully.

78 THE DEPUTY JUDGE: What I am minded to suggest is a sensible number of hours. Do I gather that travel is from Sheffield?

79 MR O'HARE: Yes.

80 THE DEPUTY JUDGE: So an hour from Sheffield to Leeds, presumably you had to be here for 10.00, so say 9 o'clock, back by 6.00, 8 hours — no 9 hours, 9.00 to 6.00. Is that right? So I am going to put 9 hours for that and delete the 2 hours. So out of those 12 hours it will only be 9.

81 MR O'HARE: Yes.

82 THE DEPUTY JUDGE: Yes.

83 MR PASCAL: One hesitates to criticise a member of the Bar's fee, but in relation to

documents I appreciate that it is a lengthy skeleton and it took some time. It is quite right it answered matters that I have not pursued. It is just that I noticed that £213 an hour, 7 hours on documents by those instructing my learned friend produces a fee of £1491, so by comparison as counsel £2,000 producing the skeleton argument is a little bit on the steep side.

84 THE DEPUTY JUDGE: You know as well as I do it does not work in the same way, does it?

85 MR PASCAL: It does not but generally speaking counsel—

86 THE DEPUTY JUDGE: Also what is the grade A rate claimed in your schedule?

87 MR PASCAL: 217.

88 THE DEPUTY JUDGE: How much?

89 MR PASCAL: 217. I am not criticising the hours spent by the instructing solicitor of £213 an hour, but it just throws slightly into relief the fee for the preparation and skeleton argument which were taken a period of time costed slightly notionally as an hourly rate but nonetheless counsel is required nowadays to broadly speaking indicate—

90 THE DEPUTY JUDGE: I appreciate that, and the fee for the hearing although of course that recognises that counsel is up to speed to some extent based on previous instructions.

91 MR PASCAL: I am not querying the brief fee.

92 THE DEPUTY JUDGE: No no, but it is comparable, is it not? That is the point I am making.

93 MR HARE: Yes.

94 THE DEPUTY JUDGE: Well Mr Hare — obviously it does not reduce what is paid to you — but I am minded to reduce that by £500, unless you want to challenge that any further. No? All right so I am going to say £1500 on the advice and 9 hours only on the attendance and travel today. So that will take 3 hours at £118 off — £354 I think comes off the subtotal and then another £500. Somebody other than me will have to work out the VAT figure.

95 MR O'HARE: I suspect it is a figure I agree.

96 MR PASCAL: I am struggling—

97 THE DEPUTY JUDGE: Why do I not rise now so that will enable you to deal with the … I think there is a permission to appeal form there. Do you have a calculator between you? Why do you not put your heads together on that whilst I deal with that form. Thank you. (Pause).

98 MR HARE: 6975 is a total inclusive of VAT.

99 THE DEPUTY JUDGE: Very well. The order will therefore be:

1. The appeal is dismissed.

2. The application for permission to appeal is refused; and 3. The appellant to pay the respondent's costs assessed in the sum of £6,975 inclusive of VAT, interest and disbursement. I make it clear that is an all inclusive figure. Very well. Thank you both very much.


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