

Appeals Circular A05/22

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MXM v General Medical Council [2022] EWHC 817 (Admin)

Learning points

- ▶ When considering interim orders, tribunals should note that the principle of proportionality is applicable at two stages:
 - ▶ first, when the IOT determines whether an interim order should be imposed, and if so whether it should be a conditions or a suspension order; and
 - ▶ second, when determining the length of any interim order, in light also of the order to be imposed (for example bearing in mind the grave effect of an interim suspension order on the registrant's ability to earn a living, to support their family, and on their reputation and ability to demonstrate when any charges are determined that they can practise without incident).
- ▶ It is important that tribunals give adequate reasons at each stage of an IOT hearing. Tribunals are not required to give reasons for reasons, but simply stating a conclusion is not sufficient; reasons for those conclusions are required.
- ▶ It is a relatively rare case where a suspension order will be made on an interim basis on the ground that it is in the public interest alone.
- ▶ When considering the risk and whether that risk is in relation to public confidence and/or public safety, tribunals must consider the seriousness of the allegations and the likelihood of any further incident of the same type of behaviour occurring again during the relevant period.

Background

This was an application made by Dr MXM, under section 41A(10) of the Medical Act 1983 ('the Act'), against an Interim Orders Tribunal's ('the IOT's') decision dated 9 November 2021 to impose an interim order to suspend his registration from the Medical Register for 18 months.

The General Medical Council's ('GMC's') investigation into Dr MXM concerned a number of serious allegations whilst Dr MXM was working as a GP, including:

- ▶ having a sexual relationship with a patient (ER) over many years (between 2018 and August 2021). Dr MXM first met ER outside of the GP practice in which he worked, but ER worked in the pharmacy adjoining the GP practice (so was a "quasi colleague") and was registered as a patient at the practice. During their affair, ER had one consultation with Dr MXM for an ear related matter [39 – 43]
- ▶ treating ER's husband, TR, as one of his patients during the affair (including for depression) [41 and 45]
- ▶ undertaking sexual activity in a clinical setting (both alone and with ER) and whilst on call [41 and 46]
- ▶ filming and uploading to the internet videos of his sexual activity with ER [41 and 47] and
- ▶ having sought to dissuade ER from seeking counselling and to persuade her to minimise the extent of their relationship [41 and 48].

At the IOT hearing the GMC sought an interim order of conditions. The Tribunal determined that it was necessary to impose an interim order of suspension for a period of 18 months as it considered "*there are concerns regarding Dr [MXM's] fitness to practise which may pose a real risk to members of the public and which may adversely affect the public interest. After balancing Dr [MXM's] interests and the interests of the public, the Tribunal has decided that an interim order is necessary to guard against such a risk*" [52]. When explaining its reasons for imposing an interim suspension order, the IOT:

- ▶ reminded itself that its function was not to make findings of fact, but to assess potential risk based on the information before it
- ▶ "*was mindful of the concerns raised ... regarding Dr [MXM's] conduct whilst working as a GP*"
- ▶ noted that the concerns were "*serious and wide-ranging*" and if later found proved, "*could indicate a real risk to patient safety and the public interest*" and a "*consequent risk to public confidence from a GP who had allegedly demonstrated*

such serious poor judgement over a prolonged period of time”, which indicated that the statutory test for the imposition of an interim order was met

- ▶ noted that the order removed Dr MXM's ability to practise medicine, but indicated that it was:

“satisfied that the order imposed is the appropriate and proportionate response. After hearing detailed submissions from both parties, the Tribunal did not consider that conditions could address the risks identified, in particular the risk to the public, confidence in the profession and to the GMC as Dr [MXM’s] regulator. The Tribunal has therefore determined that suspension is both necessary and proportionate to manage the risks identified.” [53]

- ▶ accepted the GMC’s submissions as to the likely timescales of the GMC investigation and the delays caused by the Covid-19 pandemic, in deciding on a period of 18 months [54].

Grounds

Dr MXM submitted that the order should be terminated or, alternatively, the period of suspension should be shortened, as the IOT's decision to make an interim suspension order in his case was wrong on the basis of the following four grounds:

- ▶ the IOT failed to differentiate between those aspects of the allegations which were proper matters for consideration in fitness to practise proceedings and those which were of an intimate and personal nature removed from the practice of Dr MXM's profession (and ought to be recognised under Dr MXM’s Article 8 rights), and irrelevant to the IOT's consideration
- ▶ having regard to the nature of the allegations, the IOT misidentified, and erred in its assessment of the risk to (a) public safety and (b) the public interest
- ▶ the IOT failed to give appropriate consideration to the principle of proportionality, both in respect of the nature and the duration of the order
- ▶ in support of the first three grounds, Dr MXM contended that the IOT failed to provide adequate reasons for its decision (particularly in circumstances where the GMC sought an order for conditions, not suspension, and the IOT had not given any indication that was what they were considering).

Judgment

The appeal was heard by Mrs Justice Steyn (‘the Judge’).

Anonymity Order

At the outset of the hearing, the Judge granted Dr MXM’s application for an anonymity order. The application was made on the grounds that certain matters raised in the complaints made against Dr MXM regarding the nature of the sexual

practices in which he and ER had engaged were liable to attract negative and potentially sensationalist publicity, which would be likely to have a detrimental impact on the mental health and welfare of Dr MXM's children. The Judge determined that, in this case, the article 8 rights of Dr MXM and his children outweighed the article 10 rights of the press and the public in being able to identify him as the applicant in the proceedings, having considered:

- ▶ the ages of the children
- ▶ that the scope of the restriction sought did not inhibit the press or public knowing any of the details of the case, other than identifying details and
- ▶ that at that stage, the matter was under investigation, and it was only because Dr MXM considered the IOT had erred in imposing an 18 month suspension order that he pursued the current application, bringing the matter into the public arena.

Interim orders

The Judge referred to:

- ▶ *the power of the IOT to impose an interim order on a doctor (of suspension or to impose conditions) as contained in s.41A(1) of the Act¹ [11]*, noting that:
 - ▶ in this case it was suggested that the order was necessary for the protection of the public or otherwise in the public interest (rather than in Dr MXM's interests)
 - ▶ the implication of the provision is that for a doctor to be the subject of interim suspension "in the public interest", such suspension must be at least desirable in the public interest² [12].
- ▶ *The relevant guidance "Imposing interim orders: Guidance for the Interim Orders Tribunal, Tribunal Chair and the Medical Practitioners Tribunal" issued on 30 October 2018 ('the IOT guidance') [13] which sets out:*

¹ Where an Interim Orders Tribunal ... are satisfied that it is necessary for the protection of the public or is otherwise in the public interest, or is in the interests of a fully registered person, for the registration of that person to be suspended or to be made subject to conditions, the Tribunal may make an order –

(a) that his registration in the register shall be suspended (that is to say, shall not have effect) during such period not exceeding eighteen months as may be specified in the order (an "interim suspension order"); or

(b) that his registration shall be conditional on his compliance, during such period not exceeding eighteen months as may be specified in the order, with such requirements so specified as the Tribunal think fit to impose (an "order for interim conditional registration")

² See *R (Sheikh) v General Dental Council* [2007] EWHC 2972 (Admin), *Davis J* at [15]-[16], *Sandler v GMC* [2010] EWHC 1029 (Admin), *Nicol J* at [14], and *Harry v GMC* [2012] EWHC 2762 (QB), *Burnett J* at [2]

- ▶ the test to be applied when considering imposing an interim order [14]:
 - ▶ “23... If the IOT is satisfied that:
 - a) in all the circumstances that there may be an impairment of the doctor's fitness to practise which poses a real risk to members of the public, or may adversely affect the public interest ...;
 - and
 - b) after balancing the interests of the doctor and the interests of the public, that an interim order is necessary to guard against such risk, the appropriate order should be made.”
- ▶ the factors to consider when reaching a decision on whether to impose an interim order (paragraph 24 of the IOT Guidance) including:
 - ▶ the seriousness of risk to members of the public if the doctor continues to hold unrestricted registration
 - ▶ the seriousness of the allegations
 - ▶ the weight of the information, including information about the likelihood of a further incident or incidents occurring during the relevant period and
 - ▶ whether the public confidence in the medical profession is likely to be seriously damaged if the doctor continues to hold unrestricted registration during the relevant period as well as considering the proportionality of the IOT’s response
- ▶ That in weighing up these factors, the IOT must carefully consider the proportionality of their response in dealing with the risk to the public interest (including public safety and public confidence) and the adverse consequences of any action on the doctor’s own interests (paragraph 25 of the IOT Guidance)
- ▶ specific paragraphs within the IOT Guidance relating to the “Public confidence” limb of the test [16] including that:
 - ▶ it is the responsibility of the IOT to consider whether, if allegations are later proved, it will damage public confidence to learn the doctor continued working with patients while the matter was investigated
 - ▶ the IOT should also consider any immediate risk to patient safety but that there are circumstances in which it is necessary to take action to protect public confidence even where there is no immediate risk to patients
- ▶ the two stages of analysis (paragraph 33 of the IOT Guidance) [19]:
 - ▶ “The first stage involves determining “whether it is necessary to impose an interim order to protect the public and or desirable to maintain public confidence and uphold proper standards of behaviour”
 - ▶ If the IOT decides to impose an interim order, then it moves to the second stage of the analysis which involves considering whether to impose interim conditions on the doctor's registration and, if it considers an interim order for conditions inappropriate, whether to impose an interim suspension order.”

and the approach to determining whether an interim conditions or interim suspension order is appropriate [20]

- ▶ matters to consider, as set out in the IOT Guidance, when considering the length of the interim order [27-28].

- ▶ *The requirement to give reasons*
 - ▶ The Judge also referred to the requirement to give reasons set out in Rule 27(4)(g) of the GMC (Fitness to Practise Rules) 2004, as amended, and in the IOT Guidance and [29-33] in:
 - ▶ Madan v GMC [2001] EWHC Admin 577 in which it was said:
 - ▶ “adequate reasons will inform the recipient of the basis for the decision. A reason expressed as a conclusion will frequently not disclose the underlying basis for the decision.” And in Abdullah v General Medical Council [2012] EWHC 2506 (Admin) in which it was observed that:
“What the IOP had to do – no more and no less – was to explain why their decision was the one they had announced. In most cases, probably in every case, this can be done briefly..... The parties knew what the contentious issues had been. They could expect to be told how those issues had been resolved and why the decision went the way it did. The losing side could expect to learn why it had lost. But the IOP did not have to provide an elaborate explanation of their decision. Reasons were required, but not reasons for reasons.”

The Judge acknowledged that “Any inadequacy in the IOT's reasons would not, of itself, provide a ground for terminating an interim order but if the reasoning is inadequate or opaque the weight to be attached to the professional opinion of the IOT will be diminished”³ [33].

Proportionality

The Judge said that “[T]he principle of proportionality is applicable at two stages: first, when the IOT determines whether an interim order should be imposed, and if so whether it should be a conditions or a suspension order; and second, when determining the length of any interim order” [24] and referred to the application of the principle as addressed in:

- ▶ Houshian v GMC [2012] EWHC 3458 (QB) [25]:
“The importance of the principle of proportionality in determining whether an interim order should be made pending the resolution of as yet unproven allegations faced by the practitioner, cannot be overstated. A suspension has potentially three very important consequences for a practitioner. First there is the impact upon the person's right to earn a living.... Secondly, there is the

³ Harry v GMC [2012] EWHC 2762 (QB) and Hussain v GMC [2012] EWHC 2991 (Admin)

obvious detriment to him in terms of his reputation. Thirdly it deprives the practitioner of showing that during the relevant period he has conducted himself well and competently and so as it were enhanced his prospects in front of the panel undertaking a final hearing” and

► Sandler v GMC:

“the Panel must consider very carefully the proportionality of their measure (weighing the significance of any harm to the public interest in not suspending the doctor against the damage to him by preventing him from practising)”

In relation to the context of imposing an interim suspension order on the basis that it is in the public interest, she referred to Sheikh v GMC in which Davis J observed:

“the bar is set high; and I think that, in the ordinary case at least, necessity is an appropriate yardstick. That is so because of reasons of proportionality. It is a very serious thing indeed for a dentist or a doctor to be suspended. It is serious in many cases just because of the impact on that person's right to earn a living. It is serious in all cases because of the detriment to him in reputational terms. Accordingly, it is in my view, likely to be a relatively rare case where a suspension order will be made on an interim basis on the ground that it is in the public interest.”

Court's powers

In relation to the Court's powers under s41A(10) of the Act, the Judge said that the Court's jurisdiction was well established and that in these cases “there is an extant order of the IOT which the court would only terminate or shorten if it thought that order was wrong” [35]. She followed Abdullah in which it was said that the Court has to decide whether the IOT's decision were “justified and proportionate” [36] and in deciding whether the IOT's decision is wrong, she said she “must consider all the relevant evidence and arguments, not limited to that which was deployed before the IOT” and whilst being mindful that the Court is being asked to overturn a decision of a specialist disciplinary tribunal, she indicated “the weight to be given to the opinion of the tribunal is a matter for the court to determine, as it thinks fit in the circumstances of the individual case” [37]. She confirmed that “[I]n a case such as this, where the IOT has imposed an 18 month interim suspension order, the court's powers are limited to upholding, terminating or shortening the suspension. The court has no power to substitute an order for interim conditional registration” [38].

Decision

The Judge said Dr MXM's “contention that the allegations are “removed from the practice of medicine” is misplaced and reveals a lack of insight on the part of [Dr MXM] in relation to the nature of the alleged misconduct..... the allegations here are of (i) a lengthy sexual relationship with a patient, something that is expressly prohibited by Good medical practice, para 53 and the Maintaining professional boundaries guidance; (ii) sexual activity in a clinical setting, namely a GP surgery, including (on occasions) with a patient; (iii) the videoing and uploading of sexual activity with a patient; (iv) an attempt to dissuade a patient from seeking

professional help for fear of the affair being exposed; and (v) treatment of TR, the husband of a person with whom [Dr MXM] was having an affair” [76].

Ground 4

However, the Judge decided that “the weight to be given to the IOT's decision in this case is limited” because:

- ▶ “First, where allegations of sexual misconduct are raised, the court is well placed to assess what is needed to protect the public or maintain the reputation of the profession and is less dependent upon the expertise of the IOT than would be the case if the allegations concerned questions of clinical knowledge, skill or competence” and
- ▶ “Secondly the reasoning of the IOT is very thin (a) at the second stage of the analysis (i.e. determining whether to impose a conditions order or suspension order); (b) in assessing the proportionality of imposing an interim suspension order; and (c) in assessing the proportionality of suspending the Applicant for 18 months on an interim basis” [84]

She said that:

- ▶ “the IOT's determination does no more than state a conclusion that imposing conditions could not address the risks identified and that an interim suspension order is proportionate..... What is lacking is reasons for those conclusions.” She did not consider that highlighting the lack of reasons for the conclusion was Dr MXM seeking ‘*reasons for reasons*’ [85]
- ▶ the lack of reasons at that second stage and in respect of the proportionality of an interim suspension order, was “particularly striking in circumstances where the GMC sought an interim order imposing conditions. It was not the GMC's position before the IOT that an interim suspension order was necessary, proportionate or the only order appropriate in this case; and [Dr MXM] was given no forewarning that the IOT might take a different view” [85]
- ▶ “In relation to duration, the reasons were also inadequate. The IOT accepted the GMC's submissions as to the likely timescale, but the proportionality of such a lengthy period of suspension had to be considered and was not. An 18 month period might have been proportionate if, as the GMC sought, the IOT had imposed an interim order imposing conditions. The IOT's decision that an interim suspension rather than an interim conditions order should be imposed had a profound effect on the proportionality of the timescale proposed. This is a relatively simple case. Greater urgency was clearly required if [Dr MXM] was to be prohibited on an interim basis from practising his profession.” [86]

The Judge concluded that Ground 4 (that there were inadequate reasons) was well-founded but that that alone was not a basis for terminating or shortening the interim suspension order.

Ground 1

Whilst the Judge expressed some sympathy with the submission that the way in which parts of the complaint was detailed and then referenced in the key part of the reasoning, gave “rise to some concern as to whether irrelevant matters were taken into account”, overall she said that “although the IOT did not expressly differentiate those matters which are properly the subject of the regulatory proceedings and those that are not, ultimately, I am not persuaded that this application should succeed on ground 1. That is because, first, the three matters expressly identified by the IOT in paragraph 30 as giving rise to concerns⁴.... are properly to be regarded as matters raising fitness to practise concerns. And secondly, the IOT did not identify either the fact that [Dr MXM] engaged in an extra-marital affair or the nature of the sexual practices in which he and ER are alleged to have engaged as matters of concern” [88].

Grounds 2 and 3

However, she accepted Dr MXM’s submissions on grounds 2 and 3 “that the IOT’s evaluation of risk to patient safety and the public interest, and of the proportionality of the nature and duration of the order, was flawed” [89].

She said whilst “the IOT were entitled to view ER as a patient, and consider the allegations in that context, it was incumbent upon them to consider the seriousness of the allegations and the likelihood of any further incident during the relevant period” and that it was highly material that [Dr MXM’s] relationship with ER “predated any professional connection, commenced independently of [Dr MXM’s] status as a doctor, and involved one consultation for an ear infection.....It is significant that there is no allegation that the relationship arose or continued as a result of a breach of trust in the doctor-patient relationship by [Dr MXM] or that any of the factors identified in paragraph 30 or 41 of the IOT Guidance...are engaged” [90].

She said “[I]n circumstances where the relationship did not arise in the context of a doctor-patient relationship, and there is no allegation of any pattern of sexualised behaviour towards patients, there is no real risk in the period prior to the determination of these fitness to practise proceedings, of [Dr MXM] engaging in the type of behaviour towards a patient (or the partner of a patient) that is the subject of these proceedings” [91].

⁴“The allegations the IOT expressly identified in paragraph 30 of their determination as indicating a real risk to patient safety and the public interest were (i) treating TR for depression while having an affair with his wife, (ii) engaging in sexual activity at the practice, some of which was videoed and posted online and (iii) interfering with ER’s decision to seek help for her own mental health issues.” [74]

Whilst she accepted “that the allegations of treating both ER and TR, of engaging in sexual activity in a clinical setting, and of interfering with ER’s decision to seek counselling are all matters of judgement in a clinical context” she said the latter allegation warranted limited weight (on the evidence before her) and that “in assessing the risk to patient safety...it is right to recognise that none of the allegations concern [Dr MXM’s] clinical knowledge, skill or care (save to the extent that clinical care includes treating a patient with respect, which it may be said [Dr MXM] failed to accord to TR in treating him for depression while having an affair with his wife)” [92].

Outcome

The Judge acknowledged that the allegations are serious and said that she did not consider that the IOT was wrong to take the view that Dr MXM should not be permitted to practise unrestricted whilst the matters remained under investigation. “[H]owever, on proper analysis, the risk in the relevant period is to public confidence in the profession or the regulator, rather than to patient safety. I do not consider that a fair minded member of the public apprised of the facts would be offended by [Dr MXM] continuing to practise pending a full hearing fixed for resolution of the allegations...” [93].

She said that in the circumstances of the case, “the risk is not such as to render it proportionate to impose an interim suspension order, still less for a period of 18 months, bearing in mind the grave effect of an interim suspension order on [Dr MXM’s] ability to earn a living, to support his family, and on his reputation and ability to demonstrate when any charges are determined that he can practise without incident” [94].

The Judge terminated the interim suspension order [94] but indicated that if she had the power to do so, she would have substituted an interim order imposing conditions and that she considered “that the standard conditions to which I have referred, providing as they do for the doctor to be subjected to greater monitoring and scrutiny than would otherwise be the case, are such as to address the risk to public confidence that I have identified” [95]. She also indicated that whilst she did not have the power to impose conditions, it was open to the GMC to apply for a new interim order [95].

Kind regards
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