

Appeals Circular A09/23

23 October 2023

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White v General Medical Council [2021] EWHC 3286 (Admin)

Learning points

- ▶ When an IOT is considering imposing restrictions that may affect a practitioner's right to freedom of expression under Article 10 of the European Convention on Human Rights ('ECHR'), it must expressly refer to and apply the test in Section 12(3) of the Human Rights Act 1998 ('HRA'), which requires that before it imposes such a restriction, the IOT must be satisfied that at any final MPT, the GMC is *likely to establish that publication (of the practitioner's views) should not be allowed*.
- ▶ The threshold for '*likely to establish that publication should not be allowed*' is normally that success at final MPT must be shown to be "more likely than not", and that the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case, prior to the final determination of the legitimacy of such a constraint. This may involve a specific inquiry into the merits of the case against the practitioner.
- ▶ When imposing conditions that restrict a practitioner's freedom of expression, the condition(s) must be proportionate and are likely to need to be specific as to what views or opinions the practitioner is precluded from expressing.

Background

This was an application made by Dr White ('Dr W'), under section 41A(10) of the Medical Act 1983 ('the Act'), against an Interim Orders Tribunal's ('the IOT's') decision dated 17 August 2021 to impose an interim order of conditions on his registration for 18 months.

Dr W, a GP, published a seven-minute video on YouTube ('the video'). In the video, Dr W laid out his experience as a doctor and:

- ▶ complained that doctors and nurses were being prevented from using treatments that he claimed were "safe and proven treatments" as being effective both as prophylaxis from Covid-19 infections and as treatments for it, such as hydroxychloroquine, budesonide inhalers, and ivermectin;
- ▶ went on to question the safety and necessity of the Covid-19 vaccine which he claimed was a form of genetic manipulation, and asked viewers to consider the number of deaths and serious side effects that the vaccine was causing;
- ▶ raised concerns about the accuracy of PCR testing, claiming that the false positive rate was greater than 90%;
- ▶ stated that "masks do absolutely nothing"[6];
- ▶ signposted viewers to comments and articles of others on the internet who share the same views as him [5].

Dr W was subsequently suspended by NHS England Southeast on 25 June 2021, but that suspension was revoked on 21 July 2021. The views expressed in the video were specifically disavowed as providing the reasons for the Dr W's suspension.

The General Medical Council ('GMC') commenced its fitness to practise investigation on 15 July 2021. Dr W's case was referred to the IOT for it to consider the requirement for any interim restrictions on his practise, and the allegations considered at the IOT hearing were [5]:

- ▶ "Through a social media video, Dr W spread misinformation and inaccurate details about the Coronavirus and how it is diagnosed and treated, including saying the vaccine is a form of genetic manipulation which can cause serious illness and death and that he advised against wearing masks.
- ▶ Dr W has potentially put patients at risk and diminished the public's trust in the medical profession by disseminating misinformation and inaccurate details about the measures taken to tackle the Coronavirus pandemic.
- ▶ Dr W signposted viewers of his online video to comments and articles of others on the internet who share the same views as him and this raises concerns as those individuals also promote information which is inaccurate or untrue."

In response to these allegations, and for the purposes of the IOT hearing, Dr W prepared an extensive witness statement that addressed, point by point, the allegations contained in the summary of the YouTube video. In doing so, Dr W produced an extensive volume of literature and other sources to support the position which he had taken in the video.

The IOT determined that it was necessary to impose an interim order of conditions for a period of 18 months indicating that the order was “*the proportionate response*” and that conditions could be formulated to address the risks identified in the case. In reaching its decision the IOT:

- ▶ heard submissions from the GMC that an interim order of conditions was necessary, although the GMC did not make any submissions as to any specific conditions appropriate to Dr W’s case. However, the GMC did state that the issue would be whether what was indisputably said fell within the bounds of legitimate freedom of speech protected by Article 10 of the ECHR, or whether it went beyond “*legitimate medical comment to conspiracy theories, accusing the government of a campaign of lies and of a hoax*” and were therefore matters which departed from Good Medical Practice, undermining confidence in the profession and raising concerns as to patient safety.
- ▶ heard extensive submissions on behalf of Dr W in relation to both Article 9 and, in particular, Article 10 of the ECHR, and the apparent infringement of the right to freedom of expression which was involved in the GMC’s submissions to the IOT, as well as rehearsing Dr W’s responses to the GMC’s allegations.
- ▶ considered the test to be applied under section 41A of the Act and the IOT Guidance and said that in reaching its decision it would consider:
 - ▶ the seriousness of risk to members of the public if the doctor continued to hold unrestricted registration,
 - ▶ whether public confidence in the medical profession is likely to be seriously damaged if the doctor continued to hold unrestricted registration during the relevant period and
 - ▶ the proportionality of any response in dealing with that risk.
- ▶ concluded that “*Dr [W’s] manner of expressing his own views to the general public may have a real impact on patient safety.... there is a high likelihood of repetition in the case*”, that “*Dr [W’s] alleged means of imparting information in his capacity as a registered doctor, by way of social media platforms, to a wide and possibly uninformed audience does not allow for individual circumstances and does not give the opportunity for a holistic consideration of Covid-19, its implications and possible treatments and potential for reducing risk to health in individual circumstances..... the alleged conduct is not likely to be an isolated incident...[T]he Tribunal considers that there is a high likelihood of repetition in the case*” and that “*[i]n all the circumstances there is information to suggest that Dr W might pose a real risk to public safety if he were permitted to remain in unrestricted clinical practice,...that public confidence in the profession may be seriously undermined if no order were made today, in the light of the public nature of the alleged misinformation posted by Dr W, which has the potential to reach a large audience.*”

Although the conditions did not prevent Dr W from practising medicine, the controversial conditions at the heart of the application were as follows:

- ▶ “4. [Dr W] must not use social media to put forward or share any views about the Covid-19 pandemic and its associated aspects.
- ▶ 5. [Dr W] must seek to remove any social media posts he has been responsible for or has shared relating to his views of the Covid-19 pandemic and its associated aspects.”

Grounds

Dr W challenged the conditions imposed by the IOT on five grounds [21] but in the circumstances, the Court found that it was only necessary to consider Grounds 3 and 5 [29] (*italicised below*):

- ▶ The IOT were wrong to make findings that Dr W had spread misinformation. (Ground 1)
- ▶ The reasons provided by the IOT for so concluding (the findings referred to in Ground 1) were not legally adequate. (Ground 2)
- ▶ *In reaching their conclusion the IOT failed to afford sufficient respect to Dr W’s right under Article 10 to freedom of expression. (Ground 3)*
- ▶ The IOT failed to take account of the support for Dr W’s views to be found in the bodies of medical and scientific opinion which he had furnished to support the witness statement he lodged in the proceedings. (Ground 4)
- ▶ *The IOT failed to have any, or any adequate, regard to the high test to be satisfied before a member of the medical profession could be subject to restrictions in relation to comments made outside his medical practice in the public interest. (Ground 5).*

Judgment

The application was heard by Mr Justice Dove.

Consideration of the relevant law

Mr Justice Dove:

- ▶ set out the Court’s approach to an application under s41A(10) of the Act¹ which is:
 - ▶ to exercise “an original jurisdiction and is not confined to an inquiry in relation to whether or not there were public law errors of the kind which would arise in a judicial review, albeit of course the court will seek to examine whether

¹ S41A(10) of the Act gives the Court the power to a) terminate an IOT suspension b) revoke or vary IOT conditions or c) substitute the time period of an interim order for some other time period.

or not the IOT was properly directed to the appropriate legal questions when reaching its decision”

▶ that the Court “will interfere with the decision if it is satisfied that the order which was made was wrong: see *GMC v Hiew* [2007]². When considering whether or not the order made was wrong the court will have regard not only to all of those matters and all of the evidence which were before the IOT, but can also have regard to other evidence which has come to light since the IOT reached its decision” [13].

▶ stated that the focus of his judgment must be on Article 10 of the ECHR [14] which:

▶ provides that:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...”

▶ is a qualified right, subject to conditions and restrictions as prescribed by law where necessary to further the legitimate aims of a democratic society. He noted that “one of the qualifications specifically identified within article 10(2) is the legitimate aim of pursuing public safety and the protection of health”, and that the GMC submitted that, subject to the limits of proportionality, the comments made in the video fell within the parameters of that qualification and therefore Dr W’s right to freedom of expression was not absolute [15].

▶ stated that it was important to observe two important features of the order made by the IOT, which had significant legal consequences in relation to the approach to be taken on whether or not an order imposing conditions of the kind in question should be made on an interim basis:

▶ “the order, and in particular the conditions which are attacked by [Dr W], are clear and obvious limitations on his right to freedom of expression under article 10. This is undisputed and indisputable.”

▶ “the effect of the order is to impose constraints on an interim basis, prior to the issues in respect of compliance with Article 10 having been fully heard and resolved at a final hearing.” [16].

▶ considered the **HRA**, which incorporates the rights set out in the ECHR into domestic British law and:

▶ said Section 12 of the HRA (‘Section 12’) applies “to any application for prior restraint of any form of communication that falls within article 10” [18]. Section 12(3) states that: *“No such relief is to be granted so as to restrain publication*

² 1 WLR 2007

before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.”

- ▶ said “the IOT was considering the restraint of freedom of expression prior to the trial and final resolution of the issues in the case. The conditions...restrained Dr [W’s] ability to express his views before the trial of the question as to whether this restriction of freedom of expression was legitimate”. Section 12(3) was therefore engaged and the GMC essentially did not dispute that [18].
- ▶ considered cases which had previously assessed the approach to be taken when imposing orders that restrict freedom of expression prior to the final determination of the legitimacy of such a constraint [18-20] including *PJS v News Group Newspapers Limited* [2016]³ in which Lord Mance:
 - ▶ set out the effect of Section 12 and the approach which should be taken to interim orders precluding freedom of expression stating that Section 12 set out “a test of whether the appellant is 'likely to establish that publication should not be allowed' at trial”
 - ▶ went on to quote the position as stated by Lord Nicholls in *Cream Holdings Ltd v Banerjee* [2004]⁴ that “Section 12(3) makes the likelihood of success at the trial an essential element in the court’s consideration of whether to make an interim order... on its proper construction the effect of s12(3) is that the court is not to make an interim restraint order unless satisfied that the applicant’s prospects of success at the trial are sufficient favourable to justify such an order being made in the particular circumstances of the case”
 - ▶ Indicated that *Warby J in YXB v TNO* [2015]⁵ further reinforced that “the test is whether the party seeking to restrain a person exercising free speech before trial is whether that party is "likely to establish that publication should not be allowed", or normally that success at trial must be shown to be more likely than not” [20].

Consideration of the Grounds of Dr W’s application

Mr Justice Dove considered Dr W’s Grounds 3 and 5 together (though noted that the latter was not very clearly pleaded) indicating that “when contemplating the interim restriction of freedom of expression pending a final determination, the provisions of section 12 of the 1998 Act, and in particular section 12(3), apply” [22]. He stated:

- ▶ that “it is clear that the IOT did not direct themselves to the tests required by Section 12(3) and which applied in the particular kind of case which they were considering.” He said that the IOT had not been directed to Section 12 by either

³ Paragraph 9, UKSC 26 4 All ER 554

⁴ UKHL 44, [2004] 4 All ER 617, [2005] 1 AC 253 at paragraph 22

⁵ EWHC 826, Paragraph 9

party and that the IOT's determination made no reference at all to Section 12. He said "it is clear from both the observations of the chair of the IOT during the course of the hearing, and also the subsequent written determination, that the IOT approached the making of the order on what might be described as a conventional assessment of the balance of risk and proportionality, without appreciating and applying the specific provisions arising if they were proposing to restrict [Dr W's] freedom of expression" [23].

- ▶ that this was unsurprising, since the IOT Guidance⁶ provided for the IOT did not refer to "the approach to be taken in cases where the contention is that there is a requirement to impose conditions preventing a medical practitioner from exercising their right to freedom of expression" He noted that the IOT Guidance couched "the test in terms of the assessment of whether there is a real risk, balanced with the interests of the doctor concerned" and that this was set out against the background at paragraph 22 of the IOT Guidance which emphasises that the IOT "does **not** make findings of fact or resolve disputes of fact" [24].
- ▶ that the "failure to allude to [Section 12] or apply the test which it requires was, in the particular circumstances of this case, in my judgment an error of law and a clear misdirection in the IOT's decision-making process." He stated that therefore the decision of the IOT was clearly wrong and could not stand [24].

Mr Justice Dove rejected the GMC's submission that, whilst there was no specific reference to Section 12, the IOT's decision was nevertheless sustainable, as the assessment of risk and consideration of necessity was effectively the equivalent of the test under Section 12 or alternatively, that the findings that the IOT made in that connection would satisfy the test under Section 12 [25]. The Judge said that "[t]he questions which the IOT addressed themselves to, as they identified from the Guidance, in relation to risk and necessity are not the same questions as the test indicated by section 12(3). The latter involves a specific enquiry in relation to the merits of the case" and therefore the assessment of risk which the IOT undertook could not be "properly understood as a proxy for the test which ought to have been applied under Section 12(3)" [25].

The GMC invited Mr Justice Dove to undertake his own assessment, but he said that it would be "inappropriate for the court to embark on such an exercise", as "[t]he application of the test as to whether or not it is likely that the [GMC] would establish its case at the conclusion of the final hearing of this matter is something which requires expert evaluation.....respect should be afforded to the professional expertise of the IOT, albeit, of course, that judgment must be properly directed to the correct question". He concluded that it would be inappropriate for him to "in effect, entirely remake the decision applying correct legal principles" [26].

The Judge concluded the IOT's decision was "wrong from a purely procedural perspective" and that "[t]he powers of the court are circumscribed by section 41A(10)(b) to revocation of the conditions imposed". However, he made clear that

⁶ Imposing Interim Orders: Guidance for the IOT, Tribunal Chair and Medical Practitioners Tribunal 2018.

this outcome had “no bearing whatever on the substantive merits of the parties’ competing positions on the issues” [27] and that the GMC may wish to ask the “IOT to reconsider this case and, applying the correct test, urge the IOT to conclude that having done so an order is justified” [28].

Additional matters

Whilst the Judge concluded that there was an error of law rendering the order (of the IOT) wrong, he also raised some concerns about Condition 4 which precluded Dr W from using “*social media to put forward or share any views about the Covid-19 pandemic and its associated aspects*”. Mr Justice Dove was concerned that this condition “would preclude [Dr W] from changing his mind, and expressing himself on social media in support of the positions which are adopted by the [GMC]”. The Judge said that “any condition proposing to curtail freedom of expression on an interim footing, in order to be proportionate, is likely to need to be specific as to what views or opinions the person subject to the order is precluded from expressing.” However, on the basis that he had already concluded that there was an error of law in the approach of the IOT, which led to the wrong order, he did not propose to say anything further on that issue [28].

Outcome

Mr Justice Dove granted Dr W’s application and revoked the interim order of conditions on the basis “that Ground 3 and perhaps Ground 5 succeeded only on the basis as described above, and no other basis, “it not having been necessary for the court to express any opinion as to the merits of the opinions with which this case is concerned in order to achieve a resolution of the matter.” Therefore, there was no substantive consideration required in relation to Grounds 1, 2 and 4.

Kind regards

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