Appeals Circular A 13/12

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To: Fitness to Practise Panel Panellists
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Re: Dr Robin Edward Lawrence - v – General Medical Council [2012] EWHC 464 (Admin)

Background

Dr Lawrence, a consultant psychiatrist, appeared before the Fitness to Practise Panel ('panel') in September 2010. The matters alleged against Dr Lawrence were that he had acted inappropriately towards Patient B, a married woman, in various ways during the course of her psychiatric and psychotherapeutic treatment, including continuing to treat her after becoming emotionally involved with her, telling her that she was attractive and discussing sexual fantasies with her, which was not in the best interests of the patient and was an abuse of his professional position.

Other allegations were that Dr Lawrence attempted to pursue an emotional relationship with Patient B, encouraged her to believe that he wanted to pursue an emotional relationship with her, told her personal information about himself and spoke of meeting her socially.

The panel made a series of adverse findings of fact against Dr Lawrence, although not all the charges against him were found proved. It found that his fitness to practise was impaired and directed that his name be erased from the medical register.

Dr Lawrence appealed under section 40 of the Medical Act 1983 against:

(a) certain procedural decisions made by the panel;

(b) some of the panel's factual findings;

(c) the panel's finding that his fitness to practise is impaired; and

(d) the panel's sanction of erasure.

Appeal

The appeal was heard by Mr Justice Stadlen between 8 and 11 November 2011 and the judgment was handed down on 2 March 2012.

The judge sets out details of the charges against Dr Lawrence considered by the panel in paragraph 4 together with details of the admissions made by Dr Lawrence (paragraph 5). Thereafter, he sets out the factual background (paragraphs 6 to 16) and a summary of the fitness to practise hearing (paragraphs 17 to 56).

(a) Procedural decisions challenge

Video link evidence of Patient B

The first substantive issue considered by Mr Justice Stadlen was the panel's decision to admit Patient B's evidence by means of video link (paragraphs 57 to 106). The General Medical Council ('GMC') applied to the panel for permission to produce Patient B's testimony by means of a live video link from Australia, where she was living at the time of the hearing.

The application, contested by Dr Lawrence, was successful and Dr Lawrence appealed against that procedural decision. The judge sets out, in some detail, the arguments put forward by the parties and the panel's determination (paragraphs 68 to 72) to allow the GMC's application on the basis that the Panel did have inherent jurisdiction to manage the receipt of evidence by way of video link and they were satisfied, having considered the mental health of Patient B, that she met the criteria under Rule 36(1) (b) and (e) of the Fitness to Practise Rules.

The panel's view, in considering the quality of evidence that it might receive and in balancing the interests of Dr Lawrence with that of the witness, its view was that if Patient B were to travel to the UK to give evidence she would be deprived of the emotional support of her family and her home life and would experience a period of separation from her young child. She would also be likely to experience anxiety in giving evidence. It concluded that that would be likely to adversely affect the quality of her evidence she could give and would also result in an increased risk in relapse of her mental illness.

The panel also noted from its own experience of video testimony that it was satisfied that it was able to make observations on body language and demeanour and it did not consider time pauses, slowing of the pace of cross-examination or potential difficulties with documentation to be significant factors.

The panel also stated that if there were difficulties with the quality of the video testimony which might cause it to give less weight to this evidence; that would tend to weaken the GMC's rather than the doctor's case. Accordingly, the panel considered it was able to receive Patient B's evidence via video link. It also stated that it found under what was

described as inherent jurisdiction that receiving evidence via video link could *'fairly, justly and properly dispose of Patient B's evidence'.*

Mr Justice Stadlen sets out Dr Lawrence's grounds of appeal in relation to this issue (paragraph 73) together with further submissions made by Counsel for the doctor in his skeleton argument at the hearing.

Counsel for the doctor, who appeared at the appeal, conceded that Patient B met the criteria under Rule 36(1) (e) which in the judge's view was a realistic, indeed inevitable concession. The doctor's Counsel also accepted that in the light of her concession that the 'bar', as she put it, was set high in the sense that Dr Lawrence had to show that the Panel was irrational in finding that the quality of Patient B's evidence was likely to be adversely affected in Rule 36(1)(e) being satisfied or in exercising its discretion under Rule 36(1) to treat her as a vulnerable witness.

The judge then goes on to set out the submissions made by both Counsel for the doctor and the GMC, thereafter, setting out his views in relation to the Panel's determination. He confirms (paragraph 97):

> *'In my judgment the circumstances of this case do not come close to supporting a conclusion that the FTPP was wrong let alone irrational to exercise its discretion to allow Patient B's evidence to be given via video link from Australia.'*

He, thereafter, sets out his reasons as to why Dr Lawrence's challenge failed at the preliminary stage. He also reflected on the relevant case law, specifically *Polanski v Conde Nast Publications Ltd* [2005] 1 WLR 637 (paragraphs 102 to 105).

Mr Justice Stadlen concludes this issue at paragraph 106 as follows:

> *'... in my judgment, having regard to the strength of the public interest in permitting the allegations against Dr Lawrence to be investigated and of avoiding the likelihood of Patient B's evidence being adversely affected if that could be done without unfair prejudice to Dr Lawrence, there is no warrant for concluding that the FTPP was wrong, let alone irrational, to find that there would be no unfair prejudice to Dr Lawrence if she were allowed to give her evidence by video link such as to require the FTPP to exercise its discretion against permitting her to do so. Accordingly in my judgment this ground of appeal fails.'*

Admission of Suzi Barnett's typed 'notes'

The second issue which Mr Justice Stadlen dealt with was in relation to the panel's decision to admit Suzie Barnett's typed *'notes'* as evidence in the proceedings. This is dealt with in paragraphs 107 to 134.

On the third day of the hearing immediately before Ms Barnett was due to give evidence an issue arose as to the admissibility of certain *'notes'* which she had prepared for the purpose of the hearing. The notes were described on their face as *"case notes of psychotherapy sessions between [Patient B] (client) and Suzi Barnett (psychotherapist) produced for General Medical Council investigation".*

Counsel for the doctor objected to the documents being admitted whereas Counsel for the GMC submitted that the documents were admissible whilst the weight to be attached to them was entirely a matter for the panel. She submitted that the process by which they came to be created did not render them inadmissible and they were further admissible as memory refreshing documents for Ms Barnett if she needed it.

Mr Justice Stadlen notes that at the stage of considering admissibility, the first question for the panel was whether the statements recorded as having been made by Patient B to Ms Barnett were actually made (paragraph 128).

The sole ground upon Counsel for the doctor at the panel hearing objected to the admission of the typed notes was that it had emerged that Ms Barnett had destroyed her original notes which had been available to her when she prepared the typed summary.

In Mr Justice Stadlen's view (paragraph 130) the fact that Ms Barnett's original notes had been destroyed did not make it unfair to admit them. It had not been suggested by Counsel in cross-examination that Ms Barnett had destroyed them in bad faith and it was clear on the transcript that it did not occur to her that the original handwritten notes would be of any interest to anyone. Ms Barnett's evidence was that the typed notes contained no factual information other than what had been contained in the original handwritten notes and that where the original notes recorded the actual words used by Patient B to her that was shown in the typed notes by the use of italics.

In Mr Justice Stadlen's view the assertion by Ms Barnett that the statements attributed to Patient B in the typed notes reflected those which she had recorded in the handwritten notes was a sufficient basis to entitle the panel to consider that it was fair to admit them (paragraph 131).

In the circumstances in Mr Justice Stadlen's judgment the panel was entitled to admit Ms Barnett's typed notes and this ground of challenge failed.

(b) The challenge to the panel's findings of fact

This is dealt with, by the judge, in paragraphs 135 to 143. Counsel for the doctor's primary submission was that the findings of the panel were against the weight of the evidence and plainly wrong and/or not supported by a sufficient reasoned judgment. There were two aspects to this ground of challenge, both of which related to the question of 'erotic transference'.

It was common ground at the hearing in front of the panel that Patient B suffered from erotic transference (paragraph 138). It was Dr Lawrence's case that one aspect or consequence of her admitted erotic transference was that she developed a wholly inaccurate fantasy that Dr Lawrence reciprocated her sexual and erotic feelings and felt the same way about her as she believed that she felt about him. Counsel for the doctor took issue with two sentences in the panel's determination (paragraph 140) referred to in the judgment as the first impugned statement and second impugned statement.

Mr Justice Stadlen thought it was necessary to set out at some length the nature of Counsel for the doctor's criticisms of the two statements and Counsel for the GMC's responses thereto. The judge also set out the panel's findings and reasons for those findings in relation to the evidence of Dr Lawrence and Patient B which preceded its individual findings in relation to the specific allegations against the doctor (paragraph 143).

The two statements which were impugned were as follows:

> *(1) 'From its own expertise the Panel reasoned that a woman with low-esteem unless encouraged would be unlikely to fantasise that she was attractive to another.'*
>
> *(2) 'The Panel considered what impact erotic transference might have had on Patient B's perception of events. It was mindful of the evidence of the GMC expert, Dr Kennedy, that an erotic transference was the projection of emotions and feelings of sexual attraction, which arose from the patient's previous experience, onto the therapist. In her oral evidence, Patient B openly admitted her former attraction to you.* ***The Panel did not find, however, that this would be likely, on its own, to cause her to believe that you had feelings for her.****' (Emphasis added)*

The parties' submissions in relation to the first statement are set out in paragraphs 144 to 184 and the judge's discussion of the issues at paragraphs 184 to 291.

In relation to the first impugned statement, no statement was made by the panel at any stage until the reading of the factual determination to the parties that it was considering the unlikelihood of a woman of low-esteem considering herself attractive absent encouragement. In the circumstances, therefore no submissions were made on the point.

None of the three members of the panel had any relevant expertise on the nature or extent of context of the erotic transference in the course of psychotherapy. The panel comprised three members, one lay and two medical. The lay member was not a qualified doctor and had no relevant medical training, qualifications or experience and of the other two members, one was a general practitioner. The chair of the panel was a former consultant psychiatrist, part time judicial member of the Mental Health Review Tribunal and a former part time psychiatrist member of the Parole Board. Counsel for the doctor

submitted that the obvious and natural reading of the first impugned statement was that a specialist panel chaired by a psychiatrist applied its expert knowledge to the issue identified in the statement in order to reach a conclusion on an important factual matter. This was in effect taking expert opinion evidence in private as the parties had not been given an opportunity to adduce evidence or make submissions to agree or rebut the position adopted by the panel (paragraph 154).

Counsel for the doctor submitted that the need for such openness was particularly pronounced in Dr Lawrence's case for three reasons (paragraphs 155 to 157):

1. The finding of fact made by the panel was central to its overall finding that Patient B was a credible witness and that her account should be accepted over that of Dr Lawrence.

2. The finding that a woman of low self esteem was unlikely to fantasise that she was attractive to another unless encouraged was said to be neither self-proving nor obvious and did not reflect an observation concerning likely human behaviour according with experience and common sense.

3. The hearings of fitness to practise panels give particular prominence to questions that are asked by the specialist panel. The panel in Dr Lawrence's case had ample opportunity to ask questions but had not done so.

Counsel for Dr Lawrence also dealt with the word *'expertise'* (paragraphs 158 to 167).

Counsel for the GMC made submissions (paragraphs 168 to 180).

Mr Justice Stadlen sets out the passages of the expert evidence upon which he relied in paragraphs 181 to 182 and Counsel for the GMC's submissions on the expert evidence including relevant supporting quotes at paragraph 183.

Mr Justice Stadlen (paragraphs 184 to 291) deals with the submissions by the parties in relation to each of the two impugned statements and the relevant case law. The issue of greatest concern to the judge, even before any question as to what the panel meant by '*its expertise*', is whether the conclusion reached by the panel was reached in respect of an issue which was live in the proceedings (paragraphs 184).

In order to address the issue in relation to erotic transference and low self esteem the judge considered it necessary to set out his views on the effect of the expert evidence (paragraphs 185 to 200).

In relation to the first impugned statement the panel *'reasoned from its expertise'* that a woman with low self-esteem, unless encouraged, would be unlikely to fantasise that she was attractive to another was not a conclusion open to the panel to reach, at any rate, without having given Dr Lawrence notice of its provisional conclusion and an opportunity to adduce evidence and/or make submissions on the issue. That was principally, in Mr

Justice Stadlen's judgment, because it was a finding on an issue which had not been canvassed at the hearing and on which Dr Lawrence had, therefore, been deprived of the opportunity of adducing evidence or making submissions (paragraph 201). He goes on to state that that this is also because, in so far as it purported to derive from the expertise of the psychiatrist chair it was not, in his view, appropriate for the panel to rely upon that expertise in circumstances where the chairman acknowledged that he was not an expert in psychotherapy and in particular in the process of erotic transference in the context of psychotherapy. He was not analytically trained and said that his grasp of some of the concepts was tenuous in places (paragraph 202).

The judge goes on to say that, even if the chair had expertise in the field of psychiatry as to whether a woman with low self-esteem unless encouraged would be unlikely to fantasise that she was attractive to another, he plainly did not have expertise on the question whether that unlikelihood was or might be affected by the phenomenon of erotic transference.

Mr Justice Stadlen was of the view that the first impugned statement was a finding on an issue which was live in the case before the publication by the panel of its determination. In his view that rendered the panel's finding which was not open to it to make without giving Dr Lawrence an opportunity to address it by seeking to adduce evidence and/or making submissions. He goes on to state (paragraph 213):

> *'The failure of the FTPP to afford Dr Lawrence that opportunity and its inclusion of that finding in its Determination was in my view a material procedural irregularity. It was unfair to Dr Lawrence and contrary to a fundamental principle of natural justice that a court or tribunal will only make findings of fact in respect of matters on which the parties have been afforded a fair opportunity to make submissions and/or to seek to adduce evidence as appropriate.'*

He said his conclusion was not dependent on the answer to the separate but related question of whether in making its finding of fact the panel was entitled to draw on *'its expertise'* and what expertise it was referring to.

In relation to the proposition in respect of '*expertise'* it was accepted by Counsel for the GMC that panellists are not entitled to reach a decision on an issue on the basis of their expertise or experience where the issue has not been the subject of any evidence or argument. The use to which they can use their expertise or experience is limited to the evidence which is adduced and the submissions which are laid before them. To go beyond that and reach a conclusion on an issue which was not live before the panel on which no evidence or argument had been made would be unfair (paragraph 217).

Counsel for the GMC also accepted (paragraph 218) that that followed from *Southall v General Medical Council* [2010] EWCA Civ 407 where in obiter dicta Leveson LJ addressed a submission by Dr Southall's Counsel that the lack of a panel member from the same

specialty as the practitioner required the court to pay less deference to the panel's conclusions. Leveson LJ rejected that argument stating at [767]:

> *'Any issues requiring particular specialist knowledge should be dealt with through the calling of expert evidence; neither the GMC nor the doctor would be in a position to challenge the opinion of a member of the panel and, if a professional in the same field, the risk would be that a decision would be made on the basis of an expert view that had not been subject of evidence or argument.'*

Mr Justice Stadlen also refers to the case of *Richardson v Solihull Metropolitan Borough Council* [1998] EWCA Civ 335 where the Court of Appeal specifically addressed the issue of an expert panel member becoming a '*backstage expert'* (paragraphs 224 to 229).

The judge concludes that the observations of the court in that case (paragraph 229):

> *'…support the proposition that a specialist tribunal including a GMC FTPP remains bound by the rules of natural justice; that the rules of natural justice preclude members of a specialist tribunal including expert members from giving evidence to themselves which the parties have no opportunity to challenge and that where a specialist tribunal drawing on its own knowledge and experience independently identifies an important fact or matter which may influence its decision but which has not been the subject of evidence adduced by or submissions advanced by the parties, it should state this openly and give the parties an opportunity to seek to adduce evidence and/or make submissions on it.'*

The judge did not consider it necessary for him to elaborate at any great length for upholding the challenge to the first impugned statement on the additional ground of the inappropriate reliance by the panel on its self avowed *'expertise'* (paragraph 237).

One of the problems with the first impugned statement was that the panel did not explain what it meant by *'its expertise'*. He set out the two interpretations of Counsel for the doctor and the GMC (paragraph 238) and whilst he felt that Counsel for the doctor's interpretation was more likely to be correct it was however:

> *'… impossible to be sure because the FTPP in its Determination failed to explain what it meant by its expertise or to give any particulars from which it would be possible to assess whether its expertise qualified it to make the finding in the first impugned statement.'*

In any event, whichever was the correct interpretation, Mr Justice Stadlen was not satisfied that the panel in fact possessed sufficient expertise to entitle it to make the finding which it did in the first impugned statement (paragraph 239).

In relation to the second impugned statement Mr Justice Stadlen accepted Counsel for the doctor's submission that the use of the word *'would'* suggests that the finding of the panel was a conclusion as to the nature of erotic transference and its potential effects in general terms rather than a factual finding that the factual evidence, in the case, was such that it was not likely that erotic transference on its own caused Patient B to believe that Dr Lawrence had feelings for her. It was therefore a finding on the nature and scope of the phenomenon of erotic transference in general terms. It follows that it was not a factual finding as to what actually occurred in this case based on the panel's evaluation of the conflicting factual evidence (paragraph 246).

The judge identifies that the question which arises is whether the panel's conclusion in the second impugned statement, namely that it did not find that erotic transference would be likely on its own to cause Patient B to believe that Dr Lawrence had feelings for her, was or may have been dependent in whole or in part on the finding, which he had held to be *'illegitimate'*, in the first impugned statement that a woman with low self esteem, unless encouraged, would be unlikely to fantasise that she was attractive to another (paragraph 250).

In his judgment it seems likely that the second conclusion was influenced or dependent in whole or in part on the first however although the conclusion is tainted by the first it does not depend on that judgment (paragraph 251). However, the judge also notes, allied to this point is the absence of any explanation by the panel as to how or why it reached the conclusion in the second impugned statement (paragraph 252).

The judge notes that panel's determination was entirely silent as to why it made the second impugned statement but the conclusion that it expressed in terms suggested that it was an opinion of the members of the panel rather than an opinion of the experts with which the panel agreed or from which the panel drew an inference (paragraph 254).

He considers the absence of reasons or explanations as to how it reached its second impugned conclusion is regrettable and makes it impossible, in his view, to rule out other possibilities as to what happened (paragraph 255). He goes on that if the second impugned statement was based on the first impugned statement it would follow in his judgment that there was a real possibility that the panel may have been led into error in its approach to its assessment of the evidence (paragraph 256). He then goes on to consider all the various permutations of what the panel may or may not have considered or accepted but it would appear with an absence of explanation.

Mr Justice Stadlen considers the nature and extent of the duty to give reasons (paragraphs 261 to 263) including the relevant extracts from the case law. The judge concludes (paragraph 271):

> *'What emerges from English v Emery Reinbold and Phipps in my view is that, whereas the degree of detail needed to satisfy the universal requirements of enabling the parties to know why they have won or lost and an appellate court*

readily to analyse the reasoning that was essential to the court's decision is fact sensitive and thus infinitely variable, it will often be necessary to refer to a particular piece of evidence or submission which has been accepted or rejected and particular rigour is likely to be necessary when dealing with expert evidence.'

The judge confirms (paragraph 272) that applying these general principles to Dr Lawrence's case he was unable to conclude that the panel satisfied the requirement to give adequate reasons for its conclusion in relation to the second impugned statement.

He notes (paragraph 283):

'In my judgment the errors which I have found were committed by the FTPP in this case cannot be characterised as "comparatively trivial." For reasons which I have given at its very lowest it is impossible to exclude the possibility that rather than weighing the expert and factual evidence on its merits the FTPP approached its evaluation of that evidence with pre-conceived conclusions which it was not entitled to make and in respect of which Dr Lawrence was deprived of the opportunity of seeking to adduce evidence and/or make submissions. In fact I would put it higher. In my view it is likely that that is what occurred.'

The judge goes on, however, to say that it does not necessarily follow from that that the panel's errors are fatal. He confirms that it is still necessary to consider whether there is a realistic possibility that if it had not made those errors the panel might have reached different findings of fact on the allegations against Dr Lawrence which it found proved.

He thereafter sets out the relevant matters in paragraphs 285 to 288.

The judge concludes (paragraph 289):

'Having reviewed the evidence and submissions and taking all these considerations into account I have come to the very clear conclusion that it would not be safe to conclude that there is no realistic prospect that the errors which I have found the FTPP made had a material impact on its assessment of the evidence or on the ultimate outcome or that, if the errors had not been made, the FTPP might not have made the same findings of fact or that it might not have found proved those allegations of misconduct which Dr Lawrence had not admitted.

Further in my view the inadequacy of reasons is significant. In critical respects it is not clear to me what findings the FTPP made or why it made the findings it did. The consequence is that Dr Lawrence does not know why he has lost. The consequence of the FTPP's findings is that Dr Lawrence's name has been erased from the register. He is in my judgment entitled to know why he lost.'

In the circumstances therefore the judge concludes that in the interests of justice required the findings on the disputed facts and the findings of misconduct against Dr Lawrence to be quashed.

The panel was 'plainly wrong' to find the allegations against him proved.

Counsel for the doctor acknowledged that the panel's factual findings were dependent in whole or in part on its assessment of the credibility respectively of Patient B and Dr Lawrence. She submitted that critical evidence in favour of Dr Lawrence was disregarded since there was no reasoned explanation why it did not feature in the determination. The central part of the appeal was therefore hybrid:-

1. the panel was not entitled to make the findings it did (no reasonable panel could have reached the conclusions which it did and it was therefore plainly wrong); alternatively,

2. the panel failed to discharge the duty to give sufficient reasons for its findings to enable Dr Lawrence to understand why it had reached them. That duty was greater than in the normal run of GMC disciplinary hearings because this was a case involving peculiar complexity and a number of difficult aspects including the subtleties of erotic transference, the important differences of nuance as between the evidence of Patient B and Dr Lawrence and the apparent rejection by the panel of expert evidence on psychotherapy.

The judge then sets out the submissions of Counsel for the doctor on the reasons why the panel should have approached Patient B's evidence with considerable care and caution (paragraphs 295 to 297).

Counsel for the doctor submitted that it was clear from the terms of the panel's determination on the facts that it did not exercise extreme care as firstly there was no reference in its determination to the 11 September 2006 email at all, and second the treatment of the evidence of Ms Dowd and Ms Sutcliffe which was dealt with in only one paragraph (paragraph 299).

Mr Justice Stadlen thereafter sets out the contents of the relevant email and the parties submissions in relation thereto as well as the panel's findings (paragraphs 300 to 345). Having considered the submissions from the parties the judge accepted that the email of 11 September 2006 was a piece of evidence capable of providing powerful support to Dr Lawrence's case and undermining the reliability of Patient B's testimony. It does not, however, in his judgment at any rate on its own constitute such powerful evidence that the panel was obliged for that reason alone to find the allegations against Dr Lawrence not proved. He did not consider it was of such a character that it was incapable of being reconciled with the testimony which Patient B had given up to that point nor were the inconsistencies relied on by Counsel for the doctor, both at the panel hearing and the

appeal, so compelling that the passages said to be inconsistent with it were incapable of alternative explanation (paragraph 333).

The judge goes on (paragraph 334):

> *'It follows therefore that in my view the FTPP was entitled and indeed bound to continue with the case and in particular to allow Patient B to be recalled to give her explanations of the email.'*

As the judge accepted that was not the end of the matter because it is not possible to decide on Dr Lawrence's challenge to the panel's findings of fact without reference to the question of the demeanour of Patient B and indeed the doctor himself when giving their oral testimony (paragraph 336).

The judge acknowledges that appeals to the High Court are by way of rehearing and differ from the hearing before the panel as regards oral testimony, the Court is limited to a review of the transcripts whereas the panel had had the advantage of seeing the witnesses give live evidence. The conclusion reached by the panel as to the reliability and veracity of witnesses is thus informed not only by the content of the testimony but also by the manner in which it is delivered. In that critical regard the court is in a different position to that of the panel (paragraph 336).

The judge however goes on to say that it does not, of course, follow that there are no circumstances in which a decision based in whole or in part on express or implied conclusions reached by a panel as to the demeanour of witnesses will not be overturned by the Court. He reminds himself of the task facing an appellant seeking to overturn findings of fact (paragraphs 338 to 343).

The judge also acknowledged that the hurdle which Dr Lawrence has to overcome is greater than that faced by Dr Southall because the standard of proof which the panel had to apply in this case was the civil standard whereas in Dr Southall's case it was the criminal standard.

His challenge to the principal findings of fact against him as plainly wrong was based not just on the 11 September 2006 email but on the other matters cumulatively. The judge however recorded at that stage in his judgment (paragraph 344) that in so far as reliance is placed on the contents of the email and Patient B's explanations of it in her email dated 12 September 2010 and her oral testimony when recalled, while they undoubtedly raise questions in the judge's mind, they did not in themselves lead him to conclude that the panel's findings of fact were sufficiently out of tune with the email and Patient B's explanations of it to indicate with reasonable certainty that that evidence was misread by the panel or that they were plainly wrong either in their conclusions as to the reliability of Patient B as a witness or in finding the principal allegations against Dr Lawrence proved.

The judge then goes on to consider the evidence of Ms Sutcliffe and Ms Dowd in paragraphs 346 to 488 which included the evidence given by them both, in some detail. Counsel for Dr Lawrence admitted that the strength of the support given to Dr Lawrence's case by the testimony of Ms Sutcliffe and Ms Dowd was so great that, taken together with the 11 September 2006 email in particular, it required the panel to find the principal charges of misconduct against the doctor not proved. She also submitted that the only safe conclusion was that it was disregarded by the panel because there is no reasonable explanation as to why it did not feature in their determination on the facts (paragraph 384).

Mr Justice Stadlen sets out the challenge to the panel's findings in relation to Ms Sutcliffe and Ms Dowd as falling into three broad categories (paragraph 396) as follows:

> 1. The evidence was so strongly undermining of Patient B's credibility and supportive of Dr Lawrence's case that it was plainly wrong to prefer her testimony to his
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> 2. The panel wrongly discounted their testimony and failed to give it proper weight and/or ignored it.
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> 3. The panel failed to refer to key parts of it and/or to explain whether they accepted or rejected critical parts of it and if the former how they reconciled the accepted testimony to their findings and if the latter what their reasons were for rejecting it.

Mr Justice Stadlen then sets out the submissions on behalf of the GMC (paragraphs 397 to 403). Having set out the key passages of evidence of Ms Sutcliffe and Ms Dowd and the arguments on both sides Mr Justice Stadlen turned to address Counsel for the doctor's submissions (paragraph 404). The judge thought it was convenient, in dealing with that first submission, to address Counsel for the doctor's primary overarching submission that the cumulative weight of the evidence was so strong that the panel's principal findings of fact were plainly wrong.

In considering her primary submission the judge also reminded himself that Dr Lawrence had to establish that the panel was plainly wrong and that he should only reverse findings on the facts if it could be shown that they were sufficiently out of tune with the evidence to indicate with reasonable certainty that the evidence was misread by the panel (paragraph 408). He also reminded himself that the advantage enjoyed by the panel was having heard and seen the witnesses give their evidence and therefore in a better position to judge their credibility and reliability which was not only an issue but lay at the heart of the case.

The judge confirmed that the 11 September 2006 email, whether looked at in isolation or together with Patient B's explanations of it, did not satisfy the tests to which he had referred (paragraph 410).

In relation to the testimony of Ms Sutcliffe and Ms Dowd Mr Justice Stadlen's view was that there were aspects which provided powerful support for Dr Lawrence's case and/or powerful ammunition for undermining the reliability of Patient B's testimony (paragraph 411). It was however, in his view, to be regretted that the panel did not make any reference to that part of Ms Dowd's evidence referred to in paragraph 412.

Mr Justice Stadlen goes through the evidence provided and the submissions made in some detail. However, he considers its *'waters'* are somewhat muddied by three aspects of the panel's determination:

1. First, it found Ms Sutcliffe a less reliable witness of events within her knowledge than Ms Dowd.

2. It chose to draw attention to the fact that apart from the group sessions and what they might have inferred through them, Ms Sutcliffe and Ms Dowd only had Dr Lawrence's reporting of the issues and outcomes of the one-to-one sessions.

3. The panel chose to draw attention to the close working relationship between Ms Sutcliffe and Ms Dowd on the one hand and Dr Lawrence on the other (paragraph 438).

The judge then goes on to deal with those aspects in his judgment and notes (paragraph 448) that by the time Ms Sutcliffe and Ms Dowd gave evidence Dr Lawrence had already given evidence. In the circumstances, he considered it artificial to ignore Dr Lawrence's evidence and the panel's findings in relation to it when assessing whether Dr Lawrence has satisfied the test in *Southall* that the panel was *'plainly wrong'*.

He considered it was *'inescapable'* that the panel formed a very favourable impression of Patient B as a witness and a very unfavourable impression of Dr Lawrence as a witness which included very unfavourable views based on his demeanour while giving evidence, particularly while giving answers on some important issues (paragraph 449).

The judge also thought it was *'inescapable'* that the panel found that Patient B was a good witness who gave clear considered and balanced answers. The judge considers it is abundantly clear that it reached a negative view of Dr Lawrence as a witness and a positive view of Patient B (paragraph 450).

As the judge reminded himself (paragraph 451) he had previously held that the panel had erred in concluding, at least without giving Dr Lawrence an opportunity to seek to adduce evidence and/or make submissions on the point, that a woman with low self-esteem unless encouraged would be unlikely to fantasise that she was attractive to another. He had also held that it could not be safely assumed that that conclusion did not taint the panel's conclusion that it did not find that Patient B's openly admitted former attraction to Dr Lawrence would be likely on its own to cause her to believe that he had feelings for her

and that it cannot safely be assumed that it did not for that reason close its mind to the possibility (as distinct from the likelihood) that Patient B's narrow erotic transference might have caused her mistakenly to believe that Dr Lawrence reciprocated her feelings, a proposition for which in his view there was support in the expert evidence.

In relation to the issues in this section, however, Mr Justice Stadlen reminded himself that he was concerned with a separate question as whether the evidence relied on by Dr Lawrence was so strong as to justify quashing the panel's principal findings of fact and its finding that the allegations of misconduct against Dr Lawrence were proved on the ground that they were plainly wrong (paragraph 453).

In the circumstances, he considered the approach to this matter should be on the basis of considering how a panel adopting a correct approach might legitimately have assessed Patient B's credibility and that of Dr Lawrence. The judge accepts that it could not be ruled out that a panel following the correct approach on the two matters identified might have reached the same views on Patient B's credibility as are recorded in the determination on the facts. The question is whether the cumulative weight of the evidence relied on by Dr Lawrence tips the scales so decisively as to compel the conclusion that it would have been bound to reach different views on her Patient B's credibility and reliability and that the findings actually made by this panel were plainly wrong (paragraph 454).

Mr Justice Stadlen then considers the available evidence and the submissions made by Counsel (paragraphs 455 to 488).

Mr Justice Stadlen's conclusions in relation to the submission that the panel's findings on the disputed allegations of misconduct were plainly wrong are set out in paragraphs 489 to 491.

He confirms he is not satisfied following the review that the strength of the evidence relied on by Dr Lawrence is so great as to justify a conclusion that for that reason the principal findings of fact by the panel and its conclusion that the disputed allegations of misconduct against Dr Lawrence were proved were plainly wrong. He did not consider that either individually or cumulatively the parts of the evidence relied on by Dr Lawrence satisfied the stringent test laid down in the authorities.

He concludes in paragraph 491:

> *'I have held that the FTPP's findings that the disputed allegations of misconduct against Dr Lawrence were proved are flawed and must be quashed because of the errors the FTPP made in relation to the two impugned statements and its failure to give adequate reasons. It may be that if it had not made those errors the FTPP would have reached different conclusions, made different findings of fact and found that the disputed allegations of misconduct against Dr Lawrence were not proved. However, it does not follow from that that the evidence relied on by Dr Lawrence was so strong that the FTPP's findings of fact and its*

findings that the disputed allegations of misconduct were proved were plainly wrong or an FTPP approaching the matter correctly could not have found the allegations proved.'

Inadequate Reasons and Wrong Approach Challenge

The issues relating to this matter are set out in paragraphs 492 to 514.

Mr Justice Stadlen confirms that the panel's failure to give adequate reasons was not confined to the impugned statements (paragraph 493):

'In my view this is an exceptional case. Although, as in Southall, at its heart lay a conflict of evidence between two witnesses of fact as to what one of them said and how he behaved, the resolution of that dispute required the FTPP, also as in Southall, to consider and reach conclusions about a number of issues which were themselves disputed and the subject of conflicting evidence and/or submissions.'

Although the judge accepts that the panel gave some reasons for why it found Dr Lawrence an unsatisfactory witness and Patient B reliable and credible there were a number of issues and pieces of evidence which in his view went to the heart of the question as to whether Patient B's testimony was reliable to which the panel made no reference and/or gave no indication as to whether it took them into account and if so what findings it made in respect of them and for what reasons and what weight it attached to them (paragraph 496) - principal among them, in his view, were the 11 September 2006 email and Patient B's explanations thereof and the evidence of Ms Sutcliffe and Ms Dowd.

The judge then goes on to deal with those omissions (paragraphs 498 to 511).

Mr Justice Stadlen concludes (paragraph 512):

'When I first read the Determination on the facts my impression was that it was informative of the FTPP's approach and not lacking in examples of its reasons for making the findings of fact that it did. However that does not alter the fact that once one appreciates the complexity and subtlety of the main issues in controversy and the most important pieces of evidence in the case and their relevance to and bearing on the two disputed versions of events, in my judgment it is apparent that in the respects which I have identified there was insufficient reference to those issues and no or inadequate explanation of whether and how they were resolved by the FTPP and/or no or inadequate reasons as to why it resolved them in the way it did. There is no doubt that in order to resolve the central dispute between Patient B and Dr Lawrence the FTPP had to form an impression of their respective reliability and credibility. However just as in Southall so in this case in my view the fact that the central issue is capable of being simply stated does not mean that its resolution did not

necessarily depend or should not necessarily have depended on a series of conclusions and/or findings of fact on sub-issues. Dr Lawrence is entitled to know why he lost and also in my judgment whether the FTPP approached important evidence in the case properly.'

He goes on (paragraph 513):

'I am of course very far from suggesting that the FTPP needed to go into anything like the level of detail which appears in this judgment. A few sentences on the key issues would have sufficed. As it is in my view the matters to which I have referred to in this section of my judgment and in the sections of the judgment dealing with the 11 September 2006 email and the evidence of Ms Dowd and Ms Sutcliffe support the conclusion which I have reached that the FTPP's Determination on the facts is flawed not just because of the errors it made in respect of the two impugned statements but also because of its lack of adequate reasons for its findings (if any) it made in relation to the email and the most important parts of Ms Dowd's and Ms Sutcliffe's evidence. That lack contributes to the inability of Dr Lawrence to know why he lost and whether the FTPP approached important evidence in the case properly.'

Additional challenges to Findings of Fact

Mr Justice Stadlen notes that Counsel for the doctor made a number of detailed submissions (paragraphs 515 to 519) but as he had already determined that the findings on the disputed allegations of misconduct should be quashed he considered that there was no useful purpose to be served by lengthening an already long judgment by dealing with those detailed submissions.

Mr Justice Stadlen's conclusions are set out in paragraphs 520 to 523.

In all the circumstances, he quashed the findings that the disputed allegations of misconduct against Dr Lawrence were proved directed the Registrar to remit the case to a freshly constituted panel and noted (paragraphs 521 to 522):

'I am mindful that the effect of quashing the FTPP's Determination on the disputed facts for the reasons I have given does not constitute a finding that the disputed allegations are incorrect.'

Salient Points

- Panellists are not entitled to reach a decision on an issue on the basis of their expertise or experience where the issue has not been the subject of any evidence or argument. The use to which they can put their expertise or experience is limited to the evidence which is adduced and the submissions which are laid before them.
- Reminder of the need for panels to give reasons for findings of fact. The degree of detail needed to satisfy the universal requirements of enabling the parties to know why they have won or lost and the appeal court to readily to analyse the reasoning is fact sensitive and thus infinitely variable.
- Further, it will often be necessary to refer to a particular piece of evidence or submission which has been accepted or rejected and particular rigour is likely to be necessary when dealing with expert evidence. Failure to do so may add to a lack of clarity as to why the doctor has 'won' or 'lost'.

Regards

Panel Development Team