PUBLIC RECORD

Dates: 23/09/2024 to 11/10/2024
04/11/2024

Medical Practitioner's name:	Dr Hazem EL- REFAEY
GMC reference number:	3387270
Primary medical qualification:	MB BCh 1981 Cairo

Type of case	Outcome on facts	Outcome on impairment
New - Misconduct	Facts relevant to impairment found proved	Not Impaired

Summary of outcome
Warning

Tribunal:

Legally Qualified Chair	Mr Andrew McLoughlin
Lay Tribunal Member:	Mr Philip Brown
Medical Tribunal Member:	Mr Thomas George

Tribunal Clerk:	Ms Keely Crabtree

Attendance and Representation:

Medical Practitioner:	Present, represented
Medical Practitioner's Representative:	Mr Lawrence Davies of Equal Justice Solicitors
GMC Representative:	Mr Philip Lodge, Counsel

Attendance of Press / Public

In accordance with Rule 41 of the General Medical Council (Fitness to Practise) Rules 2004 the hearing was held partly in public and partly in private.

Overarching Objective

Throughout the decision making process the tribunal has borne in mind the statutory overarching objective as set out in s1 Medical Act 1983 (the 1983 Act) to protect, promote and maintain the health, safety and well-being of the public, to promote and maintain public confidence in the medical profession, and to promote and maintain proper professional standards and conduct for members of that profession.

Determination on Facts - 09/10/2024

1. Dr El-Refaey qualified as a doctor in 1981 from Cairo University with a degree of Bachelor of Medicine, Bachelor of Surgery (MB BCh). In 1984 Dr El-Refaey moved to the United Kingdom (UK) and having passed exams obtained his Medical Licence to practise in the UK. Dr El-Refaey obtained membership of the Royal College of Obstetricians and Gynaecologists (MRCOG) in 1990 and in 1994 was awarded the degree of Doctor of Medicine (MD) from Aberdeen University.

2. Dr El-Refaey progressed through the career structure of the National Health Service (NHS) starting as a House Officer in 1984 and then in 1998 being appointed as a Consultant in obstetrics and gynaecology at Chelsea and Westminster Hospital ('the Trust'). Dr El-Refaey continues to practise, research and teach at the Trust.

3. The allegation that has led to Dr El-Refaey's hearing can be summarised as that, on one or more occasion between July and October 2019, Dr El-Refaey consulted with 29 patients and prescribed medication for the medical termination of a pregnancy ('TOP'). It is alleged that Dr El-Refaey failed to complete the relevant paperwork, failed to arrange for a second medical practitioner to complete the relevant paperwork and failed to send the relevant paperwork to the Chief Medical Officer within 14 days of the termination.

4. It is further alleged that in or around October 2019, Dr El-Refaey dishonestly informed Dr DD that he was completing the relevant paperwork and ensuring it was signed by a second medical practitioner.

5. The initial concerns were raised with the GMC on 12 November 2020 by the Trust. This was as a result of an investigation into concerns that Dr El-Refaey had failed to follow the correct legal process when providing TOP services to private patients seen at the Trust. During the course of the investigation, it was accepted by Dr El-Refaey that he had not been complying with the legislative and regulatory requirements in that a second doctor had not been asked to give an opinion as to the justification for a TOP and as a consequence Dr El-Refaey had not been completing the required forms in which the essential data are provided, namely HSA1 and HSA4 ("the forms").

6. The Trust provided the GMC with the records of patients seen privately by Dr El-Refaey and other documents that he had provided as part of its own investigation into his compliance with the legislative framework at his private clinics within the Trust. It was noted that there were no HSA1 or HSA4 forms completed for these patients.

7. As part of the GMC investigation it was established that in brief, relating to the provision of TOP, there are two documents which are legally required:

- Firstly, HSA 1 (Certificate A). This document needs to be completed prior to the abortion taking place. The document requires the signature of two medical practitioners who certify that the abortion can take place, under one of the grounds listed in the Abortion Act 1967.
- Secondly, the Department of Health needs to be notified of the abortion within 14 days, and this is done on the HSA 4 form.

8. It is the GMC's case that when Dr El-Refaey told Dr DD in a conversation in or around October 2019 that he was obtaining the second required signature on the form HSA1, this was a lie.

9. Dr El-Refaey denies that this was said as his case was that he had made Dr DD aware of his non-compliance regarding the forms.

The Outcome of Applications Made during the Facts Stage

10. The Tribunal refused Dr El-Refaey's application to withdraw the allegations. The Tribunal decided on Dr El-Refaey's application for the further disclosure of documents by the GMC which was made pursuant to Rule 16(6) of the General Medical Council (Fitness to Practise Rules) 2004 as amended ('the Rules'). The Tribunal's full decision on the applications is included at Annex A.

11. The Tribunal decided to admit already disclosed unredacted material into evidence. The Tribunal's full decision on the application is included at Annex B.

The Allegation and the Doctor's Response

12. The Allegation made against Dr El-Refaey is as follows:

That being registered under the Medical Act 1983 (as amended):

Termination of pregnancy services

1. In or around the summer of 2019, you set up a website, Abortion for Her, and you undertook private terminations of pregnancy for patients who contacted you via that website. **Admitted and found proved**

2. On one or more occasion between 20 July 2019 and 21 October 2019, you consulted with one or more of the patients listed in Schedule 1 and prescribed the medication listed in Schedule 2 for the medical termination of a pregnancy. **Admitted and found proved**

3. In respect of the consultation(s) mentioned in paragraph 2:

    a. Form HSA1 needed to be completed by two registered medical practitioners before the commencement of the treatment for the termination of a pregnancy; **Admitted and found proved**

    b. Form HSA4 needed to be completed and sent to the Chief Medical Officer within 14 days of the termination; **Admitted and found proved**

    c. you failed to:

        i. complete Form HSA1; **Admitted and found proved**

        ii. arrange for a second registered medical practitioner to complete Form HSA1; **Admitted and found proved**

        iii. complete Form HSA4; **Admitted and found proved**

        iv. send Form HSA4 to the Chief Medical Officer. **Admitted and found proved**

Dishonesty

4. In or around October 2019 you informed Dr DD that:

   a. you were carrying out medical terminations of pregnancies; To be determined

   b. you were completing Form HSA1; To be determined

   c. Form HSA1 was also being signed by:

      i. Dr EE; To be determined

      ii. the patient's GP. To be determined

5. You knew that Form HSA1 was not being completed, in respect of the medical terminations of pregnancies mentioned in paragraph 2, by:

   a. you; Admitted and found proved

   b. Dr EE; Admitted and found proved

   c. the patient's GP. Admitted and found proved

6. Your actions as described in:

   a. paragraph 4(b) were dishonest by reason of paragraphs 3(c)(i) and 5(a); To be determined

   b. paragraph 4(c) were dishonest by reason of paragraphs 3(c)(ii), 5(b) and 5(c). To be determined

And that by reason of the matters set out above your fitness to practise is impaired because of your misconduct. To be determined

The Admitted Facts

13. At the outset of these proceedings, through his solicitor, Mr Davies, Dr El-Refaey made admissions to some paragraphs and sub-paragraphs of the Allegation, as set out above, in accordance with Rule 17(2)(d) of the Rules. In accordance with Rule 17(2)(e) of the Rules, the Tribunal now announces these paragraphs and sub-paragraphs of the Allegation as admitted and found proved.

Witness Evidence

14. The Tribunal received written and oral evidence on behalf of the GMC from the following witnesses:

- Dr DD, Consultant Gynaecologist at the Trust, by video link;
- Dr GG, Consultant Obstetric Anaesthetist at the Trust, by video link;
- Dr HH, Consultant Obstetrician at the Trust, by video link;
- Dr FF, Consultant Gynaecologist and Obstetrician at the Trust, by video link;

15. The Tribunal also received evidence on behalf of the GMC in the form of a witness statement from Dr EE, Consultant Obstetrician and Gynaecologist who was not called to give oral evidence.

16. Dr El-Refaey provided his own witness statement undated but said to have been signed on 1 September 2024 and also gave oral evidence at the hearing.

Expert Witness Evidence

17. The Tribunal received a report dated 20 April 2021 from the GMC's expert witness Dr II. He also gave oral evidence at the hearing. Dr II outlined the failures of Dr El- Refaey to comply with the legislative framework for medical abortions. His opinion was that in spite of an appropriate level of clinical care provided it was clear that the required legal process was knowingly ignored throughout the provision of the service. For that reason, he concluded that the overall standard of care was seriously below that expected.

Documentary Evidence

18. The Tribunal had regard to the documentary evidence provided by the parties. This evidence included but was not limited to:

- Examples of forms HSA1 and HSA4;
- Hearing bundles totalling 1216 pages;
- Amended statement of Dr El-Refaey;
- Additional disclosure order by the Tribunal during the course of the hearing;
- Guidance note for completing HSA4 paper forms, Department of Health and Social Care - updated 1 May 2024.

The Legal, Regulatory and Medical Processes for medical terminations in 2019

19. The Tribunal understood, and it was agreed that the procedure as applied for medical terminations at the time of these allegations was as follows:

- Firstly, form HSA1 needs to be completed prior to the commencement of the termination taking place. The document requires the signature of two medical practitioners who certify that the abortion can take place, under one of the grounds listed in the Abortion Act 1967 ("the Act"). Only one doctor needs to examine the patient in a consultation.
- The patient is then given a drug (mifepristone tablet) to commence the termination.
- If the patient is completing the termination procedure at home, which is permitted, they will be provided with a second drug (misoprostol), to be taken following the advice of the doctor, to complete the termination procedure.
- Secondly, the Department of Health needs to be notified of the completion of the termination within 14 days, including the names and addresses of the doctors who certified that there were lawful grounds under the Act, gestation, method used, date and place of termination. This is done using form HSA4.

The Tribunal's Approach

20. The Legally Qualified Chair (LQC) provided legal advice to the Tribunal which the Tribunal accepted and used throughout its deliberations.

Burden and standard of proof

21. In reaching its decision on facts, the Tribunal has borne in mind that the burden of proof rests on the GMC and it is for the GMC to prove the Allegation. Dr El- Refaey does not need to prove anything. The standard of proof is that applicable to civil proceedings, namely the balance of probabilities, i.e., whether it is more likely than not that the events occurred.

22. The applicability of the burden and standard of proof in cases before this Tribunal was recently noted in *Byrne v. General Medical Council* [*2021] EWHC 2237 (Admin)* at paragraph 22 where Morris J said:

> *" (1) There is only one civil standard of proof in all civil cases, and that is proof that the fact in issue more probably occurred than not.*

(2) There is no heightened civil standard of proof in particular classes of case. In particular, it is not correct that the more serious the nature of the allegation made, the higher the standard of proof required.

(3) The inherent probability or improbability of an event is a matter which can be taken into account when weighing the probabilities and in deciding whether the event occurred. Where an event is inherently improbable, it may take better evidence to persuade the judge that it has happened. That goes to the quality of the evidence.

(4) However, it does not follow, as a rule of law, that the more serious the allegation, the less likely it is to have occurred. So, whilst the court may take account of inherent probabilities, there is no logical or necessary connection between seriousness and probability. Thus, it is not the case that 'the more serious the allegation the more cogent the evidence need to prove it'."

Good character

23. The LQC reminded the Tribunal that Dr El-Refaey has no criminal convictions or adverse regulatory findings recorded against him. He is therefore to be regarded as of good character.

24. Substantial issues of fact have to be decided and on these issues the credibility and honesty of Dr El-Refaey in the evidence he has given are themselves issues.

25. While Dr El-Refaey's good character is not conclusive and does not provide him with a defence, it is relevant when assessing his honesty.

26. Further, his good character is relevant when assessing his propensity to act as alleged. It supports and should be taken into account when assessing the inherent improbability of Dr El-Refaey acting as alleged in accordance with *Byrne v. GMC.*

Dishonesty

27. In respect of the allegations that Dr El-Refaey acted dishonestly, the LQC referred the Tribunal to the test laid down by the Supreme Court in *Ivey v Genting Casinos (UK) Ltd [2017] UKSC 67 ('Ivey')*. When dishonesty was in question, the fact-finding Tribunal had:

- to first ascertain, subjectively, the actual state of the individual's knowledge or belief as to the facts. The reasonableness of that belief was a matter of evidence going to whether they had held the belief, but it was not an additional requirement that the belief had to be reasonable; the question was whether it was genuinely held.

- when the state of mind was established, the question whether the conduct was honest or dishonest was to be determined by applying the objective standards of ordinary decent people. There was no requirement that the defendant must appreciate that the conduct was dishonest by those standards.

Approach to the evidence

28. Firstly, the passage of time may affect the memory of each of the witnesses including Dr El-Refaey about what exactly happened years ago. Delay may affect the quality of the evidence of any witness.

29. The Tribunal should bear in mind that the passage of time is likely to have affected the memory of each of the witnesses about exactly what happened. It may even have played tricks on their memories, leading them genuinely to believe that things happened when they did not.

30. A convincing witness may still be wrong. There may also be a danger of real prejudice to Dr El-Refaey because these events took place five years ago.

31. Secondly, the Tribunal must not assume that the evidence of a witness is untrue because they said something different on another occasion. It is for the tribunal to decide what the situation was in this case by considering all of the evidence. This includes any inconsistencies.

32. Thirdly, it is often best where issues of fact are in dispute, as in this case, to begin with what is not in dispute and consider such contemporaneous documents as exist in context before making any assessment of the credibility of the witnesses.

33. This has been emphasised in three recent High Court cases in the regulatory field of law: *Dutta v. GMC [2020] EWHC 1974 (Admin), Khan v. GMC [2021] EWHC 374 (Amin)* and

Joseph v GMC 2022 EWHC 3345 (Admin) which reference the commercial case of *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 *(Comm).*

34. In *Dutta* the court said that that it was an error of principle to ask: "do we believe her?" before considering the documents. This does not mean that oral testimony serves no useful purpose. But its value lies in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and reliability of the testimony of the witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, (citing *Gestmin*) it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.

35. Warby J (as he then was) in *Dutta* further cited with approval the observations of Mostyn J. in *Lachaux*, that:

> *"Witnesses, especially those who are emotional, who think they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason, a witness, however honest, rarely persuades a judge that his present recollection is preferable to that which was taken down in writing immediately after the incident occurred. Therefore, contemporary documents are always of the utmost importance…"*

36. In *Khan* the court said that it is wrong for a tribunal to begin with the question of credibility generally and without reference to the specific allegations made because in effect the tribunal is beginning its analysis by asking "Do we believe her?"

37. In *Gestmin* the court indicated that it is wrong to suppose the more confident another person is in their recollection the more likely it is to be accurate. The court suggested starting with the objective facts as shown by authentic contemporaneous documents, independent of the witness, and using oral evidence as a means of subjecting these to "critical scrutiny".

38. In *Joseph* the court referred to *Dutta* and said at paragraph 23 …

> *"that the best evidence on which to base fact finding will always be objective matters shown by contemporaneous documentation. But that is not always required and may not always be available; and then substantial reliance may properly be placed on the oral evidence of a complainant, including in*

> *preference to that of a respondent. Where reliance has to be placed on witness recollection, demeanour may in an appropriate case be a significant factor and the lower tribunal has the advantage there. And in a case where the complainant provides an oral account, and there is a flat denial from the other person concerned, and little or no independent evidence, it is commonplace for there to be inconsistency and confusion in some of the detail. Nevertheless, the task of the court below is to consider whether the core allegations are true."*

39. Fourthly, in *Byrne v. GMC [2021] EWHC 2237 (Admin),* at paragraphs 17-20, Morris J, dealing specifically with the credibility of witnesses and corroborating evidence, repeated the correct approach to evidence and said that the credibility of witnesses must take account of the unreliability of memory and should be considered and tested by reference to objective facts and, where possible, as shown by contemporaneous documents. However, there is no rule that corroborating evidence is required. Moreover, it is commonplace for there to be confusion in some of the detail. The task of the tribunal is to consider whether the core allegations are true.

40. The central issue in this case is: has the GMC satisfied the Tribunal to the requisite standard of proof that the allegations against Dr El-Refaey are true? And if so, why?

41. The Tribunal should consider the written and oral submissions of both parties but were not bound to accept any of the submissions but should form its own independent judgement in reaching conclusions as to the facts in the case.

The Tribunal's Analysis of the Evidence and Findings

42. The Tribunal has considered each outstanding paragraph of the Allegation separately and has evaluated the evidence in order to make its findings on the facts.

Forms HSA1 and HSA4

43. The Tribunal had regard to Dr II's evidence. He referred the Tribunal to the law relating to termination of pregnancy under the Act which is summarised in the Department of Health's 2014 publication *Guidance in Relation to the Requirements of the Abortion Act 1967 ('the 2014 guidance').* The relevant paragraphs are:

> *'11. Form HSA1 must be completed, signed and dated by two RMPs* [registered medical practitioners] ***before*** *an abortion is performed. The HSA1 form must be kept*

with the patient notes for 3 years from the date of termination. The form must be completed by both RMPs certifying their opinion, formed in good faith that at least one and the same ground for abortion in section 1(1) of the Abortion Act exists. The certification takes place in the light of their clinical opinion of the circumstances of the pregnant woman's individual case. The lawful grounds for abortion are set out in Annex A….

26. Section 2 of the Abortion Act requires all RMPs terminating a pregnancy to give notice to the Chief Medical Officer (CMO). It is a criminal offence for RMPs not to notify the CMO of every termination they perform. In *England, the Abortion Regulations require that Form HSA4 be submitted to the CMO within 14 days of the procedure.*
This notification is used by the Department of Health as an aid to checking that terminations are carried out within the law. Form HSA4 requires detailed information relating to the procedure, including the names and addresses of the doctors who certified there were lawful grounds under the Abortion Act, gestation, method used and place of termination. Every form is checked and monitored by DH officials authorised by the CMO. Data derived from the forms is used to publish annual statistics on abortion. It is crucial that all abortions performed are notified to the CMO, both as a matter of law and for there to be and trust in the data that are published.'

44. Dr II stated that the requirements set out in paragraph 11 of the guidance state that the signatures are required before the procedure takes place – that is, in the case of medical termination of pregnancy, prior to the patient being administered the mifepristone medication which he said commences the abortion process. Dr II stated that paragraph 26 sets out the legal requirements for informing the CMO following a termination of pregnancy.

45. Dr II stated that these requirements remain the same to the present day, even following changes in guidance about where a termination can take place, including the patient's home. He stated that as set out in the extensive correspondence surrounding this case, there was quite a lot of discussion about the existing legal framework for termination of pregnancy. Dr II stated that despite these discussions about the legal framework not having changed with the changes in medical practice, the fact remained in his opinion that the current law must be followed by doctors undertaking termination of pregnancy in the UK.

46. Dr II stated that the purpose of the requirement that two doctors certify the ground(s) for termination is to ensure that the law is being observed; this provides protection

for the woman and for the doctors providing the termination. Dr II stated that the clear intention of the Act was for each doctor to consider the woman's circumstances in forming a good faith opinion. He stated that the Department of Health considered the signing of forms without consideration of any information relating to the woman to be incompatible with the requirements of the Abortion Act.

47. Dr II stated that Section 2 of the Act requires all registered medical practitioners ("RMPs") terminating a pregnancy to give notice to the Chief Medical Officer (CMO). He said that it was a criminal offence for RMPs not to notify the CMO of every termination they perform in England, the Abortion Regulations requiring that Form HSA4 be submitted to the CMO within 14 days of the procedure. Dr II stated that this notification was used by the Department of Health as an aid to checking that terminations are carried out within the law. Form HSA4 requires detailed information relating to the procedure, including the names and addresses of the doctors who certified there were lawful grounds under the Act, gestation, method used, date of the abortion and place of termination. Dr II stated that every form was checked and monitored by Department of Health officials authorised by the CMO. He stated that data derived from the forms was used to publish annual statistics on abortion.

48. Dr II considered that form HSA4 could be completed if a patient was taking the second pill at the home address on the basis that the RMP would sign in good faith that they were expecting the patient to follow the medical advice given at the time that the first pill had been taken in the presence of a doctor.

49. On the basis that this evidence was not challenged, the Tribunal accepted Dr II's evidence.

50. The Tribunal had regard to Dr El-Refaey's witness statement in which he explained his failure to complete form HSA1, arrange for a second registered medical practitioner to complete it and his failure to complete form HSA4 and send it to the Chief Medical Officer. He stated:

> *'I accept that it is currently a legal requirement to obtain two signatures on the HSA 1 form; ... For reasons I explain below I admit I did not comply with that requirement in the period of 20 July 2019 to 21 October 2019 in respect of the patients listed in Schedule 1…There have been no further infractions since 2019.*
>
> *Similarly, I also accept that there is currently a legal requirement for the medical practitioner to complete the HAS 4 [sic] form… within a 14 day period. For reasons I*

explain below I admit I did not comply with that requirement in respect of the same patients during the period of July 2019 to October 2019. There has been no further infraction by me in that regard since October 2019. It is also important to note that no patient suffered any harm by that failure. In fact, my 29 patients were best protected by my conduct in that regard.

lt is also important to note that I self-reported my 2019 failure to complete the prescribed forms to the Trust in February 2020. This fact is confirmed by the Responsible Officer …, who confirms that I "alerted" the Trust to my administrative error. It was an honest mistake made in relation to an anachronistic administrative process which I was required to carry out in very challenging work conditions, and in a hostile working environment in which I was marginalised and, to an extent, isolated.

I carried out my private abortion work on the Private Outpatient Clinic on fourth floor for the following reasons - (1) the availability of the ultrasound machine to assess my patient and ensure that they are in the first 10 weeks of gestation ; (2) the space does not include ante-natal patients (women with wanted pregnancies); (3) the close vicinity of the room to the controlled drug cabinet. Consultants from different specialities rent a room when they wish to see a patient for an appointment. In my case. I carried out the assessment, took the history and did the scan which took about an hour.

The abortion medicated process involves the patient taking two sets of pills. The first pill (mifepristone) is taken in front of the medical practitioner. The others must be taken 36 hours later in a hospital or a clinical facility as a day case. Patients used to return to the hospital to be admitted for the second set of pills. They used to be observed and monitored by nurses and examined by the responsible clinician, to administer the pills the pills [sic] and ultimately to confirm abortion is complete prior to discharge.

However in 2018 the Department of Health declared that women could have early medical abortion at the privacy of their own homes; after a single encounter with a medical doctor. In 2018, patients were permitted to take the second pill in the privacy of their own home where they swallow it or self-administer it vaginally. This changed the pathway of care completely. It has also lead to circulation of these abusable medications in the community; "Since 2022, at least six women have been taken to court and dozens have been investigated for allegedly ending their pregnancies outside the legal requirements covering abortion."

Home abortion and single encounter with a clinician is the significant factor in this investigation and my referral for GMC. I hasten to stress however that my case is related to 29 cases in early pregnancy who were all less than 10 weeks, and that no patient came to harm, or complained about the treatment received. The matter is related to the administrative issues around the law.

lt is important to explain that the two signature requirement should not be a problem when surgery is required. As it is obvious that two doctors will be involved; a Gynaecologist and an Anaesthetist. There is a time interval between a consultation and surgery.

lt is important also to state that the "second " signatory has no role in the medical process and in fact they do not even see the patient. Practically they don't even review the notes. The form itself gives him/her the option to state that they have not met the patient concerned. The RCOG and BMA and members of Parliament consider that removing the unnecessary and obsolete second signature requirement to be an immediate priority.

Early medical abortion used to be performed in hospital clinical facilities prior to 2018. Patients used to have the first medication in the clinic; to come back two days later to a ward as a day case. Second medications and paper works was always completed prior to inserting the tablets and upon admission.

After 2018 all that changed. It was not clear to me initially where the paperwork fitted in. My focus and attention was on Patient care. These are sensitive consultations to women and young girls. Some of those 29 patients came to me from far, some spoke limited English, some was fearful and anxious about confidentiality.

Consultation involved clinical and ultrasonic assessment, record keeping electronically. I made sure that consultations were sensitive and complications were explained and guilt feelings were addressed . When the decision is agreed, and appropriate, the first drug Mifepristone is administered.'

51. In his oral evidence Dr El-Refaey told the Tribunal that he could not complete form HSA4 in all honesty because he had to verify that the abortion had actually taken place, and he could not do so as he was unsure as to whether the abortion was successful because he

had not carried out a further medical examination after a patient had taken the second pill at their home address.

52. The Tribunal had regard to the *Guidance note for completing HSA4 paper forms (updated 1 May 2024),* as follows:

> *'Forms will be returned if no information is given, if a hospital stamp is used but no doctor's name is given or if the same doctor is given twice as shown in section.*
>
> …
>
> *Currently, around 10% of paper HSA4 forms received are returned to registered medical practitioners because of missing, incomplete or invalid data. The main errors that occur are missing doctors' names on page 1, and missing gestation and missing ground information, both on page 4. Incomplete forms will be returned to either the practitioner terminating the pregnancy or to the place of termination. If an amended form is not returned within 6 weeks, reminders will be sent until the information is received. Incomplete forms generate additional work for those completing the forms and for those who process them on behalf of the CMO. Therefore, you must ensure that all information is entered accurately.*
> …
>
> *If the termination cannot be confirmed, you should leave the 'date termination confirmed' box blank. If, after sending the form, it is found that the pregnancy has not ended, a letter must be sent to the CMO and the form will be cancelled.*
> …
>
> *The HSA4 form should be sent to the relevant address shown at the top of page 1 of the form within 14 days of the termination. Any forms with missing or inconsistent data will be returned to the clinician with the relevant parts of the form highlighted. These should be checked and amended as necessary and returned to DHSC. If the revised forms are not returned within 6 weeks, reminders will be sent every 2 months until the information is received.'*

53. The Tribunal noted that the above guidance acknowledged that there were practical issues with the regard to the completion of the forms, but this guidance was not in place in 2019.

54. The Tribunal also noted the evidence from Dr DD, Dr FF and Dr HH which suggested that there had been practical issues completing and submitting the forms prior to the updated guidance in May 2024. However, Dr DD and Dr FF stated they had overcome these difficulties as the forms were a legal requirement.

55. The Tribunal noted the contents of a letter to Dr El-Refaey dated 28 October 2019 from Professor JJ, who at that time was the President of the Royal College of Obstetricians and Gynaecologists ('RCOG') which stated:

…

'We continue to provide professional support to Members of Parliament in order to change abortion legislation. Until this has been successful, we are in the unfortunate position of having to abide by a law which, as you say, is anachronistic and places healthcare professionals in difficult situations'

…

56. This letter from Professor JJ was in reply to an undated letter from Dr El-Refaey (although he says in his evidence it was sent on 20 October 2019). In that letter Dr El-Refaey says:

'In the united Kingdom It is required that form HSA1 (otherwise known as the blue form) is signed prior to commencing the treatment. It is stated twice that this form "which is a certificate of opinion" is to be completed by (two) clinicians prior to treatment.

The rapid changes in early medical abortion have rendered these requirements impossible to be met and null and void since the vast majority of patients have a single encounter with a clinician.

…

In summary it is possible to comply honestly with this requirement when surgical abortion is at hand as there is a time interval which enable a second clinician to sign the form as required. In early medical abortion this can not be met. As women have a single encounter with a single clinician prior to completing medical abortion at their home.'

57. The Tribunal were told that prior to the 2014 guidance at least 67 medical practitioners were investigated for non-compliance with completing the forms correctly by pre-signing of the second signature on HSA1 but did not face criminal prosecution or GMC disciplinary proceedings.

58. The Tribunal concluded that there had been practical difficulties in 2019 completing the forms. However, the Tribunal accepted the evidence of Dr II that Dr El-Refaey was under a duty to comply with the legislative framework for medical abortions and he failed in his duty to do so, especially in light of the 2014 guidance. Dr El-Refaey accepted that he failed in his legal duty to do this.

Dishonesty

Dr HH

59. The Tribunal noted the evidence of Dr HH who was the Case Investigator dealing with the alleged non-compliance with regulatory paperwork regarding medical termination of pregnancies undertaken by Dr El-Refaey at the Trust (Chelsea Wing, private patients). Dr HH reviewed the medical records and interviewed the key witnesses before providing a report. The report included typed up notes taken during informal interviews with: Dr El-Refaey (also known as HER in the report) on 2 March 2020; and with Dr DD and Dr FF shortly after this. It also included typed up notes of formal investigation meetings with Dr DD on 30 June 2020, Dr FF on 7 July 2020 and Dr El-Refaey on 8 July 2020.

60. The Tribunal had regard to Dr HH's typed up notes of the informal meeting at the Trust with Dr DD, as follows:

> *'I met with DD to gain assurance that the documentation processes were being undertaken correctly for similar women in the NHS termination service and for his private patients.*
>
> *…*
>
> *In 2019 (? October) DD had been informed of the non compliance with the legal documentation by Mr El Refaey and he had spoken with him and reiterated the importance of this.'*

61. The Tribunal also had regard to the typed notes taken by Dr HH of the formal investigation meeting with Dr DD on 30 June 2020, as follows:

> *'Chelsea and Westminster Hospital NHS Foundation Trust (Chelwest) system is run by you and Dr FF, it is a Consultant-run system and the private or NHS process is exactly the same. This is to see a patient, sign Certificate A and you or Dr FF sign the other part, or it could be a GP, or registrar. It's always the process for the form to be signed by 2 doctors and this process is double checked by nurses and audit. Abortion care is a highly regulated part of medicine, possibly the most regulated. The second process is that every abortion needs to be notified to the department of health. This notification is termed the "yellow form", where details of the patient and the termination of pregnancy (TOP) are filled out and sent to the DOH. There is a process in Chelwest for managing the notification forms, where Ms KK collects all of these forms and sends them to the Department of Health. She keeps a record of both private and NHS patients, as the pathway for TOP in the NHS or private service is the same. There are CQC checks and annual CCG inspections, which have always been coming out very positively. The CQC particularly is aware and has requested that the process for managing private abortions mirrors the NHS model, particularly with regards to keeping a record of the notification process.*
>
> *…*
>
> *I [Dr HH] asked when were you [Dr DD] made aware of Mr EI-Rafaey's non-compliance with the legal documentation.*
>
> *You said it was around September/October 2019. A nurse who wishes to remain anonymous has raised it with you directly as a concern with regards to the documentation. You discovered HER had a web site advertising the service at private patients in Chelwest. You asked HER about it and queried whether he was running the service in line with the required standards. He was very vague. You questioned HER as to whether he is doing the process correctly. Eventually HER said that Dr EE another consultant had signed the other part of the forms. You said you are not sure whether that was the case, however that's what HER said at the time. HER told you at the time that he will take down the website and will not be doing it again. This was an informal conversation. HER said he will shut the website down so you thought the matter is resolved. This conversation was around September/October 2019.*

Dr DD

62. The Tribunal had regard to Dr DD's GMC witness statement dated 8 November 2021, as follows:

> *'Private patients attending the hospital for an abortion can be seen in both the gynaecology outpatients or in the private patient department. In the gynaecological outpatient clinic, there are nearly always other doctors available to countersign Certificate A. However, in the private patient department, there are far fewer doctors available to countersign Certificate A and it may be necessary to go to other parts of the Trust to obtain a colleague to countersign.*
>
> *Initially, I did not know that Dr El Refaey was providing private medical terminations. However, I believe that in or around October 2019, my secretary pointed out to me that Dr El Refaey had a website offering this service. As Dr El Refaey did not work in the NHS abortion service, I was concerned about whether Dr El Refaey was correctly dealing with the requirements of Certificate A and I discussed this with him. Dr El Refaey informed me that he was carrying out medical terminations within the private patient department. He also informed me that he was completing Certificate A and that the second signature was being provided by either Dr EE, one of our consultant colleagues, or the patient's GP. I was therefore satisfied that this was being appropriately completed.*
>
> *Dr El Refaey also informed me that he was not entirely happy with how the clinic was running and he intended to stop the service for the time being. Following this discussion, I understand that Dr El Refaey did shut down his website.*
>
> *In light of our discussion, where Dr El Refaey had indicated that Certificate A was being correctly completed and that he was, in any event, closing the service, I saw no reason to take matters any further.*
>
> *On 18 February 2020, whilst I was on leave, my secretary told me that Dr El Refaey's website was up and running again. I was surprised and I sent Dr El Refaey a text asking for clarification…*
>
> *On Tuesday, 25 February 2020, I spoke with senior management (Dr GG) regarding Dr El Refaey providing private abortions at the Trust. I cannot now recall the details of what was said during that conversation. I did not speak with Dr El Refaey about this situation again and I had no further involvement once it was referred to senior management.'*

63. In his oral evidence Dr DD maintained that Dr El-Refaey had assured him that forms HSA1 and HSA4 were being completed correctly. Specifically, he said that Dr El- Refaey had told him that Dr EE had been providing the second signature on the forms. However, Dr DD accepted that Dr El-Refaey may not have assured him that the patient's GP sometimes provided the second signature, and that he may simply have assumed that.

64. Dr DD was asked in oral evidence about Dr El-Refaey's account that Dr El-Refaey's website had been repeatedly clicked from one source which he believed to be Dr DD's website manager 'LL', and which Dr El-Refaey believed was intended to disrupt his website. Dr El-Refaey said that he had contacted LL about this, and Mr LL said that he would need to speak to Dr DD about that. Dr DD accepted that his web site manager was Mr LL. He conceded that Mr LL could disrupt Dr El-Refaey's business. However, he did not recall having a conversation with Mr LL about stopping the multiple clicks as suggested by Dr El-Refaey.

65. Dr DD was asked in his oral evidence about the text messages he exchanged with Dr El-Refaey on 15 October 2019. Those text messages show that Dr DD contacted Dr El-Refaey to tell him that his website still appeared on the Google maps section. Dr DD accepted the response from Dr El-Refaey which was that he had given clear instructions last week (the Tribunal inferred this was to close down the website) and that he required to meet with Dr DD to discuss further. Dr DD responded to say that there was no need to meet specifically but needed Dr El-Refaey to instruct his web managers to take it down completely as he just wanted him to be *"squeaky clean".* Dr El-Refaey replied *"are you saying that I should not relaunch the site! And don't include this service in my private work in CW"*. The response from Dr DD is that *"anything you do will need to be passed by the CQC"* and later he messaged *"… you will need to discuss this with the bosses…they have a clear rule that you cannot undertake anything privately which you don't do on the NHS".*

66. On 18 February 2020 Dr DD texted Dr El-Refaey again: *"…I'm on holiday right now but if [sic] just had a message from the people who reported you to me previously that your website it [sic] back up. Is this true?".* In his oral evidence Dr DD said he reported this to the Clinical Director Dr GG prior to the text message.

67. Dr DD also gave evidence about his own private medical abortion practice and his concerns in 2019 and 2020 about whether Dr El-Refaey should have been undertaking private practice in that area.

68. Dr DD was questioned about an investigation that the Trust had carried out in relation to his own behaviours conducted after the investigation into Dr El-Refaey. Following that investigation, he resigned as lead of the NHS abortion service. Dr DD told the Tribunal he had been completely exonerated by the Trust following that investigation into his own professional practice.

Dr FF

69. The Tribunal had regard to Dr FF's witness statement dated 26 September 2022. In that statement she confirmed that she had checked and made corrections to the notes of the investigation meeting she attended with Dr HH on 7 July 2020.

70. The Tribunal had regard to the text messages between Dr FF and Dr El- Refaey. In those messages Dr El-Refaey raises concerns with Dr FF about the message he has received from Dr DD with regard to the website. In those exchanges there is a suggestion by Dr El-Refaey that he and Dr FF work together by relaunching the website in Dr FF's name only. It is suggested by Dr El-Refaey that permission is not required from Dr DD to which Dr FF responds that she will have to speak with Dr DD.

71. Dr El- Refaey confirmed that there were text messages passing between himself and Dr DD and also messages to Dr FF which were contemporaneous to each other.

72. The Tribunal had regard to the notes of the Trust investigation meeting with Dr FF on 7 July 2020, as follows:

> *'I [Dr HH] asked when you [Dr FF] became aware of HER's non-compliance with the documentation.*
>
> *You said that you had no idea about it; Dr DD was involved with it and advised you he's dealing with the matter. You said you were not involved and can't remember exactly when it happened.*
>
> *You said that following that HER wanted you to confirm to him as to what is the TOP documentation process in the Trust, but he didn't involve you with any details of the matter. You said that he seemed upset and by then had an interaction with Dr DD. Following HER's request you've told him what you do in the Trust with regards to the NHS abortion care pathway. You confirmed this was a telephone conversation last year; you can't remember the exact date but it was after your conversation with Dr*

DD. The topic of your conversation with HER was around the private abortion care provision. You said that HER appeared emotional and you did not want to get into conflict with private medical abortion care and you didn't want to get involved financially. You advised HER during the conversation that the requirement is there for 2 doctors' signature and a notification form for Department of Health. You said it was a supportive conversation and a clarification from you as requested by HER as to what should happen in line with the legal requirements and our Trust's procedures.

73. Dr FF in her oral evidence confirmed that she knew in October 2019 that Dr El-Refaey was feeling under pressure by Dr DD to close the website as demonstrated by the text messages. She said she had felt uncomfortable being *"stuck in the middle"* between Dr El-Refaey and Dr DD over this matter as they were both close colleagues. She also stated that she would not hide things from Dr DD.

74. Dr FF also confirmed in her oral evidence that she and Dr DD did regularly provide the second signature on each other's HSA1 forms.

Dr El-Refaey

75. The Tribunal had regard to the notes of the Trust investigation meeting with Dr El-Refaey on 8 July 2020, dealing with concerns into reported non-compliance with legal requirements and regulatory paperwork in relation to medical termination of pregnancies for private patients as follows:

"The point regarding 2 clinicians signing the form has always been a matter of debate by the BMA and other bodies, pressure groups etc. You didn't try to violate the law but you found yourself in this problem and you were not sure how to overcome it.

I asked you following on your declaration above, to confirm whether you have performed TOPs without signatures.

You said that you did.

I asked how many TOPs you've performed without signature.

You said you think it was about 20 cases. At the end of 2019 you've established 2 websites and you went into this without understanding the impact of changes implemented by the Royal College of Obs & Gynae, which made it almost impossible to

sign the form with 2 signatures. When a patient came in, you saw them, you complied with all of the medication regulations, and none of them were harmed in any way. You found it difficult to find someone to sign the form in retrospect once a tablet was given to the patient.

I asked what your plan was at the time to comply with the required 2 signatures.

You said that you have to say that you didn't think of it at the point, you didn't anticipate. After 2018 Royal College of Obs & Gynae it became easier for women who could now have a tablet taken at home, there is no need for the second visit. It requires one scan, obtaining the tablet and being able to take it at home. There was no problem before until you realised that some clinicians get these forms signed in retrospect by other juniors. You said that you couldn't do that as you know the law in too much detail and you found that doing so would be abusing people's confidence, for them to sign without knowing the complexity of the subject.

I asked whether prior to setting up your website you were seeing patients for TOPs.

You said you were not doing TOPs before having your website. You said that you took a conscious decision to start private practice as an Obs & Gynae clinician. Royal College of Obs & Gynae changed recently, which disabled the ability for you to have the form signed with 2 signatures.

I asked when you were running clinics in the hospital whether you had no one to ask for the second signature.

You said that your private practice in the hospital was upstairs and other Obs & Gynae clinicians were based downstairs. Upstairs were clinicians who were physicians or general surgeons.

I said to confirm, you've set up the website, you were doing clinics and then you realised it was not working logistically. You confirmed. I asked what you did next.

You said that you had 3 conversations with Dr DD who is in charge of the service after he became aware that you were conducting TOPs. During your first conversation Dr DD advised you that in the Trust a clinician would not be performing TOPs in private practice if they were not doing it in the NHS service.

I asked when this conversation took place.

You said this was within the first 10 days of you starting the business. Dr DD stated that you shouldn't do TOPs as this is a long understanding in the Trust that a consultant would not provide a service in private care that they don't provide under the NHS service. You tried to convince Dr DD with regards to your background and expertise and that you could do a daily clinic to cover it together. Dr DD did not accept this offer.

I asked whether during this conversation you have advised Dr DD regarding the issues you were experiencing with obtaining the 2 signatures.

You said not at all. You had the second conversation after that and at the time you were setting up a website, people in India were arranging marketing for it and you were paying money for it. You were then informed by them that there were unusual clicks on your website which was following your conversation with Dr DD. You tried to speak to Dr DD about it but he denied it. His assistant advised you that you will need to reach an agreement as otherwise too much money will be spent. A few days later Dr DD came and found your patients and said that you didn't give antibiotics to them or checked the res status, and there has been a case of pregnancy. You explained to Dr DD that this was not the case regarding res and that pregnancy was within 10 weeks.

You said that the third conversation that you had with Dr DD was when you were called in immediately and Dr DD said he went through the record and that you didn't fill in the TOP forms with the 2 signatures. Dr DD explained that this matter can be reported to Senior Medical Team and that you can be suspended, referred to the police etc. You were shaken as you felt that you couldn't speak to anybody about the 2 signatures being a problem and Dr DD would be the person to help you solve it given he was the lead, but you didn't feel he could help you with that at this point. You said you then decided to close the website. You said that this conversation happened in October 2019. You then closed your website on the same day. The website is complicated and you had other people working on it, but you phoned them immediately and they have closed it for 4 months until you'd find a solution.

I asked how long your website was live for.

You said it was for about 10 weeks.

I asked to confirm whether it was during this time that you undertook the approx. 20 terminations without the 2 signatures.

You confirmed.

I asked whether if needed I would be able to find documents for these patients with 1 signature on it or whether there are no documents for these TOP cases.

You explained that in the past there used to be hard copies of forms. You said that when you were seeing these patients you were making notes on the system and every patient encounter has a prescription done electronically. These records would be available on the Evolve system in the part where clinician can leave notes.

You said that after you decided to investigate further the subject regarding the two signatures, you wrote to the president of the Royal College of Obs and Gynae who provided you with a response [letter presented previously to the investigator]. In your view by allowing women to take tablets at home this makes the situation more difficult. Technology has also moved ahead, the College guidance is that you can just have one patient encounter, they then take the tablet and can take it at home. You wonder how in this case two clinicians can sign the form.

You said that you became aware afterwards of people all over the country involved in various schemes to overcome this problem, for example faxing the form to another clinician after and getting a fax back with the second signature.

I asked whether you asked anybody in the clinic or another day whether they can help you.

You said that you closed the clinic as instructed and you closed the website. When people who look after the website reopened it after 3 months, D DD sent you a message from South Africa that he is aware the website has opened again, you told him that when he's back you can discuss it. You then decided to give in to the Trust as you felt that Dr DD as the Lead was the person who could help you with this matter but instead the only important thing for Dr DD was the legal situation and to make sure there are no complications. You closed your practice and you felt afraid.

You said that in reality you have made a mistake but you have to say it's an honest mistake as a result of a complicated situation and a morally complex subject. You said

that you are at the latter stages of your career and you didn't plan to go through something like that at this stage.

I asked to clarify why you continued to see the women for TOPs when you realised the two signatures are an issue.

You said that this happened in the course of time.

I asked to clarify whether with the first women you saw you knew about the requirement for the 2 signatures.

You said that you did know about the requirement, but when you set up the website and people start to come in you only then try to understand how this can work.

You said that up to today, you don't understand how other clinicians deal with this private service provision. You said that you think one of the issues is that people sign it in retrospect and without thinking much about it."

76. The Tribunal had regard to Dr El-Refaey's witness statement, as follows:

'In July/August 2019, about 10 days after I set up the business, Dr DD stated that I was not permitted to carry out abortions in private care if I did not provide that care under the NHS. He said it was a strict rule, but later admitted to the investigator that it was a "custom" (and therefore not a rule), that there was nothing in writing, and he was not sure if it was a "strict rule". He was simply seeking to warn me off.

I actually offered to work with him but he refused.

Subsequently there was a second conversation with Dr DD. He has been an agent to click on my website. When I discovered this interference I sought to speak to ([Mr LL] at Chits UK) about it. This was Dr DD's marketing agent. It was suggested that I spoke with Dr DD regarding my website so that the matter could be solved (and forgotten).

On about 11 October 2019, Dr DD approached me by text message to speak to him urgently.

We had a corridor meeting. I was en route to an ante-natal clinic and he had an upcoming Gynae clinic. He asked me about the second signatures. He said that he had

searched through my patients' records and discovered that I was not obtaining the second signature. I was shocked (NB: it was date breach on his part). I said that I had not obtained them, and that was my error. He said my conduct was not lawful and could be reported to the police. I was shocked. I immediately apologised. He said he could report the matter to the senior medical team. He then demanded that I stop my private abortion work (which he viewed as being in competition with his own). He said that I had to take down my website immediately. Once I agreed to do that the HSA breach was forgotten by him. He did say though that if I reactivated the website/business he would report me.

On the 15th October 2019 Dr DD initiated a series of SMS messages to ensure that the website is closed. He admitted during the process that it was closed but advised that I must make sure that any reference to my website is removed from the Google maps organic presence. "(sic)

I requested to meet him to discuss matters. He refused. "There's no need to meet specifically". He declined all my calls subsequently and avoided me in corridors for several months afterwards.

On the 15th October 2019 and during this trail of messages I wrote (I am happy to comply with any rules and to work with you and others But cannot leave a project I have set for long). He responded with a veiled threat (Ok. You'll need to discuss this with the bosses then Hazem. They have a clear rule that you cannot undertake anything privately which you don't do on the NHS.)

On the same day I forwarded his message to Dr FF and met her and explained in detail the problem. She promised she would speak to him. She later claimed that my meeting with her was a generic meeting where she showed me how to fill the forms! This is not true as I described to her the exact problem. She initially was very critical of Dr DD but later changed course.

Dr DD refused to work with me and without the Lead's support, and the ongoing management hostility, I knew that I had to find another way forward. I researched the regulatory forms and on 20 October 2019 I wrote to the President RCOG, Prof [JJ], who agreed with my concerns about the antiquated forms. I also spoke to Dr FF about the forms and to explore ways forward…

I had no other choice other than reporting the problem and the whole matter to the Divisional director Dr GG.'

77. The Tribunal noted that Dr El-Refaey was discursive in his oral evidence and repeatedly initially failed to answer the questions put before him. Dr El-Refaey consistently denied the allegation and gave his own account of the conversations he said that he had with Dr DD about his own private abortion service and his website. (This was consistent with the meeting he had with Dr HH.) Dr El-Refaey maintained that he had been fully open with Dr DD in October 2019 about not completing the forms. Dr El-Refaey said that he had *"fessed up"*.

78. Dr El-Refaey also gave evidence about how his own private medical abortion practice had come to be and his awareness of the regulations around the forms.

79. Dr El-Refaey accepted that he had not completed the documents required and that he had self-reported these failings to Dr GG in February 2020.

Discussion and conclusions

80. The Tribunal noted that that there was a flat contradiction in the recollections of Dr El-Refaey and Dr DD of what was said in the conversation they had in October 2019.

81. It was not just the contradiction about what was said about the forms. Dr DD said that although he had been satisfied about the compliance when completing the forms, he did however have major concerns about Dr El-Refaey's practice.

82. The Tribunal noted that it was not disputed by either Dr El-Refaey or Dr DD that there had been an informal meeting between them in mid-October 2019 at which Dr DD asked Dr El-Refaey about his completion of the required forms. Dr El- Refaey recalled this having taken place in a corridor, Dr DD in a clinic. It was also not in dispute that the first of the text messages between them around that time – *"Are you able to come to OP2 to talk? Fairly urgent"* – was the message sent by Dr DD to arrange that informal meeting and was probably sent on 11 October 2019, and that later text messages between them on 15 October 2019 were exchanged following that meeting. There were no witnesses to that meeting and no contemporaneous notes taken by either of them of what was said.

83. In the absence of this, the Tribunal had regard to the content of the text messages exchanged between Dr El-Refaey and Dr DD. It noted that these made no reference at all to the required forms but were entirely about the website for Dr El-Refaey's private abortion

service and Dr DD's concern that this should be closed, and also Dr DD's concern about Dr El-Refaey's compliance with a *"clear rule that you cannot undertake privately anything which you don't do on the NHS"*. The Tribunal considered that these text messages could in isolation support either Dr El-Refaey's or Dr DD's account of the meeting: on Dr El-Refaey's account, he had been open with Dr DD about his non-compliance but Dr DD had not taken the matter further, because Dr DD was actually concerned with closing down his website and private clinic; on Dr DD's account Dr El-Refaey had given him assurances that the forms were being completed correctly and so he had no reason to raise this matter again, but he had other concerns about Dr El-Refaey's private practice.

84. The Tribunal also had regard to text messages between Dr El-Refaey and Dr FF after the meeting, which were put to Dr FF during her evidence, and which she was able to confirm from her own phone records. Those immediately after the meeting, on 15 and 16 October 2019, were also entirely about Dr DD's concerns about the website and Dr El-Refaey's suggestions that the website could be re-launched in conjunction with Dr FF, and they made no mention of Dr El-Refaey's compliance with the forms.

85. However, on 21 February and 24 February 2020, Dr El-Refaey raises the issue of compliance with completing the forms, and seeks Dr FF's advice: "*It is not possible to get the forms signed by two clinicians prior to administering mifepristone. Please tell me how to do it! If I have a patient requesting early medical TOP today; what should I do? In clear steps and I will do it. It is a question that is seriously concerning me and I don't have an answer.*." Dr FF replies "*ask me to sign the form before you give her the mife*" and later "*I have to physically sign it*".

86. The Tribunal considered the plausibility of Dr El-Refaey raising with Dr FF the problem of how to get the forms signed – at a time when he was not providing a private TOP service – if he knew he had earlier given a false assurance to Dr DD that he was getting the forms signed. Dr El-Refaey stated that he had been colleagues with both Dr DD and Dr FF for many years, and that he regarded Dr DD and FF as close colleagues, who were likely to share information. Dr FF confirmed in her oral evidence that she and Dr DD regularly provided the second signature on each other's HSA1 forms, and said she would not hide things from him and was upset about being "stuck in the middle" between Dr DD and Dr El Refaey over the issue of Dr El-Refaey's private practice.

87. The Tribunal concluded that the content of the text messages between Dr El-Refaey and Dr DD and between Dr El-Refaey and Dr FF were more consistent with Dr El- Refaey's account of the meeting between Dr El-Refaey and Dr DD in October 2019, in that Dr DD's

main concern was Dr El-Refaey's compliance with Trust rules about NHS/private practice and the website, and that neither of them raised the issue of the forms again until February 2020, when Dr El-Refaey asked for Dr FF's advice on this. The Tribunal considered it unlikely that Dr El-Refaey would do this if he had assured Dr DD in October 2019 that he was getting the forms signed.

88. The Tribunal also had regard to the timing of Dr El-Refaey's seeking advice from Dr FF about completing the forms on 21 February 2020 and his self-reporting his non-compliance with the requirements on 24 February 2020. It noted that these events immediately followed Dr DD's raising again with Dr El-Refaey the apparent re-opening of Dr El-Refaey's website (on 18 February 2020), and considered whether Dr El-Refaey may have been motivated by seeking to 'get in first' with his account to any investigation which might arise. Dr DD did in fact report his concerns about Dr El -Refaey's website to the Trust on 25 February 2020. However, because Dr El-Refaey's private TOP practice and website were in fact no longer in operation and there may therefore have been no investigation at all, the Tribunal concluded that on balance it was unlikely that Dr El-Refaey would self-report something about which he knew he had falsely previously given assurances.

89. The Tribunal also noted Dr El-Refaey's evidence that after the meeting with Dr DD in October 2019 "I researched the regulatory forms and on 20 October 2019 I wrote to the President RCOG, Prof [JJ]". The Tribunal reminded itself of the evidence it had seen concerning this correspondence. The Tribunal considers that it is unlikely that Dr El-Refaey would write to the President of his Royal College stating that it was "impossible" to meet the regulatory requirements if he knew he had just falsely given assurances he was doing so to a senior colleague.

90. The Tribunal noted the contradiction between Dr DD and Dr El-Refaey's accounts concerning how many conversations they had had in 2019 about Dr El- Refaey's private abortion service. Dr DD said that the October 2019 informal conversation was the only one. Dr El-Refaey maintained that this was the third conversation with Dr DD and that in fact, Dr DD's concerns were not with him completing the forms but with him providing the service at all.

91. Dr El-Refaey relies on three conversations, which on the GMC's case, two of them never took place. The tribunal could not find any plausible reason why Dr El- Refaey would invent these conversations, particularly when one of those conversations refers to the actions of "Mr LL" allegedly making multiple clicks on Dr El-Refaey's website and Dr DD

accepted that Mr LL is his own website manager but could not recall any conversation he had about this complaint.

92. Dr El-Refaey recalled in detail the conversations in which he had been consistent about throughout the trust process and the regulatory proceedings. The Tribunal considered that it was unlikely that Dr El-Refaey had invented these details when they served no apparent purpose.

93. The tribunal was satisfied that there must have been communication between Dr DD and Dr El-Refaey prior to the text messages of 15 October 2019 as messages reference the closure a week earlier of the website.

94. The fact that Dr DD was concerned about the re-emergence of the website in February 2020 supports Dr El-Refaey's account that Dr DD was monitoring his website through his own website manager.

95. The Tribunal therefore accepts that there were three conversations and also accepts that it was more likely than not that Dr El-Refaey's account of the third conversation was correct. The Tribunal accepted on the evidence that Dr DD was aware that Dr El-Refaey was carrying out private medical terminations prior to the conversation in October 2019.

96. The Tribunal noted the discrepancy between the informal interview and formal interview of Dr DD. Given the nature of the investigation the Tribunal would have expected there to be some reference in the informal interview, that according to Dr DD, Dr El-Refaey had been completing the forms. The specific point, namely that according to Dr DD, Dr El-Refaey had told him he was completing the forms, had only been raised by Dr DD in his formal interview over 3 months later.

97. The Tribunal noted that Dr El-Refaey gave a consistent and detailed account to the investigator and also to the Tribunal. This contrasts with the failure of Dr DD in the informal interview with the Trust to mention that Dr El-Refaey was complying with the legal requirements regarding the forms, which is only referred to the formal interview stage.

98. The Tribunal considered the demeanour of all the witnesses in the case and concluded that each witness did their best to assist the Tribunal in the evidence that they gave. The Tribunal did not conclude that the discursive approach to the evidence given by Dr El-Refaey assisted the GMC's case.

99. Having considered all the documentary and oral evidence in the proceedings and applying the test in *Ivey,* the Tribunal was not satisfied that the GMC had established on the balance of probabilities that Dr El-Refaey had said what was alleged and therefore he was not dishonest.

The Tribunal's Overall Determination on the Facts

100. The Tribunal has determined the facts as follows:

That being registered under the Medical Act 1983 (as amended):

Termination of pregnancy services

1. In or around the summer of 2019, you set up a website, Abortion for Her, and you undertook private terminations of pregnancy for patients who contacted you via that website. **Admitted and found proved**

2. On one or more occasion between 20 July 2019 and 21 October 2019, you consulted with one or more of the patients listed in Schedule 1 and prescribed the medication listed in Schedule 2 for the medical termination of a pregnancy. **Admitted and found proved**

3. In respect of the consultation(s) mentioned in paragraph 2:

    a. Form HSA1 needed to be completed by two registered medical practitioners before the commencement of the treatment for the termination of a pregnancy; **Admitted and found proved**

    b. Form HSA4 needed to be completed and sent to the Chief Medical Officer within 14 days of the termination; **Admitted and found proved**

    c. you failed to:

        i. complete Form HSA1; **Admitted and found proved**

        ii. arrange for a second registered medical practitioner to complete Form HSA1; **Admitted and found proved**

        iii. complete Form HSA4; **Admitted and found proved**

        iv. send Form HSA4 to the Chief Medical Officer. **Admitted and found proved**

Dishonesty

4. In or around October 2019 you informed Dr DD that:

   a. you were carrying out medical terminations of pregnancies; **Found not proved**

   b. you were completing Form HSA1; **Found not proved**

   c. Form HSA1 was also being signed by:

      i. Dr EE; **Found not proved**

      ii. the patient's GP. **Found not proved**

5. You knew that Form HSA1 was not being completed, in respect of the medical terminations of pregnancies mentioned in paragraph 2, by:

   a. you; **Admitted and found proved**

   b. Dr EE; **Admitted and found proved**

   c. the patient's GP. **Admitted and found proved**

6. Your actions as described in:

   a. paragraph 4(b) were dishonest by reason of paragraphs 3(c)(i) and 5(a); **Found not proved**

   b. paragraph 4(c) were dishonest by reason of paragraphs 3(c)(ii), 5(b) and 5(c). **Found not proved**

And that by reason of the matters set out above your fitness to practise is impaired because of your misconduct. **To be determined**

Determination on Impairment - 11/10/2024

101. The Tribunal now has to decide in accordance with Rule 17(2)(l) of the Rules whether, on the basis of the facts which it has found proved as set out above, Dr El-Refaey's fitness to practise is impaired by reason of misconduct.

The Evidence

102. The Tribunal has taken into account all the evidence received during the facts stage of the hearing, both oral and documentary.

103. The Tribunal also received in support of Dr El-Refaey a number of testimonials, all of which it has read.

Submissions

104. On behalf of the GMC, Mr Lodge outlined the staged approach to misconduct and impairment and reminded the Tribunal of the overarching objective of the GMC as set out in section 1(1A) and 1(1B) of the Medical Act 1983 (as amended). He submitted that the need to uphold proper professional standards and to uphold public confidence would require a finding of impairment.

105. Mr Lodge reminded the Tribunal of the meaning of 'serious misconduct'. He referred the Tribunal to the cases of *Roylance v. General Medical Council (No. 2) [2000] 1 AC 311, Spencer v General Osteopathic Council [2012] EWHC 3147 (Admin)* and *Nandi v. General Medical Council [2004] EWHC 2317 (Admin).* Mr Lodge submitted that Dr El-Refaey's actions fall within these definitions of serious misconduct.

106. Mr Lodge stated that the 2014 Guidance was intended to ensure that medical practitioners understood the crucial importance of complying with the legal and regulatory requirements when providing TOP services. The Guidance was intended to bring an end to poor practices and to prevent them developing in the future.

107. Notwithstanding Dr El-Refaey being aware of the legislation and the 2014 guidance, Mr Lodge submitted that he had failed to take any steps to ensure his compliance with the applicable law and regulations for the service he intended to provide before he launched his website and commenced medical TOPs. Mr Lodge stated that other medical practitioners, encountering similar difficulties, looked for and found ways to overcome the logistical problems caused by the 2018 changes in regulations.

108. Mr Lodge stated that confusion as to how to comply was no excuse. He submitted that Dr El-Refaey should not have commenced his service without first ensuring his compliance. Furthermore, the fact that he reported himself 3 months after ceasing activities does not reduce his culpability or the assessment of his conduct as serious.

109. Mr Lodge submitted that Dr El-Refaey failed to take any or any proper steps to overcome the logistical difficulties he encountered having commenced the service. Furthermore, Dr El-Refaey continued to provide a service that he knew was not in compliance with the law and regulations.

110. Mr Lodge submitted that Dr El-Refaey's non-compliance was deliberate – arising in part from the logistical problems encountered but also, the Tribunal may conclude, from his perception of the law as anachronistic resulting in a reluctance on his part to solve problems that he thought should not exist.

111. Mr Lodge submitted that Dr El-Refaey knowingly ignored the legal process throughout the provision of his private medical TOP service and as such his standard of care fell seriously below that expected. Furthermore, Dr El-Refaey's actions potentially, if not actually, amount to criminal offences.

112. Mr Lodge submitted that such conduct amounts to a serious departure from Good Medical Practice ('GMP 2013'), in particular paragraphs 12 and 65 were engaged:

> *'12 You must keep up to date with, and follow, the law, our guidance and other regulations relevant to your work.*
> *65 You must make sure that your conduct justifies your patients' trust in you and the public's trust in the profession.'*

113. Mr Lodge stated that the Tribunal may therefore, when deciding the issue of fitness to practice consider that Dr El-Refaey's fitness to practise is currently impaired both on personal grounds (insufficient evidence of insight, remorse or remediation), but also on public interest grounds. In particular the need, in line with the overarching objective, to promote and maintain public confidence in the profession and to promote and maintain proper professional standards.

114. Mr Lodge submitted that to determine that there was no impairment in these circumstances would undermine both the public confidence in the profession, and the proper professional standards and conduct for members of the profession.

115. On behalf of Dr El-Refaey, Mr Davies submitted that there was no longer any objective or rational basis for the Tribunal to find that the admitted, unrepeated, very historic, and said to be "administrative" errors, by an honest and self-reporting consultant doctor:

(1) constituted actionable misconduct or that if it does (which is denied);
(2) that it may cause any impairment to Dr El-Refaey's fitness to practise now or in the future.

116. Mr Davies stated that Dr El-Refaey was a good and honest doctor whom the GMC admitted had only offered "exemplary" care to his patients. He stated that it cannot be rational to suggest that such doctors have an impairment as to their fitness to practise.

117. Mr Davies submitted that the Tribunal should consider the following:

- Dr El-Refaey's clinical care at all times in regard to the facts proved had been "exemplary";
- No patient treated made any complaint;
- Dr El-Refaey admitted to the breach at the time in October 2019;
- He closed down his business;
- He self-reported the breach to the Trust;
- He has already received a three-year final written warning from the Trust, which had now expired with no further infraction.
- He has never repeated the breach to date.
- Dr II confirmed that no patient came to harm or received less than satisfactory care;

118. Mr Davies stated that the GMC had issued no new guidance since 2014, even after the significant change to the process of home abortions being facilitated by the Department of Health in 2018.

The Relevant Legal Principles

119. The LQC provided legal advice to the Tribunal which the Tribunal accepted and used throughout its deliberations.

120. The Tribunal reminded itself that at this stage of proceedings, there is no burden or standard of proof, and the decision of impairment is a matter for the Tribunal's judgement alone.

121. In approaching the decision, the Tribunal was mindful of the two-stage process to be adopted: First whether the facts as found proved amounted to misconduct and then whether the finding of that misconduct which was serious, could lead to a finding of impairment.

122. The LQC referred the Tribunal to the case of *Roylance v GMC 2000 1AC 311* that:

> *"misconduct is a word of general effect, involving some act or omission which falls short of what would be proper in the circumstances. The standard of propriety may often be found by reference to the rules and standards ordinarily required to be followed by a medical practitioner in the particular circumstances".*

123. The LQC also referred the Tribunal to the cases of *R (Remedy UK Ltd) v GMC [2010] EWHC 1245 (Admin)* and *Cohen v. GMC [2008] EWHC 581 (Admin).*

124. The LQC reminded the Tribunal that if misconduct is found, the Tribunal must determine whether Dr El-Refaey's fitness to practise is impaired today, taking into account his conduct at the time of the events and any relevant factors since then such as whether the matters are remediable, have been remedied and whether there is any likelihood of repetition.

125. Whilst there is no statutory definition of impairment, the Tribunal was assisted by the guidance provided by Dame Janet Smith in her *Fifth Shipman Report* adopted by the High Court in *CHRE v NMC and Paula Grant [2011] EWHC 297 (Admin)*. In particular, the Tribunal considered whether its findings of fact showed that Dr El Refaey's fitness to practise is impaired in the sense that he:

a. *has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or*

b. *has in the past brought and/or is liable in the future to bring the medical profession into disrepute; and/or*

c. *has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession; and/or*

d. *…'*

126. The Tribunal also took into account the guidance of Mrs Justice Cox set out in the *Grant* case, specifically paragraph 74 which states:

> *"In determining whether a practitioner's fitness to practise is impaired by reason of misconduct, the relevant panel should generally consider not* only *whether the*

practitioner continues to present a risk to members of the public in his or her current role, but also whether the need to uphold professional standards and public confidence in the profession would be undermined if a finding of impairment were not made in the particular circumstances."

127. As such, in reaching a decision as to whether Dr El-Refaey's misconduct impairs his current fitness to practise, the Tribunal should take into account the maintenance of public confidence in the profession as well as maintaining proper standards of conduct and performance.

The Tribunal's Determination on Impairment

Misconduct

128. The Tribunal first considered whether the facts found proved are a sufficiently serious departure from the standards of conduct reasonably expected of Dr El-Refaey as a registered medical practitioner, to amount to misconduct.

129. The Tribunal had regard to GMP (2013) and considered that the following paragraph was engaged in this case:

'12 You must keep up to date with, and follow, the law, our guidance and other regulations relevant to your work.'

130. The Tribunal noted and referred to its understanding of the Legal, Regulatory and Medical Processes for medical terminations in 2019, referred to in paragraph 19 of its facts determination.

131. The Tribunal also noted the 2014 Guidance in relation to requirements of the Act, as follows:

…

9. If there is evidence that either certifying doctor has not formed their opinion in good faith then the doctor performing the termination is not protected by section 1(1) of the Abortion Act and has potentially committed a criminal offence by terminating the pregnancy. It is also possible that the doctor could be acting contrary to their professional duties.

10. Practices have come to light recently which call into question whether doctors have acted in accordance with their legal obligations under the Abortion Act. These practices include the signing of HSA1 forms by doctors before a woman has been referred, and doctors signing forms relying solely on decisions made about the woman in question by other doctors or members of the multi-disciplinary team without any other information.

11. Form HSA1 ***must*** *(emphasis added)be completed, signed and dated by two RMPs before an abortion is performed. The HSA1 form must be kept with the patient notes for 3 years from the date of termination. The form must be completed by both RMPs certifying their opinion, formed in good faith that at least one and the same ground for abortion in section 1(1) of the Abortion Act exists. The certification takes place in the light of their clinical opinion of the circumstances of the pregnant woman's individual case. The lawful grounds for abortion are set out in Annex A.*

…

16. In February 2012, CQC inspectors identified a number of cases where signatures on HSA1 certificates predated the referral and assessment of women in a clinic. For example, one woman was referred to the clinic on 20 December and assessed on the 22 December. The certificate reflected that a doctor at the clinic had seen the woman and signed the form on 22 December. However, the signature of the second doctor, also a practitioner at the clinic, was dated 19 December. Therefore, on the information provided, the second doctor had certified the abortion before being assigned the case, and before having any opportunity to consider the clinical files or other specific information to the woman.

17. The pre-signing of HSA1 forms calls into question whether a doctor could turn his or her mind to a specific woman's circumstances and form a good faith opinion about which, if any, of the lawful grounds under the Abortion Act might apply (see Annex A). In subsequent investigations the CQC identified a further 14 services where there was clear evidence of pre-signing of HSA1 forms. Poor practice identified included photocopying of signatures on forms. DH considers pre-signing of forms (without subsequent consideration of any information relating to the woman) to be incompatible with the requirements of the Abortion Act.

18. It has also come to light that, in some cases, the second RMP might simply sign an HSA1 based on the decision of the first RMP, relying solely on that doctor's judgment to provide a second signature without considering any information specific to the woman concerned.

19. An example of where this situation could arise would be where an "on-call" doctor is asked to sign an HSA1 form without access to the patient records to form their opinion in good faith with no other information specific to the woman being available. Junior doctors, in particular, may feel under pressure to comply with such a request.

…

26. Section 2 of the Abortion Act requires all RMPS terminating a pregnancy to give notice to the Chief Medical Officer (CMO). It is a criminal offence for RMPs not to notify the CMO of every termination they perform. In England, the Abortion Regulations require that Form HSA4 be submitted to the CMO within 14 days of the procedure. This notification is used by the Department of Health as an aid to checking that terminations are carried out within the law. Form HSA4 requires detailed information relating to the procedure, including the names and addresses of the doctors who certified there were lawful grounds under the Abortion Act, gestation, method used and place of termination. Every form is checked and monitored by DH officials authorised by the CMO. Data derived from the forms is used to publish annual statistics on abortion. It is crucial that all abortions performed are notified to the CMO, both as a matter of law and for there to be appropriate public and Parliamentary scrutiny and trust in the data that are published.

132. Despite the 2014 guidance, the Tribunal noted that Dr El-Refaey had failed on 29 occasions between 20 July and 21 October 2019 to complete forms HSA1 and HSA4.

133. The Tribunal noted that Dr El-Refaey, according to his evidence, had only attempted on one occasion to get form HSA1 signed in accordance with the 2014 guidance. The Tribunal noted that this failing in respect of form HSA 1 made it impossible to complete form HSA4 correctly regardless of whether a patient was taking the second drug at home. That failure was the sole responsibility of Dr El-Refaey. The Tribunal concluded that such deliberate and repeated breaches constitute serious professional misconduct. The Tribunal noted Dr El-Refaey considered that the completion of the forms was 'administrative' in nature. However, the Tribunal concluded that such admitted failings were in breach of the law, in breach of the 2014 guidance and therefore constituted serious misconduct.

134. The Tribunal therefore concluded that Dr El-Refaey's actions as set out in the Allegation amounted to misconduct.

Impairment

135. Having determined that the facts found proved amounted to serious misconduct, the Tribunal went on to consider whether, as a result of this, Dr El- Refaey's fitness to practise is currently impaired by reason of his misconduct.

136. In considering impairment, The Tribunal considered Dr El-Refaey's insight into his actions. It noted his witness statement as follows:

> *'The forms themselves are regarded as being superfluous (and will be abolished in due course) with the key consideration being the health of the female patient and respecting her instructions to act of the abortion promptly to avoid future harm to her.*
>
> *I believe that given my contrition and apology, the fact that I self-reported (even after having stopped my private abortion work) and my stopping of that work since 2019, I should receive informal learning and no sanction.'*

137. The Tribunal also noted the statement of Dr MM, Chief Medical Officer at the Trust and Dr El-Refaey's Responsible Officer (RO), as follows:

> *'…*
>
> *Dr Hazem El Rafaey (sic) identified a logistical challenge in relation to obtaining a second signature relating to termination of pregnancy (TOP)" and he accepted that the documentation was not being completed correctly and subsequently the website advertising TOP service at the Chelsea Wing was later closed. Dr Hazem El Rafaey (sic) accepted there were failures to comply with the regulatory paperwork.*
>
> *Dr Hazem El Rafaey (sic) did not undertake any further private medical terminations and discussed the process of undertaking medical TOP with CD [Clinical Director], who advised him of the correct procedure.*

Dr Hazem El Rafaey (sic) fully accepted that he had made a mistake but stated that it was "an honest mistake as a result of a complicated situation and a morally complex subject".

Dr Hazem El Rafaey (sic) alerted the organisation to the breach of legal requirements. He immediately committed to stopping the termination service and has confirmed to me that he has not restarted this service since that time. He has also confirmed to me verbally that he is fully conversant with the legal requirements.

Dr Hazem El Rafaey (sic) has expressed his regret to me that he breached the legal requirements and is contrite in this respect. He has reflected on this within his appraisal.

Dr Hazem El Rafaey (sic) has not attended any professional courses but has made sure that he is fully conversant with the legal requirements for termination services. He has informed me that he is the co-author of a manuscript that considers the implications of the legal requirements that has been submitted to peer-reviewed journals. He has informed me that the manuscript is currently under review at The Lancet and the British Medical Journal…'

138. The Tribunal noted that Dr El-Refaey had admitted at the outset of this hearing that he had not complied with the legislative framework for medical abortions and had failed in his legal duty to do so. This demonstrated to the Tribunal that he had a clear understanding of the legal obligation and requirements that he was subject to in 2019.

139. The Tribunal concluded that Dr El-Refaey had demonstrated insight as to the professional misconduct that it had found. The Tribunal considered that Dr El-Refaey was genuine with regard to his recognitions of his own professional shortcomings in 2019. It concluded that Dr El-Refaey now recognises the legal obligations and requirements surrounding medical abortions.

140. The Tribunal concluded that Dr El-Refaey had remediated his misconduct by self-reporting his failings and making a conscious decision not to continue with his private medical abortion service. The Tribunal acknowledged that he was seeking to take an active part in changing the law and thereby altering the processes that medical professionals would have to comply with in the future.

141. The Tribunal concluded that he was highly unlikely to repeat his misconduct because he had self-reported the matter in 2020 and had made a conscious decision not to recommence offering private medical abortions since his self-reporting.

142. The Tribunal noted that there had been no evidence to suggest that any of the patients that Dr El-Refaey had treated in his private medical abortion practice had suffered any adverse consequences as a result of his clinical treatment. In fact, the clinical treatment of the patients had been described as exemplary.

143. The Tribunal concluded therefore that there was little or no risk to the health, safety and well-being of the public as a result of the misconduct.

144. The Tribunal went on to consider whether Dr El-Refaey's misconduct was so serious that it was necessary to make a finding of current impairment in order:

(a) to promote and maintain public confidence in the profession; and separately;
(b) to consider the promotion and maintenance of proper professional standards and conduct for members of the profession.

145. The Tribunal had regard to the nature of the misconduct that had been found proved.

146. The Tribunal noted that the misconduct had taken place 5 years ago, it had not been repeated and had caused no harm to patients.

147. Whist noting its findings at paragraph 33 above, the Tribunal acknowledged that Dr El-Refaey had faced practical difficulties with regards to completing the HSA1 and HSA4 forms. Concerning the difficulties with finding a second signatory signing the HSA1 form, the Tribunal considered these were not insurmountable. Concerning the completion of the HSA4 form the Tribunal acknowledged that there were some difficulties in completing some parts of that form since the change in 2018 to permit one of the two medicines for medical TOPs to be self-administered by the patient at home in the absence of any medical professional. The Tribunal noted that although there were practical changes approved by the Department of Health in 2018, at the time of Dr El-Refaey's misconduct in 2019 the content of forms had not been amended to keep up with the changes in medical practice.

148. The Tribunal accepted that the practice and procedure had changed since 2019. It noted the new 2024 guidance issued and the amendment to form HSA4. The administrative

practice had now adjusted to address one of the problems that Dr El-Refaey faced in completing HSA4 form.

149. The Tribunal also noted the statement of Mr MM, co-chair of the specialist society representing abortion care providers (BSACP) and of the Royal College of Obstetrics & Gynaecology (RCOG) abortion taskforce, as follows:

> *'…*
>
> *The requirement to obtain two doctors' signatures is unnecessary from a medical perspective and is an anachronism in the modern era where patient autonomy is paramount and informed consent is a foundation of good medical practice. There is no requirement for either doctor to have met the patient- indeed the overwhelming number of abortions are early medical abortions where nurses conduct the consultation, and so the signatories will be remote and make their determination by a review of the medical record. Large independent providers contract doctors to sign the forms, which since an amendment to the law in 2022 can be through working from home.*
>
> *…*
>
> *I am currently coordinating a statement calling on Parliament to urgently reform the law owing to the harm it is causing, and this is endorsed by all four Royal Colleges responsible for women's health along with over forty other organisations, medical leaders and professors of law. Previous statements have also been signed by multiple agencies…'*

150. The Tribunal accepted that this indicated that there was some consensus in the medical profession that the two-signature rule was no longer necessary and should be removed and that therefore the medical profession would view Dr El-Refaey's failure to get HSA4 form signed in that light.

151. The Tribunal determined that Dr El Refaey's conduct had brought the medical profession into disrepute by repeatedly failing to follow the 2014 guidance and the law as was applicable in 2019. The Tribunal determined that Dr El Refaey had breached a fundamental tenet of the medical profession which had the potential to undermine patients trust in the profession.

152. However, the Tribunal had regard to the context of the changes in medical practice around medical TOPs and the regulations and guidance not having kept up with this. It also had regard to the fact that it had found that the misconduct was unlikely to be repeated because of Dr El-Refaey's self-reporting of his breach, acknowledgement of his mistakes and that there had been no infractions of the regulations since. It also noted that these were historic matters and his clinical care had been exemplary. On balance, taking these factors into account the Tribunal concluded that it was not necessary to make a finding of current impairment in order to promote and maintain public confidence in the profession.

153. For the same reasons, the Tribunal did not consider that it was necessary to make a finding of impairment to uphold proper professional standards and conduct.

154. Accordingly, the Tribunal concluded that Dr El-Refaey's fitness to practise is not currently impaired.

Determination on Warning - 04/11/2024

155. As the Tribunal determined that Dr El-Refaey's fitness to practise is not currently impaired it had to consider whether in accordance with section 35D(3) of the 1983 Act, a warning was required.

Submissions

156. On behalf of the GMC, Mr Lodge submitted that the GMC seek a warning in this case. He referred the Tribunal to the Sanctions Guidance (February 2024) and the GMC Guidance on Warnings of April 2024 ("the Guidance"). Mr Lodge reminded the Tribunal of its findings at stage 2 of the hearing, in particular paragraphs 32 and 33 in its determination.

157. Mr Lodge submitted that Dr El-Refaey's accepted and proven conduct amounted to a serious breach of Good Medical Practice (GMP) in particular paragraph 12. Furthermore, Dr El-Refaey's accepted and proven conduct amounted to breaches of the Abortion Act 1967.

158. Mr Lodge submitted that Dr El-Refaey's behaviour was repeated and deliberate over a significant period of time. He reminded the Tribunal that Dr El-Refaey's conduct was assessed as amounting to serious misconduct.

159. Mr Lodge submitted that the following factors indicated that a warning should be given:

- There had been a clear breach of GMP and also Department of Health guidance issued in 2014.
- Any future repetition by Dr El-Refaey of the behaviour found proved in this case (or other similar breaches of GMP or the law) would, he submitted, inevitably result in a finding of impaired fitness to practise.
- As a consequence of Dr El-Refaey knowingly and repeatedly breaching regulations and the law there is a need to formally record the particular concerns.
- Notwithstanding that several of the factors set out in Paragraph 32 of the Guidance may favour Dr El-Refaey, he submitted that such was the deliberate and repeated nature of the misconduct over such a period of time that the misconduct found proved may not be viewed as an isolated incident.
- A warning in this case would indicate to Dr El-Refaey that his conduct represents a departure from the standards expected of members of the profession and should not be repeated. It would also send a message to other members of the profession that this type of conduct is not to be tolerated.

160. Mr Lodge submitted that in all the circumstances, in order to maintain public confidence in the profession and to ensure proper standards of conduct and behaviour, a warning in this case would be an appropriate, justified and proportionate response to the serious misconduct found proved.

161. On behalf of Dr El-Refaey, Mr Davies submitted that, when applying the Guidance to the findings of fact, it would not be appropriate or rational to issue a warning in this case. He submitted that on the found facts the correct and fair course of action would be for the Tribunal to issue a letter of advice and guidance. Mr Davies submitted that it would neither be in the public interest nor proportionate to issue a warning.

162. Mr Davies reminded the Tribunal that the Trust had issued Dr El-Refaey with (inter alia) a 3-year final written warning for the transgressions which the Tribunal had found proven. Therefore, Dr El-Refaey had already been warned, and not just warned, but finally warned.

163. Mr Davies stated that Dr El-Refaey had fully complied with his 3-year warning and had not transgressed further since 2019.

164. Mr Davies stated that it would be very unlikely to be in the public interest or proportionate for Dr El-Refaey to now be warned again by the Tribunal for exactly the same 2019 misconduct, more than 5 years after the wrongdoing. Mr Davies submitted that it would be unfair and wrong to issue a warning.

165. Mr Davies stated that it had not been in the public interest for the 67 doctors who transgressed in a far worse manner to be disciplined let alone sanctioned with a warning.

166. Mr Davies stated that Dr El-Refaey does not need to be deterred from a further transgression. He has not transgressed for over 5 years while continuing his "exemplary" clinical care. Mr Davies stated that Dr El-Refaey had more than upheld the standards of his profession since the index events and not brought the profession into disrepute.

167. Mr Davies reminded the Tribunal of its findings at stage 2, in particular paragraphs 39 and 52 in its determination that Dr El-Refaey had admitted to his error, self-reported it, was genuine with his remorse, and now recognised his legal obligations regarding Forms HSA1 and HSA4.

168. Mr Davies also reminded the Tribunal of its decision at stage 2 that Dr El-Refaey had remediated his conduct and that the conduct was highly unlikely to recur. Furthermore, in regard to the public protection, the Tribunal concluded that there was little or no risk to the health, safety and well-being of the public as a result of the misconduct.

169. Mr Davies stated that issuing a warning would also undermine doctors trying to do the right thing, after a professional mistake. He stated that Dr El-Refaey had self-reported, which was a brave act especially in an allegedly hostile working environment. Mr Davies stated that if Dr El-Refaey is now warned, why would other doctors speak up and admit fault in future? He stated that a warning on the proven facts would actually further deter whistleblowers.

170. Mr Davies stated that Dr El-Refaey had tried to resolve the very problematic situation for the good of the profession in seeking better abortion rights and to bring the prescribed paperwork in line with modern thinking precisely to protect doctors and female patients. He pointed out that there was likely to be legislative change in the near future and the Ministry [sic] of Health had issued the new HSA4 form in May 2024.

171. Mr Davies stated that there was no need to protect the public regarding the misconduct surrounding the HSA1 or (old) HSA4 form filling by Dr El-Refaey, or to seek to deter further transgressions by him for the following reasons:

- Dr El-Refaey recognised the error when the nature of it was explained to him, admitted to it when challenged, and he reported it to the Trust (when others did not) which demonstrates insight;
- Dr El-Refaey closed his business immediately and has not reopened it since October 2019 – meaning that there could be no repetition of the conduct – in that way he has taken all necessary corrective steps. He also wrote to the Royal College to point out the "impossible" problem he was facing. The Royal College agreed that the forms are not fit for purpose and should be replaced.
- Dr El-Refaey apologised and showed remorse;
- It was an isolated error related only to private practice at the Trust from July to October 2019 (and one which was not replicated in, and did not impact adversely on, Dr El-Refaey's NHS work or on his other private practice work).
- Dr El-Refaey has not repeated that error since October 2019;
- Dr El-Refaey did not breach his 3-year final written warning from the Trust;
- There is absolutely no risk of Dr El-Refaey repeating the error and therefore no likelihood of the same. It is also clear that he has learnt from the experience, suffered psychologically and financially because of the disciplinary process/previous sanctions and that he regrets and has learnt from his 2019 transgression;
- Given that there is absolutely no risk of Dr El-Refaey transgressing in the future there is clearly nothing to deter and no basis to issue a warning; there is no likelihood of any repetition of the previous 2019 transgressions;
- Dr El-Refaey had a good history and character both before and after 2019. His testimonials speak volumes as to his underlying character and contribution to his field of medicine;
- It was an isolated incident in the July to October 2019 period; and
- Dr El-Refaey's clinical care has remained exemplary;
- Dr El-Refaey is currently fit to practise and has no current impairment.

172. Mr Davies stated that it would not be in the public interest to issue a warning in this matter for the following reasons:

- The matters are very historic, in respect of two prescribed forms one of which (HSA 4) has been amended in 2024;

- The GMC chose not to investigate 67 doctors for their own non-compliance with the rules pertaining to the prescribed forms in 2012 which was pre-2018 when the forms actually had more utility and purpose;
- Dr El-Refaey is a consultant whose patient care/clinical performance is "exemplary";
- Dr El-Refaey has not caused any harm to any patient;
- Dr El-Refaey's conduct since 2019 has been exemplary;
- Dr El-Refaey is a pioneer in the medicated abortion field in respect of which a new warning could damage his ability to innovate or obtain financial support for such innovative medical advances – the warning therefore would not be in the public interest or even in the best interests of the medical profession;
- Dr El-Refaey's testimonials speak volumes as to his good character, expertise and integrity;
- Dr El-Refaey has already suffered financial loss due to the forced closure of his business.

173. Mr Davies stated that Dr El-Refaey had proven himself to be a good and honest consultant doctor. His conduct in 2019 does not warrant a further warning for his admitted, self-reported, historic and unrepeated conduct, and it would not be proportionate to issue such a warning or necessary in the public interest (quite the opposite in fact).

174. Mr Davies suggested a draft letter of advice that he submitted could be issued by the Tribunal to Dr El-Refaey.

The Tribunal's Determination on Warning

175. In reaching its decision as to whether a warning would be appropriate, the Tribunal took account of the specific circumstances of this case and had regard to the submissions provided by both parties. It had regard to the relevant guidance, including Sanctions Guidance (February 2024) and the Guidance. It accepted the legal advice which included considering the factors referred to in the Guidance at paragraph 32:

'a. the level of insight into the failings
b. a genuine expression of regret/apology
c. previous good history
d. whether the incident was isolated or whether there has been any repetition.
e. any indicators as to the likelihood of the concerns being repeated
f. any rehabilitative/corrective steps taken
g. relevant and appropriate references and testimonials.'

176. The Tribunal noted that the decision whether or not to issue a warning is a matter for it alone to determine, exercising its own judgement. It took account of the overarching objective of the GMC including the public interest and applied the principle of proportionality - weighing the interests of the public with those of Dr El-Refaey.

177. The Tribunal had regard to the following factors in this case:

- Dr El-Refaey has demonstrated insight;
- Dr El-Refaey's good character and many positive testimonials;
- Dr El-Refaey has no previous regulatory findings against him;
- Dr El-Refaey has expressed regret;
- Dr El-Refaey was highly unlikely to repeat his misconduct.

178. The Tribunal reminded itself that its decision that Dr El-Refaey's fitness to practise was not currently impaired was influenced by the existence of the above factors. However, Dr El-Refaey had failed on 29 occasions between 20 July and 21 October 2019 to complete forms HSA1 and HSA4 which was a clear breach of paragraph 12 of GMP which states:

> *'12 You must keep up to date with, and follow, the law, our guidance and other regulations relevant to your work.'*

179. The Tribunal noted that whilst the GMC had decided not to institute regulatory proceedings against 67 doctors in relation to purported similar breaches, it also took into account that the Department of Health had subsequently issued detailed and clear guidance in 2014 on the completion of forms HSA1 and HSA4. The Tribunal concluded that Dr El-Refaey had a duty to comply with that guidance.

180. Whilst the Tribunal accepts that there is a low risk of Dr El-Refaey repeating the behaviour, it also noted that on each of the 29 occasions that there had been a failure to complete the HSA1 and HSA4 forms, there had also been a potential or actual breach of the criminal law contained in Section 2 of the Abortion Act 1967.

181. The Tribunal determined that in the light of such wholesale albeit historic breaches of the law it was necessary to highlight to Dr El-Refaey, the public and the medical profession that his misconduct was serious.

182. The Tribunal therefore determined it was appropriate and proportionate to issue a warning and was satisfied that this was necessary to fulfil its duty to:

> *'b. Promote and maintain public confidence in the medical profession, and*
>
> *c. Promote and maintain proper professional standards and conduct for members of that profession.'*

183. The Tribunal considered that, whilst a warning does not prevent a doctor from practising, or place restrictions on their registration, it may have an impact on Dr El-Refaey. However, it considered that the public interest outweighed that of the individual doctor in the particular circumstances of this case.

184. The Tribunal anticipates that the warning will act as a deterrent and reminder to Dr El-Refaey and the profession as a whole that his conduct fell below the standard expected and that a repetition is likely to result in a finding of impaired fitness to practise.

185. Further, it considered that it was necessary to reinforce the importance of maintaining proper professional conduct and highlighting that following the law, guidance and other regulations must be at the forefront of every doctor's practice.

186. The Tribunal has therefore determined that a warning should be given to Dr El-Refaey in the following terms:

> 'On 29 occasions between 20 July 2019 and 21 October 2019, you consulted with patients and prescribed the medication for the medical termination of a pregnancy.
> Form HSA1 needed to be completed by two registered medical practitioners before the commencement of the treatment for the termination of a pregnancy.
> Form HSA4 needed to be completed and sent to the Chief Medical Officer within 14 days of the termination.
> On each occasion
> c. you failed to:
>
> i. complete Form HSA1
> ii. arrange for a second registered medical practitioner to complete Form HSA1
> iii. complete Form HSA4.
> iv. send Form HSA4 to the Chief Medical Officer.

This conduct does not meet with the standards required of a doctor. It risks bringing the profession into disrepute and it must not be repeated. The required standards are set out in Good Medical Practice and associated guidance.

In this case, paragraph 12 of Good Medical Practice is particularly relevant:

> *"12 You must keep up to date with, and follow, the law, our guidance and other regulations relevant to your work."*

Whilst this failing in itself is not so serious as to require any restriction on your registration, it is necessary in response to issue this formal warning.

This warning will be published on the List of Registered Medical Practitioners (LRMP) in line with the GMC publication and disclosure policy, which can be found at www.gmc-uk.org/disclosurepolicy '

187. There is no interim order to revoke.

188. That concludes this case.

ANNEX A – 25/09/2024

Dr El-Refaey makes the following applications:
1. To withdraw the Allegation.
2. To seek further disclosure.

189. Mr Davies, on behalf of Dr El-Refaey made the following applications:

- withdrawal of the allegations; and
- further disclosure of documents by the GMC made pursuant to Rule 16(6) of the General Medical Council (Fitness to Practise Rules) 2004 as amended ('the Rules').

190. Mr Lodge, Counsel, on behalf of the GMC submitted that each of the applications was opposed.

191. The documentary evidence before the Tribunal included, but was not limited to, the following:

- GMC preliminary bundle;
- GMC bundles A to D;
- Skeleton argument on behalf of Dr El-Refaey (including a letter dated 22 July 2024 from his former solicitors);
- Skeleton argument on behalf of the GMC;
- Chelsea and Westminster Hospital NHS Foundation Trust ('the Trust') investigation document;
- Dr X's final 2013 redacted letter including the GMC's case examiner decision reasoning.

Submissions

192. Mr Davies and Mr Lodge made both oral submissions and provided written skeleton arguments.

193. Mr Davies submitted that the Tribunal should withdraw the allegations that Dr El-Refaey faces. He submitted that the termination of the pregnancy allegation should be withdrawn because at least 67 other doctors who had behaved in the way in which Dr El-Refaey accepts he has done, have not been subject to regulatory proceedings. This was

because the forms that required completing had not been amended to reflect the Department of Health changes in 2018.

194. In relation to the dishonesty allegation, Mr Davies stated that the main witness to give evidence in this case was Dr DD. He submitted that Dr DD's credibility was severely damaged as a result of his own behaviours and the various inconsistent versions of what is said to have occurred between Dr DD and Dr El-Refaey during a conversation that took place in a corridor of a hospital (which form the background to the allegation of dishonesty).

195. Mr Davies submitted that credibility goes to the heart of the GMC's case and to proceed with these allegations was flawed, given the observations made about Dr DD.

196. Mr Davies made applications for disclosure which were contained in the 24 July 2024 letter from Dr El-Refeay's former solicitor as well as additional disclosure in his skeleton argument.

197. During the course of his oral submissions, Mr Davies made further applications for disclosure in addition to the documents required in his written skeleton argument. These new documents for disclosure, he submitted were also relevant in order that the Tribunal could be aware of Dr DD's professional failings. Further, he submitted they would explain the motive for Dr DD's factual changes in his evidence.

198. Mr Davies stated that Dr El-Refaey wishes to apply for a further order for disclosure for the following documents:

1 The statement of Dr DD to the disciplinary investigation into his conduct;
2 The statement given by Dr FF in respect of the same matter;
3 The statement given by the unnamed junior doctor Dr DD sought to silence;
4 Any correspondence between Ms PP and the Trust or GMC in relation to the disciplinary processes conducted against Dr El-Refaey;
5 The identity of the male doctor who agreed to carry out the sex selection abortion with Dr FF if not Dr DD;
6 WhatsApp messages sent between Dr DD and Dr FF from 1 October 2019 to 31 December 2021 ("the relevant period");
7 Financial payments made by Dr DD or his private abortion business to Dr FF in the relevant period;
8 A copy of the statement given by Dr FF to the police and/or GMC in relation to the sex selection abortion scandal;

9 A copy of the statement given by Dr DD to the police and/or GMC in relation to the sex selection abortion scandal;
10 The number of BAME doctors and white doctors referred to the GMC by NHS Trusts for disciplinary matters in 2020, 2021, 2022, 2023 and 2024 and of those, and in those respective years, the number of BAME and white doctors who the GMC brought proceedings against in the MPT. This information should be readily available pursuant to their section 1 Equality Act 2010 PSED;
11 Any written notes of the meeting that Dr HH may have taken with Dr DD whilst investigating Dr El-Refaey;
12 Any notes that have been prepared from meeting on 28 June 2021;
13 The full report from the Trust into investigations of Dr DD;
14 The full letter sent to Dr DD by the trust regarding their findings into his activities dated 21 August 2021;
15 Ms OO's statement obtained by the Trust regarding the behaviours of Dr DD.

199. In regard to the withdrawal of the allegations by Dr DD, Mr Lodge submitted that this was a completely ill-conceived application as the Tribunal had no power to make such an order.

200. Mr Lodge stated that Rule 28 allows for the Registrar to refer a case to the case examiners for a decision as to whether to withdraw an allegation or part of an allegation. Further, he stated that this was not a mechanism which can be employed by the Tribunal to withdraw or dismiss charges.

201. In regard to the repeated request in the letter of 24 July 2024 from Dr El-Refaey's former solicitors for disclosure of information, the GMC reject the suggestion that this matter has not been properly and fairly investigated. He further submitted that the GMC has fully complied with its obligations in respect of disclosure in line with the determination of the Tribunal on 19 October 2023.

202. Mr Lodge submitted that the application as it was now phrased, was not materially different to the application that was determined by the Tribunal in 2023 in that Dr El-Refaey invited the Tribunal to draw comparisons between his case and those of other doctors. Mr Lodge submitted that as there was no material changes in circumstances the applications should be dismissed.

203. In regard to the further application for disclosure of:

1 The statement of Dr DD to the disciplinary investigation into his conduct;
2 The statement given by Dr FF in respect of the same matter;

3 The statement given by the unnamed junior doctor Dr DD sought to silence.

204. Mr Lodge reiterated that pursuant to the direction of the October 2023 Tribunal, the GMC obtained the documents from the Trust in respect of a relevant allegation made concerning Dr DD. Mr Lodge stated that such disclosable documents as received were provided to Dr El-Refaey in November 2023. He stated that the GMC will keep its disclosure obligations under review and disclose any such further material in compliance with those obligations. Mr Lodge submitted that at this stage, the relevant material obtained was sufficient for the hearing to fairly proceed.

205. In regard to the further application for disclosure of:

4 Any correspondence between Ms PP and the Trust or GMC in relation to the disciplinary processes conducted against Dr El-Refaey;
5 The identity of the male doctor who agreed to carry out the sex selection abortion with Dr FF if not Dr DD;
6 WhatsApp messages sent between Dr DD and Dr FF from 1 October 2019 to 31 December 2021 ("the relevant period");
7 Financial payments made by Dr DD or his private abortion business to Dr FF in the relevant period;
8 A copy of the statement given by Dr FF to the police and/or GMC in relation to the sex selection abortion scandal;
9 A copy of the statement given by Dr DD to the police and/or GMC in relation to the sex selection abortion scandal;

206. Mr Lodge submitted that these requests were purely speculative and amount to no more than a 'fishing expedition'. He stated that the issue before the Tribunal is a narrow one, did the conversation as described by Dr DD take place or not? Mr Lodge stated that the issues surrounding the conduct of other doctors at other times, years apart from the current allegations will not assist the Tribunal in determining this issue.

207. In regard to the further application for disclosure (reference at number 10 in paragraph 9 of this Annex) in relation to statistics concerning BAME doctors and white doctors referred to the GMC by NHS Trusts for disciplinary matters, Mr Lodge stated that this information should be readily available pursuant to section 1 Equality Act 2010 PSED. He submitted that any concern about discrimination in this case was no more than pure speculation for which there was no evidence.

208. Mr Lodge stated that such concerns were raised as part of the disclosure request in January 2023. The January 2023 Tribunal observed on that occasion:

> *"There is no evidence (beyond Dr El-Refaey's unparticularised concern) that the GMC's decision to refer him to a MPT is tainted with discrimination, whether on grounds of race or otherwise. Consequently, the Tribunal took the view that Dr El-Refaey's request for the disclosure of the ethnicities of the 67 doctors was no more than a speculative 'fishing expedition'."*

209. Mr Lodge submitted that this issue had effectively been adjudicated upon and there was no evidence before this Tribunal that would allow for the approach taken by the January 2023 Tribunal to be revisited.

210. In relation to the balance of the documents requested, Mr Lodge submitted that there was no change of circumstances to revisit the earlier Tribunal's decision made on 19 October 2023.

211. Mr Lodge submitted that the GMC had complied with the disclosure requirements of that Tribunal and the most recent disclosure provided on the 23 September 2024 took the matter no further.

Legal advice

212. The Legally Qualified Chair (LQC) provided legal advice to the Tribunal which the Tribunal accepted and used throughout its deliberations.

213. The LQC referred the Tribunal to Rule 28 of the Rules.

214. The LQC reminded the Tribunal that it had a residual power to stay proceedings by way of an abuse of process argument. However, that submission had not been made to the Tribunal either in the letter from Dr El-Refaey's solicitors dated 24 July 2024, Mr Davies' written skeleton argument or in oral submissions.

215. In relation to disclosure, the LQC reminded the Tribunal that its powers first and foremost must have regard to ensuring that there is a fair hearing. That obligation is found not only in the rules of the fitness to practise rules but under case law Article 6 of the European Convention on Human Rights. Fairness has always got to be a consideration

throughout the process which includes a Tribunal reaching decisions with regard to requests for disclosure which are relevant and proportionate to the issues before it.

216. The Tribunal is aware of earlier Tribunal decisions in relation to the disclosure aspects of this case. However, this Tribunal is not bound by those decisions but can take them into account.

217. The Tribunal must have particular regard to the statutory overarching objective:

a. To protect, promote and maintain the health, safety and wellbeing of the public;
b. To promote and maintain public confidence in the medical profession; and
c. To promote and maintain proper professional standards and conduct for members of that profession.

The Tribunal's approach and decisions

Withdrawal of the allegations

218. The Tribunal had regard to Rule 28 of the Rules which allows for the Registrar to refer a case to the case examiners for a decision as to whether to withdraw an allegation or part of an allegation. This is before a medical practitioners tribunal hearing has opened.

219. The Tribunal therefore concluded that it had no power to make such an order and therefore dismissed Dr El-Refaey's application.

Disclosure of documents

220. The Tribunal considered each of the disclosure requests separately.

1 The statement of Dr DD to the disciplinary investigation into his conduct

221. The Tribunal was told by Mr Davies that he had only that morning learned that Dr DD had given two statements dated 30 March 2021 and 26 April 2021 which were provided in relation to the Trust's investigation into his own conduct. The Tribunal decided this would not alter its approach in determining whether these statements were relevant for disclosure to this Tribunal.

222. The Tribunal considered the suggestion made by Dr El-Refaey that Dr DD had made malicious allegations of dishonesty against him which are before the Tribunal. Further, it was

suggested that Dr DD's credibility was severely damaged as a result of his own behaviours and the various inconsistent versions of what is said to have occurred between Dr DD and Dr El-Refaey during an informal conversation in or around October 2019.

223. The Tribunal was of the view that what Dr DD said in his statements to the disciplinary investigation at the Trust into his own conduct could be potentially relevant. However, the Tribunal noted in that investigation the Trust made no adverse findings against Dr DD at the conclusion of its investigation and took no further action.

224. The Tribunal therefore concluded that allowing the disclosure of Dr DD's statements would inevitably risk satellite litigation into whether or not Dr DD had behaved inappropriately at the Trust. This would be a disproportionate use of the Tribunal's time and was not therefore considered appropriate.

225. The Tribunal further concluded that a fair hearing in relation to the allegation that Dr El-Refaey faces could be undertaken without Dr DD's statements being disclosed.

226. The Tribunal's reasons were that the further disclosure requested of Dr DD's statements would not assist it in determining the relevant issues which were the facts to be found in relation to the allegation that Dr El-Refaey faces. The Tribunal decided that it would assess Dr DD's credibility based on the written and oral evidence at a later stage of the hearing.

227. Accordingly, the Tribunal refused Dr El-Refaey's application for the further disclosure of Dr DD's statements. Nevertheless, the Tribunal was mindful of paragraphs 18 and 19 of Annex B of 19 October 2023 made by the previous Tribunal. This Tribunal notes the ongoing requirement of the GMC to comply with previous Tribunal directions.

2 The statement given by Dr FF in respect of the same matter

228. The Tribunal noted that Dr FF was not present when the informal conversation between Dr DD and Dr El-Refaey took place. Therefore, what Dr FF has said in her statement was not directly relevant to what transpired between Dr DD and Dr El-Refaey.

229. The Tribunal considered that this request was in effect a fishing expedition to seek further information as to whether Dr DD had behaved inappropriately at the Trust, when the Trust had taken no further action following its investigation. The Tribunal concluded that would inevitably risk it opening 'satellite litigation' into whether or not Dr DD had behaved

inappropriately at the Trust; this is not a matter with which the Tribunal is concerned. The Tribunal concluded that it was inappropriate to order disclose given the issues before it.

230. The Tribunal therefore concluded Dr El Refaey had not established that the statement given by Dr FF was relevant to his case and the allegation that he faces.

3 The statement given by the unnamed junior doctor Dr DD sought to silence

231. The Tribunal referred to its reasoning as set out above. For the same reasons, the Tribunal determined not to grant Dr El-Refaey's application for disclosure of the statement given by the unnamed junior doctor, namely this was a fishing expedition for evidence to discredit Dr DD in relation to matters where the Trust had decided to take no further action.

4 Any correspondence between Ms PP and the Trust or GMC in relation to the disciplinary processes conducted against Dr El-Refaey

232. Mr Davies stated that this matter was no longer being pursued

5 The identity of the male doctor who agreed to carry out the sex selection abortion with Dr FF if not Dr DD;
6 WhatsApp messages sent between Dr DD and Dr FF from 1 October 2019 to 31 December 2021 ("the relevant period");
7 Financial payments made by Dr DD or his private abortion business to Dr FF in the relevant period;
8 A copy of the statement given by Dr FF to the police and/or GMC in relation to the sex selection abortion scandal;
9 A copy of the statement given by Dr DD to the police and/or GMC in relation to the sex selection abortion scandal.

233. The Tribunal did consider each of these items separately. The Tribunal formed its own independent view but considered that under rule 30 of the Rules neither of the limbs applied, that is:

'a there has been a material changes in circumstances and that it is in the interests of justice to reconsider the matter or
b it is otherwise in the interest of justice to do so'

234. The Tribunal referred to its reasoning as set out above. For the same reasons, the Tribunal determined not to grant Dr El-Refaey's application for disclosure of this information, namely this was a fishing expedition into completely unrelated events for evidence to discredit Dr DD in relation to matters where the Trust had decided to take no further action.

10 The number of BAME doctors and white doctors referred to the GMC by NHS Trusts for disciplinary matters in 2020, 2021, 2022, 2023 and 2024 and of those, and in those respective years, the number of BAME and white doctors who the GMC brought proceedings against in the MPT. This information should be readily available pursuant to their section 1 Equality Act 2010 PSED [Public Sector Equality Duty]

235. Whilst the Tribunal acknowledge the concerns that have been raised, the Tribunal was of the view that the number of BAME doctors and white doctors referred to the GMC by NHS Trusts for disciplinary matters was irrelevant to the issues before the Tribunal, which is to determine facts from the evidence in relation to the allegation that Dr El-Refaey faces.

236. The Tribunal considered that if there are such concerns the Tribunal was not the forum in which to raise and consider them.

11 The written notes of the meeting that Dr HH may have taken with Dr DD

237. The Tribunal noted that it had typed notes of Dr HH in the appendix to the Trust note. The Tribunal considered that these written notes, if they exist, would be relevant as they would be the original notes of a meeting that she has typed up. Dr HH can be cross examined on these notes. The Tribunal therefore directs that the GMC should obtain these notes and disclose them, if they exist.

12 Any notes that have been prepared from the meeting on 28 June 2021

238. The Tribunal considered that if such notes exist, and they include material relevant to Dr DD's role in the investigation of Dr El-Refaey then they are potentially relevant. However, this disclosure was already covered by the order of the Tribunal on 14 October 2023.

13 The full report from the Trust into investigations of Dr DD

239. The Tribunal considered that if the full report includes material relevant to Dr DD's role in the investigation of Dr El-Refaey then it is potentially relevant. However, this disclosure was already covered by the order of the Tribunal on 14 October 2023.

14 The full letter sent to Dr DD by the trust regarding their findings into his activities dated 21 August 2021

240. The Tribunal considered that if the full letter includes material relevant to Dr DD's role in the investigation of Dr El-Refaey then it is potentially relevant. However, this disclosure was already covered by the order of the Tribunal on 14 October 2023.

15 Ms OO's statement regarding Dr DD.

241. The Tribunal's understanding was that the raising of concerns in Ms OO's statement about Dr DD predate the allegation against Dr El-Refaey. The Tribunal concluded that this request for disclosure to be a fishing expedition and would inevitably risk satellite litigation about the conduct of Dr DD even if there was something relevant in Ms OO's statement regarding the issues before this Tribunal.

242. The Tribunal concluded that it was not appropriate to order disclosure of Ms OO's statement and that a fair hearing could be conducted in relation to the allegations that Dr El-Refaey faces.

243. The Tribunal had regard to the balance of the requests for disclosure made in the letter of 24 July 2024. The Tribunal determined, having considered each request separately, that each was in effect a repetition of previous requests that the earlier Tribunal had decided. This Tribunal concluded that neither of the limbs in rule 30 of the Rules applied, namely:

'a there has been a material changes in circumstances and that it is in the interests of justice to reconsider the matter or
b it is otherwise in the interest of justice to do so'

ANNEX B – 26/09/2024

Application by the GMC to object to the document BRW14AC607054FO provided to the Tribunal on 26 September 2024 being admitted as evidence.

244. On 26 September 2024 document BRW14AC607054FO ('the unredacted material') consisting of 10 pages was provided to the Tribunal by Mr Davies. Pages 1 to 3 (inclusive) were disclosed by the GMC voluntarily in September 2023 to Dr El-Refaey. These are a summary of findings, conclusion and decision made by the Trust regarding an investigation into Dr DD. Pages 4 to 10 (inclusive) were disclosed to Dr El-Refaey on 3 November 2023 following an order made by a Tribunal on 19 October 2023. These are sections from an investigation report and recommendation from a Case Manager following a Trust investigation into Dr DD.

Submissions

245. Mr Lodge submitted that the above documents were said to be prejudicial in relation to Dr DD and that there should be a separate application for bad character against him if this unredacted material was to be used in cross examination. He submitted that it was therefore inappropriate for the Tribunal to see this evidence in its unredacted form.

246. Mr Lodge submitted that the redacted version of pages 1 to 10 in the hearing bundle should be used in the hearing.

247. Mr Lodge confirmed to the Tribunal that the GMC were not suggesting that the unredacted material had been disclosed accidentally. He stated that he did not seek to make an application for a new determination regarding disclosure under Rule 30 of the General Medical Council (Fitness to Practise Rules) 2004 as amended ('the Rules') which provides that any preliminary argument binds this Tribunal unless this Tribunal considers that: -

> *'a there has been a material changes in circumstances and that it is in the interests of justice to reconsider the matter or*
> *b it is otherwise in the interest of justice to do so'*

248. Mr Davies submitted that the short chronology was as follows:

- Pages 1 to 3 were disclosed on 4 September 2023 voluntarily by the GMC to Dr El-Refaey in unredacted form;
- Pages 4 to 10 were disclosed by the GMC on 3 November 2023 to Dr El-Refaey following a tribunal hearing regarding disclosure on 19 October 2023;
- All those documents had been placed in unredacted form (at one stage) in a bundle for the hearing;

- The GMC had unilaterally made redactions to those documents up to and including May 2024.

249. Mr Davies submitted that he had prepared his cross examination of Dr DD on the basis of the unredacted material. He submitted that the unredacted material was crucial to the credibility of Dr DD.

250. Mr Davies submitted that once the unredacted material had been disclosed it would be unfair to prevent Dr El-Refaey from deploying that material at the hearing.

251. Mr Davies submitted that as disclosure had been made by the GMC and that the redactions had only taken place following disclosure of Dr El-Refaey's witness statement and other evidence, it would now be unfair to prevent him from being allowed to cross examine about the content of the unredacted material.

Legal advice

252. In relation to disclosure, the LQC reminded the Tribunal that its powers first and foremost must have regard to ensuring that there is a fair hearing. That obligation is found not only in the rules of the fitness to practise rules but under case law Article 6 of the European Convention on Human Rights. Fairness has always got to be a consideration throughout the process which includes a Tribunal reaching decisions with regard to admission into evidence documents which are relevant and proportionate to the issues before it.

253. The LQC reminded the Tribunal that there was no submission that the unredacted material had been disclosed accidentally because there was no evidence before it to suggest that it had. Further, there was no submission by the GMC under rule 30 of the Rules and the Tribunal must have regard to the terms of the order made on 19 October 2023 by an earlier Tribunal in relation to disclosure.

The Tribunal's approach and decisions

254. The Tribunal noted that the GMC had not suggested that disclosure of the unredacted material was accidental and further there was no application to request a new determination of the order for disclosure made on 19 October 2023 under rule 30 of the Rules.

255. The Tribunal noted that pages 1 to 3 of the unredacted material had been voluntarily disclosed by the GMC and Dr El-Refaey wished to cross examine Dr DD about its content.

256. The Tribunal concluded that in all the circumstances it would be fair and in the interests of justice for this Tribunal to admit the already disclosed unredacted material into evidence. Further, the Tribunal concluded it would be fair to allow Dr El-Refaey to cross examine Dr DD on pages 1 to 3 of the unredacted material.

257. The Tribunal noted that pages 4 to 10 of the unredacted material had been disclosed by the GMC following an order made by an earlier Tribunal on 19 October 2023 and that the GMC had said neither that the disclosure of the unredacted material was accidental, nor had it applied under rule 30 of the Rules to ask for a redetermination of that earlier hearing of 19 October 2023.

258. The Tribunal concluded that in all the circumstances it would be fair and in the interests of justice for this Tribunal to admit the already disclosed unredacted material into evidence. The Tribunal concluded that as Dr El-Refaey wished to cross examine Dr DD, it was only fair to allow him to do so using the already disclosed unredacted material.