

PUBLIC RECORD

Dates: 22/08/2022 - 25/08/2022

Medical Practitioner's name: Dr . KYAW HTIN
GMC reference number: 2449771
Primary medical qualification: MB BS 1975 Med Inst (I) Rangoon

Type of case	Outcome on facts	Outcome on impairment
New - Misconduct	Facts relevant to impairment found proved	Impaired
New - Conviction	Facts relevant to impairment found proved	Impaired

Summary of outcome

Erasure

Tribunal:

Legally Qualified Chair	Mr Tanveer Rakhim
Lay Tribunal Member:	Mrs Valerie Blessington
Medical Tribunal Member:	Dr Helen McCormack
Tribunal Clerk:	Ms Rebecca Paterson

Attendance and Representation:

Medical Practitioner:	Not present and not represented
GMC Representative:	Ms Colette Renton, Counsel

Attendance of Press / Public

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

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 - 23/08/2022

Background

1. Dr Kyaw Htin qualified from the Medical Institution of Rangoon in 1975. At the time of the events Dr Kyaw Htin was employed as an Associate Specialist in Trauma and Orthopaedics at the County Durham and Darlington NHS Foundation Trust ('the Trust').
2. The allegation that has led to Dr Kyaw Htin's hearing can be summarised as follows. It is alleged that Dr Kyaw Htin was excluded by the County Durham and Darlington NHS Foundation Trust ('the Trust') and that, while excluded, on more than one occasion, he attended the Trust's Darlington Memorial Hospital to complete a Cremation form 5.
3. It is also alleged that on 24 February 2021, at the County Durham and Darlington Magistrate's Court, Dr Kyaw Htin was convicted of three counts of making false representations between 25 February and 11 September 2019 with a view to procuring the burning of human remains. It is alleged that Dr Kyaw Htin was sentenced to pay a fine of £1500 as a result of those convictions. The Cremation Form 5 required that Dr Kyaw Htin had communicated with the practitioner who originally signed the medical certificate relevant to the deceased. The GMC's position is that Dr Kyaw Htin did not do so, and that in signing the Cremation Form 5, he had made false representations on the statement of truth.
4. The initial concerns were raised with the GMC on 13 September 2019 by Dr A, the Medical Referee for Darlington Crematorium, who had contacted Dr B, the Executive Medical Director for County Durham and Darlington Foundation Trust. The referral was subsequent to a local investigation at the Trust.

The Outcome of Applications Made during the Facts Stage

5. Dr Kyaw Htin was not present or represented at the hearing. The Tribunal granted the GMC's application to proceed in Dr Kyaw Htin's absence, made pursuant to Rule 31 of the General Medical Council (Fitness to Practise Rules) 2004 as amended ('the Rules'). The Tribunal's full decision on the application is included at Annex A.

The Allegation and the Doctor's Response

6. The Allegation made against Dr Kyaw Htin is as follows:

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

1. On 26 March 2019, you were excluded by the County Durham and Darlington NHS Foundation Trust ('the Trust') and were verbally advised that you should not come to Trust premises, or words to that effect. **To be determined**
2. You received a letter from the Trust dated 27 March 2019, confirming that during your period of formal exclusion you should not return to Trust premises without prior permission except for the purposes of personal or family healthcare, to see your representative or to participate in any investigatory work, if requested. **To be determined**
3. You attended at the Trust's Darlington Memorial Hospital to complete a Cremation 5 form while you were excluded on more than one occasion, as set out in Schedule 1. **To be determined**
4. On 24 February 2021 at the County Durham and Darlington Magistrates' Court you were convicted of three counts of making false representations between 25 February 2019 and 11 September 2019 with a view to procuring the burning of human remains, namely that you had truthfully answered the questions of the Cremation Form 5, contrary to section 8 of the Cremation Act 1902. **To be determined**
5. On 24 February 2021 at the County Durham and Darlington Magistrates' Court you were sentenced to pay a fine of £1,500.00 in relation to:
 - a. the offences at paragraph 4; **To be determined**
 - b. a further 27 cases of the same offence as at paragraph 4, which were taken into consideration. **To be determined**

And that by reason of the matters set out above your fitness to practise is impaired because of your:

- a. misconduct in respect of paragraphs 1, 2 and 3; **To be determined**
- b. conviction in respect of paragraphs 4 and 5. **To be determined**

The Admitted Facts

7. As Dr Kyaw Htin was neither present nor represented on day one of the hearing and no formal written admissions had been produced, the Tribunal was required to determine the entirety of the facts as detailed within the Allegation.

Witness Evidence

8. The Tribunal received evidence on behalf of the GMC in the form of witness statements from the following witnesses who were not called to give oral evidence:
 - Dr B, Executive Medical Director for the Trust; and
 - Dr A, Medical Referee for Darlington Crematorium.
9. Dr Kyaw Htin did not provide a witness statement.

Documentary Evidence

10. The Tribunal had regard to the documentary evidence provided by the parties. This evidence included but was not limited to:
 - Cremation 5 forms (45 were provided covering February 2019 to September 2019);
 - Various documents relating to the criminal investigation into Dr Kyaw Htin's conduct;
 - Memorandum of conviction;
 - Various documents relating to the Trust's investigations into Dr Kyaw Htin's conduct;
 - Guidance and Regulations relevant to Cremation.

The Tribunal's Approach

11. 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 Kyaw Htin 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.

The Tribunal's Analysis of the Evidence and Findings

12. 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.

Paragraphs 1 and 2

13. In determining these paragraphs of the Allegation, the Tribunal had to determine whether, on 26 March 2019, Dr Kyaw Htin was excluded by the Trust and verbally advised that he should not come to Trust premises. Additionally, the Tribunal had to determine whether, on 27 March 2019, Dr Kyaw Htin received a letter from the Trust confirming that he could not return to Trust premises during his period of formal exclusion, apart from specified circumstances that were cited within the letter.

14. The Tribunal took account of Dr B's witness statement in which he stated that, during a meeting with Dr Kyaw Htin on 26 March 2019:

'Given the nature of the allegation, it was agreed that Dr Kyaw would be excluded from the Trust premises pending an investigation into the allegations. The terms of the exclusion were clearly explained to Dr Kyaw and he was informed that he would be with immediate effect pending an investigation.'

15. The Tribunal also had regard to Dr D's handwritten notes of the meeting on 26 March 2019. Dr D held the role of Deputy Director Medical Workforce at the Trust and had been present at the meeting. It noted that Dr D had written:

'Exclusion from workplace – 4 weeks, then reviewed. Not to come to Trust premises... Full opportunity to give views.'

16. The Tribunal considered that the handwritten notes of Dr D supported the position that there was in fact a discussion about Dr Kyaw Htin's exclusion at the meeting on 26 March 2019. The Tribunal was also of the view that the letter sent by Dr B to Dr Kyaw Htin the following day served as further evidence of such a discussion:

'Further to our meeting held on Tuesday 26 March 2019 at which [Dr D], Deputy Director Medical Workforce was also present, I write to confirm our discussion, which outlined that I had no alternative but to formally exclude you from duty...'

17. In light of the written notes of 26 March 2019 meeting, and the subsequent confirmation within the Trust's letter of the following day, the Tribunal considered that on 26 March 2019, Dr Kyaw Htin was excluded by the Trust and verbally advised that he should not come to Trust premises.

18. In relation to paragraph 2 of the Allegation, the Tribunal again had regard to the letter of 27 March 2019. It noted that within the letter it was written that:

'During your period of formal exclusion you should not return to Trust premises without my prior permission except for the purposes of personal or family healthcare, to see your representative or to participate in any investigatory work, if requested.'

19. The Tribunal did not consider that the production or receipt of the letter on 27 March 2019 was in dispute and therefore accepted its contents. The Tribunal was of the view that the contents of the letter clearly demonstrated that Dr Kyaw Htin had been excluded and that he was not to return to Trust premises except in the specified circumstances as outlined above. This was further supported by the Record of Interview, dated 11 March 2020, between Dr Kyaw Htin and the Police, during which is stated that:

'Dr KYAW confirmed that he was excluded from his duties on the 27 March 2019...'

20. Accordingly, the Tribunal found paragraphs 1 and 2 of the Allegation proved.

Paragraph 3

21. In relation to this paragraph of the Allegation the Tribunal had to determine whether Dr Kyaw Htin attended the Trust's Darlington Memorial Hospital to complete a Cremation 5 form while he was excluded on more than one occasion, as set out in Schedule 1.
22. The Tribunal was mindful of its previous finding that Dr Kyaw Htin had been excluded by the Trust on 26 March 2019 and it took account of the Trust letters to Dr Kyaw Htin regarding exclusion renewal which confirmed a continuous period of exclusion between 26 March 2019 and 19 October 2019.
23. The Tribunal had sight of Cremation 5 forms relevant to the individuals as set out in Schedule 1, and which appeared to have been signed by Dr Kyaw Htin. There were 40 patients listed in Schedule 1 with the dates of their form ranging from 17 April 2019 to 11 September 2019.
24. The Tribunal had further regard to the Record of Interview between Dr Kyaw Htin and the Police, dated 11 March 2020. Within this record it was stated that:

'Dr KYAW was asked how long he had been signing cremation 4 forms as a part B Doctor. He stated that he had been for about a year. He stated that he started doing this as he was asked by the mortuary to start signing forms as a part B Doctor not a part A Doctor.'

25. The Tribunal considered that there was sufficient evidence to demonstrate that Dr Kyaw Htin completed a Cremation 5 form on more than one occasion, as set out in Schedule 1, whilst he was excluded.
26. The Tribunal went on to consider whether Dr Kyaw Htin attended the Trust's Darlington Memorial Hospital to do so. The Tribunal noted that within his Police Interview, it had been recorded that Dr Kyaw Htin described the process of the '*cremation for* [sic]':

'He explained he would have to check the details of the deceased and also the body you would make sure that there is no suspicious cause of death.'

27. The Tribunal considered that in order to assess the body, it was reasonable to conclude that Dr Kyaw Htin must have attended the Darlington Memorial Hospital. The mortuary would be assumed to be part of the hospital site, thus part of the Trust property. There was no evidence to the contrary presented. The Tribunal was of the view that Dr Kyaw Htin's responses in relation the Trust's investigatory meeting further supported this conclusion:

'I thought the exclusion was from my clinical duties and not from the site. I realised that wasn't the case when [Mr E] texted [sic] me about a Crem Form. I now realise I shouldn't have come on site and I have apologised to [Dr B]. I realise it was a mistake.'

28. Additionally, in response to a question as to how Dr Kyaw Htin knew a Cremation Form needed doing, he replied:

'The mortuary staff contact me and ask me to do them.

...

I come in and examine the body.'

29. Having regard to the Cremation 5 forms relating to the individuals in Schedule 1 and the evidence in relation to Dr Kyaw Htin's exclusion, the Tribunal was satisfied that Dr Kyaw Htin had, on more than one occasion, attended the Trust's Darlington Memorial Hospital to complete a Cremation 5 form whilst he was excluded.
30. Accordingly, the Tribunal found paragraph 3 of the Allegation proved.

Paragraph 4

31. In relation to this paragraph of the Allegation, the Tribunal had to determine whether on 24 February 2021, Dr Kyaw Htin was convicted of three counts of making false representations between 25 February and 11 September 2019.
32. The Tribunal had regard to the Memorandum of Conviction dated 24 February 2021. The memorandum referred to three counts of making false representations as set out at paragraph 4 of the Allegation, to which Dr Kyaw Htin had entered a Guilty Plea.
33. Accordingly, the Tribunal found paragraph 4 of the Allegation proved.

Paragraph 5

34. With regard to paragraph 5 of the Allegation, the Tribunal had to determine whether Dr Kyaw Htin was sentenced to pay a fine of £1,500 in relation to the offences at paragraph 4 and a further 27 cases of the same offence as at paragraph 4, which were taken into consideration.
35. Having further regard to the Memorandum of Conviction, the Tribunal was satisfied that Dr Kyaw Htin had been fined a total of £1500 in relation to three counts of making false representations, and that 27 cases of the same offence had been taken into consideration.

36. Accordingly, the Tribunal found paragraph 5 of the Allegation proved.

The Tribunal's Overall Determination on the Facts

37. The Tribunal has determined the facts as follows:

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

1. On 26 March 2019, you were excluded by the County Durham and Darlington NHS Foundation Trust ('the Trust') and were verbally advised that you should not come to Trust premises, or words to that effect. **Determined and found proved**
2. You received a letter from the Trust dated 27 March 2019, confirming that during your period of formal exclusion you should not return to Trust premises without prior permission except for the purposes of personal or family healthcare, to see your representative or to participate in any investigatory work, if requested. **Determined and found proved**
3. You attended at the Trust's Darlington Memorial Hospital to complete a Cremation 5 form while you were excluded on more than one occasion, as set out in Schedule 1. **Determined and found proved**
4. On 24 February 2021 at the County Durham and Darlington Magistrates' Court you were convicted of three counts of making false representations between 25 February 2019 and 11 September 2019 with a view to procuring the burning of human remains, namely that you had truthfully answered the questions of the Cremation Form 5, contrary to section 8 of the Cremation Act 1902. **Determined and found proved**
5. On 24 February 2021 at the County Durham and Darlington Magistrates' Court you were sentenced to pay a fine of £1,500.00 in relation to:
 - a. the offences at paragraph 4; **Determined and found proved**
 - b. a further 27 cases of the same offence as at paragraph 4, which were taken into consideration. **Determined and found proved**

And that by reason of the matters set out above your fitness to practise is impaired because of your:

- a. misconduct in respect of paragraphs 1, 2 and 3; **To be determined**
- b. conviction in respect of paragraphs 4 and 5. **To be determined**

Determination on Impairment - 24/08/2022

1. 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 before, Dr Kyaw Htin's fitness to practise is impaired by reason of misconduct and a conviction.

The Evidence

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

Submissions

3. On behalf of the GMC, Ms Renton submitted that Dr Kyaw Htin's fitness to practise is currently impaired by reason of his misconduct and his conviction for a dishonesty offence.
4. Ms Renton directed the Tribunal to the case of *GMC v Nwachuku* [2017] EWHC 2085 ('*Nwachuku*') in which she submitted that at paragraphs 45 to 49, there was a summary of relevant regulatory cases involving dishonesty at the impairment stage:

'45. Dishonesty encompasses a very wide range of different facts and circumstances. Any instance of it is likely to impair a professional person's fitness to practise: R (Hassan) v General Optical Council [2013] EWHC 1887 per Leggatt J at paragraph [39].

46. Dishonesty constitutes a breach of a fundamental tenet of the profession of medicine: PSA v GMC & Igwilo [2016] EWHC 524 . A finding of dishonesty lies at the top end in the spectrum of gravity of misconduct: Patel v GMC Privy Council Appeal No.48 of 2002.

47. A finding of impairment does not necessarily follow upon a finding of dishonesty. If misconduct is established, the tribunal must consider as a separate and discrete exercise whether the practitioner's fitness to practise has been impaired: PSA v GMC and Uppal [2015] EWHC 1304 at paragraph [27].

48. However, it will be an unusual case where dishonesty is not found to impair fitness to practise: PSA v Health and Care Professions Council & Ghaffar [2014] EWHC 2723 per Carr J at paragraphs [45] and [46].

49. The attitude of a practitioner to the allegations made and any admissions of responsibility for the misconduct will be taken into account as relevant factors in determining whether or not fitness to practise has been impaired: Nicholas-Pillai v GMC [2009] EWHC 1048 per Mitting J at paragraph [18].'

5. Ms Renton submitted that this was not an unusual case and that a finding of misconduct and dishonesty implied that there was current impairment. She submitted that dishonesty was at the higher end of gravity in relation to misconduct. She also submitted that, taking into account Dr Kyaw Htin's lack of engagement in these proceedings, his attitude towards his conduct as found proved was unknown.
6. Addressing misconduct, Ms Renton submitted that misconduct was a word of general effect involving some act or omission that falls short of what is proper in the circumstances. She referred the Tribunal to the Good Medical Practice ('GMP') and submitted that both attending the Trust premises while excluded and Dr Kyaw Htin dishonestly completing Cremation 5 Forms marked a significant departure from the following paragraphs of GMP:

'65 You must make sure that your conduct justifies your patients' trust in you and the public's trust in the profession.

68 You must be honest and trustworthy in all your communication with patients and colleagues. This means you must make clear the limits of your knowledge and make reasonable checks to make sure any information you give is accurate.

71 You must be honest and trustworthy when writing reports, and when completing or signing forms, reports and other documents. You must make sure that any documents you write or sign are not false or misleading.

a You must take reasonable steps to check the information is correct.

b You must not deliberately leave out relevant information.

73 You must cooperate with formal inquiries and complaints procedures and must offer all relevant information while following the guidance in Confidentiality.

7. Ms Renton submitted that Dr Kyaw Htin's conduct fell significantly below the standards expected of a registered practitioner. She reminded the Tribunal of its finding that Dr Kyaw Htin had been specifically told not to attend the Trust premises and that he wilfully breached that on repeated occasions. Ms Renton submitted that Dr Kyaw Htin did not only breach his exclusion for a reason other than a specified exception, he also worked in a clinical manner for which he was paid. She submitted that this did not demonstrate any compliance or respect for the investigative process.
8. In relation to Dr Kyaw Htin's conviction, Ms Renton submitted that it arose from a failure to properly or honestly answer questions on a Cremation certificate. She submitted that this was an important document which requires a high level of responsibility. Ms Renton

submitted that the public places trust in doctors to respect these procedures and that the families and loved ones of the deceased would expect that the legal procedures relating to a person's death would be handled properly. She submitted that the public would be shocked to hear of a doctor improperly completing certificates that allow a person's body to be cremated. Further, Ms Renton submitted that the false representation related to Dr Kyaw Htin completing forms accurately when, in reality, he had not spoken with the medical professional who had completed the medical certificate. Ms Renton submitted that this demonstrated a failure to take reasonable steps to make sure that the information in the certificates was correct.

9. Ms Renton therefore submitted that the findings of dishonesty and Dr Kyaw Htin's misconduct amounted to serious professional misconduct.
10. Addressing impairment, Ms Renton referred the Tribunal to Dame Janet Smith's test in The Fifth Shipman Report, cited in CHRE v NMC and P Grant [2011] EWHC 927 (Admin), which sets out factors that may lead to a finding of impairment, and submitted that Dr Kyaw Htin's misconduct and conviction engaged all four limbs:

'a) Whether the registrant 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;

b) Whether the registrant has in the past brought and/or is liable in the future to bring the profession into disrepute;

c) Whether the registrant has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the profession.

d) Whether the registrant has in the past acted dishonestly and/or is liable to act dishonestly in the future.'

11. Ms Renton submitted that Dr Kyaw Htin had specifically chosen not to engage with these proceedings and that his engagement throughout the regulatory process had been limited. She acknowledged that there had been some degree of insight by Dr Kyaw Htin's admissions to the Trust and his guilty pleas at the Magistrates' Court but that there had been nothing to assist the Tribunal with assessing his current mindset. She submitted that Dr Kyaw Htin had not provided any explanation as to why he acted in the way that he did, nor had he provided any reflective statement. Ms Renton submitted that there was therefore no evidence of insight or remorse and so it followed that there was no evidence of remediation. She set out the GMC's position that in the absence of proper evidence of insight, remorse, or attempts to remediate, there remained a risk of repetition.
12. Ms Renton referred to the overarching objective and submitted that the facts as found proved could not be said to uphold any element of the overarching objective. She submitted that Dr Kyaw Htin's case was likely to be a matter of public interest and that

there was a deterrent element to findings of misconduct which sends out a message to the profession that certain behaviour is unacceptable. Ms Renton therefore submitted that a finding that Dr Kyaw Htin's fitness to practise was not currently impaired would seriously undermine the overarching objective.

The Relevant Legal Principles

13. 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.
14. In approaching the decision, the Tribunal was mindful of the two stage process to be adopted when considering whether Dr Kyaw Htin's fitness to practise was impaired by reason of misconduct: first whether the facts as found proved amounted to misconduct, and that the misconduct was serious, and then whether the finding of that misconduct which was serious could lead to a finding of impairment.
15. The Tribunal must determine whether Dr Kyaw Htin'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 any likelihood of repetition.
16. The Tribunal bore in mind the cases as set out by Ms Renton in her submissions on misconduct and impairment. It took account of the principles in *Nwachuku*, namely that dishonesty lies at the top end in the spectrum of gravity of misconduct, and is a breach of a fundamental tenet of the profession. It noted that although any instance of dishonesty is likely to impair a professional person's fitness to practise, impairment does not necessarily follow from a finding of dishonesty and misconduct; where misconduct is found, the Tribunal must consider impairment as a separate and discrete exercise.
17. The Tribunal also bore in mind it would be unusual not to find impairment where dishonesty was present. Further, the practitioner's attitude to a misconduct allegation would be considered when deciding impairment.
18. In relation to the Dame Janet Smith's test in the Fifth Shipman Report, the Tribunal noted not every limb of the listed criteria needed to be engaged, as denoted by the use of 'and/or' between each criterion. A finding on a single criterion could suffice for purposes of finding impairment.

The Tribunal's Determination on Impairment

Misconduct

19. The Tribunal first considered whether Dr Kyaw Htin's actions as found proved at paragraphs 1, 2, and 3 of the Allegation amounted to misconduct.

20. The Tribunal was of the view that Dr Kyaw Htin's actions in attending Trust premises and carrying out clinical work while excluded demonstrated significant departures from GMP as set out by Ms Renton. It considered that such conduct demonstrated a failure to fully cooperate with the Trust's investigative procedure and undermined the public's trust in the profession. The Tribunal considered that the dishonest element of Dr Kyaw Htin's conduct amounted to a serious and a significant departure from the principles within GMP.
21. The Tribunal noted that Dr Kyaw Htin's conduct was repeated such that he completed Cremation 5 Forms on at least 40 occasions whilst excluded from Trust premises. In light of the significant departures from GMP and the repeated nature of Dr Kyaw Htin's conduct, the Tribunal considered that his conduct fell so far short of the standards of conduct reasonably to be expected of a doctor as to amount to serious misconduct.

Impairment

22. Dr Kyaw Htin's conviction was found proved at paragraphs 4 and 5 of the Allegation. The Tribunal having found that the facts found proved amounted to misconduct, went on to consider whether, as a result of that misconduct and his conviction, Dr Kyaw Htin's fitness to practise is currently impaired.
23. In relation to his conviction, the Tribunal bore in mind that Dr Kyaw Htin had been convicted of a dishonesty offence and that it involved both untruthfully completing Cremation 5 Forms and failing to consult the original medical practitioner who originally signed the medical certificate relating to the deceased. The Tribunal considered that the Cremation 5 Form was an important legal document which required a high level of responsibility reflected in the inclusion of a Statement of Truth. The conviction incorporated three counts of such conduct, while 27 other instances were taken into consideration.
24. The Tribunal acknowledged that Dr Kyaw Htin had made admissions at the Trust's investigation meetings and that he had at that stage expressed some remorse for his actions. It also took account of Dr Kyaw Htin's Guilty Pleas at the Magistrate's Court. However, the Tribunal noted that Dr Kyaw Htin had provided no further information nor reflections in relation to these proceedings and that there was therefore very little by way of demonstrating insight. The Tribunal was mindful that dishonesty was difficult to remediate in any event and, in light of the absence of any further engagement, insight, or remorse, there remained a risk of repetition of Dr Kyaw Htin's conduct.
25. The Tribunal accepted Ms Renton's submissions in relation to Dame Janet Smith's test in the Fifth Shipman Report, namely that all four limbs were engaged. In particular, the Tribunal was of the view that Dr Kyaw Htin had acted dishonestly, had breached fundamental tenets of the profession, and his conduct was likely to bring the profession into disrepute.

26. The Tribunal was of the view that the public would be shocked to learn that Dr Kyaw Htin had undermined the Trust’s investigative process by attending the hospital whilst excluded. In addition, he had completed a number of Cremation 5 Forms which specifically state:

‘I certify the information I have given above is true and accurate to the best of my knowledge and belief...’

Dr Kyaw Htin knew when he signed the forms that the information he was giving was not true. By failing to follow the correct procedures in relation to those forms, there was a potential risk of harm to patients and the public relating to incorrect certification for purposes of cremation.

27. The Tribunal considered Dr Kyaw Htin has brought the profession into disrepute by continuing to work when excluded, coupled with then undertaking the work in a dishonest manner for which he had been convicted. The Tribunal therefore considered that the overarching objective required a finding of impairment in order to protect, promote and maintain the health, safety and well-being of the public, and to promote and maintain public confidence and standards in the profession.
28. Accordingly, the Tribunal determined that Dr Kyaw Htin’s fitness to practise is currently impaired by reason of his misconduct and a conviction.

Determination on Sanction - 25/08/2022

1. Having determined that Dr Kyaw Htin’s fitness to practise is impaired by reason of misconduct and a conviction, the Tribunal now has to decide in accordance with Rule 17(2)(n) of the Rules on the appropriate sanction, if any, to impose.

The Evidence

2. The Tribunal has taken into account evidence received during the earlier stages of the hearing where relevant to reaching a decision on sanction.

Submissions

3. On behalf of the GMC, Ms Renton submitted that the appropriate sanction was one of erasure.
4. In making her submissions, Ms Renton referred the Tribunal to the relevant paragraphs of the Sanctions Guidance (‘SG’). She submitted that this was not an exceptional case and that to take no action would therefore be inappropriate. Additionally, it was Ms Renton’s submission that conditions were not appropriate or workable in light of the

nature of Dr Kyaw Htin's conviction and his lack of insight. She submitted that there was no evidence to suggest that Dr Kyaw Htin would comply with any such conditions and that, in light of the information that he was retired, it would be very difficult to impose any conditions. Further, that conditions would not address the degree of impairment found by the Tribunal.

5. Addressing suspension, Ms Renton highlighted paragraph 91 of the SG and submitted that it could be used to have a deterrent effect. She submitted that although a message did need to be sent out in terms of upholding professional standards, suspension was the minimum sanction required. Ms Renton submitted that the element of dishonesty and the conviction undermined confidence in the profession. She submitted that there was no up to date acknowledgement of fault and reminded the Tribunal of its finding that it was not satisfied that there was no risk of repetition. She submitted that there have been multiple serious breaches of GMP and that it was unknown as to whether remediation was likely to be successful. Ms Renton further submitted that although there was no evidence that Dr Kyaw Htin had repeated his conduct, at the time of the events he was under investigation by the Trust for a separate matter which had also been referred to the GMC.
6. Ms Renton acknowledged that there had been a lapse of time since the incident occurred and that Dr Kyaw Htin had previously made admissions. However, addressing the aggravating factors, Ms Renton submitted that the Tribunal had not been provided with any information of remorse, mediation or insight; both the misconduct and conviction were related to each other and aggravated each other; there had been a significant departure from GMP; the behaviour had been repeated, amounting to persistent dishonesty; and signing the documents without having followed proper procedure was an abuse of position.
7. Ms Renton referred the Tribunal to the case of *GMC v Bramhall* [2021] EWHC 2109 (Admin) ('*Bramhall*') and submitted that in order to impose a sanction less than erasure, there needs to be some evidence of insight. She submitted that there was no evidence of insight now and, for that reason, suspension could not be an appropriate sanction. Ms Renton submitted that Dr Kyaw Htin's conduct was fundamentally incompatible with continued registration.
8. Addressing erasure, Ms Renton submitted that there had been two safeguards in this case, exclusion from the Trust premises whilst the investigation continued and the procedure relating to the Cremation 5 Form. Ms Renton submitted that Dr Kyaw Htin had abused the trust placed in a doctor to abide by exclusions and to complete paperwork properly.
9. Ms Renton referred the Tribunal to *Khan v General Medical Council* [2015] EWHC 301 and submitted that it set out that dishonesty lies at the top end of misconduct and that Dr Kyaw Htin's case was particularly serious as his misconduct occurred in performance of his professional duties and that there had been a breach of trust.

10. Ms Renton submitted that arriving at the appropriate sanction was a finely balanced exercise and that, had there been a degree of insight, the GMC may have invited the Tribunal to instead impose suspension. Ms Renton reminded the Tribunal of its finding that Dr Kyaw Htin's conduct had brought the profession into disrepute. She submitted that it was conduct which falls short of compatibility with registration and that erasure was the only outcome which addressed all three limbs of the overarching objective.

The Tribunal's Approach

11. The Tribunal bore in mind that the decision as to the appropriate sanction, if any, to impose in this case is a matter for the Tribunal exercising its own judgement. In reaching its decision, the Tribunal has taken the SG into account and borne in mind the overarching objective.
12. The Tribunal reminded itself that the main reason for imposing any sanction is to protect the public and that sanctions are not imposed to punish or discipline doctors, even though they may have a punitive effect. Throughout its deliberations, the Tribunal has applied the principle of proportionality, balancing Dr Kyaw Htin's interests with the public interest.

The Tribunal's Determination on Sanction

Aggravating and Mitigating Factors

13. The Tribunal has already set out its decision on the facts and impairment which it took into account during its deliberations on sanction. Before considering what action, if any, to take in respect of Dr Kyaw Htin's registration, the Tribunal considered and balanced the aggravating and mitigating factors in this case.
14. The Tribunal identified the following aggravating factors:
 - Dr Kyaw Htin failed to work collaboratively with colleagues by consulting with the medical practitioner who had signed the relevant medical certificates;
 - He had abused his professional position by signing the Cremation 5 Forms without following proper procedure;
 - There had been no evidence beyond the initial admissions that Dr Kyaw Htin had developed insight, reflected, or undertaken remediation in relation to his misconduct;
 - The misconduct and conviction were two related instances which aggravated each other;
 - There was repeated misconduct which amounted to persistent dishonesty.
15. Having identified aggravating factors in this case, the Tribunal identified the mitigating factors to be:

- Dr Kyaw Htin had made some previous admissions during the Trust’s investigation and he had made a Guilty Plea in relation to the criminal conviction;
- There had been a lapse of time since the misconduct and conviction occurred;
- Dr Kyaw Htin had previously said that he should have done things differently in relation to the Cremation 5 Forms and he had expressed remorse during the Trust investigation;
- Dr Kyaw Htin stated as part of the Trust investigation that he had been facing challenging personal circumstances.

16. The Tribunal considered each sanction in ascending order of severity, starting with the least restrictive.

No action

17. The Tribunal first considered whether to conclude the case by taking no action. It noted that taking no action following a finding of impaired fitness to practise would only be appropriate in exceptional circumstances. The Tribunal determined that there are no exceptional circumstances in this case and that, given the seriousness of its findings, it would not be sufficient, proportionate, or in the public interest to conclude this case by taking no action.

Conditions

18. The Tribunal next considered whether to impose conditions on Dr Kyaw Htin’s registration. The Tribunal noted that conditions are appropriate and workable in certain circumstances including where a doctor has been open and honest and has shown insight. It also noted that conditions may be appropriate where a Tribunal is satisfied that the doctor will comply with them and has the potential to respond positively to their work being supervised. Dr Kyaw Htin had previously informed the GMC that he had retired and was no longer practising. The Tribunal was therefore of the view that it would be difficult to identify any workable conditions. Further, given Dr Kyaw Htin’s failure to engage with these proceedings, it was not satisfied that he would comply with any conditions imposed.

19. The Tribunal was also of the view that imposing conditions on Dr Kyaw Htin’s registration would not sufficiently mark the seriousness of his dishonest conduct.

Suspension

20. The Tribunal went on to consider whether to impose a period of suspension on Dr Kyaw Htin’s registration. The Tribunal accepted that suspension does have a deterrent effect and could be used to send a signal to Dr Kyaw Htin, the profession, and the public about what is regarded as behaviour unbecoming a registered doctor. The Tribunal noted the SG

provides that suspension may be appropriate where there is an acknowledgement of fault and it is satisfied the conduct will not be repeated.

21. The Tribunal was mindful that Dr Kyaw Htin had not engaged in these proceedings beyond his email which stated:

‘Thanks I have stated previously that I don’t wish to engage virtual hearing [sic] as I have retired over a year now and stopped practicing [sic] and happy to leave it to MTPS [sic] and GMC decision’.

As a result, the Tribunal considered that there was no evidence to demonstrate current insight or to support a finding that Dr Kyaw Htin was likely to remediate his conduct.

22. The Tribunal was mindful of the case of Bramhall, as raised by Ms Renton on behalf of the GMC, and noted that in order for suspension to be the appropriate sanction, there needed to be some evidence of current insight. In light of the Tribunal’s findings in relation to Dr Kyaw Htin’s misconduct and conviction, lack of insight, and the risk of repetition, the Tribunal concluded that a period of suspension would not be appropriate to sufficiently protect the public interest. The Tribunal also found that imposing a period of suspension would not maintain public confidence or uphold proper professional standards.

Erasure

23. The Tribunal went on to consider whether the sanction of erasure was appropriate and proportionate in this case. The Tribunal reminded itself of the aggravating factors it had identified in this case and noted the following paragraphs of the SG were relevant to its deliberations:

‘108 Erasure may be appropriate even where the doctor does not present a risk to patient safety, but where this action is necessary to maintain public confidence in the profession. For example, if a doctor has shown a blatant disregard for the safeguards designed to protect members of the public and maintain high standards within the profession that is incompatible with continued registration as a doctor

109 Any of the following factors being present may indicate erasure is appropriate (this list is not exhaustive).

...

b A deliberate or reckless disregard for the principles set out in Good medical practice and/or patient safety

...

d Abuse of position/trust (see Good medical practice, paragraph 65: ‘You must make sure that your conduct justifies your patients’ trust in you and the public’s trust in the profession’).

...

h Dishonesty, especially where persistent and/or covered up (see guidance below at paragraphs 120–128).

...’

24. The Tribunal reminded itself of its finding that Dr Kyaw Htin’s conduct represented a serious departure from Good Medical Practice and that he had shown a deliberate disregard for the principles therein. The Tribunal accepted Ms Renton’s submission that Dr Kyaw Htin’s misconduct was carried out in circumstances whereby he abused his position of trust and that his dishonesty was repeated on multiple occasions, amounting to persistent dishonesty. The Tribunal was of the view that Dr Kyaw Htin’s misconduct and conviction, taken in conjunction with the absence of any evidence to demonstrate insight, falls short of being compatible with continued registration.
25. The Tribunal therefore concluded that erasure is the only appropriate sanction to protect patients, promote and maintain public confidence in the medical profession, and to uphold proper professional standards and conduct for members of the profession.
26. The Tribunal therefore determined that Dr Kyaw Htin’s name be erased from the Medical Register.
27. Unless Dr Kyaw Htin exercises his right of appeal, his name will be erased from the Medical Register 28 days from the date on which written notice of this decision is deemed to have been served upon him. A note explaining his right of appeal will be sent to him.
28. Ms Renton confirmed that no immediate order was sought by the GMC on the grounds that it would be disproportionate. The Tribunal was satisfied that no immediate order was necessary.
29. There was no Interim Order to revoke.
30. That concludes this case.

ANNEX A – 23/08/2022

Application to Proceed in Dr Kyaw Htin's Absence

Service of Notice of the Hearing

1. Dr Kyaw Htin is neither present nor represented today.
2. Ms Renton, Counsel, on behalf of the General Medical Council (GMC) provided the Tribunal with documents regarding service of these proceedings on Dr Kyaw Htin. She referred the Tribunal to an email dated 27 June 2022 in which Dr Kyaw Htin confirmed that he was happy to receive service by email.
3. Dr Kyaw Htin was subsequently sent emails including a copy of the Notice of Allegation letter sent by the GMC, the receipt of which was acknowledged by Dr Kyaw Htin on 13 July 2022.
4. He was also sent a copy of the MPTS Notice of Hearing letter, which Dr Kyaw Htin confirmed receipt of on 14 July 2022. Ms Renton submitted that Dr Kyaw Htin had clearly received the Notice of Hearing and that the GMC had therefore made all reasonable efforts to ensure that notice was properly served.
5. The Tribunal had regard to the service bundle provided by the GMC, as well as Ms Renton's submissions. Having considered all of the evidence before it, including Dr Kyaw Htin's confirmation in relation to the use of email for service, the Tribunal was satisfied that notice of the hearing had been properly served in accordance with Rules 15 and 40 of the Rules and paragraph 8 of Schedule 4 to the Medical Act 1983 (as amended).

Proceeding in Dr Kyaw Htin's absence

6. The Tribunal went on to consider whether it would be appropriate to proceed with this hearing in Dr Kyaw Htin's absence pursuant to Rule 31. The Tribunal was conscious that the discretion to proceed in the absence of a doctor should be exercised with the utmost care and caution, balancing the interests of the doctor with the wider public interest.
7. Ms Renton invited the Tribunal to proceed in Dr Kyaw Htin's absence and took the Tribunal through the relevant documents within the service bundle. She referred to relevant case law and submitted that Dr Kyaw Htin had been appropriately served with all of the relevant documentation and therefore had the means to fairly attend the hearing in his own interest. Ms Renton submitted that Dr Kyaw Htin had made it plain that he was contactable but that he did not wish to engage. She submitted that an adjournment would not resolve his absence. Although she acknowledged that there was always a disadvantage to a practitioner not being present, Ms Renton submitted that weighing this against the other factors, the GMC invited the Tribunal to proceed.

8. Ms Renton submitted that Dr Kyaw Htin had acknowledged receipt of the Notice of Allegation and Notice of Hearing and that he had stated that he did not wish to engage with the hearing. Ms Renton therefore submitted that Dr Kyaw Htin had demonstrated that he had chosen to absent himself and that he had demonstrated a failure to engage in these proceedings.
9. Ms Renton submitted that in balancing the interests of Dr Kyaw Htin and the public, it was in the public interest to proceed today.

The Tribunal's Decision

10. The Tribunal considered the case of *Adeogba v General Medical Council* [2016] EWCA Civ 162 in which it was found that *'there is a burden on ... all professionals subject to a regulatory regime, to engage with the regulator, both in relation to the investigation and ultimate resolution of allegations made against them. That is part of the responsibility to which the sign up when being admitted to the profession.'*
11. The Tribunal was satisfied that Dr Kyaw Htin had been properly served with notice of this hearing. The Tribunal had regard to Dr Kyaw Htin's email dated 14 July 2022 in which he stated:

'... I have stated previously that I don't wish to engage virtual hearing as I have retired over a year now and stopped practicing [sic] and happy to leave it to MPTS and GMC decision'.
12. Dr Kyaw Htin had stated his intention not to attend the hearing, he had not requested an adjournment, and there was no evidence to suggest that any such adjournment would prompt him to attend the hearing if it was held at a future date. The Tribunal was satisfied that Dr Kyaw Htin had voluntarily absented himself from this hearing.
13. Considering the public interest in these matters, the Tribunal concluded that it was fair and in the public interest as well as in the interests of justice to proceed with this hearing today.
14. Therefore, in accordance with Rule 31, the Tribunal has determined to proceed in Dr Kyaw Htin's absence.

SCHEDULE 1

Date	Deceased patient named in Cremation 5 form
17 April 2019	XXX
23 April 2019	XXX
26 April 2019	XXX
28 April 2019	XXX
8 May 2019	XXX
14 May 2019	XXX
20 May 2019	XXX
20 May 2019	XXX
5 June 2019	XXX
6 June 2019	XXX
12 June 2019	XXX
12 June 2019	XXX
26 June 2019	XXX
3 July 2019	XXX
10 July 2019	XXX
24 July 2019	XXX
26 July 2019	XXX
26 July 2019	XXX
31 July 2019	XXX
7 August 2019	XXX
7 August 2019	XXX
7 August 2019	XXX
13 August 2019	XXX
13 August 2019	XXX
14 August 2019	XXX
23 August 2019	XXX
27 August 2019	XXX
27 August 2019	XXX
28 August 2019	XXX
28 August 2019	XXX
29 August 2019	XXX
4 September 2019	XXX
4 September 2019	XXX
11 September 2019	XXX