Appeals Circular A02/24

09 April 2024

Seventh floor
St James's Buildings
79 Oxford Street
Manchester
M1 6FQ

0161 923 6263
enquiries@mpts-uk.org
www.mpts-uk.org

To: MPTS Associates

CC: Tribunal Clerks
Medical Defence Organisations
Employer Liaison Adviser

Adil v General Medical Council [2023] EWCA Civ 1261

Learning points

- Confirmation that the test for analysing freedom of speech cases is as set out in the case of *DPP v Ziegler [2020] QB 253*:

  (1) Is what the defendant did in exercise of one of the rights in Article 10?
  (2) If so, is there an interference by a public authority with that right?
  (3) If there is an interference, is it 'prescribed by law'?
  (4) If so, is the interference in pursuit of a legitimate aim as set out in paragraph 2 of Article 10?
  (5) if so, is the interference 'necessary in a democratic society' to achieve that legitimate aim? This question will in turn require consideration of the well-known set of sub-questions which arise in order to assess whether an interference is proportionate:

  (a) Is the aim sufficiently important to justify inference with a fundamental right?
  (b) Is there a rational connection between the means chosen and the aim in view?
  (c) Are there less restrictive alternative means available to achieve that aim?
  (d) Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?

- Any professional doctor would know that the statutory advice contained within GMP and the Social Media Guidance contains principles relevant to their conduct and fitness to practise. It is foreseeable from this guidance that using one's status as a doctor to promote views on social media which are baseless and damaging to patient health would be regarded as misconduct and attract disciplinary sanction.

- GMC Guidance does not need to identify what forms of medical opinion are proscribed; statements which undermine public trust in the profession can be many and various, and it would be undesirable to try to identify or categorise them definitively.

- There does not need to be a foreseeable test as to what amounts to legitimate political, medical or scientific opinion. Opinions expressed by a doctor which are baseless and dangerous, invoking their status and experience to engender trust in them, are not 'legitimate' in the sense of enjoying absolute immunity under Article 10 rights of freedom of expression or being incapable of amounting to misconduct.

- Where statements are made by a doctor invoking their status to engender trust and support in them, the extent to which the views are capable of medical and scientific support is a matter of importance, and this is recognised by paragraph 68 of GMP.[1]

- A reiteration that if a tribunal determines that a sanction of suspension is appropriate, in some circumstances, it *may* be appropriate to take into account periods of interim suspension when determining the length of the suspension.

Background

This was an appeal brought by Mr Adil ('Mr A'), against the decision of the High Court dated 5 April 2023 dismissing his appeal against the decision dated 22 June 2022 of a Medical Practitioners Tribunal ('the Tribunal') to suspend his registration for six months with immediate effect (and to direct a review hearing).

Tribunal hearing

The Tribunal found that Mr A's fitness to practise was impaired by reason of misconduct in relation to what he said about the Covid-19 pandemic in videos posted on YouTube between April and October 2020, in which he introduced himself as a doctor.

Mr A appealed to the High Court against the finding of misconduct and the sanction on grounds including that; the Tribunal's conclusions on misconduct and impairment were contrary to the right to freedom of expression in Article 10 of the European Convention on Human Rights ('ECHR') because they gave rise to an interference which was not "prescribed by law" which did not meet the requirements laid down within Article 10(2) and was unlawful and in any event, the conclusions on misconduct and impairment were a disproportionate interference with Mr A's rights under Article 10(1). His appeal was dismissed by Mr Justice Swift (Adil v GMC [2023] EWHC 797 (Admin)) and a summary of the Tribunal's decision and judgment can be found in tribunal circular 04/23 Adil v General Medical Council (2023) EWHC 797 (Admin) - May 2023.

Mr Justice Swift rejected all of Mr A's grounds of appeal and confirmed that the right to freedom of expression is a qualified right, subject to conditions etc '*prescribed by law'* which is

[1] GMP para 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"

a requirement for legal certainty. He said the provisions of the Medical Act 1983 ('the Act') (as amended) were not on their own sufficient to meet the requirement of foreseeability, but the Act authorises the GMC to set standards of professional conduct and those standards are set out in Good Medical Practice ('GMP') and other explanatory guidance. The GMC's Social Media Guidance ('SM Guidance') refers to Paragraph 65 of GMP (which contains an obligation to ensure that practitioners' conduct maintains public trust in the medical profession) and confirms that the obligation applies when using social media, such as YouTube. He concluded the SM Guidance read in conjunction with the obligation within Paragraph 65 of GMP was sufficient for the purposes of the *prescribed by law* condition and that maintaining the good-standing of the medical profession was, for the purposes of Article 10(2) of the ECHR, pursuit of a legitimate objective.

Grounds of Appeal to the Court of Appeal

Mr A was given permission by Lord Justice Andrews to appeal against the High Court decision on three grounds; the first two essentially repeat grounds one and two previously advanced before Mr Justice Swift [34-36]:

- GMP and the SM Guidance do not meet the "prescribed by law" condition in Article 10(2) (Ground 1)
- The decisions of the Tribunal do not meet the tests of necessity or proportionality in Article 10(2) (Ground 2)
- The sanction was disproportionate and inappropriate (Ground 3).

In response, the GMC sought to challenge Mr Justice Swift's conclusion that the terms of the Act were insufficient, without GMP and the SM Guidance, to meet the prescribed by law condition.

Judgment of the Court of Appeal

Judgment was given by Lord Justice Popplewell ('the Judge') with whom Lord Justice Bean and Lord Justice Dingemans agreed. The Judge:

- Confirmed that an appeal to the Court of Appeal is by way of review, not rehearing (as with an appeal to the High court under s40 of the Act) [37-40].

- Made some preliminary observations about the way the GMC's charge sheet was framed, agreeing with Mr Justice Swift's observations that "it would be good practice for the charge sheet to identify the guidance which the misconduct is said to breach" but "that it is not a matter of substance that it did not do so in this case" [42]. He stated that the nature and effect of Mr A's remarks "must be taken in the round and as a whole in determining whether the disciplinary process was an unlawful interference with his Article 10 rights, or otherwise unfair or inappropriate" [43]. The Judge said that the GMC's allegation (at paragraph 4(b)) that Mr A's '*conduct was contrary to widely accepted medical opinion*' is "not a sufficient criterion on its own to establish misconduct. There are many matters of medical debate on which professional views legitimately differ, and the fact that a doctor expresses a minority view, even a view shared by a small minority, is not

sufficient of itself to render his conduct improper….However, the relationship between the views expressed and widely accepted medical opinion is not irrelevant to the question of whether [Mr A's] conduct undermined confidence in the professional in the particular circumstances of this case….and that was how the Tribunal treated it". He said the allegation is not to be viewed in isolation; when taken together with the other aspects of the charge, it was "properly included as a relevant aspect of the charge of undermining public confidence in the medical profession" [44].

- Stated that the appropriate structure for analysing the application of Article 10 rights is in the series of questions identified in paragraph 63 of *DPP v Ziegler [2020] QB 235* ('the Ziegler test')[2] which are [45]:

  (1) Is what the defendant did in exercise of one of the rights in Article 10?
  (2) If so, is there an interference by a public authority with that right?
  (3) If there is an interference, is it 'prescribed by law'?
  (4) If so, is the interference in pursuit of a legitimate aim as set out in paragraph 2 of Article 10?
  (5) if so, is the interference 'necessary in a democratic society' to achieve that legitimate aim? This question will in turn require consideration of the well-known set of sub-questions which arise in order to assess whether an interference is proportionate:
    (a) Is the aim sufficiently important to justify inference with a fundamental right?
    (b) Is there a rational connection between the means chosen and the aim in view?
    (c) Are there less restrictive alternative means available to achieve that aim?
    (d) Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?

It was common ground in this case that the answers to Questions 1 and 2 was yes. Ground 1 addresses Question 3 of the Ziegler test and Ground 2 addresses Questions 4 and 5. The Judge logically addressed Ground 2 first, followed by Grounds 1 and 3.

- <u>(Ground 2) – The decisions of the Tribunal do not meet the tests of necessity or proportionality in Article 10(2):</u>

  - The Judge said "[t]he legitimate aims in Article 10(2) which are potentially engaged in this case are the interests of public safety and protection of health…… Sanctioning doctors for comments likely to undermine public health and cause harm to the public so as to deter such behaviour also directly engages the aim of protection of public health and safety" [47]. Mr A submitted that it was an unlawful interference with freedom of expression to sanction a doctor for views on matters of medical scientific or political significance, even if they are minority views which are contrary to widely accepted medical opinion and that a doctor should always be able to express their views save where they are seriously offensive to others, particularly groups with protected characteristics [49]. The Judge did not agree with these propositions in such absolute terms or with the limited qualification and noted the submission

[2] and approved and applied by the Supreme Court in that case [2022] AC 408 and in In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill [2022] UKSC 32.

"obscures the need to focus on the particular views expressed by [Mr A] in this case". He emphasised that "all depends upon the facts of each individual case" [50].

The Judge pointed out that "by using his professional medical credentials, [Mr A's] views were intended to, and likely to engender more credence than if expressed by a layman" and that Mr A's "views were expressed in extreme terms, and were, as the Tribunal held, asserted as fact" [51]. He said the key aspects of Mr A's conduct was that his views were **baseless** and **dangerous** [52], and on this basis, "there is little doubt that sanctioning [Mr A] for misconduct was in pursuit of the legitimate Article 10(2) aim of protecting public health and safety" [62]. The Judge expanded on what he meant by "baseless" and "dangerous" in more detail.

Baseless

- The Judge stated that where statements are made by a doctor invoking his status to engender trust and support in them, "the extent to which the views are capable of medical and scientific support is a matter of importance". He noted that paragraph 68 GMP (which provides that in communication, a doctor must make clear the limits of their knowledge and make reasonable checks to make sure information is accurate) is "directly applicable" to Mr A's YouTube videos, and is not confined to existing clinical patients [53].

- He went on to say that "there is an important qualitative difference between a doctor's views which have some supporting scientific basis, even if not widely accepted, and views whose validity or accuracy is unconnected to any supporting evidential basis, in order words **baseless**" [54].

- If the views are baseless, that is an important consideration for the reasons explained at paragraph 17 of the SM Guidance[3]; people will take medical views from doctors on trust and may reasonably take them as representing the views of the profession more widely. The Judge confirmed that "the expression "views of the profession more widely" does not mean the views of the majority of the profession, but it does mean at least a minority based on information which has been checked for accuracy and with some scientific and medical basis for support" [55].

Dangerous

- The Judge noted that the Tribunal found that Mr A's conduct undermined public health. Mr A submitted that the Tribunal reached this conclusion solely on the basis that Mr A's conduct was contrary to "public health messages" [58]. However, the Judge stated that there were two aspects of the Government's health messages: 1. the dangers to the health of the public posed by the virus and

[3] SM Guidance para 17: " If you identify yourself as a doctor in publicly accessible social media, you should also identify yourself by name. Any material written by authors who represent themselves as doctors is likely to be taken on trust and may reasonably be taken to represent the views of the profession more widely"

its spread on the one hand and 2. the restrictions to be imposed in order to mitigate its effect on the other.

- The Judge concluded that Mr A's "views undermined public confidence in both aspects, not just the steps that the Government was requiring or recommending to mitigate the effects of the virus" [59]. The views being advanced by Mr A "were not that the restrictions imposed in order to mitigate the effects were the wrong ones. They were, rather, that there was no virus, and accordingly no steps were necessary at all…..It is self-evident that this would contribute to public harm if accepted", as people were being encouraged to behave in the way they would have if there was no virus [59].

- The Judge therefore confirmed that the views expressed by Mr A were not dangerous because they contradicted public health messages on restrictions, as such, but because "they undermined the public health messages about the existence and virulence of the virus" [59] and that Mr A's YouTube comments about the vaccine could discourage people from having any vaccination and was therefore another risk to the health of those who might believe Mr A's opinions. The Judge noted that Mr A's comments were quite different from contributing to a debate on whether the medical advantages outweigh the medical risks; it "was encouraging a view that vaccines should be shunned irrespective of the medical benefits or properties because there was no disease to protect against and they were being implemented for commercial and world domination purposes" [60].

- The Judge agreed with the Tribunal that Mr A's views were likely to undermine public health and safety. The views were dangerous; both in relation to social behaviour and in relation to vaccination [61]. He concluded that "[I]n these circumstances, there can be little doubt, in my view, that sanctioning [Mr A] for misconduct was in pursuit of the legitimate article 10.2 aim of protecting public health and safety" [62].

Proportionality

- In looking at whether the interference [with a practitioner's right to freedom of speech] is "necessary" (Question 5 of the Ziegler test), the Judge flagged that the most important features of Mr A's conduct were that "the views he expressed repeatedly over a period of time during the early stages of the pandemic were baseless, dangerous and given by a doctor invoking his senior professional status and experience to lend them credence" [65]. The Judge agreed with the Tribunal that the "seriousness of that conduct fully justifies the conclusion that it fell well short of the standards to be expected of a senior doctor and undermined public trust in the medical profession; and that the application of disciplinary sanctions is a necessary and proportionate interference with freedom of expression in the interest of public health and safety in order to maintain public trust in the NHS and deter others from such unprofessional and dangerous conduct" [65].

- Mr A argued (amongst other things) that there is no foreseeable test as to what a "'legitimate opinion" is, which therefore pointed away from proportionality. The Judge rejected this submission, stating that "the facts of this case do not require a determination in the abstract of what amounts to 'legitimate' political, medical or scientific opinion. Opinions expressed by a doctor which are baseless and dangerous, invoking his status and experience to engender trust in them, are not 'legitimate' in the sense of enjoying absolute immunity under article 10 rights of freedom of expression or being incapable of amounting to misconduct" [69].

Overall, Ground 2 was rejected.

- <u>(Ground 1) – The GMP and Social Media Guidance do not meet the "prescribed by law" condition in Article 10(2):</u> The Judge referred to two of the requirements flowing from the expression 'prescribed by law'; that the law must be adequately accessible and sufficiently precise to allow reasonable foreseeability of the consequences which a given action may entail.[4] The Judge first addressed the GMC's submission that the provisions of the Act would satisfy the prescribed by law condition if they stood alone. The Judge stated that it is not necessary in this case to address that point "as the provisions do not stand alone, rather they are supplemented by the statutory advice in the GMP and the SM Guidance which any professional doctor would know contained principles relevant to their conduct and fitness to practise. That is emphasised by GMP [paragraph 6][5] and SM Guidance [paragraph 3][6], each of which state that serious or persistent failure to follow the guidance which poses a risk to patient safety or trust in doctors will put registration at risk" [75].

  - The Judge said that paragraphs 65 and 68 of GMP, and paragraph 17 of the SM guidance make clear that conduct of the kind outlined in those paragraphs may have the consequence of putting registration at risk [75]. He concluded that "in these circumstances, it is clearly foreseeable from the published guidance that using one's status as a doctor to promote views on social media which are baseless and damaging to patient health would be regarded as misconduct and attract disciplinary sanction" [77].

  - Mr A argued that there should be express guidance saying that misconduct could cover expressions on matters of medical opinion. The Judge rejected this, stating that "[Mr A's] conduct was so far from being a contribution to medical scientific or political

[4] The following are two of the requirements flowing from the expression 'prescribed by law'; "the law must be adequately accessible: the citizen must be able to have an indication that it is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able to – if need be with appropriate advice- to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail" The Sunday Times v United [1979] 4 WLUK 163

[5] GMP para 6: To maintain your licence to practise, you must demonstrate, through the revalidation process, that you work in line with the principles and values set out in this guidance. Only serious or persistent failure to follow our guidance that poses a risk to patient safety or public trust in doctors will put your registration at risk.

[6] SM Guidance para 3: In this guidance, we explain how doctors can put these principles into practice. You must be prepared to explain and justify your decisions and actions. Only serious or persistent failure to follow our guidance that poses a risk to patient safety or public trust in doctors will put your registration at risk.

debate that is unhelpful to form a proposition in these terms." He stated that "what matters is whether it should have been reasonably foreseeable that [Mr A's] conduct was professional misconduct and might attract disciplinary sanction. Making comments which are baseless and dangerous is self evidently proscribed by paragraphs 65 of GMP quite apart from paragraphs 68 and paragraph 17 of the SM Guidance" [79].

- Addressing Mr A's wider submission that in order to achieve sufficient certainty and foreseeability, the guidance would have to spell out what forms of opinion are proscribed, the Judge stated that "it would be undesirable to try and identify or categorise them definitively. One cannot regulate for all forms of freedom of speech in advance. It would not be practical or realistic to expect a regulator to publish guidance on such matters" [80].

Overall, Ground 1 was rejected.

- Ground 3 - The sanction was disproportionate and inappropriate: The Judge considered Mr A's submissions that the sanction should have been one of conditions, and alternatively, six months' suspension was excessive as it didn't take into account the lengthy period of suspension already imposed by interim suspension orders (around 18-months in total).

  - The Judge opined that the six-month suspension was "both appropriate and proportionate", as the misconduct was serious because it was damaging to public health (which was also one of the reasons it undermined confidence in the profession) [92]. Further, The Tribunal found that Mr A lacked insight and there was a risk of repetition. The Judge said that a "period of suspension was necessary in order to enable [Mr A] to gain insight into the seriousness of his conduct and avoid the risk of repetition. This directly engaged the need to protect members of the public from harm" [93]. The Judge agreed with the Tribunal that nothing less than suspension would have been sufficient to mark the seriousness of the offending in order to promote standards within the profession and public trust [93].

  - As to the submission that the previous periods of interim suspension should be taken into account, the Judge stated that it is an independent question whether and to what extent it is appropriate to take interim suspensions into account when considering a further period of suspension. The Judge stated that in cases where "the purpose of the sanction is to…deter him from repetition of the conduct in question, it is a matter of common fairness that account should be taken of the punitive and deterrent effect of having already been deprived of the ability to practice for a period under temporary suspension orders" [99]. The Judge went on to say that "it may also be appropriate to take into account periods of interim suspension insofar as the sanction is intended to mark the gravity of the offence so as to send a message to the profession and to the public". The Judge concluded that Tribunals could send the necessary message to the profession and the public by "making clear that the gravity of the misconduct needed to be marked by a suspension of a stated length; but that in fairness to the practitioner, he should be allowed to return to practice immediately,

or within a lesser period, by reason of his already having been deprived of the ability to do so in the period prior to the imposition of the sanction" [100].

- However, in the case of Mr A, the Judge noted that in cases where the suspension was "required to return the practitioner to fitness to practise, and/or to mitigate the risk of further commission of the misconduct, and/or for the continued protection of the public from harm", periods of interim suspension may have little or no relevance [101][7]. He said that in this case, the suspension was required to rehabilitate Mr A "so as to remedy his continued impairment to practice through lack of insight; to remove or mitigate the risk of further commission of the misconduct; and for the protection of public harm". The six-month period was therefore necessary for those objectives to which the period spent suspended under interim suspension orders was irrelevant [103].

Ground 3 was accordingly rejected.

As all three grounds of appeal were rejected, Mr A's appeal was dismissed.

Kind regards
Tribunal Development Section
0161 240 7292
Tribunaldevelopmentsection@mpts-uk.org

[7] The Judge stated that is consistent with the decision of *Kamberova v Nursing and Midwifery Council [2016] EWHC 2995 (Admin)* [at paras 36 and 40].