Appeals Circular 04/23

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Adil v General Medical Council [2023] EWHC 797 (Admin)

Learning points

- The right to freedom of expression in Article 10 of the ECHR[1] is a qualified right and subject to formalities, conditions, restrictions or penalties as are '*prescribed by law*'[2]. The 'prescribed by law' condition is a requirement for legal certainty and in the context of the regulation of a professional, the obligation within Paragraph 65 of Good Medical Practice ('GMP') to maintain public trust in the medical profession is sufficient for the purposes of this '*prescribe*d by law' condition. The Medical Act 1983 authorises the GMC to set standards of professional conduct and those standards are set out in GMP (and other explanatory guidance). Standards such as paragraph 65 of GMP reflect the general body of obligations attaching to a profession and are capable of being readily understood by the members of that profession and with reasonable foreseeability, to understand how they are required to conduct themselves.

- The interest in preserving the Article 10 right to freedom of expression is important, therefore, some comments may be potentially controversial but remain within the domain of freedom of expression for doctors.

- A tribunal may be justified in interfering with a practitioner's right to freedom of expression even where the comments were made outside of work. However, in cases

[1] Article 10(1) of the European Convention on Human Rights ('ECHR') is a right to freedom of expression including the right "…to receive and impart information and ideas without interference by public authority".

[2] Article 10(2): "The exercise of these freedoms… may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law… in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others."

where a practitioner uses their position or credentials as a doctor to promote an opinion on a matter of medical importance, the remarks will squarely engage their professional responsibilities.

- Tribunals do not need to consider the fact that comments *were not* made in the course of treating a patient as a mitigating factor. However, if comments *were* made during the course of treating a patient, a tribunal would be entitled to consider this as an aggravating factor.

- In determining whether conduct had tended to diminish public trust and confidence in a profession, tribunals are required to apply their own expertise to assess whether, objectively, the conduct found to have occurred had that effect on ordinary, reasonable members of the public. Because the matter is an objective standard applied by an expert tribunal, specific evidence relevant to public trust and confidence is neither necessary for such a conclusion nor, when available, need not be determinative of the conclusion the tribunal may reach.

Background

This was an appeal brought by Mr Adil ('Mr A'), pursuant to section 40 of the Medical Act 1983 ('the Act'), against a Medical Practitioners Tribunal's ('the Tribunal's') decision dated 29 June 2022 that Mr A's registration be suspended for six months with immediate effect (and a review hearing directed).

Mr A worked as a locum colorectal surgeon at the Chesterfield Hospital and then at the North Manchester Hospital NHS Trust. The allegations against Mr A fell into two broad groups. The first group concerned treatment that he had provided to Patient A at the Chesterfield Hospital in November 2019. The Tribunal only found some of those facts proved but concluded that none of those matters amounted to misconduct, or, therefore, impaired fitness to practise.

Mr A's appeal therefore only related to the second group of allegations, that took place when Mr A worked at the North Manchester Hospital NHS Trust.

The Tribunal found proved that:

- between April and October 2020, Mr A appeared in a number of YouTube videos stating words to the effect that:
  - Covid-19 did not exist, it was a conspiracy brought by the UK, Israel and America, that it was a multibillion scam for the benefit of various persons, organisations and companies, that it was being used to impose a new world order, was made as part of a wider global conspiracy and that Bill Gates infected the world with Covid-19 in order to sell vaccines.
  - as to Covid-19 vaccines, they would be given to everyone, by force if necessary and that they could potentially contain microchips that affect the human body and further the 5G mobile phone technology agenda, the vaccine will transform human

psychology and beliefs and could be used to control and/or reduce the world's population.

- whilst the allegations did not concern any treatment given to any patient:
  - in the videos Mr A used his position as a doctor to promote his opinions.
  - the videos undermined public health/public confidence in the medical profession and were contrary to widely accepted medical opinion.

- Mr A assured his then responsible officer that he would remove the videos, but failed to do so, and instead uploaded further videos.

In concluding that Mr A's actions amounted to misconduct, the Tribunal considered:

- Good Medical Practice 2013 ('GMP'), specifically paragraphs relating to communicating accurate information, and ensuring that conduct justifies patients' trust in doctors, and the public's trust in the profession[3].
- the GMC's Doctors' use of social media guidance ('the Social Media Guidance') and ECHR Article 10 (freedom of expression).

Mr A admitted that he had made the statements alleged but told the Tribunal that he regretted making the videos and no longer agreed with those comments. The Tribunal noted that in the videos, Mr A had made further comments that were not included in the allegations brought by the GMC (ie opinions on mask wearing and the discharge of elderly patients from hospital), but agreed that, while these opinions were potentially controversial, "*these remained within the domain of freedom of expression for doctors as well as the wider public*" [5 and 8].

However, in relation to the allegations found proved above the Tribunal was satisfied that Mr A's views "*did not fall within the domain of legitimate freedom of expression for a doctor in the context of the pandemic at the time*" and that Mr A's statements "*breached the trust that the public had a right to expect of him as a doctor in the UK*" [8].

Whilst Mr A stated that he was trying to help in a period of widespread confusion, the Tribunal was "*gravely concerned that Mr A was using his credentials as a doctor to promote his opinions and to engender trust in him on the part of those listening*" and determined that his comments "*went into the realms of scaremongering conspiracy theories, which added to the public confusion*" and that could have resulted in members of the public failing to adhere to restrictions or failing to get vaccinated [8].

When considering whether Mr A's fitness to practise was impaired, the Tribunal were concerned that Mr A's insight was far from developed, and his expressions of regret and apologies had come very late in the day. Overall, the Tribunal considered Mr A "*lacked adequate understanding and appreciation of the impact of his actions*" and it "*was not satisfied that in the face of an opportunity to proclaim his views in such a way again, there was no risk that he would do so*" [9]. The Tribunal concluded that all three limbs of the

[3] Paragraphs 65, 68 and 69 of GMP

overarching objective were engaged, that Mr A's fitness to practise was impaired and determined to impose a six-month suspension, with a review shortly before the expiry (and to make an immediate order of suspension).

Grounds

Mr A appealed on the basis that the Tribunal's decisions were inconsistent with his Article 10 rights, specifically on the grounds [10] that:

- the conclusions on misconduct and impairment were contrary to Article 10(1) because they give rise to an interference with Article 10 rights that is not "*prescribed by law*" that, for that reason alone, does not meet the requirements laid down within Article 10(2) and is unlawful (Ground 1).

- in any event, the conclusions on misconduct and impairment were a disproportionate interference with Mr A's rights under Article 10(1) (Ground 2).

- the Tribunal was wrong to conclude that expressing views "outside widely accepted medical opinion" either amounted to misconduct or was capable of providing justification for interference with Mr A's right to freedom of expression (Ground 3).

- there was no evidence to support a conclusion that what Mr A said damaged the reputation of the medical profession. It was submitted that this also went to whether the conclusions of misconduct, impairment, and the penalty imposed could be proportionate interferences with Mr A's Convention rights (Ground 4).

- the decisions to impose a final order for suspension and to make an immediate order suspending Mr A pending any appeal were disproportionate in that each failed to give sufficient weight to mitigating or compensating circumstances (Ground 5).

Judgment

The appeal was heard by Mr Justice Swift.

- Ground 1 – Mr Justice Swift said that the '*prescribed by law*' condition in Article 10 is a requirement for legal certainty. He indicated that the requirements of this, in principle, had been considered by The European Court of Human Rights on numerous occasions and that in *Sunday Times v United Kingdom*[4] *(*which concerned whether an injunction preventing publication of a newspaper article was consistent with Article 10) the Court stated that two requirements "*flow from the expression 'prescribed by law'. First, the law must be adequately accessible: the citizen must be able to have an indication that 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 foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail*" [12].

[4] *Sunday Times v United Kingdom* (1980) 2 EHRR 245

- Mr A submitted that the parts of the GMP and the Social Media Guidance fell short of the requirement for 'foreseeability'. Mr Justice Swift rejected the GMC's submission that the requirement for foreseeability was met by provisions of the Section 35 of the Medical Act 1985 (as amended ('the Act') alone, read with Section 1(1A) and (1B) of the Act, as that is the statutory framework under which the GMC acts [13]. He stated that these provisions were not, on their own, sufficient to meet the requirement of foreseeability (for a practitioner to understand how they are required to conduct themselves) that is part of the prescribed by law condition. He said that taken alone, those provisions of the Act do no more than provide the power to the GMC to set standards of professional conduct, professional performance and medical ethics (pursuant to Section 35C(2), which could be added to the list) make clear that 'misconduct' can be a premise for a conclusion that a practitioner's fitness to practise is impaired; and provide a range of disciplinary sanctions for consideration and application [14-15].

- Mr Justice Swift said that those sections of the Act "need to be read together with the further documents the GMC has issued pursuant to its power under section 35 of the Act. [GMP] is the most important… and is to be read together with the other explanatory guidance the GMC publishes" [17]. He said that paragraph 65 of GMP was relevant in this case[5] and that the GMC's Social Media Guidance refers to this paragraph and states that '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'. He said that "[T]he obligation within paragraph 65 of Good Medical Practice to maintain public trust in the medical profession is framed in general terms. The Social Media Guidance confirms that the obligation applies when using social media, such as YouTube, and also makes clear that "serious or persistent failure" that presents a risk to public trust in doctors can be misconduct") [17].

- Mr Justice Swift said that although the obligation under paragraph 65 of GMP was stated generally, he was satisfied that "in the context of regulation of a profession that is sufficient for the purposes of the prescribed by law condition. Standards such as paragraph 65 of GMP reflect the general body of obligations attaching to a profession and are capable of being readily understood by the members of that profession, and certainly with the assistance of appropriate advice" [17].

- Mr Justice Swift noted that although the GMC's allegations were not formulated with express reference to GMP or its Social Media Guidance, and that "it is advisable to refer the relevant provisions in the statement of charges. On the facts of this case, however, I do not consider this error to be a matter of substance" [19]. In addition, whilst the allegations that Mr A's actions were 'contrary to widely accepted medical opinion' (paragraph 4b of the allegation) and matters that 'undermine public health' (paragraph 4a) were not standards expressly set out in or that could be directly traced to either GMP or other GMC guidance, these were really further particulars of the allegation that Mr A's actions undermined public health (paragraph 4a) [19]. He

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

said this did not affect the outcome of the submission on the prescribed by law condition [20]. Mr Justice Swift was satisfied that taking account of paragraph 65 of GMP, and the GMC's Social Media Guidance, it should have been reasonably foreseeable to Mr A that his actions might conflict with professional standards set by the GMC [20]. This first ground of appeal therefore, failed.

- Grounds 2, 3 and 4 – Mr Justice Swift considered these grounds together, as Grounds 3 and 4 were aspects of Ground 2. He confirmed that there was no dispute that each of the Tribunal's decisions on misconduct, impairment and sanction, interfered with Mr A's Article 10 rights [21]; the question was whether this interference was justified [22], accepting that "[t]he interest in preserving the Article 10 right to freedom of expression is important" [23]. The Judge indicated that whilst he must apply Article 10 for himself "when doing so it is right that I attach weight to the Tribunal's evaluation of the substance of this complaint, so far as it affects matters of professional standing. Moreover, maintaining the good-standing of the medical profession is, for the purposes of Article 10(2), pursuit of a legitimate objective. The opinion of a specialist tribunal on what is necessary for that purpose cannot but be relevant to my application of Article 10(2) in the circumstances of this appeal" [24].

  - Mr Justice Swift rejected Mr A's submission that the Tribunal's decisions were in breach of Article 10, because when he made the YouTube videos, Mr A was acting outside of the professional sphere. He said that it was significant that Mr A presented himself as a doctor in the videos [26] and that it was "clear that the substance of [Mr A's] remarks squarely engaged his professional responsibilities" [28].

  - Mr Justice Swift also remarked that Mr A's statements were "outlandish" and were not mitigated by the fact that Mr A was outside work. He said it was largely immaterial where or when the YouTube videos were made; "what mattered was that [Mr A] used his position as a doctor to promote an opinion on a matter of medical importance" [28].

  - Mr Justice Swift also said that it was immaterial that Mr A was not acting in the course of treating any patient. He said, had that been so (ie if his approach to providing clinical treatment to a patient suffering from Covid-19 had been on the premise that the virus didn't exist), that would have *aggravated* the misconduct, but the absence of a complaint of that nature did not *mitigate* Mr A's actual conduct [28].

  - Mr Justice Swift concluded that "it was clearly open to the Tribunal to conclude that such remarks, presented by [Mr A] on the basis of his medical credentials, were likely to diminish public trust in the medical profession. The Tribunal's further assessments: (a)that making such remarks….would undermine the protection of public health, and (b) that [Mr A's] opinions, as broadcast, were so far removed from anything capable of being described as legitimate medical opinion were also conclusions that were reasonable…..these matters were not discrete from the

obligation not to act in a way that would tend to impair trust in the profession; rather they were particular aspects of that obligation"[29].

- The Judge considered that the Article 10 right to freedom of expression does not change the above position, as this right is a qualified right. He said "Exercise of the right to freedom of expression may be restricted when necessary, in the interests of public safety, for the protection of public health and for the protection of rights of others. Each of these legitimate objectives was material to the Tribunal's consideration of [Mr A's] YouTube videos", and each of its decisions on misconduct, impairment and sanction, "were not disproportionate interference with [Mr A's] Article 10 rights" [30].

- As to Grounds 3 and 4, Mr A submitted that it was wrong for the Tribunal to address the matter before it by reference to a standard of whether what had been said was *contrary to widely accepted medical opinion* and there was no evidence to support that his actions undermined the confidence in the medical profession. Mr Justice Swift did not consider that either of those were matters was sufficient to make good Mr A's case [31].

- He did accept that there are some matters on which doctors' opinions on medical matters will differ, and disciplinary action in circumstances where a practitioner holds or expresses an outlying opinion on a matter of professional practice could amount to an unjustified interference with Article 10 rights, where there is no clear justification (such as evidence of harm to patients or public health). He said that on different facts, Ground 3 could be a matter of substance [32]. However, he confirmed that on the facts of this case, there was no breach of Article 10, because what Mr A said, "was so far removed from any conceivable notion of received medical opinion that the Tribunal's reference to 'widely accepted medical opinion' does not become close to being a decisive matter". The Judge said the Tribunal's conclusions on the matters of substance before it were each entirely consistent with a correct application of Article 10 [34].

- Mr Justice Swift stated that Ground 4 was in error. He said deciding "whether conduct had tended to diminish public trust and confidence in a profession, requires a tribunal such as this one to apply its own expertise to assess whether, objectively, the conduct had that effect on ordinary, reasonable members of the public…..specific evidence relevant to public trust and confidence….is neither necessary for such a conclusion, nor, when available, need not be determinative of the conclusion the tribunal may reach". Given the public statements Mr A made, the Tribunal's conclusion that his conduct was in breach of GMP Paragraph 65 was correctly reached [35]. Ground 2, 3 and 4 therefore failed.

- Ground 5 – Mr Justice Swift noted that this ground relied in part on Ground 3, which did not assist Mr A for the reasons detailed above. In considering whether the six-month suspension or the decision to impose the suspension immediately were disproportionate, the Judge concluded that considered in the round, the Tribunal's decision on sanction was entirely consistent with the Sanctions Guidance (including paragraph 22 which

concerns the significance attaching to interim suspension orders [39]), and the Tribunal's reasons fully explain why the sanction was appropriate [40].

- Mr Justice Swift, had regard to the Tribunal's determination on sanction, in particular the key conclusion that Mr A's fitness to practise was currently impaired and was satisfied that the Tribunal's decision was one properly available to it. Whilst the Judge considered Mr A's submission that there was no risk to patients, he said that this was a 'false trial' as "the suspension was not imposed on account of any such risk, but rather as a way of addressing the need to maintain public trust in medical practitioners" [40].

- Mr Justice Swift said that the Tribunal's assessment on the immediate order logically followed from the Tribunal's comments in the determination on sanction and the conclusion reached on immediate order was therefore one that was properly available [41]. For those reasons, Ground 5 also failed.

As Mr Justice Swift rejected all five grounds of appeal, Mr A's appeal was dismissed.

Kind regards
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