



Neutral Citation Number: [2021] EWHC 1366 (Admin)

Case No: CO/87/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Birmingham Civil Justice Centre
Priory Courts, 33 Bull Street, Birmingham, B4 6DS

Date: 21/05/2021

Before :

THE HONOURABLE MRS JUSTICE STEYN DBE

Between :

JONATHAN ULLMER
- and -
SECRETARY OF STATE FOR EDUCATION

Appellant

Respondent

Andrew Faux (instructed by **The Reflective Practice**) for the **Appellant**
Simon P G Murray (instructed by **The Government Legal Department**) for the **Respondent**

Hearing dates: 6 May 2021

Approved Judgment

Mrs Justice Steyn :

Introduction

1. This is a statutory appeal brought by a teacher, Mr Ullmer, against the decision of the Secretary of State for Education, made on the recommendation of the Professional Conduct Panel (“the Panel”) of the Teaching Regulation Agency (“the TRA”), to prohibit him from teaching without a period of review (“the Prohibition Order”).
2. On 9 January 2020, the appellant filed a statutory appeal pursuant to regulation 17 of the Teachers’ Disciplinary (England) Regulations 2012 (“the 2012 Regulations”), raising seven grounds of appeal in support of his application to overturn the Prohibition Order.
3. On 27 August 2020, the appellant filed an application to amend his Grounds of Appeal to add a new Ground 1A, and for this new ground to be determined as a preliminary issue. Ground 1A reads:

“The Respondent’s destruction of the audio recording of the hearing is a serious procedural or other irregularity in the proceedings before the Professional Conduct Panel such that the High Court should allow the appeal.”

4. Accordingly, this appeal was listed for a “rolled up” hearing of the appellant’s application for permission to amend and for the court to rule on the new ground, if permission is granted, as a preliminary issue. I indicated at the end of the hearing that I would grant permission to amend, but dismiss the appeal on ground 1A, with reasons to follow. Accordingly, the appellant’s appeal on his original seven grounds has been listed to be heard on 15 July 2021.

The proceedings below

5. The Panel convened from 18 to 22 November 2019 to consider the allegations made against the appellant, as particularised in the Notice of Proceedings dated 23 September 2019. The Panel received documentary evidence, including witness statements. During the five day hearing, the Panel also heard oral evidence from:
 - i) Pupil A and Child X (who was Pupil A’s girlfriend during part of the material time), called by the presenting officer; and from
 - ii) the appellant, the appellant’s wife, three former pupils of the School, a former colleague from a different school, and a contractor who had attended the School on occasions for work purposes, called by the appellant’s representative.
6. The Panel found that allegations 1(a), 1d(iv), 1(f), 1(h), 1(j) and 1(k) were not proven. The remaining allegations, all of which the Panel found proven, were that the appellant:

“was guilty of unacceptable professional conduct and/or conduct that may bring the profession into disrepute in that whilst employed as a teacher at Cecil Jones High School (“the School”) between 1989 and 2002:

1. You failed to maintain appropriate professional boundaries and/or developed an inappropriate relationship with Pupil A between and/or around 1989 and 1995 whilst Pupil A was a pupil at the school, including by:
 - a. ...
 - b. giving lifts to Pupil A and/or permitting Pupil A to drive your car;
 - c. making inappropriate comments to Pupil A, such as by:
 - i. telling Pupil A that once he turned 16 you would become better friends and/or would spend more time outside of school;
 - ii. telling Pupil A to keep visits to your home accommodation quiet and/or not to tell other teachers;
 - iii. suggesting that by sharing information of a sexual nature that you didn't share with others, it would build a deeper friendship;
 - iv. accusing Pupil A of being a bad friend as he was not prioritising you;
 - v. questioning Pupil A about his personal relationships and/or sexual experiences;
 - vi. telling Pupil A about your own personal relationships and/or sexual experiences;
 - d. spending time with Pupil A outside of the School's premises, including by:
 - i. allowing Pupil A to go to your home accommodation and/or to stay overnight;
 - ii. taking and/or going with Pupil A to restaurants/pubs and/or the cinema;
 - iii. going to Kent with Pupil A and/or staying overnight in Kent with Pupil A;
 - iv. ...
 - e. providing Pupil A with food and/or alcoholic drinks;
 - f. ...
 - g. staying in the same bed with Pupil A;

- h. ...
 - i. play fighting with Pupil A;
 - j. ...
 - k. ...
 - l. discussing masturbation with Pupil A;
 - m. engaging in sexual activity in the presence of Pupil A;
 - n. engaging in sexual activity with Pupil A”.
2. Your conduct as may be found proven at 1 above was sexually motivated.”
7. The Panel “*was satisfied that the conduct of the teacher amounted to misconduct of a serious nature which fell significantly short of the standards expected of the profession. Accordingly, the panel was satisfied that the teacher was guilty of unacceptable professional conduct*”. The Panel also found that the appellant’s conduct “*may bring the profession into disrepute*”.
8. The Panel recommended the imposition of a prohibition order without provision for a review period. The Panel’s recommendation was considered by Alan Meyrick, the Chief Executive and Accounting Officer of the TRA, acting on behalf of the Secretary of State. Mr Meyrick’s decision, for which he gave written reasons, accorded with the Panel’s recommendation.

Recording of the Panel hearing

9. The amendment to add Ground 1A has arisen because the audio recording of the substantive hearing before the Panel has been lost. Sarah Buxcey has given evidence on behalf of the TRA explaining how the loss occurred and the steps taken by the TRA to attempt to retrieve the audio recording taken at the substantive hearing. Ms Buxcey states:

“In accordance with usual practices, throughout the substantive hearing, a dedicated recorder was present in the room, and operated by the independent Legal Advisor to the panel, to record the proceedings. The recording data was stored (successfully) on a removable SD card within this machine.

Following the hearing, the TRA followed its standard process in that the SD card was removed from the recording device and placed into a standard issue Department for Education (“DfE”) laptop. The relevant official uploaded the data files from the SD card to the case file. It appeared that the upload had completed successfully. The official then proceeded, as is usual practice, to delete the recording from the SD card.

It would not have been the usual process to review a recording held within a case file unless there was a specific need. It was only when this appeal was received that the TRA checked the recording in the case file and found that it had not in fact uploaded.”

10. The respondent took steps to attempt to retrieve the missing audio files, first, with the assistance of the Department for Education’s IT department examining all data stored on the Department’s servers/Sharepoint, including the first and second stage recycle bins and, secondly, by commissioning a specialist data recovery company to retrieve the data held on SD cards in the TRA’s offices. Unfortunately, the recording of the appellant’s substantive hearing before the Panel was not part of the data recovered.
11. However, the note of the hearing taken by the Presenting Officer instructed by the TRA has been disclosed. This is a 99-page typed note of the submissions and evidence. The note of Pupil A’s oral evidence runs to 21 pages. In addition, the Legal Advisor’s draft legal directions to the Panel have been disclosed. These directions are in the form of six pieces of “Template Advice”.

The legal framework

12. The Secretary of State has responsibility for regulating teachers’ conduct and holding a list of teachers who have been prohibited from teaching. Section 8 of the Education Act 2011 amended the Education Act 2002 (“the 2002 Act”) to include sections 141B and 141C, along with Schedule 11A. Section 141B provides:

“(1) The Secretary of State may investigate a case where an allegation is referred to the Secretary of State that a person to whom this section applies -

(a) may be guilty of unacceptable professional conduct or conduct that may bring the teaching profession into disrepute...

(2) Where the Secretary of State finds on an investigation of a case under subsection (1) that there is a case to answer, the Secretary of State must decide whether to make a prohibition order in respect of the person.

(3) Schedule 11A (regulations about decisions under subsection (2)) has effect. ...”

13. In *Lonnie v National College for Teaching and Leadership* [2014] EWHC 4351 (Admin), William Davis J observed:

“9. The Education Act of 2011 in part 3 abolished a body known as the General Teaching Council for England. That body hitherto had been the regulatory body of the teaching profession; there had been no final decision-making vested in the Secretary of State. The evidence in this case suggests that there had been some public disquiet as to the operation of that council. In any

event, the regime introduced by the 2011 Act required the Secretary of State to investigate any case where an allegation was referred to her that a person to whom the section applied, namely a teacher, might have been guilty of unacceptable professional conduct or conduct that might bring the teaching profession into disrepute. The statutory framework in the Education Act 2011 does not identify in terms how it is that the Secretary of State is to investigate the case, but in section 141B(2), this is stated:

“Where the Secretary of State finds on an investigation of a case under (1) that there is a case to answer, the Secretary of State must decide whether to make a prohibition order in respect of the person.”

10. I glean from that statutory provision that it is for the Secretary of State to decide whether a prohibition order is to be made in relation to a teacher who has been guilty of the relevant conduct. That decision is the Secretary of State's decision.”

14. The regulations under Schedule 11A to the 2002 Act are the 2012 Regulations. These provide for the procedure to be followed in reaching a decision as to whether to make a prohibition order in respect of a teacher.
15. Regulation 5 requires the Secretary of State to take certain action when he considers that a teacher “*may be guilty of unacceptable professional conduct or conduct that may bring the teaching profession into disrepute*”. The Secretary of State must inform the teacher of the allegation, give the teacher the opportunity to comment and then decide whether the case should either be discontinued or be considered by a professional conduct panel (“a PCP”).
16. Regulation 6 provides that where the Secretary of State decides that a case should be considered by a PCP, he must appoint such a panel (reg. 6(1)). The PCP must include at least three persons comprising one or more teachers or persons who have been teachers within the past five years before their term of tenure as a panellist began, and one or more other persons (reg. 6(2)).
17. Regulation 7 provides (so far as material):
 - “(1) A professional conduct panel must consider cases referred to it by the Secretary of State in accordance with paragraphs (2) to (5) and regulations 9 to 11.
 - (2) Subject to paragraph (3), a professional conduct panel must determine all cases following a hearing. ...
 - (5) Where a professional conduct panel finds the teacher -
 - (a) to have been guilty of unacceptable professional conduct or conduct that may bring the teaching profession into disrepute ...

the panel must make a recommendation to the Secretary of State as to whether a prohibition order should be made.”

18. If such a recommendation is made, the Secretary of State must consider it and decide whether to make a prohibition order and, if so, whether an application may be made in the future for a review of the prohibition order: see reg. 8(1) and (2). A prohibition order prohibits the person to whom it relates from carrying out teaching work indefinitely, although the order may allow the teacher to apply for a review after a minimum period. Pursuant to reg. 8(3), the minimum period must not be less than two years from the date on which the prohibition order takes effect.
19. The procedures for decision-making are set out in guidance entitled “*Teacher misconduct: disciplinary procedures for the teaching profession*”, last updated in May 2020. There is also guidance, last updated in October 2018, entitled “*Teacher misconduct: the prohibition of teachers: Advice on factors relating to decisions leading to the prohibition of teachers from the teaching profession*”.
20. Since April 2018 the TRA has administered the arrangements for teacher regulation on behalf of the Secretary of State. This was previously done by the Teaching Agency (2012-2013) and the National College for Teaching and Leadership (2013-2018).

The approach on appeal to the High Court

21. Paragraph 5 of Schedule 11A to the 2002 Act requires the regulations to provide for a right of appeal to the High Court. No further appeal lies from the High Court’s decision: paragraph 5(3) of Schedule 11A. Regulation 17 provides that a person in relation to whom a prohibition order is made may appeal that decision to the High Court within 28 days of the date on which notice of the order was served on them.
22. An appeal pursuant to regulation 17 of the 2012 Regulations is brought under CPR Part 52. CPR 52.21 provides:
 - “(1) Every appeal will be limited to a review of the decision of the lower court unless –
 - (a) a practice direction makes different provision for a particular category of appeal; or
 - (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.
 - (2) Unless it orders otherwise, the appeal court will not receive -
 - (a) oral evidence; or
 - (b) evidence which was not before the lower court.
 - (3) The appeal court will allow an appeal where the decision of the lower court was -
 - (a) wrong; or

(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

(4) The appeal court may draw any inference of fact which it considers justified on the evidence.

(5) At the hearing of the appeal, a party may not rely on a matter not contained in that party's appeal notice unless the court gives permission."

23. Practice Direction 52D lists statutory appeals from other professional regulatory bodies which are to be heard by way of rehearing but appeals from the Secretary of State for Education pursuant to regulation 17 of the 2012 Regulations are not included in the list. There is no practice direction that provides otherwise, therefore this appeal "*will be limited to a review*" unless the court considers that "*in the circumstances of an individual appeal it would be in the interests of just to hold a re-hearing*".

The appellant's submissions

24. The main submission made by Mr Faux is that in the absence of a transcript of the Panel proceedings, the High Court cannot fairly fulfil its appellate function. The inadvertent destruction of the audio recording by the respondent amounts to such a serious procedural irregularity that to proceed with the appeal would be unjust, and so the appeal should be allowed on this ground alone.
25. In support of this submission, Mr Faux raised the issue whether the appeal should be by way of rehearing or review. He submits that the interests of justice require that the appeal should be by way of rehearing and, if this is right, he contends that it assists his argument that in the absence of a transcript the court cannot properly scrutinise the Panel's findings on appeal.
26. In his skeleton argument, Mr Faux submitted that while not every case heard on appeal has been explicitly approached as a rehearing rather than a review, the High Court has been persuaded on a number of occasions that the correct approach to an appeal brought by a teacher against a prohibition order imposed by the Secretary of State for Education is to conduct a rehearing of the type that is conducted on appeals from other professional regulators where the practice direction specifies a rehearing is required. In this regard, he relied on *O v Secretary of State for Education and National College for Teaching and Leadership* [2014] EWHC 22 (Admin), *Lonnie and Wallace v Secretary of State for Education* [2017] EWHC 109 (Admin), to which I refer below. In addition, on occasion, the Secretary of State has argued that the correct approach is to conduct a rehearing rather than a review: *Zia v National College for Teaching and Leadership and Secretary of State for Education* [2018] EWHC 159 (Admin).
27. In his oral submissions, Mr Faux responded to the respondent's reliance on *Brittain v Secretary of State for Education* (unreported, 9 July 2019), a more recent decision in which Lang J observed that "*in this type of appeal there is little difference between an appeal by way of rehearing or by way of review*" and held that neither the facts nor the grounds of appeal in that case required a rehearing in the interests of justice. Mr Faux submits that in *Brittain*, and the other cases to which I have been referred, the question whether the appeal should proceed as a rehearing has not been argued. This case

provides a useful opportunity to determine the point following argument from both sides.

28. Mr Faux acknowledged that the distinction between a review and a rehearing in the context of this type of appeal is a fine one. He suggested that there is a “*scintilla of a distinction*” between the two. He described the approach of the court on a rehearing as “*more interventionist*”. In support of this submission, Mr Faux relied on *El Karout v Nursing and Midwifery Council* [2019] EWHC 28 (Admin), in which a hearsay issue “*was not clearly ventilated in the grounds of appeal, or in the appellant’s skeleton argument or in the respondent’s skeleton argument*”, nevertheless Spencer J, having re-read the entire transcript following the hearing, took the initiative and directed the parties to file further written submissions addressing the issue. Mr Faux submits that the judge was able to take the initiative in this way because the hearing was by way of rehearing rather than review.
29. In his oral submissions, Mr Faux made clear that he does not rely on any feature of this specific case, or the grounds of appeal, in support of his submission that the interests of justice require a rehearing. He makes a broader submission that appeals pursuant to regulation 17 of the 2012 Regulations must be by way of a rehearing to ensure that the scheme as a whole complies with article 6 of the European Convention on Human Rights (“the ECHR”).
30. Mr Faux submits that the lack of separation between the function of the prosecution service and the adjudicator, both being functions that fall to the Secretary of State in the context of the statutory scheme for professional regulation of teachers in England, creates a difficulty for the scheme in complying with article 6. He does not suggest it is an insurmountable difficulty. Rather, his contention is that only by conducting the appeal in the most interventionist manner available (i.e. by way of a rehearing) can the High Court ensure that the statutory scheme when viewed as a whole is compatible with article 6. He concedes that the type of rehearing that would take place on a regulatory appeal is sufficient to cure any possible defect created by the prosecutorial and decision-making functions both sitting with the Secretary of State.
31. In response to the respondent’s reliance on *Wallace v Secretary of State for Education* [2017] EWHC 109 (Admin), Mr Faux submits that the argument that the whole system was flawed for article 6 purposes was not run in *Wallace*. He raised the point, as he has done before me, that the fact that the NCTL was involved at the stage of investigating and presenting the case and then again at the decision-making stage gave rise to an article 6 problem which required to be cured to ensure that the system was compliant with article 6. But it was accepted by the respondent in *Wallace* that the appeal should be by way of rehearing.
32. As regards the appellant’s main argument, Mr Faux accepted from the outset that the transcript of the substantive hearing is unnecessary to enable him to pursue ground 1B by which the appellant contends that the Panel wrongly admitted a covert recording of a conversation between the appellant and the complainant, Pupil A; and, indeed, he acknowledges that the transcript of the interlocutory hearing at which the admissibility of the recording was determined is, in any event, available. During the course of his oral submissions, Mr Faux conceded that the transcript is also unnecessary for the purposes of pursuing grounds 4, 5 or 7 which, broadly, allege failures to follow the legal directions given regarding the approach to the appellant’s good character and to the

burden and standard of proof, and that the Panel took an erroneously broad-brush approach to allegation 1c.

33. However, he maintained that to make a fair determination of the appeal on grounds 2, 3 and 6 it was necessary for the court to be able to read a verbatim transcript of the hearing before the Panel. Given the loss of the audio recording, the appeal should be allowed, and the matter remitted for a rehearing before a Panel.
34. Mr Faux submits that the heart of this appeal will be an attempt to persuade court that the Panel were wrong to find that Pupil A was a compelling witness. This is an uphill challenge because the courts generally recognise that the assessment of credibility is best left to those who heard and saw the witness give evidence, and so, he contends, the court will need persuading by reference to detailed information derived from the transcript that the Panel's assessment of credibility was wrong. The loss of the audio recording means he does not have the information he would have wished to rely on, such as in relation to Pupil A's explanation as to why it was only when he saw a therapist that he realised what he said occurred was sexual abuse.

The respondent's submissions

35. The written submissions on behalf of the Secretary of State were made by Iain Steele and, in view of Mr Steele's unavailability for the re-listed hearing of this preliminary issue, at the hearing the Secretary of State was represented by Simon Murray.
36. The Secretary of State submits permission to amend to add Ground 1A should be refused under CPR 52.17 because the proposed new ground has no real prospect of success or, if permission is granted, the ground should nevertheless be dismissed.
37. Mr Steele describes this as an opportunistic attempt to obtain a second bite at the cherry in circumstances where the Panel preferred the evidence of Pupil A to that of the appellant on key points; and the effect would be to require witnesses to give evidence again on distressing matters dating back to 1990-1993. Mr Faux readily acknowledges the description of Ground 1A as "*opportunistic*" is apt, and that having to give evidence again would be very difficult for the witnesses. No doubt Mr Faux would not accept, though, the connotation that the word opportunistic may carry that this use of the loss of the audio recording is unprincipled.
38. In respect of the question whether the appeal proceeds by way of review or rehearing, Mr Murray submits that it is unnecessary to determine the question because, irrespective of the answer, Ground 1A should be dismissed. If the court does not determine the issue, the appellant can run the argument again, if he wishes, when the original seven grounds are heard, that the appeal should be by way of a rehearing. However, if the court determines the issue, his submission is that the appeal proceeds by way of a review.
39. The Secretary of State submits the older authorities cited by the appellant (*O v SSE, Lonnie and Wallace*) were wrong to assume that the appeal was by way of rehearing. He draws attention to *Brittain*, a case which had two important features in common with the present case. First, the case involved a challenge to the PCP's findings of fact in relation to alleged sexual conduct with a pupil. Secondly, there was no transcript of the PCP hearing because the recording had failed. Nevertheless, Lang J held that the

appeal must proceed by way of a review. Similarly, in *Jones v Secretary of State for Education* [2019] EWHC 3151 (Admin), where the appellant did not contend that the interests of justice required a rehearing, Cavanagh J held that the appeal was by way of a review.

40. The Secretary of State submits the onus is on the appellant to provide cogent reasons why the interests of justice exceptionally require a rehearing, and the appellant has not done so. In any event, there is little practical difference between a review and a rehearing, since neither involves the court hearing the evidence again or reaching a decision unconstrained by the Panel's findings. The court will accord appropriate respect to the primary findings of fact made by the Panel which heard the witnesses give evidence.
41. Mr Murray maintained, in his oral submissions, that the appellant has not shown that it would be in the interests of justice, in the individual circumstances of this appeal, for it to proceed by way of rehearing. Indeed, the appellant does not rely on any individual circumstances: his submission is that article 6 requires a rehearing in all appeals brought pursuant to regulation 17 of the 2012 Regulations.
42. The Secretary of State submits the argument that there are any difficulties created by the role of the Secretary of State in "*directing prosecutions*" and also being the "*final decision maker*", such that in order to comply with article 6 the court should conduct a rehearing, is without merit and has been rejected in *Wallace and Lone v Secretary of State for Education* [2019] EWHC 531 (Admin). In these cases, the courts held that the senior TRA official who takes the final decision on behalf of the Secretary of State whether to make a prohibition order does not lack independence or impartiality under article 6 or the common law, notwithstanding the role played by other TRA employees in investigating and presenting the case. The courts also accepted that the PCP is itself independent and impartial. A further attempt to argue that the PCP is not independent was withdrawn in *Jones v Secretary of State for Education* [2019] EWHC 3151 (Admin) ([17]-[18]). The system of decision-making considered in *Wallace* was the same as in the present case, save that the NCTL had not yet been replaced by the TRA.
43. The Secretary of State has provided a copy of the witness statement made by Mr Meyrick in *Lone*, in which he gives a detailed account of the exercise of decision-making powers in teacher misconduct proceedings on behalf of the Secretary of State and the internal processes within the TRA to ensure the necessary separation of the TRA's different functions and the independence of decision makers.
44. In respect of the contention that the loss of the recording constitutes a "*a serious procedural or other irregularity in the proceedings in the lower court*", Mr Steele submits the point is nowhere developed. No authority is cited for the proposition that the type of "*irregularity*" contemplated by the CPR extends to include matters such as the loss of a recording or transcript that may occur long after the hearing has concluded. He observes that by the time the recording was lost the Panel had already delivered its decision on whether the facts were proven and whether they amounted to relevant conduct, heard submissions on sanction and brought the hearing to an end, and it is likely it had decided upon its recommendation to the Secretary of State on the imposition of a prohibition order and was by that stage functus officio. Mr Steele submits that the loss of the recording cannot sensibly be said to be an irregularity that has arisen in the proceedings before the Panel.

45. At the hearing, Mr Faux did not elaborate on the submission that the loss of the recording was an “irregularity” within CPR 52.21(3)(b). The Secretary of State submits the appellant has to show that the court cannot fairly determine the merits of the appeal, having regard to the specific facts of this case, and the terms of the appellant’s other grounds.
46. While it is good practice to make an audio recording of PCP hearings, the Secretary of State relies on the absence of any obligation in the statutory scheme to make a recording. Mr Murray submits that in certain tribunals, such as the employment tribunal, it is not routine for hearings to be recorded. Even in tribunals such as the PCP where ordinarily hearings are recorded, the recording systems are not infallible and, as in this case and in *Brittain*, there may be no transcript available. The Secretary of State relies on *McClennan v General Medical Council* [2020] CSIH 12, 2020 SLT 443 at [84] in support of the submission that appeals against findings of fact can be pursued even without a transcript of the first instance hearing.
47. The Secretary of State submits that the position in this case is no different to that in *Brittain*, which similarly involved a challenge to the PCP’s findings of fact in relation to alleged sexual conduct with a pupil. The absence of a transcript in *Brittain* did not prevent Lang J from properly scrutinising the PCP’s findings and determining the appeal. A transcript is not needed to enable the court fairly to determine any of the grounds of appeal raised. Moreover, in this case a detailed note of the hearing is available, taken by the Presenting Officer and, aside from commenting that it is not a verbatim transcript, Mr Faux did not explain why it was insufficient to enable a fair determination of the appeal.
48. As regards the appellant’s submission that the absence of a transcript prevents the court engaging in some broader form of examination of the case “*unfettered by the issues placed before it by the parties*”, the Secretary of State submits the court in a statutory appeal is required to determine the appeal as framed by the appellant, not to carry out a general enquiry into every aspect of the PCP’s decision-making and reasons, let alone to trawl through the transcript of the PCP hearing with a view to spotting potential grounds of appeal that the appellant may have overlooked. The solitary example of *El Karout*, where the court identified an important point that had not been clearly raised in the appeal as filed, does not, he submits, support the proposition that the court is required to carry out such an onerous undertaking in every appeal.

Post-hearing submissions

49. Shortly after the hearing on 6 May 2021, the Court of Appeal’s decision in *Sastry and Okpara v General Medical Council* [2021] EWCA Civ 623 (which was handed down on 30 April 2021) came to my attention. In view of its relevance to the distinction between an appeal by way of rehearing or review, on Monday 10 May I invited the parties to make brief written submissions, if they wished, on that case.
50. Mr Faux relies on *Sastry* as demonstrating that “*given the gravity of the issues at stake*”, the nature of the appeal in this case requires that the appeal should proceed by way of rehearing.
51. Mr Murray submits that *Sastry* bears out the notion that if a court is conducting a rehearing, as opposed to a review, there is more scope to consider the factual

determination. However, he maintains that this appeal should be by way of review. The decision in *Sastry* reflects the particular statutory scheme in relation to appeals by medical practitioners. It does not support a submission that appeals under Schedule 11A of the Education Act 2002 should be treated in the same way as appeals under section 40 of the Medical Act 1983. The appellant's argument by analogy, on the basis that all professionals should be treated in the same way, would rob CPR 52.21 of effect.

Review or rehearing: analysis and decision

52. I reject the Secretary of State's submission that I should not determine the question whether this appeal should proceed by way of review or rehearing. Although I have found that it is not decisive of Ground 1A, it will be necessary to determine whether the remainder of this appeal proceeds by way of review or rehearing. Given that I have heard full argument on the issue, it would be an inefficient use of the parties' and the court's resources for it to be reargued when the other grounds of appeal are heard in July.

53. There are conflicting authorities of the High Court on the question whether regulatory appeals in respect of teachers should, leaving aside any consideration of matters specific to the individual case, proceed by way of review or rehearing. As I have said, there is no right of appeal from the High Court. In *Willers v Joyce (No.2)* [2016] UKSC 44, [2018] AC 843, Lord Neuberger addressed the application of the doctrine of precedent, noting the nuanced position when it comes to courts of co-ordinate jurisdiction. He observed at [9]:

“So far as the High Court is concerned, puisne judges are not technically bound by decisions of their peers, but they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so. And, where a first instance judge is faced with a point on which there are two previous inconsistent decisions from judges of co-ordinate jurisdiction, then the second of those decisions should be followed in the absence of cogent reasons to the contrary.”

54. In several cases, the High Court has held that the appeal proceeds as a rehearing. *First*, in *O v SSE Stephen Morris QC* (as he then was) held:

“54. As to the approach of the appeal court, CPR 52.11 makes a distinction between “review” and “re-hearing” which is explained in the accompanying notes in *The White Book Service 2013* at §§52.11.1. (“Review” in the CPR sense is not the same as the basis of “judicial review”; it is a more interventionist degree of review: see *E.I. Du Pont Nemours & Co v S.T. Dupont* [2006] 1 WLR 2793 at §94). Certain categories of appeals are specifically required to take the form of a “re-hearing”, including appeals from the Fitness to Practice Panel (FPP) of the General Medical Council: see Practice Direction 52D, para 19.1. In *Cheatle v General Medical Council* [2009] EWHC 645 (Admin) at §§12 to 15, Cranston J set out the approach of the High Court on such appeals from the FPP. As regards the present appeal, it is not specifically referred to in Practice Direction 52D.

Nevertheless, in *Burke v General Teaching Council* [2009] EWHC 3138 (Admin) at §§1–2, an appeal under the similar predecessor legislation relating to the GTC, HH Judge Pelling QC held that such an appeal is an appeal by way of “re-hearing” and that the approach to be adopted is that set out by Cranston J in *Cheatle*.

55. Mr Offer, counsel for the Appellant, in the grounds of appeal and in his skeleton, puts the Appellant's challenge on the basis of *Wednesbury* unreasonableness and relevant/irrelevant considerations — effectively judicial review grounds. However, in so doing, the Appellant sets the hurdle it has to overcome at too high a level. Judicial review is not the appropriate approach in the present case. The question for this Court is whether the Decision was “wrong” (or “unjust because of a serious irregularity”), and not whether it was one which no reasonable panel could have reached.

56. The appeal here is by way of re-hearing, the most “interventionist” level of appeal court review. In this regard I note that *The White Book Service*, supra, points out, citing *Assicurazioni Generali SpA v Arab Insurance Group* [2002] EWCA Civ 1642, that where the appeal court is being asked to reverse findings of fact based upon oral evidence which the judge has heard, the approach of the appeal court is the same, whether it proceeds by way of “review” or by way of “rehearing” (in the CPR sense of those terms).

57. On such an appeal, in general, this means deciding whether the decision below can be said to be wrong. On issues of professional judgment, the Court may need to defer to expertise of the lower court or tribunal. But, on questions of primary fact, the position is different. Whilst the lower court or tribunal is the primary decision maker on questions of fact, the High Court will correct material errors of fact on various grounds, such as insufficient evidence or mistake.

58. Where the decision below depends on preferring the account of X over that of Y on the basis of reliability and credibility, including an assessment of demeanour, I have *considered* *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409, *Mubarak v General Medical Council* [2008] EWHC 2830 (Admin) (citing *Gupta v GMC* [2002] 1 WLR 1691) and *In the matter of F (Children)* [2012] EWCA Civ 828 (as well as *Cheatle* §15). The position can be summarised as follows:

(1) The appellate court will be reluctant to interfere with the findings of fact made by the lower court or tribunal: *Cheatle*, §§15, 23 to 28.

(2) There are different schools of thought as to the significance of demeanour; on the one hand, the lower court is best placed to assess credibility, because it has had the opportunity to assess demeanour. On the other hand, demeanour is not necessarily a good or the best test of credibility and it is question of feel, which may be unreliable: compare *Mubarak* §5 with *Cheatle* §23.

(3) However, the predominant view is that demeanour is a significant factor. For example, the assessment, as genuine, of a witness' distress when giving evidence can be a sound foundation for a finding of truthfulness: see *Re F* §44.

(4) Thus the starting position is that the lower court is in a better position to assess credibility and reliability of witnesses: see in particular *Mubarak* §5 citing *Gupta* at §10.

(5) However the appellate court may reach a different conclusion if the circumstances so justify. Demeanour is not conclusive, and it may be that the advantage of having seen and heard the witnesses is not sufficient to explain or justify the conclusion of the court below: see *Mubarak* §6 citing *Thomas v Thomas* [1947] AC 484 at 487–488.

(6) There will always be inconsistencies of detail in the evidence of witnesses. The task is to consider whether the *core* allegations are true: see *Mubarak* §20 and *Re F* §45.

Finally to the extent that there is or may be a tension between *Mubarak* and *Cheatle* as to the approach on appeal to findings of fact, I give the Appellant here the benefit of any such doubt and will adopt the somewhat more interventionist approach indicated by *Cheatle*.” (emphasis added)

55. It can be seen that the approach of the High Court was considered in some detail in *O v SSE*, but the judge’s attention was not drawn to *Davis v General Teaching Council for England* [2010] EWHC 2075 (Admin) and *R (Duncan) v General Teaching Council for England* [2010] EWHC 429 (Admin) (see §63-64 below) in which the appeals proceeded by way of review. Nor does the approach appear to have been the subject of argument in *O v SSE* or in *Burke v General Teaching Council* [2009] EWHC 3138 (Admin), in which HHJ Pelling QC simply stated in the first paragraph that the appeal was by way of rehearing.

56. *Secondly*, in *Lonnie, Davis J* held at [17]:

“There is agreement also as to the nature of this appeal and I adopt gratefully what was said by Mr Stephen Morris QC sitting as a deputy High Court Judge in [*O v SSE*].”

57. Having quoted paragraph 57 of *O v SSE* (see §52 above), *Davis J* continued:

“There is no suggestion here that there was any error of fact. There was a judgment exercised by the Secretary of State based on the facts as found by the panel. I am not being asked to correct any material error of fact. Therefore whilst this appeal is a rehearing, and may be described properly as interventionist, there are no issues in relation to fact. I must stand back and take proper account of the judgment and discretion vested in the Secretary of State as is clear from the statutory framework.”
(emphasis added)

58. *Thirdly*, in *Wallace*, Holgate J said at [28] that the “*appeal is by way of re-hearing*”, citing *O v SSE* at [54]-[58] and *Lonnie* at [17]-[22]. As in *Lonnie*, there was agreement between the parties that the appeal was by way of rehearing.

59. *Fourthly*, in *Zia*, Lambert J recorded at [21]:

“Mr Mehta, for the Secretary of State, submitted that my approach to this appeal should be by way of a rehearing rather than a review. He also urged me to defer to the expertise of the lower court or tribunal on issues of professional judgement, *McTier v Secretary of State for Education* [2017] PTSR 815 and to follow the approach of Holgate J in *Wallace v Secretary of State for Education* [2017] PTSR 675 and not treat a decision of the Secretary of State as “wrong” and therefore allow the appeal simply because I disagree on the merits with some aspect of the Secretary of State’s reasoning or with the final outcome. The essential challenge brought by Mr Zia is one of procedural irregularity rather than an attack on factual findings or a judgement based on factual findings. However, I accept so far as it is relevant that the approach proposed by Mr Mehta is correct.”
(emphasis added)

60. *Fifthly*, in *Lone*, Davis J held at [11]:

“The appellate jurisdiction I am exercising is not properly identified in the Education Act or the regulatory scheme set out thereunder. The jurisdiction that I must exercise is that provided by the CPR, Part 52.21(3):

The appeal court will allow an appeal where the decision of the lower court was (a) wrong, or; (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

The nature of the jurisdiction at (a) is not the same as in a judicial review challenge to a decision founded on classic public law principles. The appeal is a rehearing rather than a review. Thus, it is not for me to apply a rationality test based on the *Wednesbury* standard. Rather, I must consider the overall merits of the decision taking into account the requirement to give proper weight to the judgment of the decision maker with expertise and

experience in a specialist field. It is not sufficient that I conclude that I would have reached a different decision. I must find that the decision was wrong. The proper approach is helpfully summarised in the judgment of Mrs Justice Lambert in *Zia ...* at paragraph 21.” (emphasis added)

61. However, the two most recent judgments of the High Court have ruled that the appeal proceeds by way of review, not rehearing. In *Brittain*, as in this case, the PCP concluded that the appellant had engaged in the sexual touching of a pupil. A further similarity with this case is that there was no transcript of the hearing as the recording had failed. However, the appellant did not seek to rely on the failure of the recording and the absence of a transcript in support of the grounds of appeal (*Brittain*, [3]). Both parties were represented by Counsel, but it does not appear that the question whether the appeal should proceed by way of review or rehearing was the subject of argument.

62. Nevertheless, the issue was addressed in some detail by Lang J as follows:

“22. By CPR 52.21(1), an appeal proceeds by way of review unless a practice direction provides otherwise, or the court considers it will be in the interests of justice to hold a rehearing.

23. PD52D lists statutory appeals from other professional regulatory bodies which are to be heard by way of rehearing but appeals from the Secretary of State for Education are not included in the list. Therefore, I respectfully doubt the view taken in *O v Secretary of State for Education* [2014] EWHC 22 (Admin), relying upon *Burke v General Teaching Council* [2009] EWHC 3138 (Admin), that such appeals are by way of rehearing. In my view the court was correct to hold in *Davis v General Teaching Council for England* [2010] EWHC 2075 (Admin) and *R (Duncan) v General Teaching Council for England* [2010] EWHC 429 (Admin) that the appeal is by way of review.”

63. *Davis* and *Duncan* were both decided in February 2010, shortly after HHJ Pelling QC’s judgment in *Burke*, but nearly four years before Mr Morris QC’s judgment in *O v SSE*. In *Davis*, having cited CPR 52.11 (the then relevant provision), Hickinbottom J stated at [13]:

“As I understand it, the nature of the appeal was canvassed before His Honour Judge Oliver-Jones QC sitting as a Deputy High Court Judge on 2 December 2009, who confirmed that this appeal would be by way of review and not re-hearing.”

64. In *Duncan*, Ouseley J addressed the issue briefly at [4]:

“The provisions of the CPR which govern this appeal are CPR 52.11(1), which mean that the appeal is by way of review, not by way of rehearing - it was not suggested that individual circumstances required a rehearing - and by CPR 52.11(3), which means that an appeal is to be allowed either where the

PCC's decision is wrong or where it is unjust because of a serious irregularity.”

65. In *Brittain*, Lang J then proceeded to consider whether the interests of justice required a rehearing. She said:

“24. In considering whether exceptionally this appeal should proceed by way of rehearing, I have had regard to the authorities on the approach to be taken by the appellate court at a rehearing or upon a review.”

66. Having cited *E I Dupont de Nemours & Co v S T Dupont* [2003] EWCA Civ 1368, [2006] 1 WLR 2793 at [92] to [96], *Assicurazioni Generali SPA v Arab Insurance Group* [2002] EWCA Civ 1942, [2003] 1 WLR 577 at [13]-[16], [22]-[23] and [197], and *Southall v General Medical Council* [2010] EWCA Civ 407 at [407], Lang J concluded at [28]:

“Even where PD 52D does require an appeal by way of rehearing from decisions of professional regulatory bodies, for example in *Southall v General Medical Council*, such appeals are not conducted as rehearsals in the full sense, as described by Aldous LJ in *E I Dupont de Nemours* at [96] where the appellate court hears evidence and reaches a decision unconstrained by the conclusion of the lower court. Save in exceptional cases the court will not hear evidence and it will accord appropriate respect to the primary findings of fact made by the first instance panel which heard the witnesses give evidence. In my judgment, in this type of appeal there is little difference between an appeal by way of rehearing or by way of review. Both are governed by CPR 52.21(3) in which the test to be applied is whether the decision under appeal is wrong or unjust. In my judgment, in this case, neither the facts nor the grounds of appeal require a rehearing in the interests of justice.”

67. The most recent authority addressing whether an appeal under regulation 17 of the 2012 Regulations is by way of rehearing or review is *Jones v Professional Conduct Committee of the Teaching Regulation Authority and Secretary of State for Education* [2019] EWHC 3151 (Admin). Cavanagh J, having cited CPR 52.21, held at [57]:

“There is no practice direction which provides that an appeal under regulation 17 of the 2012 Regulations should be made by way of rehearing, and there was no suggestion on behalf of the Appellant that the interests of justice require a rehearing to be held. Therefore, this appeal is by way of a review.”

68. In the absence of any cogent reason to do otherwise, in accordance with *Willers v Joyce* (No.2), I should follow the approach taken in the most recent authorities of *Brittain* and *Jones*. Mr Faux submits that the fact that the point was not the subject of argument provides a cogent reason not to follow the approach taken in *Brittain*. It is striking that despite the plethora of conflicting authorities on the point, this appears to be the first case in which the parties have taken opposing positions as to the nature of the appeal. I

accept that in these circumstances I should determine the issue on the arguments, rather than simply following the most recent authorities.

69. I have set out CPR 52.21 in §22 above. The exception in CPR 52.21(1)(a) to the rule that every appeal will be limited to a review of the decision of lower court or tribunal only applies if “*a practice direction makes different provision for a particular category of appeal*”. PD52D lists statutory appeals from various other professional regulatory bodies which are to be heard by way of rehearing but appeals from the Secretary of State for Education are not included in the list. Nor is there any other practice direction that makes “*different provision*” for appeals brought pursuant to regulation 17 of the 2012 Regulations.
70. Accordingly, I agree with Lang J in *Brittain* at [23], Cavanagh J in *Jones* at [57] and Ouseley J in *Duncan* at [4] that this category of appeal is by way of review unless CPR 52.21(1)(b) applies so as to require a rehearing. In *Burke* the point was not argued, and no reasons were given for holding that the appeal was by way of rehearing. In *O v SSE*, the court recognised that there was no provision in any practice direction requiring that the appeal be by way of rehearing, but the judge understandably followed *Burke* in circumstances where *Davies* and *Duncan* were not cited. Similarly, in *Lonnie, Wallace, Lone* and *Zia* the courts have followed the *Burke* line of authority without argument. It may be that in each of these cases the Secretary of State took the view that CPR 52.21(1)(b) applied.
71. CPR 52.21(1)(b) applies if “*the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing*”. The appellant’s primary argument, that a rehearing is required to ensure compliance with article 6 of the ECHR, encompasses the category of regulation 17 appeals. On its face, CPR 52.21(1)(b) is concerned with the interests of justice in the “*individual appeal*” rather than the “*category of appeal*”. Nonetheless, I accept that if the appeal would otherwise be incompatible with article 6, CPR 52.21(1)(b) would be apt to apply.
72. The contention that the procedure would be incompatible with article 6 unless the appeal is by way of rehearing, was addressed by Holgate J in *Wallace*. At [44], Holgate J observed that the first ground of appeal was that:
- “The procedure operated by the Respondent under 2002 Act and the 2012 Regulations is not compliant with Article 6(1) of the ECHR in that the decision-maker is not independent of the prosecutor. Compliance with Article 6(1) is not achieved unless either (a) the Respondent is obliged to defer to the conclusions of the PCP, or (b) the right of appeal is to the High Court exercising “full jurisdiction”. The latter would require the appeal to be a “re-hearing” in which the High Court defers to the views of the PCP as an expert panel, but not to those of the Secretary of State”.
73. Holgate J addressed this ground in detail at [45]-[70]. Although I accept that in *Wallace* the Secretary of State conceded that the appeal was by way of rehearing, it is readily apparent that the court heard and determined precisely the same article 6 argument as has been repeated before me. Holgate J held:

“47. The NCTL is responsible for selecting a PCP comprising at least 3 members. I was told that there is a pool of about 90 persons from which the College may draw in order to constitute a panel to deal with a specific case (or cases). In addition, the NCTL will appoint a legal adviser for that particular panel, who will be a different person to any lawyer previously involved in the investigation. The legal adviser is external and not a member of the Department's staff. He or she will advise the panel on questions of law or procedure or mixed law and fact. The adviser may also remind the members of the panel of the evidence, ask questions of witnesses and others in order to clarify the evidence or issues, and help the PCP formulate and record their reasons for their decision. However, the adviser does not participate in the reaching of the decision.

48. The NCTL will appoint a “presenting officer” to put forward its case to the panel. In the present proceedings the College appointed an external lawyer. Typically, that lawyer will have been previously instructed by the NCTL to conduct the investigation. At this stage there therefore remains a clear separation between on the one hand the investigation and prosecution of a case (on the instructions of the NCTL) and on the other the composition of the PCP, the conduct of the hearing and the preparation of the panel's findings and recommendation. Indeed, Mr Faux accepted on behalf of the Appellant that under the scheme, the PCP is independent of NCTL's involvement in a case and to that extent, at least, Article 6 is satisfied.

49. The nub of Mr Faux's argument hinges on what happens after the PCP has reached its conclusions. The PCP's report is sent to a “senior official” in the NCTL for a decision to be taken on behalf of the Respondent as to what action should be taken under regulation 8 and section 141B(2). Mr Faux simply submits that because that person is an official of the NCTL and because officials of that agency are also responsible for the initial investigation, the decision that there is a case to answer and the pursuit of that case before the PCP, the ultimate decision-maker is not independent for the purposes of Article 6(1).

50. At this point it is necessary to return to the statutory scheme. As Mr Dunlop pointed out in his submissions, the scheme created by the amendments introduced by the 2011 Act is unusual. It splits the decision-making between two tiers. The first tier, the PCP, is responsible for deciding whether or not relevant allegations against a teacher are proved. If they conclude that they are not, that is the end of the case. The Respondent has no power to review findings by a PCP that there was no unacceptable professional conduct, or no conduct bringing the profession into disrepute, or no relevant conviction. The Respondent has no power to substitute different findings or

conclusions on those matters. Likewise, where a PCP concludes that there was misconduct within the ambit of section 141B(1), the Respondent is not entitled to take a different view.

51. The Respondent accepted through her counsel, and I agree, that she has no power to interfere with any of the findings made by a PCP in reaching their conclusions as to the extent to which an allegation of misconduct within section 141B(1) is, or is not, made out. So, in the present case the Respondent was bound by the PCP's conclusions accepting allegations (1) to (4) but rejecting the allegations of dishonesty ((5) to (7)), and also bound by the findings upon which those conclusions were based. ...

52. The second stage of the decision-making process only arises if the PCP decides that one or more allegations of misconduct falling within section 141B(1) of the 2002 Act is made out. At that point the PCP has to consider whether or not to recommend that a prohibition order is made and, if so, whether a provision for review should be included (and on what terms). Regulation 8(1) obliges the Respondent to consider the PCP's recommendations on the "prohibition order issue", or the "sanction issue", but it is plain from the legislation that the decision on this subject is for the Respondent alone. She is not bound to follow the recommendations made by the PCP. So the Respondent is entitled to accept or reject a recommendation that a prohibition order either is made, or is not made.

53. Because in this second stage, the legislation ascribes different functions to the PCP (of recommending) and to the Respondent (of determining), there is nothing in the statutory scheme which treats the Respondent as bound by any part of the PCP's reasoning on the "sanctions issue" leading up to its recommendation. ...

54. Accordingly, any issue as to whether the process lacks independence for the purposes of Article 6(1) is confined to the "sanctions" part of the decision. It has not been suggested that the PCP lacks independence and therefore, on the argument I have heard, that issue does not arise in relation to the earlier stage in which the PCP finds facts and reaches conclusions on whether misconduct falling within section 141B(1) has occurred. That is an independent determination of that part of the case, which cannot be altered by the NCTL acting on behalf of the Respondent.

...

57. The Appellant has failed to demonstrated a lack of independence on the part of the senior official of the NCTL who takes the final decision under section 141B(2) and regulation 8. Indeed, as I pointed out in paragraph 49 above, Mr Faux baldly

asserted this argument simply on the basis that officials who are responsible for the investigation for the decision that there is a case to answer and the senior official who takes the final decision are all employed by NCTL. ...” (emphasis added)

74. Holgate J addressed the appellant’s reliance on *R (Kaur) v Institute of Legal Executives Appeal Tribunal* [2011] EWCA Civ 1168, [2012] 1 All ER 1435 (*Wallace* at [57]-[58]), holding that the decision is of no assistance because it concerned *self-regulation* by a professional body, whereas the scheme considered in *Wallace* (and in this case) “*has nothing to do with self-regulation at all*”. At [60], Holgate J observed that arguments of this nature “*require a proper analysis not only of the statutory framework, but also a full description of the process in fact operated by the Respondent and a careful analysis of relevant case law*”, not broad-brush arguments of the kind presented. At [61], Holgate J held that the appellant’s argument was “*not improved by attempting to focus on how the nature of the “hearing” in the High Court can “cure” supposed problems in the process conducted by the Respondent*”. The first reason for rejecting this argument was that the appellant “*has failed to demonstrate that any such problems exist*”.
75. In my judgment, Mr Faux’s contention that there is an article 6 problem that requires to be cured by ruling that the appeal should proceed by way of rehearing fails for the reasons given by Holgate J in *Wallace*. I have considered the witness statement provided by Mr Meyrick in *Lone*, and I am satisfied that the internal processes within the TRA ensure the necessary separation of the TRA’s different functions and the independence of decision-makers.
76. Moreover, in this case, the focus of the appeal is the first stage decision of the Panel i.e. the Panel’s conclusions on the allegations and the findings underlying those conclusions. The Secretary of State was bound to accept those conclusions and findings, and he has done so. It is not suggested, and could not be, that the Panel was not independent. The Secretary of State was not bound to accept the Panel’s recommendation as to sanction, but (unlike in *Wallace*) he did accept the recommendation, and in any event, there is no distinct challenge to the sanction imposed. The challenge to the prohibition order rests squarely on the appeal against the Panel’s conclusions on the allegations.
77. Accordingly, I reject the appellant’s contention that the appeal must proceed by way of rehearing to ensure the statutory scheme complies with article 6.
78. The appellant’s alternative contention is that the gravity of the matters in issue are such that the interests of justice require that the appeal should proceed as a rehearing. In considering this argument, it is important to have in mind the distinction between appeals by way of rehearing or review in the regulatory context.
79. In *Sastry* the Court of Appeal considered two second appeals brought by doctors under section 40 of the Medical Act 1983 against the sanction of erasure from the medical register imposed by the Medical Practitioners Tribunal and upheld by the High Court. The Court of Appeal drew a distinction between the unlimited right of appeal given to a medical practitioner by section 40 and the limited right of appeal on the ground of “*sufficiency*” conferred on the General Medical Council by section 40A of the Medical Act 1983 (*Sastry* at [97]). The Court noted that in accordance with CPR 52.21(1) and

CPR PD52D, para 19.1, appeals under section 40 are by way of rehearing, whereas there is no equivalent provision in the Practice Direction in respect of section 40A and so appeals brought by the GMC under section 40A are by way of review (*Sastry* at [98]).

80. The Court of Appeal observed that in *Bawa-Garba v General Medical Council* [2019] 1 WLR 1929 (a section 40A appeal) “*the court identified the approach of the appellate court as being supervisory in nature, in particular in respect of an evaluative decision, whether it fell “outside the bounds of what the adjudicative body could properly and reasonably decide”*” (*Sastry* at [107]). The Court of Appeal endorsed this approach “*as appropriate to the review jurisdiction applicable in section 40A appeals*”, but not in respect of section 40 appeals by way of rehearing (*Sastry* at [108]).
81. The appropriate approach in the context of section 40 appeals by way of rehearing is that identified in *Ghosh v General Medical Council* [2001] 1 WLR 1915 and approved in *Khan v General Pharmaceutical Council* [2017] 1 WLR 169 (*Sastry* at [108]). The Court of Appeal summarised the approach in these terms:

“102. Derived from *Ghosh* are the following points as to the nature and extent of the section 40 appeal and the approach of the appellate court:

i) an unqualified statutory right of appeal by medical practitioners pursuant to section 40 of the 1983 Act;

ii) the jurisdiction of the court is appellate, not supervisory;

iii) the appeal is by way of a rehearing in which the court is fully entitled to substitute its own decision for that of the Tribunal;

iv) the appellate court will not defer to the judgment of the Tribunal more than is warranted by the circumstances;

v) the appellate court must decide whether the sanction imposed was appropriate and necessary in the public interest or was excessive and disproportionate;

vi) in the latter event, the appellate court should substitute some other penalty or remit the case to the Tribunal for reconsideration.

...

105. It follows from the above that the Judicial Committee of the Privy Council in *Ghosh* approved by the Supreme Court in *Khan*, had identified the test on section 40 appeals as being whether the sanction was “wrong” and the approach at the hearing, which was appellate and not supervisory, as being whether the sanction imposed was appropriate and necessary in the public interest or was excessive and disproportionate.” (emphasis added)

82. The Court of Appeal observed at [109]:

“We agree with the observations of Cranston J in *Cheatle* that, given the gravity of the issues, it is not sufficient for intervention to turn on the more confined grounds of public law review such as irrationality. The distinction between a rehearing and a review may vary depending upon the nature and facts of the particular case but the distinction remains and it is there for a good reason. To limit a section 40 appeal to what is no more than a review would, in our judgment, undermine the breadth of the right conferred upon a medical practitioner by section 40 and impose inappropriate limits on the approach hitherto identified by the Judicial Committee of the Privy Council in *Ghosh* and approved by the Supreme Court in *Khan*.” (emphasis added)

83. As Lang J observed in *Brittain* at [28] (see §66 above), even where PD 52D requires an appeal by way of rehearing from decisions of professional regulatory bodies, such appeals are not conducted as rehearings in the full sense. Permission is required to adduce any evidence that was not before the lower tribunal and save in exceptional cases the court will not hear oral evidence. The question for the court, whether the appeal is by way of rehearing or review, is whether the decision under appeal is wrong or unjust. The bounds of either form of appeal are defined by the grounds of appeal (CPR 52.21(5)). And the court will accord appropriate respect to the primary findings of fact made by the first instance tribunal which heard the witnesses give evidence. So in the context of this case, the distinction between an appeal by way of rehearing or by way of review is a fine one.
84. Nevertheless, *Sastry* makes clear that the distinction is real not illusory. If the appeal is by way of rehearing, the appellate court can be more interventionist than on an appeal by way of review and it will not defer to the judgment of the Panel more than is warranted by the circumstances. In this case, the Panel’s conclusions prevent the appellant ever practising his profession again and, in view particularly of the conclusion that he engaged in sexual activity with a pupil, they have a profound impact on his reputation. In my judgment, given the gravity of the matter, the interests of justice require that this appeal should be by way of rehearing.

The impact of the loss of the audio recording: analysis and decision

85. I reject the appellant’s contention that the loss of the audio recording constitutes “*a serious procedural or other irregularity in the proceedings in the lower court*” within the meaning of CPR 52.21(3). That argument was not developed by Mr Faux in his written or oral submissions, and I agree with the Secretary of State’s submissions that it cannot sensibly be said that the subsequent loss of the audio recording is an irregularity in the proceedings before the Panel such as to render those proceedings unjust.
86. The appellant’s principal contention is that the appeal cannot fairly be determined without the transcript. He acknowledges, and I agree, that he does not need the transcript to pursue Grounds 1B, 4, 5 or 7. But he maintains that it is needed to pursue Grounds 2, 3 and 6.

87. In Ground 2 the appellant alleges:

“At the substantive trial on 18 to 22 November 2019, having erred by allowing the admission of the recording, the same PCP placed undue weight on the absence of denial by Mr Ullmer when confronted by his accuser and failed to accord sufficient weight to the explanations proffered by Mr Ullmer at the hearing for his lack of engagement with and responses in the conversation, namely that he was in a busy public restaurant and was in a state of shock at the nature of the allegations made by a man he viewed as a long-term and close family friend.”

88. This ground focuses, first, on the weight that the Panel gave to the absence of denial by the appellant in the conversation that was recorded by Pupil A and secondly, on the weight the Panel failed to give to the appellant’s explanations that he was in a busy public restaurant and he was in a state of shock. The primary focus of this ground will necessarily be on the decision. What weight the Panel gave, or failed to give, to these matters, can only be ascertained by focusing on the Panel’s decision: the transcript will not assist in this regard.

89. I accept that in addressing whether *undue* or *insufficient* weight was given, the appellant may wish to refer to the evidence. But he will be able to rely, if he wishes, on the contemporaneous record of the conversation which is the subject of this ground, his written witness statement, and the Presenting Officer’s detailed note of his examination-in-chief, cross-examination and questioning by the members of the Panel. While the Presenting Officer’s note does not purport to be verbatim, it is evidently detailed. Mr Faux, who appeared for the appellant before the Panel, did not identify any deficiency in the Presenting Officer’s note. In my judgment, Ground 2 can be determined fairly without the transcript.

90. By Ground 3 the appellant contends:

“The PCP wrongly found the complainant to be a credible witness:

a. Argument had been raised that as he was a trained actor, thus it was not surprising he presented as a credible witness. The PCP purported to address these concerns by noting that both the main parties were trained in drama and therefore they would be mindful to “remain vigilant about the accounts given and their presentation throughout”. The PCP were wrong to equate the skills of Mr Ullmer as a teacher trained to teach English and drama and the complainant, a successful actor and “immersive journalist”. Further, at no point in the judgement is there any indication that the complainant’s evidence was approached with caution.

b. The PCP failed to undertake any proper analysis of the impact of the evidence of positive good character of Mr Ullmer including evidence of a long and successful education

career with no hint of other improper behaviour towards pupils;

c. The PCP failed to undertake any proper analysis of the effect on the credibility of the complainant of the undisputed evidence that the complainant had participated in a long-term friendship with Mr Ullmer for over 20 years since leaving school;

d. The PCP were wrong to accept uncritically assertions made by the complainant that a therapeutic relationship has led to a realisation that he had been abused as a sixth former and failed to approach such evidence critically and with an awareness of the dangers of relying on memories discovered during therapy.”

91. The focus of both the points made in (a) is the Panel’s decision. In their decision, did the Panel wrongly equate the acting skills of the appellant and Pupil A? In their decision, did the Panel fail to approach Pupil A’s evidence with due caution? The transcript of the hearing is not needed to engage fairly in this analysis. The evidential basis for it, namely the differing work experience of the appellant and Pupil A, is available without a transcript of the proceedings.
92. Point (b) focuses on the Panel’s analysis of the impact of the appellant’s good character. Their analysis is contained in their decision. The transcript of the hearing is not needed to show the appellant’s good character. Whether the Panel’s analysis was flawed can only be ascertained by focusing on the Panel’s decision.
93. It was not disputed that the appellant and Pupil A had been friends for many years after Pupil A left school. The transcript is not needed to establish that undisputed evidential point. The focus of point (c) is, again, on the Panel’s analysis which is to be found in the Panel’s decision.
94. Point (d) focuses on the Panel’s treatment of Pupil A’s evidence that it was only during therapy that he had realised the appellant’s conduct was abusive. The primary focus will again be on the Panel’s decision. The transcript is not needed to establish that base evidential point on which the appellant relies. Insofar as the appellant may wish to rely on the evidence in support of this point, or Ground 3 more broadly, the witness statements and the Presenting Officer’s detailed note of the oral evidence are available. In my judgment, Ground 3 can also be fairly determined without the transcript.
95. Ground 6 states:

“The PCP did not follow the legal direction it had received earlier concerning its approach to the passage of time since the alleged events and the need to make appropriate allowance for that in favour of the respondent teacher. In the alternative, the PCP ‘s failure to set out how it approached the issue of the long passage of time since the events alleged was a failure to give adequate reasons.”

96. In my judgment, it cannot sensibly be contended that the transcript of the hearing is needed to fairly determine this ground. The first sentence alleges a failure on the part of the Panel to follow a legal direction. The relevant legal direction, given following the conclusion of the hearing and prior to the Panel adjourning to consider its decision as to whether the facts of the allegations were proved, is available. The contention that the Panel failed to follow this direction can only be made by reference to the Panel's decision: the transcript of the proceedings will not assist. The second sentence is a reasons challenge which, again, can only be determined by reference to the reasons given. The evidential basis for Ground 6 is the passage of time, which is an undisputed fact for which it is unnecessary to refer to a transcript of the proceedings.
97. I also reject the appellant's contention that the transcript is needed to enable the court to engage in a broader form of examination of the case, unfettered by the issues placed before it by the parties. In *El Karout* the court identified an important point regarding the admission of hearsay evidence that had not been clearly raised by the unrepresented appellant in her appeal, and so the judge invited submissions before determining the issue. That is a proper approach, particularly where a party is unrepresented, but it does not support the appellant's bold proposition that the court is required to engage in a broad examination of whether the Panel's decision is wrong or unjust, independent of the grounds of appeal relied upon by the appellant. CPR 52.21(5) makes clear that the parameters of the appeal, whether by way of review or rehearing, are defined by the notice of appeal, albeit the court has power to permit the grounds of appeal to be amended, as I have done in this case.
98. Accordingly, I reject the appellant's contention that this appeal cannot be determined fairly in the absence of a transcript.

Conclusion

99. For the reasons I have given, I grant the appellant permission to amend his grounds of appeal to add Ground 1A, but I dismiss the appeal on that ground. The remainder of the appellant's appeal will be determined at the hearing which is listed to be heard on 15 July 2021. Pursuant to CPR 52.21(1)(b), that hearing will proceed as rehearing rather than a review.