



Neutral Citation Number: [2021] EWHC 1619 (Admin)

Case No: CO/655/2021

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 15/06/2021

**Before :**

**THE HONOURABLE MR JUSTICE MORRIS**

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**Between :**

**DR SHEELA JOGULA RAMASWAMY**

**Appellant**

**- and -**

**GENERAL MEDICAL COUNCIL**

**Respondent**

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**Daniel Matovu** (instructed on direct access) for the **Appellant**  
**Christopher Knight** (instructed by **General Medical Council**) for the **Respondent**

Hearing dates: 6, 7 and 10 May 2021  
Further written submissions: 24, 26 and 27 May 2021

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**Approved Judgment**

**Mr Justice Morris :**

**Introduction**

1. This is an appeal against two determinations (“the Determinations”) of a Medical Practitioners Tribunal (“the Tribunal”) dated 12 January 2021. By the Determinations, the Tribunal found that Dr Sheela Ramaswamy (“the Appellant”) had failed to comply with a direction made by the General Medical Council (“the GMC”) that she undergo a health assessment for the purposes of a fitness to practise investigation (“the Non-Compliance Determination”) and further directed that the Appellant’s registration be suspended for a period of nine months (“the Sanction Determination”). As part of her appeal, the Appellant challenges further decisions of the Tribunal: first, the decisions made by the Tribunal, both before, and on, 11 January 2021, to refuse to postpone the hearing and, on 11 January 2021, to proceed in the Appellant’s absence. A further appeal against the determination to make the suspension effective immediately has not been pursued. The appeal is made under paragraph 5A(5) of Schedule 4 to the Medical Act 1983, as amended (“the Act”). The respondent to the appeal is the GMC.
2. The Appellant aged 42 is a registered doctor who has practised as a speciality doctor in elderly medicine. In August 2018 the GMC opened an investigation into the Appellant’s fitness to practise arising from concerns about correspondence between her and the GMC and made a formal direction pursuant to Rule 7(3) of the General Medical Council (Fitness to Practise) Rules 2004, as amended (“the Rules”) that she should undergo a medical assessment arising out of a concern as to her fitness to practise. The background to that correspondence is a relationship between the Appellant and another doctor, and the Appellant’s subsequent use of that doctor’s name. On 29 July 2020 the GMC made a further direction that the Appellant should undergo a health assessment. The Appellant did not comply with that direction and in October 2020 the GMC referred that non-compliance to the Tribunal. A hearing date of 11 and 12 January 2021 was fixed. In decisions, made by a Medical Practitioners Tribunal Service (“MPTS”) case manager, prior to the hearing (on 11 December 2020 and 7 January 2020) the Tribunal refused to adjourn the hearing. The Tribunal considered the reference at a hearing on 11 and 12 January 2021. On 11 January 2021 the Tribunal refused a further application to adjourn. The Appellant did not attend on 11 January 2021; she attended in person on 12 January 2021. In the Non-Compliance Determination, issued at the start of the hearing on 12 January 2021, the Tribunal held that the Appellant had failed to comply with the direction and that there was no good reason for that failure. The Tribunal then proceeded to hear argument on sanction. In the Sanction Determination, the Tribunal imposed the sanction of suspension. The Tribunal directed that the suspension take effect immediately.
3. The Appellant challenges the Non-Compliance Determination on the grounds that it was unjust due to serious procedural irregularity and/or was substantively wrong. She challenges the Sanction Determination on the grounds that it was unnecessary, excessive and disproportionate.

**The relevant legal framework**

**The Act: The GMC and the Medical Practitioners Tribunal**

4. The statutory framework for the GMC and the Tribunal is to be found in the Act, and the Rules made under the Act.

***The over-arching objective and the over-riding objective***

5. Section 1(1A) of the Act provides that the “over-arching objective of the General Council in exercising their functions is the protection of the public”. Section 1(1B) expands on this, providing that “the pursuit by the General Council of their over-arching objective involves the pursuit of the following objectives: (a) to protect, promote and maintain the health, safety and well-being of the public; (b) to promote and maintain public confidence in the medical profession; and (c) to promote and maintain proper professional standards and conduct for members of that profession.”
6. Schedule 4 of the Act addresses proceedings before the Tribunal (and other relevant tribunals) and requires the GMC to make rules in respect of proceedings before the Tribunal. Paragraph 1(1A) provides that “The “over-riding objective” of the [GMC] in making rules under this Schedule with respect to the procedure to be followed in proceedings before a Medical Practitioners Tribunal ... is to secure that the Tribunal ... deals with cases fairly and justly”. Paragraph 1(1B) goes on to provide that, where the GMC consider that there is a conflict between meeting their over-riding objective and their over-arching objective, priority must be given to meeting the over-riding objective i.e. that cases are dealt with fairly and justly. (See further paragraph 5A(3H) of Schedule 4 below, where the Tribunal must have regard to the over-arching objective. I consider that that duty is also subject to the over-riding objective.)

**Fitness to Practise proceedings**

7. Section 35C(2) of the Act provides that a person’s fitness to practise shall be regarded as impaired for the purposes of the Act by reason only of one of five specified matters, including “(a) misconduct... (d) adverse physical or mental health...”. It is well established that under section 35C the determination of impairment of fitness to practise involves a two-stage process. First the issue of whether there has been misconduct or adverse health (or other grounds) and, secondly, whether as a result of the relevant ground, fitness to practise is impaired.
8. Part 2 of the Rules deals with the “Investigation of Allegations”. An “allegation” is defined as an allegation that fitness to practise is impaired (rule 2). An allegation is to be initially considered by the Registrar and where he considers that an allegation does not fall within section 35C(2) the Registrar must notify the maker of the allegation (if any) accordingly (rule 4(2A)).

**Interim orders**

9. Section 41A of the Act provides that the Tribunal or the Interim Orders Tribunal may make an order to suspend registration (an interim suspension order) or an order that registration is conditional on compliance with requirements specified in the order (to which I refer as an “interim conditions order”) where it is satisfied that it is necessary for the protection of members of the public or is otherwise in the public interest or is in the interests of the registrant.

## **Directions and non-compliance: Schedule 4 paragraph 5A of the Act**

### ***The power to make a direction***

10. At the heart of the present proceedings is paragraph 5A of Schedule 4 to the Act. The power to direct an assessment is set out in sub-paragraphs (1) to (2B) which provide, inter alia, as follows:

*“(1) The General Council may make rules—*

*(a) authorising the giving of directions by any of—*

*(i) the Investigation Committee,*

*(ii) a Medical Practitioners Tribunal,*

*(iii) such other persons as may be specified in the rules,*

*requiring an assessment of a kind referred to in sub-paragraph (1A) to be carried out;*

...

*(1A) The assessments referred to in sub-paragraph (1) are—*

*(a) in the case of a registered person, an assessment of the standard of a person's professional performance;*

...

*(c) ... an assessment of the person's physical or mental health.*

...

*(2B) An assessment of a person's physical or mental health may include an assessment of the person's physical or mental health at any time prior to the assessment and may include an assessment of the person's physical or mental health at the time of the assessment.”*

### ***Non-compliance: Reference to the Tribunal and the Tribunal's consideration***

11. The power to refer non-compliance with a direction to the Tribunal is set out at sub-paragraphs (3) to (3H) of paragraph 5A, which provide, inter alia, as follows:

*“(3) If the Registrar is of the opinion that a registered person who is required to submit to an assessment by virtue of this paragraph has failed to submit to that assessment or to comply with requirements imposed in respect of the assessment, the Registrar—*

*(a) may refer that matter to the MPTS for them to arrange for it to be considered by a Medical Practitioners Tribunal, and*

*(b) if he does so, must without delay serve on the person concerned a notification of the making of such a referral.*

...

*(3B) Where a matter is referred to the MPTS under sub-paragraph (3) ..., the MPTS must arrange for the matter to be considered by a Medical Practitioners Tribunal.*

...

*(3D) The Medical Practitioners Tribunal, on their consideration of a matter under sub-paragraph (3B) ..., may, if they think fit—*

*(a) direct that the person's registration in the register is to be suspended (that is to say, is not to have effect) during such period not exceeding twelve months as may be specified in the direction; or*

*(b) direct that the person's registration is to be conditional on the person's compliance, during such period not exceeding three years as may be specified in the direction, with such requirements so specified as the Tribunal think fit to impose for the protection of members of the public or in the person's interests.*

*(3E) Where, under sub-paragraph (3D), the Tribunal give a direction for suspension or a direction for conditional registration, the MPTS must without delay serve on the person concerned notification of the direction and of the person's right to appeal against it under sub-paragraph (5).*

...

*(3H) In deciding whether to give a direction under sub-paragraph (3D), a Medical Practitioners Tribunal must have regard to the over-arching objective.”*

### ***Tribunal rules for non-compliance hearing***

12. The formal rules on procedure before a Medical Practitioners Tribunal at a non-compliance hearing pursuant to paragraph 5A(3B) are in Rule 17ZA of the Rules. It provides, among other things, that, after the GMC's representative has presented the case, the doctor may, in response, adduce evidence and call witnesses in respect of the

question of non-compliance, and that the Tribunal may receive further evidence and hear any further submissions from the parties as to its decision whether to make a direction under paragraph 5A(3D).

***Guidance in relation to non-compliance hearings***

13. Guidance as to the conduct of a non-compliance hearing by a Medical Practitioners Tribunal is contained in "Non-compliance guidance for Medical Practitioners Tribunals" ("the Guidance"), which sets out the factors to be considered by a tribunal when making a finding in respect of the question of non-compliance and determining what order if any to make following a finding of non-compliance. Part A of the Guidance sets out the considerations that are relevant where, as in the present case, there has been a referral for hearing by the GMC. Paragraph A6 provides as follows:

*"A6. The GMC may make such a referral where it considers the relevant failure creates a risk to public protection because it means the GMC cannot investigate the concern about the doctor's fitness to practise."*

The footnote to that paragraph states that "the purpose of the non-compliance power is set out" at pages 31/32 of the Department of Health consultation response report of January 2015 ("The DoH Report"). The DoH Report records that the proposal to refer the case to the Tribunal in a case of non-compliance was not supported by the majority of respondents. It further points out that there is a clear risk to public protection where a concern about a doctor's fitness to practise cannot be investigated *other than* by means of an assessment. If referred to the tribunal, the registrant would have the opportunity to explain whether there are good reasons as to why they had not complied. In particular the registrant would be able to raise if they consider that the assessment should not have been directed or that its requirements were unreasonable. The tribunal would be required to have regard to the over-arching objective of public protection, but that would be operated subject to the over-riding objective to ensure the cases are dealt fairly and justly. In this way, the DoH Report provides important background not only to paragraph A6, but also to paragraphs A24 and A46 to A48 set out below.

14. Part A of the Guidance further provides:

*"A9 When considering the issue of non-compliance with a GMC direction or request to provide information the tribunal will need to consider whether or not:*

*a the doctor has failed to comply with the GMC's direction or request to provide information*

*b there was a good reason for the doctor's failure to comply.*

*A10 The tribunal will not consider whether the doctor's fitness to practise is impaired when determining the issue of non-compliance.*

...

***Decision on non-compliance***

A16 *When considering the issue of the doctor's compliance with a GMC direction or request to provide information, the tribunal should ask the following questions:*

- a *Has the doctor failed to comply with the GMC's direction or request to provide information?*
- b *If so, is there a good reason for the doctor's failure to comply?*

...

***Has the doctor failed to comply with the GMC's direction or request to provide information?***

A18 *A doctor may have failed to comply with a GMC direction or request to provide information where they have:*

- a *explicitly refused to submit to a direction to undergo an assessment or provide the information requested from them*
- b *agreed to submit to a direction to undergo an assessment but subsequently failed to comply with some or all of the requirements imposed in respect of that assessment*
- c *agreed to provide the information requested but subsequently failed to provide it in part or in full*
- d *failed to respond to a direction to undergo an assessment or request to provide information*
- e *been prevented from participating in an assessment by reason of their adverse physical or mental health (health-related non-compliance).*

...

***If so, is there a good reason for the doctor's failure to comply?***

A23 *When considering the issue of whether there is a good reason for a doctor's failure to comply with a GMC direction or request to provide information, the tribunal*

*will need to make a judgement based on the individual circumstances of the case.*

A24 *Examples of good reason for failing to comply with a GMC direction or request to provide information could include, but are not limited to, where:*

*a there is objective evidence that demonstrates a doctor's adverse physical or mental health prevented them from complying with a GMC direction or request to provide information, and there is a realistic prospect of the doctor being able to comply in a reasonable timeframe in the future (see below)*

*b a doctor can demonstrate they did not receive the GMC's direction or request to provide information and, since its existence came to the doctor's attention, they have not been provided with an opportunity, and / or sufficient time, to comply*

*c a doctor can demonstrate they are not, or could not reasonably be expected to be, in possession of the information requested by the GMC*

*d a doctor can demonstrate that, in all the circumstances, it was not reasonable for them to comply with the GMC's direction or request to provide information (see below)*

*e a doctor can demonstrate that their failure to comply does not create a risk to public protection because the GMC can still investigate the concern (see below).*  
*(emphasis added)*

As regards paragraph A24d, the Guidance further provides:

***“In all the circumstances, it was not reasonable for the doctor to comply with the GMC's direction or request to provide information***

A37 *A doctor may say that, given all the circumstances known at the time the GMC made its direction or request to provide information, it was not reasonable for them to comply.*

A38 *Where this is raised, the tribunal should consider the full circumstances of the case to decide whether it was reasonable for the doctor to comply. However, the*



*tribunal should not make a finding on whether the direction or request to provide information was lawful.”*

15. As regards paragraph A24e, the Guidance further provides:

***“The doctor's failure to comply has not created a risk to public protection because the GMC can still investigate the concern***

A46 *There is a clear risk to public protection where a concern about a doctor's fitness to practise has been raised but cannot be investigated other than by means of an assessment, or by requiring a doctor to provide information, and the doctor does not comply. The absence of such evidence may interfere with the GMC's ability to take forward a case on the grounds of impairment.*

A47 *The outcome of the assessment, or the information requested from the doctor, should be material to the GMC's investigation. If, without it, the GMC is unable to proceed with the investigation in a proportionate way and take action in response to the concern, the failure to comply will create a risk to public protection.*

A48 *If there are other proportionate means by which the allegations can otherwise be adequately investigated, or the information requested from the doctor can be acquired, this may indicate that the doctor's failure to comply has not created a risk to public protection because the GMC can still investigate.” (*emphasis added*)*

16. Part A concludes at paragraph A50 which provides that, where the tribunal finds that the doctor has failed to comply with the GMC's direction or request for information *and* that there is no good reason for the doctor's failure to comply, it should make a finding of non-compliance and proceed to consider whether to make a direction in accordance with Part C of the Guidance.

### ***Guidance on Sanction: Part C***

17. I do not set out the provisions of Part C in detail. The position in summary is as follows. If action is required, the Tribunal may consider either an order of conditional registration (for a maximum of three years) or suspension (for a maximum of 12 months). Conditional registration might be appropriate where the doctor has provided some mitigation for their non-compliance (C13). It is unlikely to be appropriate where a doctor has explicitly refused to comply with, or has failed to respond to, a direction and there is no mitigating information available (C14). In such a case suspension is likely to be appropriate (C24). A suspension order sends a message about the important role the GMC and the MPTS plays in making sure that a doctor's practice meets the expected standards and that the public is adequately protected where fitness to practise concerns have been raised (C22). Suspension has a deterrent effect and can be used to send a signal to the doctor, the profession and public about

what behaviour is expected from a registered doctor. Suspension from the register also has a punitive effect, in that it prevents the doctor from practising and therefore from earning a living as a doctor during the period of suspension, although this is not its purpose (C25). The tribunal may take into account the previous opportunities the doctor has had to comply and the level of the doctor's engagement with the fitness to practise process. An order of suspension is to be reviewed after a period of time considered appropriate by the tribunal, or at the request of the GMC (C26). Finally where an order is made which restricts practice, it will usually be desirable to revoke any existing interim order to avoid there being two orders in place (C3).

### **Appeal from the Tribunal to the High Court**

18. Appeals from the Tribunal in relation to a non-compliance decision are governed by paragraph 5A(5) of Schedule 4 which provides as follows:

*“(5) An appeal shall lie to the relevant court (within the meaning of section 40(5) of this Act) from any direction of a Medical Practitioners Tribunal given under sub-paragraph (3D) above, and on an appeal under this sub-paragraph the relevant court may—*

*(a) quash the direction;*

*(b) substitute for the direction any other direction which the Tribunal could have made; or*

*(c) remit the case to the MPTS for them to arrange for a Medical Practitioners Tribunal to dispose of it in accordance with the court's directions,*

*and the decision of the court on any appeal under this sub-paragraph shall be final.”*

For the purposes of paragraph 5A(5), in England and Wales "the relevant court" is the High Court.

### ***“Review” or “rehearing” and this Court’s approach on appeal***

19. Following the oral hearing, I raised with the parties the question whether, in the light of CPR 52.21(1), an appeal under paragraph 5A(5) is an appeal by way of review or by way of rehearing, and the related question of the correct approach of this Court on such an appeal. I received further, relatively brief, written submissions, referring to a number of cases, in particular *General Medical Council v Jagjivan* [2017] EWHC 1247 (Admin) [2017] 1 WLR 4438, *Bawa-Garba v General Medical Council* [2018] EWCA Civ 1879, [2019] 1 WLR 1929 at §§60-67 and the very recent decision of the Court of Appeal in *Sastry v General Medical Council* [2021] EWCA Civ 623, especially at §§96-110; and to two cases, specifically of appeals under paragraph 5A(5), namely *Ali v General Medical Council* [2017] EWHC 741 (Admin) and, most recently, *Teewary v General Medical Council* [2021] EWHC 376 (Admin). The question of review or rehearing was not addressed in either of these last two cases.

20. This is an issue of some complexity upon which I reach no final conclusion: principally because its determination does not affect my conclusions on the issues in this case (and most particularly on Ground 2) and additionally because I have not had the benefit of full argument on all relevant case authorities. Nevertheless I make the following observations:
- (1) An appeal under paragraph 5A(5) is distinct from an appeal under section 40 of the Act, and unlike in the latter case, special provision for paragraph 5A(5) is not made in CPR Practice Direction 52D. It follows that CPR 52.21(1)(a) does not apply to such an appeal, which is therefore not “by way of rehearing” pursuant to that sub-paragraph.
  - (2) However, I can see some force in Mr Matovu’s argument to distinguish a paragraph 5A(5) appeal from a section 40A appeal (which *is* by way of review) on the basis that the former is a doctor’s right and is unlimited and the latter is a limited right of appeal; and thus for the Court, in any particular such appeal, to decide, pursuant to CPR 52.21(1)(b) that it is “in the interests of justice to hold a re-hearing”.
  - (3) On any appeal (including this appeal), the question for the Court is whether the decision of the court below (here, the Tribunal) was “wrong” or “unjust because of a serious procedural or other irregularity in the proceedings in the lower court”: see CPR 52.21(3)(a) and (b).
  - (4) The difference in the Court’s approach on appeal between “review” and “rehearing” applies to consideration of the question whether the court below was “wrong” under CPR 52.21(3)(a) (“the first limb”). I am not persuaded that that difference applies to the alternative limb under CPR 52.21(3)(b), namely “injustice due to irregularity”: see *Ali* at §§44, 45 et seq and *Teewary* at §§55 and 56; and in both *Bawa-Garba* and *Sastry* the issue related to the first limb. On the issue of whether the decision below was “wrong”, the difference in approach between review and rehearing will, in some circumstances, make a relevant difference; in others it may not: compare *Bawa-Garba* at §60 with *Sastry* at §109 (and the many earlier cases cited). The difference, where it does apply, relates to the degree of respect accorded to the decision of the court below; such difference as there is may well depend on whether the challenge is to findings of fact, misconduct, impairment or sanction. Mr Knight suggested that there was not much difference between review and rehearing in the content of the relevant approach; Mr Matovu contended that, on a rehearing, this Court should be fully entitled to substitute its own decision. (In *Sastry* the Court of Appeal compared the approach in *Bawa-Garba* at §67 with its approach at §102; although I note that both cases were largely concerned with sanction).
21. On the facts of the present case, even on the approach advocated by Mr Matovu, I am not satisfied that the Non-Compliance Determination was wrong (see paragraph 153 below), and accordingly I do not make a definitive ruling on the complex issues of principle raised.

## Adjournments

22. As regards applications to adjourn Tribunal hearings, I have been referred to *General Medical Council v Adeogba* [2016] EWCA Civ 162, [2016] 1 WLR 3867 at §§13 to 23 and *Sanusi v General Medical Council* [2019] EWCA Civ 1172; [2019] 1 WLR 6273 at §§63 to 66, and 70 to 71. Both were cases where the Tribunal decided to proceed in the absence of the practitioner in question. (Unlike the present case, there were no positive applications to adjourn). From these authorities I derive the following propositions.

- (1) The starting point is the approach, in criminal law, to trial in the absence of the defendant, namely the discretion to proceed must be exercised with great care, fairness to both sides must be taken into account, and fairness to the defence is of prime importance.
- (2) Amongst the factors relevant to whether to proceed in absence are whether an adjournment might result in the defendant attending, the likely length of any adjournment, the extent of the disadvantage to the defendant, and the general public interest.
- (3) However there is a difference between a criminal trial and disciplinary proceedings - in the latter the decision must also be *guided* by the over-arching objective in section 1(1A). The fair, economical, expeditious and efficient disposal of allegations is of very real importance.
- (4) Fairness to the medical practitioner is of prime importance and a prime consideration; fairness to the GMC and the interests of the public must also be taken into account.
- (5) There is a burden on practitioners to engage with the regulator, in relation to the investigation and resolution of allegations made against them.
- (6) It would run counter to the GMC's over-arching objective if a practitioner could effectively frustrate the process and challenge a refusal to adjourn when that practitioner has deliberately failed to engage in the process.
- (7) However, where there is good reason not to proceed, the case should be adjourned. Where there is no such good reason, the case should proceed.
- (8) Ultimately, the discretion whether or not to proceed must be exercised having regard to all the circumstances of which the Tribunal is aware, taking account of the above features.

I would add that given the terms of paragraph 1(1B) of Schedule 4 to the Act, I approach the matter on the basis that the over-riding objective of fairness takes precedence over the over-arching objective.

23. As regards the effect of any serious procedural irregularity, the question arises whether the irregularity made any difference to the outcome. The position is that the respondent to the appeal must show that, absent the irregularity, the decision of the court below "would inevitably have been the same"; and that probability of the same outcome is not enough: see *Sanusi* §85 citing *R v Chief Constable of the Thames*

*Valley Police ex p Cotton* [1990] IRLR 344 and *R (Smith) v North Eastern Derbyshire Primary Care Trust* [2006] 1 WLR 3315 at 3321A.

***The Teewary case***

24. The approach to an appeal under paragraph 5A(5) of Schedule 4 in respect of a non-compliance referral has been recently considered by HH Judge Keyser QC in the *Teewary* case. In that case a woman made a complaint of harassment against Dr Teewary to the GMC. The GMC opened an investigation. Mr Teewary sent long and rambling emails to the GMC, claiming that the GMC was harassing him. The GMC was concerned at the tone, manner, structure and volume of these emails. A GMC medical examiner advised that the emails raised mental health concerns. As a result the GMC made a direction that Dr Teewary undergo a health assessment. (The direction was in terms similar to that made in the present case: see paragraph 35 below). Dr Teewary did not undertake the assessment and the GMC referred the non-compliance to the Tribunal under paragraph 5A(3). The Tribunal found non-compliance and that there was no good reason for it, and imposed a suspension order for 12 months. Dr Teewary appealed on a number of grounds, including the ground that the Tribunal ought to have found that there was good reason for his non-compliance, because the GMC had refused to send relevant papers to the medical examiners and the examination process was unfair.
25. At §56 of his judgment, Judge Keyser stated that a hearing may be rendered unfair if a party is denied the opportunity to present his case to the court or tribunal. The judge then turned to discuss the appeal.
26. The judge held, at §57, that the starting point for the Tribunal was that there was a valid direction and any challenge to the direction itself is to be made by judicial review; the Tribunal did not have jurisdiction to question the lawfulness of the direction, referring to paragraph A38 of the Guidance. He further held, at §58, that the Tribunal was not concerned with the merits of Ms V's complaint, but was dealing solely with the question of non-compliance with the direction, which was an independent and important obligation. He continued at §59 as follows:

*“59. I do not mean to suggest that it necessarily follows that the questions of the level of need for a health assessment and of the merits of Ms V's complaint were entirely irrelevant for the Tribunal. In theory, both questions could have been relevant to the consideration of what if any sanction ought to be imposed for non-compliance: for example, it could in theory have been the case that the evidence available to the Tribunal showed that the original grounds for believing that Dr Teewary might have mental health problems had all been shown to be baseless; a finding to that effect might possibly have been material to the Tribunal's decision as to how to deal with a nevertheless unjustified failure to undergo a health assessment. However, two points need to be emphasised. First, such questions could not have been relevant to findings as to non-compliance or as to justification for non-compliance. Second, and emphatically, on the facts*

*of this case such considerations do not arise.” (emphasis added)*

I address §59 of the judgment further in paragraph 141 below.

### **The Factual Background**

27. A central part of the background to this case is that the Appellant in the past had an intimate sexual relationship with a consultant doctor, to whom I refer as “the Doctor”. That relationship lasted some years. That relationship ended. The Doctor sought to deny ever having had that relationship, and as a result, the Appellant was suspected of having a delusional belief about its existence. There were historic medical reports. In the past, and more recently the Appellant has referred to herself by the Doctor’s name. The GMC maintains that she has repeatedly insisted that it refer to her by the Doctor’s surname because she is married to the Doctor. The Appellant is not legally married to the Doctor; he is married to another woman. The GMC considers that the tone and content of the Appellant’s correspondence with *it* is problematic, being extremely aggressive, accusatory, repetitive and conspiratorial, suggesting an unfounded belief that she is being persecuted. The GMC considers that her continued insistence that she is married to the Doctor and that her name is his name is a matter of obvious concern to the GMC about the state of her mental health.
28. The Appellant does not accept this. She maintains that her conduct is based on her cultural and religious beliefs about the sanctity of relationships. She maintains that, in accordance with Hindu custom, she was married to the Doctor at her home on 21 February 2014. In any event she has continued to practise as a doctor throughout the relevant period with no complaint about her fitness to do so. She contends that at no stage has it been suggested that she is anything other than a good and competent doctor.

### **Events between 2015 and August 2018**

29. In 2015, the Appellant’s employer, NHS Grampian, conducted an investigation into her conduct following allegations of bullying and harassment made by other employees (including the Doctor), which included the consideration of the intimate relationship between the Appellant and the Doctor.
30. On 2 July 2015, the Appellant self-referred to the GMC. In January 2016, the GMC confirmed that it would not be taking the matter further.
31. The Appellant’s health was assessed by clinicians on various occasions between 2015 and 2016 as part of her employer’s investigations and occupational health requirements, on the basis that it was alleged that she was delusional about the existence of the relationship with the Doctor. It was found that she was not suffering from any delusional order of any kind. For example, Dr Robertson, a consultant psychiatrist, concluded that the Appellant has no diagnosable mental disorder and that all of the symptoms could be explained in terms of cultural differences.
32. In August 2016 the Appellant was summarily dismissed by NHS Grampian for gross misconduct on grounds of bullying and harassment of colleagues. However, her employer’s solicitor confirmed that they had not reported her to the GMC. The

Appellant was subsequently prosecuted. On 7 March 2017 the Appellant was found not guilty before the Sheriff Court of a stalking-related charge concerning the Doctor.

33. Meanwhile in 2016 and 2017 the Appellant worked as a doctor at two hospitals until she received notice of the interim suspension order on 7 November 2018: see paragraph 38 below.
34. On 28 November 2017 the GMC issued the Appellant with a formal warning concerning the matters for which she was summarily dismissed by NHS Grampian. Subsequently the Appellant complained to the GMC that this was done without undertaking any separate investigation and without following any due process. On 22 March 2018, in an email addressed to the Appellant in the Doctor's name, the GMC confirmed to the Appellant that its investigation was now "closed". That investigation was closed *after* it was known that the Appellant had been dismissed by Grampian and that she had been acquitted of the criminal charges and at a time when it was known by the GMC that she had been using the Doctor's name.

### **28 August 2018: opening of an investigation and the First Direction**

35. On 28 August 2018, the GMC wrote to the Appellant in the following terms

*"Over recent months you have sent correspondence to us regarding your previous investigation, and raising concerns about members of staff at NHS Grampian.... We consider that the content and tone of this correspondence raise concerns about your health. We need to satisfy ourselves that your health is not affecting your ability to practice medicine safely. We will therefore be undertaking a review of your fitness to practice.*

...

*In the light of the information about your current health, one of our assistant registrars... has directed you to undertake a health assessment... "* (*emphasis added*)

This letter then attached a separate letter, also dated 28 August 2018, setting out formally the direction to undergo a health assessment ("the First Direction"). The direction states that the decision was "*based on information... which suggests your health may be affecting your fitness to practise due to*" certain identified mental disorders. The medical examiners would be asked to report on her health and to give an opinion on her fitness to practise. As explained by the GMC at the hearing on 11 January 2021, the background to the First Direction was that in July 2018 a medical case examiner had reviewed the emails which had been received and decided that the tone and content raised some concerns and so an investigation was opened inviting her to undergo a health assessment. In about five or six emails to the GMC, between 1 May 2018 and August 2018, the Appellant had insisted that the GMC should address her using the Doctor's surname. She complained that the GMC was harassing her, that she would make a complaint to the police and that she would sue the GMC for millions of pounds.

### **1 October 2018: Interim Suspension Order**

36. On 1 October 2018 the Interim Orders Tribunal made an interim suspension order under the provisions of section 41A of the Act. The suspension was for a period for 12 months, with a review after 6 months. This interim order was made in the context of the then current investigation into fitness to practise, described in the previous paragraph. It was made in the Appellant's absence.
37. On 29 and 30 October 2018, the Appellant emailed the GMC to demand health assessments of all GMC staff who had contacted her, for admission into evidence in proceedings she had brought against her former employer, NHS Grampian.
38. In a telephone call on 7 November 2018 the GMC reminded the Appellant that she had been directed to undergo a health assessment. On the same date the Appellant became aware of the interim suspension order and ceased work. On 21 November 2018 the GMC corresponded with the Appellant seeking her agreement to undergo the health assessment.
39. On 5 December 2018, the Appellant wrote to the investigation officer at the GMC asking a number of questions including the name of the person at the GMC who had decided about the alleged health issues, the date upon which the GMC had so decided and the name of the doctor who had been approached by the GMC and given advice that a health assessment should be advised. On 12 December 2018, the investigation officer indicated that its target response date would be the end of February 2019. No response was subsequently given.
40. As further explained by the GMC in opening at the hearing on 11 January 2021, the Appellant did not comply with the First Direction and the matter was referred for a non-compliance decision in December 2018, but on further review it was felt that there was not sufficient to refer the matter for non-compliance and further steps needed to be taken. As Mr Knight explained in oral argument by reference to an internal GMC note dated 10 January 2019, what happened was that the GMC took internal legal advice and decided not to refer the matter to the Tribunal, but to progress it by seeking comments from employers to see if there were concerns, and to obtain external medical advice from a specialist handler (of the type which was eventually sought from Professor Gilvarry). As matters turned out information was gathered from employers (including a substantial amount of feedback) and then advice was sought and taken from Professor Gilvarry in February 2020 (see paragraphs 49 and 50 below). The GMC has not disclosed why it was thought as at the end of 2018 it was not appropriate to make a reference to the Tribunal for non-compliance.
41. On 19 March 2019, at the six month review hearing, (conducted in the Appellant's absence) the Interim Orders Tribunal maintained the interim suspension order. By May or June 2019, and following the process decided upon in January 2019, the GMC had received comments from employers and feedback from patients.
42. On 30 August 2019 the GMC applied to the Court of Session to extend the period of the interim suspension order for a further 12 months.

**10 September 2019: Interim Conditions Order, instead**



43. On 10 September 2019 the Appellant, represented by her counsel, Mr Matovu, sought to set aside the interim suspension order. In the course of that hearing, Mr Matovu indicated that the Appellant agreed to an independent assessment. In the event the Interim Orders Tribunal varied the interim suspension order to one of interim conditional registration (“the interim conditions order”). This enabled the Appellant to resume working, subject to detailed reporting and notification provisions.
44. On 30 September 2019 the Court of Session made an order under section 41A(7) of the Act extending the period of the interim conditions orders until 30 September 2020.
45. On 10 October 2019, following the Appellant’s earlier indication, through counsel, to the Interim Orders Tribunal that she would be willing to undergo a health assessment, the GMC re-sent to the Appellant the health assessment agreement form. On 18 October 2019 the Appellant received the Court of Session’s order granting an extension of the interim conditions order. On 24 October 2019, the Appellant emailed the GMC, saying that forcing her to undergo a health assessment was unlawful harassment and contrary to a judgment given by the Court of Session on 30 September 2019.
46. On 11 November 2019, the Appellant commenced employment at the Royal Victoria Hospital in Birmingham. She worked there until 30 September 2020.
47. On 13 December 2019, following a hearing attended by Mr Matovu who contended that the order should be lifted, the Interim Orders Tribunal maintained the interim conditions order. The Appellant’s position was that she did not consider that the health assessment was warranted, but, if there had to be one, she would agree to an independent assessment.

### **February 2020: attempt to appeal to the Court of Session**

48. On 8 February 2020 the Appellant lodged a petition of appeal against the interim conditions order with the Court of Session. If successful, it would have revoked the order in its entirety. On 24 February 2020 the GMC emailed the Appellant to update her that it was seeking specialist advice in relation to its investigation, and reminding her of the option to undergo a health assessment. On 7 March 2020 the Court of Session returned the Appellant’s petition. There was confusion as to whether the Court of Session had jurisdiction. As a result, the Appellant changed her address of registration to an address in England so that her appeal could be lodged with the High Court.

### **Professor Gilvarry’s advice**

49. On 16 April 2020 the GMC received written confirmation of specialist advice from Professor Gilvarry on whether there was a basis for concern as to the Appellant’s health as a fitness to practise matter, and whether a health assessment was appropriate. That advice had been given in a telephone conference on 27 February 2020.
50. Professor Gilvarry was provided with the Appellant’s published LRMP record, and 17 emails from the Appellant to the GMC between 1 May 2018 and December 2019. She was asked, inter alia, whether “the documents” and case history raised concerns about

the Appellant's mental health and whether that could impact upon her fitness to practise and, in particular, whether it would "be reasonable/appropriate for the GMC to undertake a formal assessment of the doctor's health". Professor Gilvarry's advice was that the documents did raise concerns regarding the doctor's mental health. The record of the discussion with Professor Gilvarry continues as follows:

*"The correspondence suggests [the Appellant] is very irritable. The tone and content of her correspondence can be grandiose... The content of the correspondence is at times inappropriate, threatening and persecutory. There is... often grandiose and demanding behaviour.*

...

*Prof Gilvarry reiterated that the doctor's behaviour throughout her correspondence suggests irritability, and is persecutory, threatening and grandiose. This may form part of a psychotic illness. However it was also acknowledged that there may be occasions where her irritability in correspondence to the GMC may be acceptable.*

*Prof Gilvarry explained the correspondence suggests there could possibly be a delusional disorder present. It could be personality traits or possible personality disorder, with the doctor able to work without significant issues being noted by employers and then send inappropriate correspondence to the GMC. However, it is unlikely that she would be able to maintain this persona and not be noticed by people outside the GMC."*

*Prof Gilvarry confirmed that in her opinion following review of the bundle we do have a reasonable justification to investigate [the Appellant's] health as a fitness to practice concern and that in this case a health assessment is appropriate."*

*(emphasis added)*

51. On 10 May 2020 the Appellant attempted to submit her appeal against the interim conditions order to the High Court. On 12 May 2020 the GMC Assistant Registrar made a further direction for a health assessment. On 18 May 2020 the GMC enquired of the Appellant whether she was able to undertake a health assessment in the context of the pandemic. On 3 June 2020, at the next review, and in the Appellant's absence, the Interim Orders Tribunal maintained the interim conditions order.

### **3 July 2020: Interim Order Appeal to the High Court**

52. On 3 July 2020 the Appellant re-lodged with the High Court her appeal against the interim conditions order. The High Court accepted the appeal ("the Interim Order Appeal"). The GMC received notice of this appeal on 7 July 2020.
53. On 21 July 2020 the GMC filed its Grounds of Resistance in that appeal. The GMC sought to have the Interim Order Appeal and its own application for an extension of

the interim order heard at the same time. That application would address in greater detail the progress made in relation to the assessment of the Appellant's health. The GMC pointed to the need for the court to consider all the circumstances in the round. Further, the GMC agreed that the Appellant's employers had generally indicated that there was no material fitness practise concerns about her conduct towards patients and that that was relevant to any assessment of the Appellant's mental health. However that did not address the issue which particularly concerned the GMC, namely the repeated representation by the Appellant of her relationship with the Doctor. The GMC went on to argue that the medical assessments in 2015-2016 were of no assistance. They concerned different matters at different times. The GMC's concern was not that the Appellant was delusional about ever having had a relationship with the Doctor, but about her persistent assertion that she is married to him and that she has taken his name. The earlier reports of two doctors did not address her conduct in 2018-2019 as it post-dated these reports and as it "*occurs in the context of the gross misconduct dismissal and the [criminal prosecution]*" of which neither doctor was aware. The GMC was entitled to revisit the matter in the light of her dismissal for misconduct and the criminal charge. It was the Appellant's response which caused fresh and different concerns to justify the opening of the new investigation in August 2018. (Although I note that the previous investigation was closed *after* these events: see paragraph 34 above).

### **29 July 2020: The Second Direction**

54. On 29 July 2020 the GMC sent to the Appellant a further direction to undertake a health assessment ("the Second Direction"). It was in substantially the same terms as the First Direction. The GMC informed the Appellant in writing that it was resuming its investigations in the light of the state of the pandemic. Mr Matovu points out that the Second Direction was made only after the GMC had received notice of the Interim Order Appeal.
55. On 13 August 2020 the GMC applied to the High Court for a further extension of the interim conditions order, due to expire on 30 September 2020. On 13 August 2020, and again on 20 August 2020, the GMC sent to the Appellant a reminder to complete the health assessment agreement form and to comply with the direction.
56. Following a short hearing before Whipple J, on 25 September 2020 the High Court made an order, by consent, under section 41A(7), extending the period in which interim orders may be made until 30 September 2021. However that order recorded that this extension was made without prejudice to, and to maintain the status quo pending, the ongoing Interim Order Appeal. If that appeal was successful then both the existing interim conditions order and the extension would be revoked. The Appellant contends that this consent order was sufficient to maintain the status quo in any event.

### **21 October 2020: The referral to the Tribunal**

57. On 21 October 2020 the GMC referred the Appellant to the Tribunal for a non-compliance hearing for failure to undertake the health assessment directed by the Second Direction. In its letter, the GMC said "*we aim to hold the hearing within 3 months... we will write to tell you the provisional listing date for the hearing in due course*" (*emphasis added*).

58. On 19 November 2020 the MPTS, in a letter expressly addressed to the Appellant but sent only to Mr Matovu's email address, indicated that the hearing had been scheduled for 11 and 12 January 2021. The letter went on: "*If the hearing dates are not suitable, please inform us by 03/12/2020. If we have not heard from you by then, the hearing dates will be considered to be confirmed*". Mr Knight informed the Court on instructions that, although not addressed to it, the GMC received a copy of this letter. The letter only asked if the given dates were suitable; it did not ask for reasons or for alternative dates.

### **1 December 2020 to 7 January 2021: Applications for adjournment**

59. On 1 December 2020 the Appellant informed the MPTS that the proposed dates were not suitable. Further correspondence ensued. On 10 December 2020, an MPTS case manager, made a decision refusing to adjourn the hearing ("the First Adjournment Decision"). Events leading up to, and the contents of, the First Adjournment Decision are set out in more detail in paragraphs 66 to 75 below.
60. On 11 December 2020, and for the first time, the Tribunal gave formal notice of the hearing on 11 and 12 January 2021. On the same date the Interim Orders Tribunal maintained the interim conditions order, with varied conditions. On 18 December 2020 the parties were notified that the Interim Order Appeal would be heard by the High Court on 16 February 2021. The Appellant suggests that it had taken over a year for the Appellant to get a hearing before the Court, and points to the fact that, by contrast, the GMC could readily get hearings before the Court for extensions of the interim order and a hearing of its referral to the Tribunal within three months.
61. On 5 January 2021 the Tribunal informed the parties of the members of the Tribunal to hear the case. On 6 and 7 January 2021, Mr Matovu made representations seeking to adjourn the hearing due to commence on 11 January 2021. At 5pm on 7 January 2021, the parties were informed that the MPTS case manager had made a decision refusing the application to adjourn ("the Second Adjournment Decision"). Events leading up to, and the contents of, the Second Adjournment Decision are set out in more detail in paragraphs 76 to 82 below.

### **11 and 12 January 2021: The Non-Compliance hearing**

62. The non-compliance hearing commenced before the Tribunal on 11 January 2021. The Appellant did not attend but made a further application to postpone the hearing by two emails sent on that morning. The Tribunal made a further decision refusing that postponement ("the Third Adjournment Decision"). The Tribunal further determined to proceed in Appellant's absence. On 11 January 2021 the Tribunal considered the issue of non-compliance. On 12 January 2021 the Appellant attended in person. The Tribunal first announced the Non-Compliance Determination. It then heard argument from both parties on sanction and proceeded to make the Sanction Determination. The further course of the hearing and the contents of the Non-Compliance Determination and of the Sanction Determination are set out in more detail, respectively, in paragraphs 87 to 90 and 92 to 96 below.
63. In summary, the Tribunal determined that the Appellant had been non-compliant, that the appropriate sanction was suspension; and that the sanction should take effect immediately. At the same time, the Tribunal revoked the interim conditions order.

## **Events after 12 January 2021**

64. The GMC invited the Appellant to withdraw the Interim Order Appeal since the interim conditions order had now been revoked, and on 9 February 2021 the GMC applied to strike out the Interim Order Appeal for that reason. On 15 February 2021 the Appellant filed the present appeal. The Interim Order Appeal was listed to be heard on 16 February 2021. On that date, the matters came before Robin Knowles J. Given developments, it was agreed that the Interim Order Appeal should be dismissed. What was left was the present appeal, for the conduct of which the judge gave directions. The parties also discussed whether matters could be resolved without a hearing and, to that end, the order of Robin Knowles J dated 19 February 2021 set out, in its recitals, detailed provisions for a process by which it might be agreed for a health assessment to take place. It was hoped that these recitals would help the parties to move forward. In the event, and unfortunately, that has not happened. Each side suggests that it is the other side which has not responded constructively to the suggested process.

## **The Determinations**

65. In this section I set out, in some detail, both the relevant decisions and determinations of the Tribunal which are challenged in this appeal, and, in greater detail, the events leading up to each.

## **The First Adjournment Decision**

### ***Events leading up to the First Adjournment Decision***

66. Following the letter of 19 November 2020 (see paragraph 58 above), on 1 December 2020 at 1252pm Ms Jones of the GMC sent an email to Mr Matovu, copy to the Appellant, with attached letter of 1 December 2020 from GMC to Mr Matovu. The email stated the GMC understood that Mr Matovu was instructed by the Appellant. The letter itself appears to be addressed to Mr Matovu only. It stated: “*I now enclose the Details of Non-Compliance which will be considered by the tribunal at the hearing on 11-12 January 2021*”. It appears that, at that stage, Ms Jones considered that the hearing date had been fixed.
67. On the same date, the Appellant herself responded by email to Ms Jones’ email. The email was sent to Ms Jones at the GMC and to Mr Matovu. It was not sent to the Tribunal. However, the text of the email was addressed to the Tribunal. (The Appellant’s apparent confusion between the GMC and the Tribunal is perhaps not surprising, particularly given the terms of the initial referral). The Appellant stated (and repeated) “*there is no availability for the dates mentioned below*”. The “*dates mentioned below*” referred to the dates mentioned in Ms Jones’ 1 December letter.
68. By email dated 3 December 2020 at 1135am Ms Jones wrote to the Tribunal, copy to Mr Matovu, but not to the Appellant, (despite the direct email received from the Appellant). She pointed out that Mr Matovu had not responded at all to her email of 1 December. She referred to the Appellant’s email of 1 December which she interpreted as “*she could not do the dates*” and she had forwarded that to the Tribunal. She understood that Mr Matovu was acting in another matter concerning the Appellant. She pointed out that the letter of 19 November with proposed date of the

hearing had been sent to just Mr Matovu, but that they now knew that the Appellant was aware of the hearing, but it was not clear that she ever received the 19 November letter. She suggested fairly that the possible confusion arose out of the fact that Mr Matovu was instructed on a direct access basis.

69. On 4 December 2020 at 1126am the case management officer at the Tribunal responded to Ms Jones at the GMC, with copy to Mr Matovu *and* the Appellant. In that email, the Tribunal asked Mr Matovu to confirm that he was acting and referred him to the Appellant's email of 1 December saying that there was no availability for the dates mentioned. He then asked both the Appellant and Mr Matovu:

*“please can you provide your reasons why the hearing dates do not suit your availability. I will need this information to pass on to a Case Manager who will consider your request to move the hearing. When you provide your reasoning, please can you provide your availability for February 2021 to May 2021 in case we will need to re-schedule the hearing” (emphasis added)*

First, this suggests that in fact the Tribunal regarded the hearing as fixed. Secondly, it appears that the Tribunal was considering, as possible alternatives, a window of February to May 2021. (In the event Mr Matovu did subsequently provide dates within that period). From the Tribunal's perspective, it appears that there was no reason for particular hurry.

70. The Appellant responded to the Tribunal by email at 231pm on 4 December, pointing out that the Tribunal was very well aware that Mr Matovu was her legal representative and that was why the Tribunal had contacted him directly in November to intimate the hearing dates. She stated: “*Mr Matovu is not available as mentioned earlier in my correspondence*”. There was no reply from Mr Matovu and no alternative dates were provided.
71. Ms Jones at the GMC responded to the Tribunal at 441pm on 4 December, opposing the request for an adjournment. It pointed out that *Mr Matovu* had not responded to the letter of 19 November to say that that date was not suitable. (Whilst strictly accurate, this does not tell the full picture, since the 19 November letter had been addressed to the Appellant and the Appellant had responded more than once). Neither Mr Matovu nor the Appellant had provided any reason why Mr Matovu was not available or provided any alternative dates as requested by the Tribunal. She continued: “*Dr. Jogula Ramaswamy has a history of not complying with and failing to engage with the GMC process, to say the dates are “not available” seems designed to frustrate the process*”.
72. On 7 December by email at 1157am the Tribunal then informed the parties that “the postponement request” would be forwarded to a case manager.

### ***The First Adjournment Decision***

73. By the First Adjournment Decision dated 10 December 2020, the MPTS case manager refused to postpone the non-compliance hearing. The decision recorded that the hearing was due to commence on 11 January 2021. In paragraph 4, the case

manager recorded that the Appellant had requested a postponement on the basis that Mr Matovu was unavailable to attend the hearing. At paragraph 5, the case manager recorded the GMC's submission that Mr Matovu had been informed of the proposed hearing dates and that "no response had been received". On a strict reading, this refers to the absence of response *from Mr Matovu*. At paragraph 6, the case manager recognised that no formal notice of the hearing had been served, and so there was no formal application for a postponement. Instead this was an administrative decision.

74. At paragraphs 8 to 12, the case manager then set out her reasons for refusing the postponement. She found that very little information had been provided by the Appellant. She considered that there were other reasonable alternatives open to the Appellant to participate in the proceedings. The Appellant would have ample time to explore those avenues: namely obtaining alternative legal representation; representing herself at the hearing; or providing written submissions to the Tribunal. She stated that no information had been provided by the Appellant as to whether these options had been considered. At paragraph 10 she stated that "*the availability of legal representation is not a primary consideration when deciding whether a hearing ought to proceed*". The Appellant did not have an unfettered right to be represented by her current counsel. "*The public interest in Tribunal hearings proceeding in a timely manner will not be served if hearings can only take place when representatives are available*". She added that the preparation time and complexity of the issues were unlikely to be extensive.
75. At paragraph 11, she stated that no indication had been given as to when the Appellant's representative might be available for a hearing and an indefinite postponement of the matter could not be in the interests of justice. At paragraph 12, she concluded by pointing out that the Appellant could make a further postponement application and that the Appellant was strongly encouraged to consider the issues she had raised (namely the three alternatives) and to ensure that any further application was supported by detailed information in relation to those issues.

## **The Second Adjournment Decision**

### ***The events leading up to the Second Adjournment Decision***

76. By email on 6 January 2021 to the Tribunal, Mr Matovu requested the hearing to be adjourned to a date when he would be available, pointing out that he had an 8-day hearing commencing on 11 January 2021. At that time, he did not offer alternative dates of availability. By a further email on 6 January 2021 at 1242pm, Mr Matovu made further and more detailed representations regarding the postponement request. He referred to the long history of proceedings between the GMC and the Appellant and to the High Court hearing due to take place on 16 February 2021. He pointed out that he had been representing the Appellant throughout in all of her hearings. The GMC had been notified at the beginning of December of his non-availability for 11 January 2021. He complained that the GMC appeared to be controlling when hearings should take place at their own convenience and that that was unfair to the Appellant. He complained that the GMC was handling the Appellant in a manner which amounted to bullying and harassment. It would be oppressive to insist that the Appellant should have to deal with the non-compliance hearing without her chosen legal representative, pointing out that it would be necessary to take the panel through the entire history of the matter. Finally he pointed out that there would be no prejudice

to the GMC in postponing the non-compliance hearing until after the High Court appeal had been heard.

77. Later that afternoon at 452pm, the GMC responded to Mr Matovu's submissions, relying on the reasoning in the First Adjournment Decision. They pointed out that no specific details of Mr Matovu's availability had been given, and no convincing reasons had been given as to why alternative representation could not be arranged. The non-compliance matter was distinct from the Interim Order Appeal and was not complex. Mr Matovu responded further at 550pm contending that the non-compliance proceedings were related to the interim order proceedings. The matter was not straightforward such that another advocate could easily be obtained to take over the case. He reiterated that the GMC had not indicated any prejudice. He concluded by indicating that, if asked to provide dates, his clerk could provide them so the matter could be relisted as soon as practicable. However in any event the Interim Order Appeal should be heard first.
78. At 930am on 7 January 2021 the Tribunal indicated that Mr Matovu's last email of the previous evening would be passed on to a case manager who would consider it when making a decision. (No indication was given as to *when* the case manager would be considering that decision, although given the imminence of the hearing on the following Monday, it would be likely to be within the next day). Then at 125pm on 7 January 2021 Mr Matovu provided the Tribunal with alternative dates of his availability following the High Court hearing. He gave a substantial number of dates of availability in the period between 18 February and the end of May 2021.

### ***The Second Adjournment Decision***

79. By the Second Adjournment Decision made on 7 January 2021 by the same case manager, it was recorded that Mr Matovu had requested "*a postponement ... for an unspecified period on the basis of his availability*". He had explained that he had another professional commitment on 11 January 2021 and that it would be unfair for the hearing to proceed.
80. At paragraphs 6 to 8 she summarised the parties' submissions as made in the email exchanges on 6 and 7 January above. However she made no reference to Mr Matovu's dates of availability set out in his email at 125pm.
81. In her reasons (at paragraphs 11 to 18) the case manager recorded that the Appellant had been aware of the hearing date since 19 November and that the Appellant had first indicated on 1 December that "*there is no availability for the dates mentioned below*" and that that had been considered as part of the First Adjournment Decision. She went on to say that no information had been provided about whether any of the alternatives pointed out in the first decision had been considered. She repeated her view that there was not an unfettered right to representation by her current representative. It had been incumbent upon the Appellant to look into the alternatives. Importantly, she continued at paragraph 16:

*"It is also unclear from the information provided as to when [Mr Matovu] is available to attend a hearing and also when the High Court litigation is anticipated to be concluded. There is risk, therefore, that any postponement granted would be open-*



*ended in nature. ... this would not be in the public interest nor in the interests of justice and would undermine the regulatory process.”* (emphasis added)

Thus, on the face of the decision, no account was taken of the dates of availability provided at 125pm on 7 January.

82. The case manager concluded, at paragraph 17, that the public interest in proceeding with the hearing as scheduled “*must be the prevailing consideration*”. By the time of the hearing the Appellant would have sufficient time to adequately instruct an alternative representative. The matters were not sufficiently complex as to mean that an alternative representative could not sufficiently represent her. Finally, at paragraph 18, she stated that she was not persuaded that a postponement was “*proportionate in the circumstances*”. She repeated that the Appellant could make an adjournment application at the start of the hearing itself, but that, if she did so, she should ensure that any application was supported by evidence in relation to the issues of alternatives.

### **The Third Adjournment Decision**

#### ***Events leading up to the Third Adjournment Decision***

83. In an email dated 11 January 2021 at 839am to the GMC, placed before Tribunal, the Appellant referred to Hindu religious rituals and said that she had already pointed out that she and Mr Matovu were not available on 11 and 12 January. In a further email at 901am to the Tribunal and the GMC, she pointed that Mr Matovu had provided his dates of availability *until* the month of May. She relied on what Mr Matovu had said in his emails of 6 and 7 January. She asked for the hearing to be adjourned until a date when Mr Matovu was available, because the case was very complex with a history going back to 2014.
84. At the outset of the hearing itself, the Chair addressed this further application for an adjournment. After hearing from the GMC, the Chair summarised her understanding of the history of the application, referring to the Appellant’s email at 901am. Significantly, the Chair stated as follows:

*“It is also the case that Mr Matovu has set out his unavailability which seems to go on until May.”*  
(emphasis added)

The Tribunal then retired and returned with its decision to refuse the adjournment (i.e. the Third Adjournment Decision).

#### ***The Third Adjournment Decision***

85. By the Third Adjournment Decision, the Tribunal referred to the email sent by the Appellant at 839am that morning. At paragraph 3 it recorded the GMC’s submission that the Appellant had not advanced any new reasons to support this third application
86. At paragraphs 4 to 13, the Tribunal had borne in mind “*the statutory over-arching objective*” (as set out in paragraph 5 above). It had given careful consideration “*to the*

*emails from the Appellant and from Mr Matovu, relating to postponing today's hearing". The Decision continued:*

- “8. *The Tribunal decided that it was fair, reasonable and the interests of the public to continue with today's hearing. The Tribunal was of the view that Dr. Jogula Ramaswamy had not provided sufficient reasons or justification for this Tribunal to adjourn these proceedings at this time. Dr. Jogula Ramaswamy had not satisfy this tribunal that it would be unfair to proceed. They suggested that Dr. Jogula Ramaswamy had ample opportunity to provide this Tribunal with written submissions, arrange for alternatively representation or to make suitable arrangements to attend the hearing in person*”
9. *The Tribunal supported the opinion of [GMC counsel] that Dr. Jogula Ramaswamy had not provided them with any new information to support the application for adjournment.*”

*(emphasis added)*

At paragraph 10, the Tribunal pointed out that the High Court hearing in relation to the interim order was a separate issue to the issue of non-compliance. At paragraph 13, the Tribunal concluded:

*“... Taking all circumstances and submissions into account it would not be appropriate or proportionate to allow adjournment of these proceedings at this stage and accordingly refused Dr. Jogula Ramaswamy's application for an adjournment”*

*(emphasis added)*

## **The Non-Compliance Determination**

### ***Events leading up to the Non-Compliance Determination***

#### *Day 1 of the hearing on 11 January 2021*

87. At the hearing on 11 January 2021, the GMC made its opening, setting out the chronology of events and concluded by submitting that “*reasonable requests were made for legitimate reasons for the doctor to undergo a health assessment and she has simply not complied, so that is the background to the matter, Madam.*”. The GMC made reference to the Guidance, including brief reference to paragraphs A24 and A46, submitting in relation to A46 that “*there doesn't seem to be very much that is advanced by the doctor at all so in our submission... both limbs are found proved.*”

#### *Day 2 of the hearing on 12 January 2021*

88. The non-compliance hearing continued on 12 January 2021. At the outset the Chair explained to the Appellant (by now present) that the non-compliance part of the process was concluded, that the Tribunal would hand down its decision on that aspect first and then the Appellant could make submissions on sanction only. The Tribunal then announced the Non-Compliance Determination.

### ***The Non-Compliance Determination***

89. The Non-Compliance Determination runs to 32 paragraphs. The Tribunal set out the background, the evidence and the submissions, including relevant provisions of the Guidance, including paragraphs A24 and A46. At paragraph 20 it set out the sequence of events as described above between May and August 2020 referring to each of the instances when the Appellant had been directed to undertake a health assessment. Then, at paragraphs 21 to 23, the Tribunal set out its conclusions in relation to whether the Appellant had failed to comply with the direction:

*“21. The Tribunal first considered whether Dr Jogula Ramaswamy had failed to comply with the request to complete a health assessment. The Tribunal had specific regard to paragraph A18 of the Guidance as set out above.*

*22. The Tribunal noted that Dr Jogula Ramaswamy has engaged with the GMC’s investigation intermittently but has not engaged with the directed health assessment.*

*23. The Tribunal has taken account of the numerous attempts on the part of the GMC to contact Dr Jogula Ramaswamy regarding the direction that she undergoes a health assessment. The Tribunal determined that Dr Jogula Ramaswamy had not yet undertaken a Health Assessment and thus had failed to comply with the direction.”*

90. At paragraphs 24 to 32, the Tribunal set out this conclusions on whether there was a “good reason” for the failure to comply with the direction stating:

*“24. The Tribunal considered whether there was evidence before it to suggest that Dr Jogula Ramaswamy’s failure to comply was unavoidable or otherwise excusable.”*

Then at paragraphs 25 to 27 the Tribunal repeated, largely verbatim, Professor Gilvarry’s views as set out in paragraph 50 above. However, as regards the penultimate paragraph there quoted and highlighted, at paragraph 27 the Tribunal repeated the first two sentences, but, significantly, it omitted the third sentence (underlined in paragraph 50 above). The Tribunal then continued, at paragraphs 28 to 32, as follows:

*“28. Professor Gilvarry recommended any future correspondence between the GMC and Dr Jogula Ramaswamy should be with her legal representative who can provide her with advice and support.*

29. *The Tribunal noted that it is not Dr Jogula Ramaswamy's conduct with NHS Grampian that has formed the basis for the request for a Health Assessment but the tone and content of her communications with the GMC. It took into account the report of Prof Gilvarry and its conclusions about Dr Jogula Ramaswamy's possible health conditions. While the Tribunal noted that Dr Jogula Ramaswamy had advised that she had her own evidence to oppose the views of the GMC, she had not provided copies of this to this Tribunal and it appeared that this dated back several years and predated the decisions of the Assistant Registrar.*
30. *The Tribunal noted Dr Jogula Ramaswamy has not provided a cogent reason as to why she can't comply with the direction from her regulator and considered whether she would comply at any point in the future.*
31. *The Tribunal determined that it was a reasonable request from the GMC for Dr Jogula Ramaswamy to undertake a Health Assessment and that, without this, the GMC investigation is unable to proceed.*
32. *The Tribunal has determined that from the evidence before it, Dr Jogula Ramaswamy has not provided a reasonable excuse for her failure to comply."*

*(emphasis added)*

### ***The Decision on further evidence***

91. As regards the admission of further evidence, in a further decision on 12 January 2021, the Tribunal stated that on 12 January, after it had announced its decision on non-compliance, the Appellant had applied to admit further evidence. In that decision the Tribunal confirmed that it had read the additional evidence and would accept it and that it had not dissuaded them from "their decision on non-compliance".

### **The Sanction Determination**

#### ***Events leading up to the Sanction Determination - Day 2 of the hearing***

92. After announcing the Non-Compliance Determination, the Tribunal then proceeded to consider sanction. The Appellant then raised again the question of adjournment, pointing out expressly that Mr Matovu had given his dates of availability between February and May and suggesting that they had not been passed on to the Chair. The Chair responded that, as the Appellant would see when she received a copy of the Third Adjournment Decision itself, the points she was now raising about Mr Matovu's availability had been taken into account. The Chair stated that the decision not to adjourn had been made yesterday and it was too late to go over that decision. (In fact, as pointed out at paragraphs 121 and 122 below, there is no reference in the

Third Adjournment Decision to Mr Matovu’s dates of availability; and in any event they were misunderstood.)

### ***The Sanction Determination***

93. The Sanction Determination runs to 27 paragraphs. The Tribunal first recorded that it accepted the Appellant’s application to adduce further documentation in advance of the sanction stage, for reasons given in Annex C (as above). The Determination then went on to record the evidence and the submissions including relevant references to the Guidance. At paragraphs 10 to 12, the Tribunal recorded the Appellant’s arguments that Professor Gilvarry’s report was not appraised with a full background of the case and that the Appellant had undertaken six previous health assessments with no concerns being raised about her well-being and mental health, and that she had worked at various trusts and none had highlighted any concern in her performance and she had received nothing but good feedback.
94. At paragraph 13, the Tribunal recorded that the Appellant ultimately conceded that she would agree to undertake a GMC Health Assessment. At paragraph 14 and 15 the Tribunal set out its approach as to the appropriate sanction. At paragraph 16 and 17 it recorded that this was a matter for its own judgment and that, throughout its deliberations, it considered the three over-arching objectives.
95. The Tribunal then considered in turn each of the options available to it, including no action, the imposition of conditions or an order for suspension. It rejected the first two options. As regards conditions, the Tribunal stated:

*“20. The Tribunal were concerned about Dr Jogula Ramaswamy willingness to comply with any further conditions. It noted that she had been first directed to undergo a Health Assessment in August 2018 and this was repeated in July 2020 but that Dr Jogula Ramaswamy had not yet complied. The Tribunal considers that this suggests a good lack of insight and a clear disregard towards her regulator which undermines public confidence in the profession. The Tribunal had borne in mind Dr Jogula Ramaswamy had agreed to undergo a previous direction for a Health Assessment in September 2019 but had then changed her mind shortly after. In the circumstances did not consider that conditions would be workable or appropriate.*

*21. The Tribunal acknowledged there appeared to be no issues with Dr Jogula Ramaswamy’s performance at work. It accepted that there may be cultural and emotional issues which have impacted Dr Jogula Ramaswamy’s decision-making, but nevertheless the Tribunal remind the doctor of her professional obligation to comply with a direction from her regulator.”*

*(emphasis added)*

96. The Tribunal concluded that the appropriate sanction was suspension for nine months. After setting out paragraphs C23 and C24 of the Guidance, the Tribunal continued as follows:

- “23. The Tribunal also noted that this matter has been ongoing since 2018 and Dr Jogula Ramaswamy has had numerous reminders that she has not acted upon.*
- 24. For the reasons set out above the Tribunal determined that the only appropriate and proportionate sanction in this case is one of suspension.*
- 25. The Tribunal determined that a period of 9 months suspension was appropriate. Given Dr Jogula Ramaswamy’s selective compliance with her regulator, the Tribunal determined that this would be sufficient to allow her to agree to and undertake a GMC Health Assessment if she was willing to do so.*
- 26. In coming to this decision, the Tribunal balanced the interests of the public and the interest of the doctor. It bore in mind if the doctor were to agree to and undertake a GMC Health Assessment as directed she would be able to apply for a early review of this order.”*

Paragraph 27 then went on to provide that the Tribunal would review the case at a hearing to be held before the end of the period of suspension.

### ***The immediate sanction determination***

97. In a further determination the Tribunal decided that the suspension should take immediate effect. Since no point now arises in this appeal in respect of that determination, I do not set it out in detail. Significantly, at the end of that determination, the Tribunal indicated that the interim conditions order was to be revoked.

### **The Grounds of Appeal**

98. In her Grounds of Appeal, the Appellant raised matters under four heads: procedural unfairness; abuse of process on the part of the GMC; the Non-Compliance Decision was wrong; and the Sanction Determination was unjust and disproportionate. In written and oral argument before the Court, the allegation of abuse of process was not put forward as a distinct ground (but rather as part of the argument on Ground 1). Thus the Appellant’s case was put on the following three grounds:
- (1) The three decisions refusing to adjourn the non-compliance hearing were procedurally unfair. (The unfair refusal to adjourn was compounded by the unreasonable refusal to accept additional information from the Appellant which she wished to place before the Tribunal).

- (2) The Tribunal's determination of non-compliance was wrong and seriously flawed.
- (3) The Tribunal's determination on sanction was unnecessary, excessive and disproportionate.

### **Ground 1- procedural unfairness**

#### **The Parties' submissions**

99. *The Appellant submits* that it was procedurally unfair to refuse to adjourn the non-compliance hearing to allow the Appellant to be legally represented by the same counsel as had been representing her since September 2019 at what, for her, was a critically important hearing. The Tribunal's suggested alternatives of her finding different legal representation or acting in person were unreasonable, given the long history to the matter and the importance of the case. The GMC pressing for a quick hearing had the effect of derailing the Interim Order Appeal before the High Court. The interim conditions order provided adequate protection for the public in the meantime. There was no need for the hearing to take place within 3 months, unless the GMC's ulterior motive was to get it listed before the Interim Order Appeal. The GMC had not been acting with any urgency in relation to the Appellant's non-compliance.
100. As to the First Adjournment Decision, the Tribunal misinterpreted the position: the hearing had not been fixed by that time and the Appellant had not made any request to postpone any such fixed hearing. The Tribunal should not have treated it as a formal application to adjourn. It was clear that Mr Matovu was the Appellant's counsel and that he was not available on 11 and 12 January. The Appellant had responded in time, and to the question she was asked. At that point another date should have been found.
101. As to the Second Adjournment Decision, by that time Mr Matovu had provided his dates of availability and the Decision did not take them into account. The Decision was wrong to conclude that the public interest in proceeding was the primary consideration. The Tribunal did not consider the likely length of any adjournment. The case is complex and the need for representation by the same counsel was not taken into account.
102. As to the Third Adjournment Decision, the Tribunal failed to have regard to the overriding objective of fairness. Again, there was no reference to Mr Matovu's dates of availability; in fact the Chair misunderstood what Mr Matovu had said about his availability. A decision without proper consideration of dates of availability could not be proportionate. Further the Tribunal did not address the question of prejudice. There was potentially great prejudice to the Appellant in proceeding without Mr Matovu, given that her livelihood was at stake. There was no prejudice to the GMC from a short adjournment. The Interim Order Appeal should have been heard first. If the High Court had removed the conditions in the interim order it would, or might, have affected the Tribunal's consideration of the non-compliance issue.
103. Further the unfair refusal to adjourn the hearing was compounded by the Tribunal's unreasonable refusal to accept evidence from the Appellant.

104. Finally, if the matter had been adjourned to a date suitable to the Appellant's counsel and if all relevant documentation had been considered, it is likely that the outcome would have been very different.
105. *The GMC submits* that in refusing the adjournment, there was no procedural irregularity, and in any event, none which was "serious" within CPR 52.21(3)(b).
106. Following the First Adjournment Decision, the Appellant was repeatedly told what steps she should take. Despite being aware of the listing since 19 November 2020, she never engaged with the alternatives. As regards the Interim Order Appeal, the non-compliance reference was entirely separate. Its outcome could not have affected the outcome of the non-compliance reference. There is no evidence that the GMC had an ulterior motive in referring the non-compliance to the Tribunal or in seeking its listing in order to avoid the outcome of the Interim Order Appeal. The issue of non-compliance was not complex.
107. As regards the First Adjournment Decision, what mattered was that the Appellant and Mr Matovu had been told of the date in November. Mr Matovu did not himself respond. There was no response until 1 December and the Appellant's emails of 1 and 4 December were clearly uncooperative. She did not engage constructively. The Decision was reasonable. In any event it was not a definitive refusal. The alternatives put forward were reasonable.
108. As regards the Second Adjournment Decision, the Appellant did nothing further until 6 January. In none of his three emails on that date, did Mr Matovu give dates of availability. They were not provided until 125pm on 7 January, by which time they had been informed that the matter was going to be referred to the case manager for decision. If those dates were not before the case manager when she made the Decision that was the Appellant's responsibility. Thus not addressing dates of availability was not sufficient to amount to a serious procedural irregularity.
109. As regards the Third Adjournment Decision, the GMC accepts that it does not address all the points. It was a summary, in the context of the two previous decisions. The Tribunal emphasises that this application had been made at a very late stage, and, in those circumstances, it was not an unreasonable decision. Having asked itself the right question, the Tribunal was entitled to conclude that it was not unfair to proceed. The position might have been different had the Appellant set out her position back in late November. As to Mr Matovu's dates of availability, Mr Knight submitted that, although the Tribunal was aware of those dates, by not referring to them in the Third Adjournment Decision, the Tribunal had accorded them no particular weight, and that at that stage it was appropriate for it not to have done so.
110. The additional documents had been admitted into evidence on the second day and the Tribunal had made it clear, when doing so, that they would have made no difference to the issue of non-compliance.
111. Finally and in any event, even if there was serious procedural irregularity, the appeal on the substance is so poor that it is inevitable that the outcome would have been the same, even if there had been an adjournment.

## **Discussion**



112. The question here is whether the two substantive determinations (the Non-Compliance Determination and the Sanction Determination) were “unjust because of a serious procedural or other irregularity in the proceedings in the [Tribunal]”. On the facts of this case that involves two questions:

- (1) Was the refusal (in the three adjournment decisions) of the Tribunal to adjourn the hearing on 11 and 12 January a serious procedural irregularity?
- (2) If so, were the substantive determinations “unjust” as a result of that irregularity?

In my judgment, in this case question (2) is determined by reference to the question of whether, had the hearing been adjourned, the substantive outcome would inevitably have been the same (see paragraph 23 above).

*(1) Serious procedural irregularity*

113. I address each of the three adjournment decisions in turn.

*The First Adjournment Decision*

114. The Appellant has raised legitimate concerns about the circumstances leading up to the First Adjournment Decision. First, as at the date of that decision, 10 December 2020, the date of the hearing had not been formally fixed. The Appellant had replied, in the terms requested and within the time allotted in the 19 November 2020 letter, to say that the hearing dates were not suitable. Yet the Tribunal proceeded to treat her correspondence as a formal application to postpone the hearing and to proceed to a formal decision. No attempt to resolve the matter more informally was made. Secondly, the language used by the GMC in its initial letter of 21 October 2020 (in particular the use of “we”) was unfortunate and apt to give the Appellant the impression that the fixing of the hearing date was within the GMC’s power.

115. On the other hand, the Appellant’s responses were minimal and did not proactively cooperate with a view to finding dates which were suitable. It is correct, strictly, that Mr Matovu himself did not directly respond. Moreover at that point in time, the hearing was still over a month away. Neither the Appellant nor Mr Matovu responded to the Tribunal’s request in its email of 4 December to put forward alternative dates of availability. The Appellant in her email merely repeated that Mr Matovu was not available on the proposed dates. There was no reply from Mr Matovu. Further, the First Adjournment Decision was not a definitive refusal of an adjournment. Paragraph 12 makes it clear that it remained open to the Appellant to make a further application, and pointed to matters which she should address, if she did so. These considerations outweigh the Appellant’s concerns and lead me to conclude that the First Adjournment Decision (and the events leading up to it) did not amount a serious procedural irregularity.

*The Second Adjournment Decision*

116. By the time of the Second Adjournment Decision, the position was somewhat different. Mr Matovu had put forward detailed reasons why fairness required the Appellant to be represented by him at the hearing, in his emails of 6 January; and at

125pm on the next day, had sent to the MPTS the dates of his *availability* in each of the months of February to May 2021.

117. The Decision itself is open to a number of legitimate criticisms. First, the statement at paragraph 14 that the case manager had been provided with no information as to why the alternative options had been “discounted” is both incorrect and strange. It is incorrect because Mr Matovu had explained in detail why it was imperative for him to represent the Appellant; it is strange because earlier in the Decision, at paragraph 8, the case manager appears to summarise what Mr Matovu had said. The statement suggests that the case manager had not fully taken those representations into account. Secondly, the statement at paragraph 17 that the public interest in proceeding as scheduled “must be the prevailing consideration” is a misdirection in law. The over-riding consideration is fairness to both parties, with fairness to the Appellant being the prime consideration (see paragraph 22 above). Thirdly, as the hearing before this Court has demonstrated, the case manager underestimated the complexity of the issues arising. I do not accept that it was fair to suggest that the Appellant might instruct alternative legal representation. Fourthly, the case manager took no account of the relative prejudice to the parties of the decision whether to adjourn or not. In my judgment, the factual complexity of the case and the consequences of the order sought being made were such that the ability of the Appellant to be represented by her counsel of choice who had been acting for her throughout was a consideration of great weight, and was not adequately taken into account.
118. Nevertheless, the key issue here is the question of alternative dates of availability. Mr Matovu had provided those dates at 125pm. Yet at paragraph 16 of the Decision, the case manager states that it was unclear when Mr Matovu was available to attend a hearing. This is a further oddity. Either the case manager was actually aware of those dates when taking the decision or she had taken the decision in ignorance of that information. If the former was the position, then, on that basis alone, the Second Adjournment Decision amounted to a serious procedural irregularity. However, there is no evidence to suggest that the dates of availability had been passed on to her within the MPTS. I therefore find that when she made her decision she had no such information on the dates of availability. On the one hand, it might be said that the responsibility for the failure to pass on the information should lie with the Tribunal, and that the “Tribunal” wrongly failed to take it into account. On the other hand, the information was provided by Mr Matovu very late in the day, despite earlier requests, and having been informed hours before that the application had been passed on to the case manager for decision.
119. Whilst the matters set out in the paragraph 117 above are serious concerns about the “regularity” of the decision to adjourn, I conclude that, on the assumption that the case manager was not aware of Mr Matovu’s dates of availability and therefore proceeded on the basis that no such dates had been put forward, the Second Adjournment Decision did not amount to a *serious* procedural irregularity.

### *The Third Adjournment Decision*

120. The Third Adjournment Decision is open to the same legitimate criticisms as set out in paragraph 117 above. First, at paragraph 6, emphasis is placed on the “over-arching objective”, yet no reference is made to the “over-riding objective” of fairness to both parties, with fairness to the Appellant being the prime consideration.

Secondly, in so far as the Tribunal relied upon the two previous decisions and in particular the Second Adjournment Decision, (at paragraph 7), for the reasons given above, that latter decision was itself open to substantial criticism. Thirdly, again the Tribunal did not expressly consider the relative prejudice to the parties of the decision whether to adjourn or not. As the GMC had stated in earlier correspondence, it was positively seeking an order of suspension, which if granted would mean that the Appellant would lose her livelihood. The consequences for the Appellant were very serious, and in my judgment warranted counsel of her own choice.

121. Against this background, I turn to the key issue of dates of availability. By the time of the Third Adjournment Decision (on the morning of Monday 11 January 2021), Mr Matovu's dates of availability were known to the Tribunal (or at the least must be taken to have been known). In my judgment, having been with the Tribunal since the previous Thursday lunchtime, there is no reason why those dates were not, or could not have been, taken into account by the Tribunal itself on the morning of 11 January. There is no reference in the Third Adjournment Decision to the dates of availability. If, as I have assumed in paragraph 118 above, the case manager was not aware of those dates when taking the Second Adjournment Decision, the statement at paragraph 9 of the Third Adjournment Decision that the Appellant "had not provided them with new information" was incorrect. In this way, in refusing the adjournment, the Tribunal failed to take into account a highly material consideration.
122. In fact, from the transcript, it is clear the Tribunal *was* aware that Mr Matovu had provided the relevant information as to his dates of availability, but had misinterpreted that information, and had understood Mr Matovu to have said that he was unavailable at any time until after May (see paragraph 84 above). In fact Mr Matovu was available on multiple dates between February and May. I do not accept Mr Knight's submission that the reference to "unavailability" necessarily implies knowledge of the flip side i.e. of availability. In any event, it was not the case that he was available only "after" May.
123. Neither the Appellant nor Mr Matovu provided alternative dates of availability until 7 January 2021, despite having been first asked in December. No clear explanation of this has been provided. That indicates a less than cooperative attitude on the Appellant's part. However, given that the dates were clearly provided and known by the time of the Third Adjournment Decision, at the latest, I accept the submission that there is no evidence that it was the late hour of their provision which led to the Tribunal's decision. The Tribunal did not say (as it could have done) that it had received the dates of availability, but that they had been received too late to allow the date to be adjourned and that the hearing could not be accommodated within a reasonably short period of time.
124. As to the statement at paragraph 10 that the Interim Order Appeal was separate to the issue of non-compliance, that was an over-simplification. I accept Mr Matovu's submission here that there was overlap between the underlying factual issues (as demonstrated by the terms of the GMC's Grounds of Resistance in the former proceedings). Both arose out of one and the same investigation into the same fitness to practise concern. The outcome of the Interim Order Appeal might have had some bearing upon the outcome before the Tribunal. (The Interim Orders Tribunal had lifted the suspension order, yet that was what the GMC was seeking to have re-imposed by the non-compliance proceedings. Whilst such an order might serve a

different purpose, the *effect* of any order for suspension imposed in the non-compliance proceedings would be to re-impose an order to the same effect as the one which the Interim Orders Tribunal had removed, and in respect of one and the same investigation and concern). In any event, the GMC had, and has, advanced no reason why the non-compliance issue had to be heard as a matter of urgency, or within 3 months as suggested. The First Direction had been given over two years earlier and Professor Gilvarry's opinion obtained almost a year earlier. If, as Mr Knight submitted, the Interim Order Appeal had no bearing upon the non-compliance issue, hearing the latter after the former would have made no difference.

125. In my judgment, the failure to take account of dates of availability coupled with the plain error of fact as to that availability, amount to a serious error. When taken together with the further criticisms set out in paragraphs 117 and 120 above, I conclude that Appellant had put forward "good reason" for the adjournment (see *Adeogba* at §19) and that the Third Adjournment Decision amounted to a serious procedural irregularity. The unfairness arising from that irregularity was compounded by the subsequent refusal to admit the documents and information specifically in relation to the issue of non-compliance.

(2) *Were the substantive determinations "unjust"?*

126. Having found that the Third Adjournment Decision was a serious procedural irregularity, the further question on Ground 1 is whether the substantive Determinations were, as a result of that irregularity, unjust. That question is answered by considering, whether, if the hearing had been adjourned, and Mr Matovu had represented the Appellant at the adjourned hearing, and had placed before the Tribunal the additional documentation which the Appellant wished to place before it, the outcome would "inevitably have been the same" (per *Sanusi* §85, paragraph 23 above). In relation to the Non-Compliance Determination, the question therefore is whether the Appellant's case put forward to this Court under Ground 2 below would inevitably have failed before the Tribunal.
127. For the reasons which I set out in my consideration of Ground 2 below, I have concluded that the GMC has not shown that, absent the serious procedural irregularity, the Non-Compliance Determination (and thus the Sanction Determination) "would inevitably have been the same": see paragraph 154 below. In those circumstances, I conclude that the Non-Compliance Determination and the Sanction Determination were both unjust because of a serious procedural irregularity. I therefore conclude that Ground 1 is established.

**Ground 2 – Non-Compliance Determination**

**The Parties' submissions**

128. *The Appellant submits* that there were a number of matters not properly considered by the Tribunal and the finding of non-compliance was seriously flawed. In summary, first, the Non-Compliance Direction was not properly reasoned, in view of its central reliance upon Professor Gilvarry's evidence; secondly the Appellant had, and has, a defence of good reason under paragraph A24e of the Guidance; the failure to comply does not create a risk to public protection because the GMC can still investigate the relevant concern.

129. As to Professor Gilvarry, first, her evidence did not consider any of the previous medical assessments of the Appellant; secondly she had not been informed of the negative responses that the GMC had received to its inquiries of hospitals; and thirdly, and critically, the Tribunal did not fully cite Professor Gilvarry's evidence, leading to a mischaracterisation of its true meaning and effect. In these circumstances, the Tribunal was wrong to rely upon Professor Gilvarry's evidence to support its conclusion on "good reason".
130. As to the paragraph A24e defence, the relevant "concern" here was whether the Appellant's health was affecting her ability to practise medicine safely (and not simply her health alone). The issue is whether that concern could be investigated other than by means of a health assessment. Here, there were other proportionate means of investigating that concern without a health assessment, namely the material the GMC has already obtained from employers, further information from other sources (including five other employers) and putting all relevant information to Professor Gilvarry. As regards her employers, the GMC could find out if any patient safety concerns had been noticed. The feedback forms (which were all positive) would have provided the best evidence as to whether or not there were any real fitness to practise concerns. The Tribunal's consideration of good reason was perfunctory. It did not consider the information which had obtained by the GMC from employers nor the documents which were only admitted in relation to sanction. It did not consider the previous medical assessments which had concluded that she was not suffering from any delusional or other mental disorder. They were relevant in showing that the Appellant had no history of mental disorder. The Appellant was denied the opportunity to put forward her paragraph A24e defence
131. Further, as revealed by its position in its Grounds of Resistance in the Interim Order Appeal, the GMC's case on why the investigation was re-opened and the health concern it seeks to address by an assessment is confused. In fact the health concern giving rise to the present investigation is in substance the same as earlier and has already been addressed (see for example paragraph 34 above). The issue of use of the Doctor's name, now said to give rise to the health concern, was not mentioned when the investigation was opened, and in any event the Appellant has used that name for some time. Moreover there is no evidence to show that the use of the Doctor's name has created any risks with the public. Further the GMC has not adequately explained why there was no referral to the Tribunal in December 2018.
132. The Appellant submits that for these reasons the finding at paragraphs 30 to 32 of no good reason was wrong; alternatively and in any event, the Appellant's defence is sufficiently arguable that it is not inevitable that, had the Appellant been given a proper opportunity to raise it, the outcome would have been the same.
133. *The GMC submits* that the Tribunal's conclusions on non-compliance at paragraph 23 and 29 to 32 are unimpeachable and in any event not wrong. There can be no suggestion that the Tribunal was wrong to find that the Appellant had in fact failed to comply with the directions. The Appellant appears to advance an argument that the directions ought not have been made. That is not a matter which the Tribunal could consider, nor which this Court can consider. The Appellant's arguments are directed to the effect that the health assessment will show that there is no relevant mental health condition or not one which impairs fitness to practise. That is not relevant to the question of whether she complied with the direction. The Guidance makes clear

that it is not a reason for a practitioner to refuse to comply with a direction because they do not believe it should have been issued. Where reliance is placed on “good reason”, the Tribunal must be wary not to stray into determining the level of the need for a health assessment: see *Teewary* at §59. Paragraphs A24e and A46 of the Guidance should not be used as a “back door” way to challenge the lawfulness of a direction or the underlying investigation.

134. Secondly, as regards the suggested alternative means, the relevant “concern” is the Appellant’s mental health. That cannot be assessed other than by way of a health assessment. The earlier medical reports do not, and could not, address the issue being investigated by the GMC. The current concern is about the Appellant’s persistent assertion that she is married to the Doctor and that she has taken his name and the general content and tone of her correspondence with the GMC from 2018. That conduct post-dates the earlier medical assessments. At their highest those reports can only establish that in 2015-2016 the Appellant’s mental health was not impaired. The feedback from employers is not irrelevant, but cannot assess whether the Appellant has a mental health condition. The GMC is not in a position to make inquiries of others (beyond employers and the NHS) (as suggested in the final sentence of Professor Gilvarry’s evidence).
135. Thirdly, it is no part of the Tribunal’s or this Court’s role to conduct a detailed scrutiny of Professor Gilvarry’s evidence. In the final sentence (omitted from the Non-Compliance Determination), Professor Gilvarry was saying that others (beyond the GMC *and beyond* employers and the NHS) might have noticed any relevant condition.

## **Discussion**

136. By this ground, the Appellant contends that the Non-Compliance Determination was wrong, as a matter of fact and law, on the basis that the Appellant had good reason not to comply with the Second Direction within paragraph A24e of the Guidance. However in considering this ground, I bear in mind that, unless the GMC can demonstrate that the Appellant’s good reason defence was bound to fail before the Tribunal, then this appeal must succeed on grounds of serious procedural irregularity. Nevertheless I start by considering the Tribunal’s Non-Compliance Determination and the merits of the paragraph A24e defence.
137. The interrelationship between whether the Tribunal’s decision was wrong and whether the outcome would inevitably have been the same is not straightforward. In the present case, the following questions arise:
  - (1) Was the Tribunal’s Non-Compliance Determination wrong?
    - (a) Was the Tribunal’s decision in its own terms seriously flawed?
    - (b) If it was flawed, does this Court, on the basis of the argument it has now heard, consider that the Tribunal’s Non-Compliance Determination was wrong?

- (2) Even if the Non-Compliance Determination was not “wrong”, is it inevitable that, if the Appellant had had the opportunity to make her case before the Tribunal, it would have reached the same conclusion as it did?

*General considerations*

138. First, I note HH Judge Keyser QC’s observations at §§57 and 58 of *Teewary* that any challenge to a direction itself is to be made by judicial review and the Tribunal did not have jurisdiction to question the lawfulness of the direction, and further Mr Knight’s submission that it is no part of the jurisdiction of the Tribunal under paragraph 5A to consider the legality of the direction itself.
139. Secondly, however, on a reference for non-compliance, the Tribunal *must* consider, as its second question, whether there is “good reason” for failure to comply: Guidance, paragraph A16b. Paragraph A24 then sets out five examples of such good reason. In particular, by paragraph A24e, good reason is provided where the doctor can demonstrate that the failure to comply does not create a risk to public protection because the GMC “can still investigate the concern”. Further explanation of this ground is provided at paragraphs A46 to A48 (set out at paragraph 15 above). As a matter of construction of these provisions alone, the relevant “concern” is a concern about “fitness to practise” and “impairment” to fitness to practise (see A46); and the relevant “investigation” is an investigation into fitness to practise (A47). Further, if the GMC is able to investigate the concern “by other means”, the failure to comply with the direction will not have created a risk to public protection (A48). In my judgment, this means that the doctor will demonstrate good reason if he can establish that the direction was not “necessary” in order to enable the GMC to investigate the concern, even if the direction was reasonable or appropriate. Finally, the Tribunal may only make a finding of non-compliance if it finds that there is no good reason for failure to comply (A50).
140. Thirdly, whilst there is a tension between the first and second points, my view is that, whatever the correct position is as regards the route to challenge the direction or the reference, it is open to a doctor, on a reference to the Tribunal, to contend that the Tribunal *cannot find non-compliance*, because he has established good reason under paragraph A24e i.e. because the direction was not necessary to enable the GMC to investigate the concern.
141. Mr Knight relies strongly on §59 of the judgment in *Teewary* as authority for the proposition that the need for the health assessment which has been directed by the GMC, is not relevant to findings of, nor to justification for, non-compliance, and can only be taken into account at the stage of sanction. He further submits that this Court is bound to follow that conclusion, unless there is powerful reason not to do so: *Willers v Joyce* [2016] UKSC 44 at §9. He submits that this authority takes precedence over the terms of paragraph A24e of the Guidance. Accordingly, such an issue cannot be raised as a defence to non-compliance under A24e of the Guidance. I do not accept this submission. First, as HH Judge Keyser himself recognised, his view at §59 is not part of the ratio decidendi of his decision in *Teewary*. In that case, there was no direct paragraph A24e defence. Dr Teewary’s defence was that he was justified in refusing because of perceived unfairness in the way in which the assessment was being conducted (see §64). He was not contending that there was no need for the assessment at all. Secondly, and in any event, my view is that paragraphs A24e and A46 to A48 of the Guidance make it clear that a doctor is entitled to raise,

as a reason for non-compliance, that the assessment was not necessary to investigate the fitness to practise concern. In my judgment, the Tribunal should apply that Guidance, which was introduced to meet serious objections recorded in the DoH Report. These matters were not raised before HH Judge Keyser. If I were otherwise required to follow §59 of his judgment, I would have found that this would be “powerful reason” not to do so.

*The Appellant’s “good reason” defence*

142. The Appellant’s case on good reasons under paragraph A24e now put forward is that concern about her *fitness to practise* can be investigated by “other means” – by consideration of the previous medical assessment in 2015 and 2016, by consideration of the employer feedback the GMC had already obtained and by obtaining further employer feedback from the other hospitals where the Appellant had worked in the relevant period. Further, her case is that Professor Gilvarry’s evidence does not support the proposition that a mental health assessment was *necessary* to investigate the concerns.

*The relevant “concern”*

143. There was much debate about whether the relevant “concern” in this case is the Appellant’s mental health or her fitness to practise. Whilst there is force in Mr Knight’s submission that the only practical way to investigate whether the Appellant has a mental health condition is by way of a health assessment, he accepted that such a condition is only relevant if it gives rise to a concern about fitness to practice. In my judgment, given the terms of section 35C and rules 2 of the Rules and the terms of the Guidance, the concern that is being investigated is the Appellant’s fitness to practise (and not her health condition on its own). Indeed this is what Professor Gilvarry was also expressly addressing.

*Professor Gilvarry’s evidence*

144. I make three important observations about Professor Gilvarry’s evidence.
- (1) Mr Knight submits that the true meaning of Professor Gilvarry’s evidence is that whilst *employers* would not necessarily notice any personality disorders, that people, other than the GMC and employers, would most likely notice them. On that basis, having asked employers, the GMC was not in a position to make wider inquiries of friends and the public at large. Thus a health assessment was the only means to investigate. I do not accept this submission. The precise wording of the final sentence of the relevant paragraph of Professor Gilvarry’s advice is essential to a proper understanding of that advice: it is underlined at paragraph 50 above. In my judgment the word “However” qualifies the previous sentence and the final words “outside the GMC” include not only the wider public, but the Appellant’s employers and the NHS more generally. On that basis, the true sense of that paragraph is (very arguably) that it is *likely* that, if the Appellant had a personality disorder, it *would* be noticed by, amongst others, *her employers*. That conclusion provides strong support for the proposition that the GMC’s concern could reasonably and proportionately be investigated by inquiries of her employers – both those which the GMC had already received and by making further



inquiries of those employers which had not been asked. (In this regard, as explained below, it is highly pertinent that the Tribunal chose to omit this last sentence at paragraph 27 of the Non-Compliance Determination).

- (2) The only evidence that was placed before Professor Gilvarry were the email exchanges with the GMC (and her general record). The evidence gathered from employers and feedback forms was not provided to her. Given the true sense of her advice (as in (1) above) the fact that employers had raised no concerns about the Appellant's performance might well have been relevant to her overall conclusion. (Nor did she see the earlier medical reports which found no concerns; they were, arguably, relevant even if they pre-date the correspondence with the GMC).
- (3) In any event, her conclusion was that a health assessment was reasonable and appropriate. She was not asked, and did not say, that such an assessment was necessary or the only means to investigate the relevant concern about the Appellant.

*(1) Was the Tribunal's assessment flawed in its own terms?*

145. In my judgment, on the basis of the material that was before it, the Tribunal's assessment in the Non-Compliance Determination was seriously flawed.
146. The Tribunal, having earlier set out paragraphs A24 and A46, addressed "good reason" at paragraphs 24 to 32. At paragraph 31 it concluded that, without the health assessment, the GMC was "unable to proceed" (tracking the wording of A47). It thus appears that, to this extent, the Tribunal was considering (and rejecting) a possible A24e defence. Its conclusion was based centrally on its assessment of Professor Gilvarry's evidence (paragraphs 25 to 29). Given my conclusion on the refusal to adjourn, the Tribunal's reliance upon the Appellant's failure herself to put forward a good reason or to put forward her evidence (paragraphs 29 and 30) cannot support the Tribunal's conclusion. Further, as to the Tribunal's view (also at paragraph 29) that "conduct with NHS Grampian" did not form the basis of the direction, this is contradicted by the GMC's own statements in its Grounds of Resistance (see paragraph 53 above) – material which, again, was not before the Tribunal.
147. Turning to Professor Gilvarry's evidence itself, by omitting reference to the final sentence of the relevant paragraph, it appears likely that the Tribunal failed to proceed on the basis of the true sense of her opinion. Secondly, for the reasons given in paragraph 144 above, Professor Gilvarry's evidence was itself not based on the complete picture and did not support the conclusion that the GMC was "unable to proceed" with an assessment.
148. For these reasons, I conclude that the Tribunal's conclusion at paragraphs 29 to 32 of the Non-Compliance Decision was seriously flawed.

*(2) Was the Tribunal's decision wrong, in the light of the evidence and argument now placed before this Court?*

149. This Court has now heard argument on the Appellant's good reason defence under paragraph A24e and been referred to some of the evidence in support, including some

of the earlier medical reports and some of the employer, and patient feedback. However the Court has not considered the full extent of the evidence which might be relevant to whether a health assessment was necessary. Much of the argument has been directed towards Ground 1. The Appellant contends that there was good reason for her to use the Doctor's name and that that would be established on the evidence.

150. On the basis of the material which this Court has considered, and despite Mr Knight's submission to the contrary, in my judgment the paragraph A24e defence has some considerable merit. The strongest points in the Appellant's favour are the true meaning of Professor Gilvarry's opinion and the fact that it is not known what her opinion might have been, had she seen the employer and patient feedback and been asked whether an assessment was necessary to investigate a fitness to practice concern. On the other hand, there may be merit in Mr Knight's argument that the only way to assess whether the Appellant has a mental health condition and one which could impair fitness is to have a health assessment conducted by qualified practitioners and that speaking to employers and patients would not answer that question.
151. Further the Appellant contends that there was a clear reason why the Appellant was using the Doctor's name and that this is not a case of someone using a name for no rational reason. This Court has not had the opportunity to consider the material relevant to such a contention; that would be something for the Tribunal to consider.
152. In my judgment, it would be unfair to the GMC to deprive it of the opportunity of meeting the paragraph A24e defence, by finding now definitively, that the good reasons defence is clearly established and thus that the Non-Compliance Determination was wrong. To do so would also remove the opportunity for that case to be considered by a Tribunal with its particular medical expertise, and taking account of what is necessary to maintain public confidence and safety.
153. I am not therefore satisfied that, taking account of the material now placed before this Court, that the Non-Compliance Determination was wrong and it falls to be quashed *on that ground*.
- (3) *Would the "good reasons" defence inevitably have failed, if the hearing had been adjourned?*
154. I return therefore to the question, which arises on Ground 1: if the hearing had been adjourned to a date when Mr Matovu represented the Appellant and put forward the paragraph A24e defence, would the Non-Compliance Determination inevitably have been the same i.e. would the Tribunal inevitably have rejected that defence? For the reasons I have given above, the answer to this question is No. The paragraph A24e defence, on the basis as advanced before this Court, would have had some prospect of success before the Tribunal, but for the serious procedural irregularity found in paragraph 125 above.

### **Ground 3 – sanction**

155. In the light of my conclusion on Ground 1, Ground 3 does not fall for determination as a separate ground of challenge. From that conclusion, it follows that both the Sanction Determination, as well as the Non-Compliance Determination will be

quashed. Since this matter may be remitted to the Tribunal for a fresh full determination, no useful purpose is served by this Court adjudicating upon the sanction imposed in respect of the Non-Compliance Determination which is quashed.

### **Conclusions**

156. For the reasons set out in paragraphs 125 and 127 above, Ground 1 of this appeal succeeds and the Non-Compliance Determination and the Sanction Determination will be quashed, pursuant to paragraph 5A(5)(a) of Schedule 4 to the Act. I will hear the parties as to any further appropriate remedies, including any question as to remitting the matter to the Tribunal.
157. I am grateful to counsel for the quality of the argument and for the helpful manner in which this case has been prepared and conducted.