Neutral Citation Number: [2021] EWHC 2237 (Admin)

Case No: CO/3017/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/08/2021

Before :

THE HONOURABLE MR JUSTICE MORRIS

- -

Between :

DR TIMOTHY PAUL BYRNE **Appellant**

- and –

GENERAL MEDICAL COUNCIL **Respondent**

- -
- -

Ranald Davidson (instructed by **DAC Beachcroft**) for the **Appellant**
Peter Mant (instructed by **General Medical Council**) for the **Respondent**

Hearing dates: 3 and 16 March 2021
Further written submission 30 March 2021

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Approved Judgment

Mr Justice Morris :

Introduction

1. This is an appeal from a decision ("the Decision") of the Medical Practitioners Tribunal ("the Tribunal") dated 30 July 2020. By the Decision, the Tribunal determined that the name of Dr Timothy Paul Byrne ("the Appellant") should be erased from the medical register for impairment of his fitness to practise arising out of sexual misconduct. The Tribunal found that the Appellant had engaged in an inappropriate relationship which developed into a sexual relationship with a vulnerable patient, Patient A.

2. The appeal is brought under section 40 of the Medical Act 1983 and is in respect, principally, of the Tribunal's findings of fact, its consequent findings of misconduct and impairment of fitness to practise and of sanction. The Respondent to the appeal is the General Medical Council ("the GMC").

Some factual background

3. The Appellant is a consultant psychiatrist. Patient A is a woman aged 53 and has been treated by mental health services since she was 16. Patient A was a patient of the Appellant between 2007 and 2016. In late 2016 Patient A reported to another therapist that she had had an inappropriate relationship with the Appellant between 2011 and 2013. She made allegations of physical and emotional intimacy, including kissing, touching and more serious sexual acts in 2012. These complaints were reported by the other therapist to the local NHS authority. There was a local investigation, culminating in a warning. The matter was then referred to the GMC who brought proceedings before the Tribunal. After a hearing in July 2019, in March 2020 the Tribunal found a number of allegations of fact proved and went on to find that those findings of fact amounted to misconduct and impairment of fitness to practise. On 30 July 2020 the Tribunal imposed the sanction of erasure.

4. In this judgment I address relevant legal principles, the facts in more detail, the proceedings before the Tribunal, the Decision, the Grounds of Appeal before finally addressing each ground in turn.

The Legislative Framework and relevant legal principles

5. The statutory framework for the GMC and the Tribunal is to be found in the Medical Act 1983, as amended ("the Act"), and the General Medical Council (Fitness to Practise) Rules 2004, made under the Act ("the Rules"). Other relevant material is to be found in certain case law.

The GMC and the Medical Practitioners Tribunal

6. Section 1(1A) of the Act provides that "the overarching 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 overarching 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".

Fitness to practise proceedings

7. The procedure for determination of "fitness to practise" is divided into two stages: an investigation stage and then reference to, and consideration and determination by, the Tribunal. Section 35C(2) of the Act provides that: "a person's fitness to practise shall be regarded as impaired for the purposes of this Act by reason only of – (a) misconduct… ". 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 other grounds) and, second, whether as a result of such misconduct (or other ground), fitness to practise is impaired.

Appeals

8. Section 40 of the Act makes provision for appeals from Tribunal decisions to, inter alia, this Court. By s.40(1)(a), appealable decisions include a tribunal decision under s.35D giving a direction for erasure, for suspension, or for conditional registration or varying the conditions imposed by a direction for conditional registration. Under s.40(7), this Court's powers on appeal include the power to dismiss the appeal, to allow the appeal and quash the direction appealed against, to substitute its own direction, or to remit the case to the MPTS for them to arrange for a tribunal to dispose of the case in accordance with the Court's directions.

9. On appeal, the question for the Court is whether the Tribunal was wrong, or unjust because of a serious procedural or other irregularity: see CPR 52.21(3). Further, an appeal under s.40 is a full appeal by way of re-hearing (and is thus, in principle, broader than the usual jurisdiction of "review" applicable to most appeals): see CPR 52.21(1)(a) and Practice Direction 52D, §19.

10. I heard substantial argument on the correct approach of the Court on an appeal from a decision of the Tribunal on the facts. This raised a number of particular issues, which I address in the following paragraphs. In this regard I have been referred to the following principal authorities: *Gupta v General Medical Council* [2001] UKPC 61 [2002] 1 WLR 1691 at §10 (citing *Thomas v Thomas* [1947] AC 484 at 487-488); *E.I. Dupont de Nemours v S.T. Dupont* [203] EWCA Civ 1368 at §§84-98 esp at §84 and §98; *Assicurazioni Generali SpA v Arab Insurance Group* [2003] 1 WLR 577 at §§13-22, 197; *Chyc v General Medical Council* [2008] EWHC 1025 (Admin) at §23; *Muscat v Health Professions Council* [2008] EWHC 2798 (Admin) at §83; *Mubarak v General Medical Council* [2008] EWHC 2830 (Admin) at §§5, 20; *Southall v General Medical Council* [2010] EWCA Civ 407 at §47 and §§50-62 (citing *Libman v General Medical Council* [1972] AC 217 at 221F); *Casey v General Medical Council* [2011] NIQB 95 at §6; *O v Secretary of State for Education* [2014] EWHC 22 (Admin) at §§58 to 64, 66; *R (Dutta) v General Medical Council* [2020] EWHC 1974 (Admin) at §§21-22, 38-43; *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3650 (Comm); *McGraddie v McGraddie* [2013] UKSC 58; *Henderson v Foxworth* [2014] UKSC 41 at §§48 and 58-67; *Perry v Raleys Solicitors* [2019] UKSC 5 at §52, and the US case *Anderson v City of Bessemer* (1985) 470 US 564 at 574-57;**,** and *Khan v General Medical Council* [2021] EWHC 374 (Admin).

(1) The approach of the Court on appeal to a finding of fact, and in particular a finding of primary fact

11. The issue is as to the circumstances in which an appeal court will interfere with findings of fact made by the court or decision maker below. This is an issue which has been the subject of detailed judicial analysis in a substantial number of authorities and where the formulation of the test to be applied has not been uniform; the differences between formulations are fine. I do not propose to go over this ground again in detail, but rather seek to synthesise the principles and to draw together from these authorities a number of propositions.

12. First, the degree of deference shown to the court below will differ depending on the nature of the issue below; namely whether the issue is one of primary fact, of secondary fact, or rather an evaluative judgment of many factors: *Assicurazioni Generali* at §§16 to 20. The present case concerns findings of primary fact: did the events described by the Patient A happen?

13. Secondly, the governing principle remains that set out in *Gupta* §10 referring to *Thomas v Thomas*. The starting point is that the appeal court will be very slow to interfere with findings of primary fact of the court below. The reasons for this are that the court below has had the advantage of having seen and heard the witnesses, and more generally has total familiarity with the evidence in the case. A further reason for this approach is the trial judge's more general expertise in making determinations of fact: see *Gupta*, and *McGraddie v McGraddie* at §§3 to 4. I accept that the most recent Supreme Court cases interpreting *Thomas v Thomas* (namely *McGraddie* and *Henderson v Foxworth*) are relevant. Even though they were cases of "review" rather than "rehearing", there is little distinction between the two types of cases for present purposes (see paragraph 16 below).

14. Thirdly, in exceptional circumstances, the appeal court will interfere with findings of primary fact below. (However the reference to "virtually unassailable" in *Southall* at §47 is not to be read as meaning "practically impossible", for the reasons given in *Dutta* at §22.)

15. Fourthly, the circumstances in which the appeal court will interfere with primary findings of fact have been formulated in a number of different ways, as follows:

- where "*any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusions*": per Lord Thankerton in *Thomas v Thomas* approved in *Gupta;*

- findings "*sufficiently out of the tune with the evidence to indicate with reasonable certainty that the evidence had been misread*" per Lord Hailsham in *Libman;*

- findings "*plainly wrong or so out of tune with the evidence properly read as to be unreasonable*": per in *Casey* at §6 and Warby J (as he then was) in *Dutta* at §21(7);

- where there is "*no evidence to support a … finding of fact or the trial judge's finding was one which no reasonable judge could have reached"*: per Lord Briggs in *Perry* after analysis of *McGraddie* and *Henderson.*

In my judgment, the distinction between these last two formulations is a fine one. To the extent that there is a difference, I will adopt, in the Appellant's favour, the former. In fact, as will appears from my analysis below, I have concluded that, even on that approach, I should not interfere with most of the Tribunal's primary findings of fact.

16. Fifthly, I consider that, whilst noting the observations of Warby J in *Dutta* at §21(1), on the balance of authority there is little or no relevant distinction to be drawn between "review" and "rehearing", when considering the degree of deference to be shown to findings of primary fact: *Assicurazioni* §§13, 15 and 23. *Du Pont* at §§94 and 98 is not clear authority to the contrary. Rather it supports the proposition that there may be a relevant difference when the court is considering findings of evaluative judgment or secondary or inferential findings of fact, where the court will show less deference on a rehearing that on a review. Nevertheless if less deference is to be shown in a case of rehearing (such as the present case), then, again I will assume this in the Appellant's favour.

(2) The credibility of witnesses and corroborating evidence

17. First, the credibility of witnesses must take account of the unreliability of memory and should be considered and tested by reference to objective facts, and in particular as shown in contemporaneous documents. Where possible, factual findings should be based on objective facts as shown by contemporaneous documents: *Dutta* §§39 to 42 citing, in particular, *Gestmin* and *Lachaux.*

18. Secondly, nevertheless, in assessing the reliability and credibility of witnesses, whilst there are different schools of thought, I consider that, if relevant, demeanour might in an appropriate case be a significant factor and the lower court is best placed to assess demeanour: Despite the doubts expressed in *Dutta* §42 and *Khan* §110, the balance of authority supports this view: *Gupta* §18 and *Southall* at §59.

19. Thirdly, corroborating documentary evidence is not always required or indeed available. There may not be much or any such documentary evidence. In a case where the evidence consists of conflicting oral accounts, the court may properly place substantial reliance upon the oral evidence of the complainant (in preference to that of the defendant/appellant): *Chyc* at §23. There is no rule that corroboration of a patient complainant's evidence is required: see *Muscat* §83 and *Mubarak* §20.

20. Fourthly, in a case where the complainant provides an oral account, and there is a flat denial from the other person concerned, and little or no independent evidence, it is commonplace for there to be inconsistency and confusion in some of the detail. Nevertheless the task of the court below is to consider whether the core allegations are true: *Mubarak* at §20.

(3) The requirement "to put your case"

21. Where the court below is considering reaching a conclusion on a case theory, or basis of facts or a version of events, not based on the oral or documentary evidence before

it and not put forward by either party, it must give the parties a reasonable opportunity to address that basis before reaching such a conclusion; and not to do so amounts to procedural unfairness: *Dutta* §§34 to 36. However there is no rule that every ground for doubting the evidence of a witness must be put to the witness. The question is whether the trial viewed overall was unfair: *Chen v Ng* [2017] UKPC 27 at §§52-56.

(4) "Serious cases": the standard of proof and "heightened scrutiny"

22. The standard of proof to be applied by the Tribunal and by this Court is the civil standard of balance of probabilities. As regards the position where the allegations, or the consequences for the person concerned, are particularly serious, the Appellant referred me to *Casey* at §16, suggesting that there is a need for a "heightened examination of the evidence". It was common ground that the correct approach is as set out in my judgment in *O v Secretary of State for Education* at §66. In that case, after referring to the relevant House of Lords and Supreme Court authorities (*Re B* and *Re S-B*) (which in turn referred to *Re Doherty* cited in *Casey)*, I summarised the position as follows:

> *"(1) There is only one civil standard of proof in all civil cases, and that is proof that the fact in issue more probably occurred than not.*
>
> *(2) There is no heightened civil standard of proof in particular classes of case. In particular, it is not correct that the more serious the nature of the allegation made, the higher the standard of proof required.*
>
> *(3) The inherent probability or improbability of an event is a matter which can be taken into account when weighing the probabilities and in deciding whether the event occurred. Where an event is inherently improbable, it may take better evidence to persuade the judge that it has happened. This goes to the quality of evidence.*
>
> *(4) However it does not follow, as a rule of law, that the more serious the allegation, the less likely it is to have occurred. So whilst the court may take account of inherent probabilities, there is no logical or necessary connection between seriousness and probability. Thus, it is not the case that "the more serious the allegation the more cogent the evidence need to prove it".*

(5) The extent of the duty to give reasons

23. In relation to the duty to give reasons, I have been referred to a number of authorities, including in particular *Selvanathan v GMC* [2000] 10 WLUK 307; *English v Emery Reimbold & Strick* [2002] 1 WLR 2409; *Gupta,* supra, at §14; *Phipps v GMC* [2006] EWCA Civ 397 at §106; *Muscat,* supra at §108; *Mubarak*, supra, at §§9-12, 35-36; *Southall*, supra, at §§50-55, 56 and 59 and *O v Secretary of State for Education*, supra, at §§59 -63.

24. In the present case Rule 17(2)(j) of the Rules requires the Tribunal to give reasons for its findings of fact. In considering the extent and content of the duty to give reasons, the current leading authority is Southall, citing in detail the earlier cases of *Selvanathan*, *Gupta*, *Phipps* (in turn referring to *English v Emery Reimbold & Strick*). At §54, Leveson LJ (citing *Phipps*) confirmed that the purpose of such a duty to give reasons is to enable the losing party to know why he has lost and to allow him to consider whether to appeal. It will be satisfied if, having regard to the issues and the nature and content of the evidence, the reasons for the decision are plain, either because they are set out in terms or because they can be readily inferred from the overall form and content of the decision. It is not necessary for them to be expressly stated, when they are otherwise plain or obvious. Leveson LJ then continued as follows:

> *"55. For my part, I have no difficulty in concluding that, in straightforward cases, setting out the facts to be proved (as is the present practice of the GMC) and finding them proved or not proved will generally be sufficient both to demonstrate to the parties why they won or lost and to explain to any appellate tribunal the facts found. In most cases, particularly those concerned with comparatively simple conflicts of factual evidence, it will be obvious whose evidence has been rejected and why. In that regard, I echo and respectfully endorse the observations of Sir Mark Potter. [in Phipps]*
>
> *56. When, however, the case is not straightforward and can properly be described as exceptional, the position is and will be different. Thus, although it is said that this case is no more than a simple issue of fact (namely, did Dr Southall use the words set out in the charge?), the true picture is far more complex. First, underlying the case for Dr Southall was the acceptance that Mrs M might perfectly justifiably have perceived herself as accused of murder with the result that the analysis of contemporaneous material some eight years later is of real importance: that the evidence which touched upon this conversation took over five days is testament to that complexity. Furthermore it cannot be said that the contemporaneous material was all one way: Dr Corfield's note (and, indeed, her evidence) supported the case that it was (or at least could have been) Mrs M's perception alone. Ms Salem's note (accepted by Mrs M as 100% accurate so far as it went) did not support the accusation and her evidence was that if those words had been said, she would have recorded them. I am not suggesting that a lengthy judgment was required but, in the circumstances of this case, a few sentences dealing with the salient issues was essential: this was an exceptional case and, I have no doubt, perceived to be so by the GMC, Dr Southall and the panel.*

…

> *59. Further, once providing some reasons, in my judgment, the panel did have to say something about Dr Southall who gave evidence on this topic for some days. If (as must have been the case) they disbelieved him, in the context of this case and his defence, he was entitled to know why even if only by reference to his demeanour, his attitude or his approach to specific questions. In relation to Ms Salem, the position was worse: to say that the panel "did not find her evidence to be wholly convincing" is not good enough. If she did not make a note of the specific challenge of murder (which she said she would have done), it must have been the panel's view that she decided, at the time of the interview, that she would not do so and so have entered into an implicit agreement with Dr Southall to cover up an overly oppressive interview. That is nothing to do with not being wholly convincing: it is about honesty and integrity and if the panel were impugning her in these regards, it should have said so. (emphasis added)*

25. As made clear at §56, the factual issue in *Southall* was not "a simple issue of fact" of whether the doctor did or did not use particular words; rather it was particularly complex. §56 of *Southall* is not authority for the proposition that specific reasons for disbelieving a practitioner are required in every case where his defence is rejected. The references to "the circumstances of this case" and "in the context of this case and his defence" in §§56 and 59 imply that there will be cases where such reasons will not be required.

Reasons and credibility

26. As regards reasons concerning the credibility of witnesses

    (1) Where there is a dispute of fact involving a choice as to the credibility of competing accounts of two witnesses, the adequacy of reasons given will vary. In *English v Emery*, Lord Phillips stated that "*it may be enough to say that one witness was preferred to another, because the one manifestly had a clearer recollection of the material facts or the other give answers which demonstrated that his recollection could not be relied upon*". On the other hand, *Southall* at §55, and *Gupta* at §13 and 14 suggest that even such limited reasons are not necessarily required in every case.

    (2) Secondly, whilst Mr Mant accepted that it is a common practice in Tribunal decisions on fact, there is no requirement for the disciplinary body to make, at the outset of its determination, a general comparative assessment of the credibility of the principal witnesses. Indeed such a practice, undertaken without reference to the specific allegations, has been the subject of recent criticism in *Dutta* at §42 and *Khan* at §§106 and 107. In my judgment, consideration of credibility by reference to the specific allegations made is an approach which is, at least, equally appropriate.

27. Finally, an appeal court will not allow an appeal on grounds of inadequacy of reasons, unless, even with the benefit of knowledge of the evidence and submissions made below, it is not possible for the appeal court to understand why the judge below had reached the decision it did reach. It is appropriate for the appeal court to look at the underlying material before the judge to seek to understand the judge's reasoning and to "identify reasons for the judge's conclusions which cogently justify" the judge's decision, even if the judge did not himself clearly identify all those reasons: see *English v Emery Reimbold* §§89 and 118.

The background facts in more detail

The factual chronology

The Appellant

28. The Appellant qualified as a medical practitioner in 1984. He commenced his training as a psychiatrist in 1986 and became a member of the Royal College of Psychiatrists in 1989. He had practised as a consultant psychiatrist since 1995. From 2007 onwards he was employed as a consultant psychiatrist on the Isle of Man. Prior to this case he had an unblemished disciplinary record.

Patient A

29. Patient A was born in 1967. As a child she had been sexually abused by a non-family member. She had been in receipt of care from mental health services since the age of 16 and had latterly been diagnosed as suffering anxious personality disorder. This disorder is characterised by feelings of tension and apprehension, insecurity and inferiority. Despite these mental health problems, Patient A had been able to secure employment. She was married and the mother to one son. As result of her condition, she is vulnerable to exploitation. She is more at risk of developing an inappropriate relationship with a therapist and being taken sexually advantage of by a therapist. Patient A had sexual thoughts about the Appellant and a dream is recorded in her journal. However she does not have a history of psychosis or delusion. The evidence before the Tribunal was that there was no evidence of confabulation on her part.

The Appellant and Patient A

30. Between 2007 and 2016 the Appellant was the treating psychiatrist and care coordinator for Patient A. From approximately October 2007 the Appellant provided Patient A with a course of mentalization therapy. Initially this was carried out once a week and subsequently increased in frequency to three sessions per week. Appointments took place both at the hospital and occasionally at Patient A's home

31. Patient A alleged that from early to mid 2011, her relationship with the Appellant gradually became more physical and intimate. She alleged that on 25 June 2012 the Appellant and Patient A kissed; the kissing continued and then in July 2012 during a home visit, the Appellant took her hand and put it on his erect penis. Thereafter, the intimacy developed and on three occasions the Appellant masturbated her. From June 2013 the relationship became less physically intimate, when the Appellant accidentally sent a text message to his wife that was intended for Patient A. The therapeutic relationship continued into 2014. The Appellant denies any form of

sexual relationship, although he admitted an incident of kissing and that he had not recorded or reported that to anyone at the time.

32. The Appellant's notes were recorded on the hospital RiO system for May 2012 to September 2013. At various times the Appellant and Patient A also communicated by email and texts to/from the Appellant's work mobile phone. Further, at least until mid 2012, Patient A kept a series of personal logs in a journal in which she recorded her thoughts and feelings. Within these logs are documented Patient A's sexual fantasies related to the Appellant. She stopped writing it when her relationship became sexually intimate. She was always concerned that someone would find out. The emails and texts between the Appellant and Patient A did not make direct reference to the sexual contact. She said that it was mutually agreed that this could not be spoken about because it was wrong. Nevertheless the contemporaneous documents from the earlier part of their relationship do include some reference to physical and emotional intimacy.

Treatment by other therapists

33. From approximately January/March 2014 Patient A's ongoing therapy passed through two different clinicians - Kael Cockcroft and Dr Marina Hudson - before she commenced a course of Schema therapy with Mr Simoes, a psychologist, in September 2015. The Appellant continued in his formal role as her care coordinator, but he did not see her for treatment or therapy.

Disclosure by Patient A in 2016

34. Patient A saw Mr Simoes for about a year, before making disclosures to him in September 2016 about her relationship with the Appellant. On 9 September 2016 Patient A first notified Mr Simoes of an incident when the Appellant had allegedly kissed her in the course of a home visit approximately four years earlier. On 28 September 2016 Mr Simoes completed an incident reporting form in relation to the kissing incident. On 13 October 2016, Mr Simoes documented a further disclosure of alleged inappropriate sexual contact made by the Patient A. On 18 October 2016 Mr Simoes and Patient A attended a meeting with an external investigator. At that meeting Patient A reiterated the incident involving a kiss as well as identifying occasions on which the Appellant had allegedly held her hand, put his hand through her hair, hugged her and stroked/played with her hair. Subsequently on a date before Christmas 2016, Patient A described additional incidents in which the Appellant allegedly provided her with a scarf and handkerchief; placed her hand on his erect penis during a home visit; and masturbated her on three occasions during therapy sessions at hospital.

35. In his witness statement, Mr Simoes explained the following about Patient A's disclosures. First, the initial disclosure was made in response to a suggestion by Mr Simoes that Patient A should see the Appellant about a review of her medication. Secondly, Patient A had to be assured about confidentiality before telling him about the intimate relationship. Thirdly, she had great difficulty in making the disclosures and discussing the incident verbally. Fourthly, Patient A was worried that she would not be believed if she presented a complaint and it was Mr Simoes who reported the matter to the Appellant's employer.

36. In December 2016 Patient A received a copy of her RiO notes. In January 2017 Patient A provided further written information, disputing the accuracy of her clinical records.

Local disciplinary proceedings

37. In the meantime, on 19 October 2016 and again on 30 November 2016, the Appellant was interviewed by the external investigator instructed by the local NHS service. In April and May 2017, the Appellant participated in a local disciplinary hearing. At that hearing he accepted in hindsight that the therapeutic boundaries between him and Patient A had become blurred and that there had been a single occasion in 2012 on which Patient A had kissed him. All other allegations, including the more serious allegations of sexual nature, were denied. The disciplinary tribunal also heard evidence from Patient A, supported by Mr Simoes. At the conclusion of the hearing the local disciplinary tribunal issued the Appellant with a written warning arising out of his failure to document and report the admitted kissing incident.

The involvement of the GMC

38. Following this investigation, Patient A's complaints against the Appellant were subsequently referred to the GMC and investigated in accordance with the Rules, culminating in the proceedings before the Tribunal.

The Tribunal Proceedings

The allegations

39. The charges against the Appellant stated as follows:

> *"1. Between 2007 and 2016, you acted as Patient A's treating psychiatrist and/or care coordinator and during this time:*
>
> *(a) You engaged in an inappropriate relationship with patient A;*
>
> *(b) On one or more occasions during consultations with patient A you:*
>
> *(i) held patient A's hand;*
>
> *(ii) hugged patient A;*
>
> *(iii) stroked patient A's hair and/or face and/or ears;*
>
> *(iv) told Patient A you loved and/or cared for her as much as your daughter, or words to that effect;*
>
> *(c) on one occasion you arrived at and entered Patient A's house unannounced;*
>
> *(d) you gave Patient A gifts including:*

(i) a scarf;

(ii) a handkerchief with your aftershave on.

2. Your actions as set out at paragraph 1a-d were sexually motivated.

3. Between June 2012 and June 2013 you engaged in a sexual relationship with Patient A in that:

(a) on at least two occasions you kissed patient A on the lips;

(b) in or around July 2012 you placed Patient A's hand on your erect penis whilst kissing Patient A;

(c) on one or more occasions during consultations at Reayrt Noa you masturbated Patient A.

4. In relation to Patient A you failed to:

(a) record any kiss and/or intimacy between you and Patient A in her medical Records;

(b) report any kiss and/or intimacy between you and Patient A to your employer and/or colleagues;

(c) accurately and/or appropriately record the details of consultations with Patient A in her medical records, as described at Schedule 1.[1]

5. At all times Patient A was vulnerable as a result of her mental health."

The Appellant admitted allegation 5, and allegation 4 (a) and (b), but only in relation to his failure to record and report the incident in which he was kissed by Patient A in 2012. All other allegations were disputed.

The hearing and the evidence

40. The hearing before the Tribunal took place on a number of days between 8 July 2019 and 30 July 2020. At the fact-finding stage over five days between 8 and 17 July 2019, culminating in the determination on the facts on 10 March 2020, the Tribunal considered documents and statements filed by both parties. The Tribunal received written and oral evidence from the Appellant, Patient A, Mr Simoes and others. Patient A's witness statement ran to 66 pages and 192 paragraphs, comprising a very detailed account of relevant events. The Appellant's witness statement was 12 pages long, and addressed the specific allegations in 4 pages, consisting, in the main, of simple denials. The documentary evidence included notes of a meeting between Patient A and Mr Simoes and the external investigator, email and text messages

[1] Schedule 1 set out, in respect of six dates, specific allegations of "medical record inconsistency": see further paragraphs 103, 104, 106 and 108 below.

between the Appellant and Patient A between 2011 and 2016 and entries in Patient A's journal.

41. Patient A and Mr Simoes gave oral evidence on 8 and 9 July 2019. On the afternoon of 9 July 2019 the Appellant gave his evidence in chief and under cross-examination in part. There was then a break of 6 days. On 15 July 2019 the Appellant completed his evidence and other evidence was called on his behalf. That comprised the expert evidence of Dr Martin Baggeley, a consultant psychiatrist and the evidence of Dr Hudson (who gave testimonial evidence). On 16 July 2019 oral and written submissions were made by the parties and the Tribunal also received legal advice. At the close of proceedings on that day the Tribunal retired to deliberate. On 17 July 2019 the parties were recalled by the Tribunal and invited to provide further submissions on whether the Tribunal should recall Patient A "to give further evidence in order to reduce the length of its deliberations". The indication provided by the Tribunal chair was that such evidence related to "some discrete areas". Following submissions, including submissions by the Appellant, the Tribunal decided not to proceed to recall Patient A.

42. After a gap of eight months, the Tribunal handed down its "determination on facts" on 10 March 2020.

The Decision

The Tribunal's findings and conclusions in summary

43. The Decision comprises three parts: "Determination on Facts", "Determination on Impairment" and "Determination on Sanction". In the Determination on Facts, the Tribunal founds as follows:

- allegations 1(a), (b)(i) to (iv), (c) and (d) proved;
- allegation 2 not proved;
- allegations 3(a) to (c) proved;
- allegation 4(a) and (b) proved, in relation to all allegations 1;
- allegation 4(c) proved.

44. Following further hearings, on 22 July 2020, the Tribunal made the Determination on Impairment, concluding that its findings on the facts amounted to misconduct and that the Appellant's fitness to practise was impaired by reason of that misconduct; and on 30 July 2020 made the Determination on Sanction, concluding that it was necessary to erase the Appellant's name from the register, and made an immediate order of suspension.

The Determination on Facts

45. After setting out the background, the allegations, and the evidence and its approach to the burden and standard of proof, the Determination on Facts continued as follows:

"The Tribunal's Analysis of the Evidence and Findings."

> *"19. The Tribunal has considered each outstanding paragraph of the Allegation separately and has evaluated the evidence in order to make its findings on the facts."*

46. It then addressed each of the allegations in turn. With the exception of the finding in respect of allegation 1(a), by this appeal the Appellant challenges the Tribunal's findings in respect of each of the allegations found proven. For ease of reference, the Tribunal's findings which are challenged are set out when considering the challenges under Ground 1 (see paragraph 56 and following below). In the following paragraphs, and, by way of relevant background, I set out the Tribunal's findings on allegations 1(a) and 2 (found not proven).

Allegation 1(a): inappropriate relationship with Patient A

47. The Tribunal addressed allegation 1(a) at paragraphs 20 to 28 as follows:

> *"20. The Tribunal had regard to Dr Byrne's witness statement, dated 18 June 2018, in which Dr Byrne states that he saw Patient A in April 2007 after she requested a change of psychiatrist and that he took over as her psychotherapist from June 2008. This is supported by Patient A's witness statement, dated 18 September 2018, which states 'to my knowledge and from looking at my medical records, I consider that Dr Byrne had been my treating psychiatrist since 2007'. This was not contested by either party. The Tribunal therefore accepted that Dr Byrne acted as Patient A's treating psychiatrist and/or care coordinator between 2007 and 2016.*
>
> *21. The Tribunal noted that Patient A attended sessions with Dr Byrne on a regular basis, initially once per week then gradually increasing the frequency to three times per week. The Tribunal understood that a degree of interaction is necessary for an effective therapeutic relationship. However, the Tribunal noted that it is critical for both the therapist and the patient that appropriate boundaries are maintained.*
>
> *22. The Tribunal considered whether Dr Byrne had maintained appropriate boundaries in his relationship with Patient A, giving careful consideration to the email and text exchanges between Dr Byrne and Patient A from 2011 to 2016, both in terms of their content and their number.*
>
> *23. The Tribunal had regard to the email correspondence between Dr Byrne and Patient A from 15 to 16 May 2011 and considered this to be an example of an acceptable therapeutic relationship. However, it determined that later email correspondence indicates that therapeutic relationship boundaries had been crossed.*

24. The Tribunal had sight of an email sent from Dr Byrne to Patient A, dated 21 September 2011:

> *'... perhaps I am being defensive and trying to justify my actions in this way because I don't like being criticised when I think I do care and genuinely try my best to help you…*

25. The Tribunal noted the following email from Dr Byrne to Patient A, dated 17 November 2011:

> *'I say what I say and do what I do for you because I think you are a very special person and you are very important to me'*

26. The Tribunal also had sight of an email sent from Dr Byrne to Patient A, dated 21 June 2014:

> *'Thank you for your thoughtful reply. I think you're right about kindness and selflessness not being helpful. I allowed the relationship between us to be too warm and I think that made it very difficult for you and me to think clearly. I think the same happens to an extent when we are angry. It's true I cannot see the depth of your suffering. I can only imagine the increasing extent and intensity given what you have told me. I honestly do not blame you for the way things went or for hating me. I failed and lost your trust. That pains me deeply but I understand my pain is not comparable to yours.'*

27. The Tribunal noted that in the local investigation Dr Byrne accepted that he had given Patient A too much information about his personal life, that he had been 'too available' and had over-activated Patient A's attachment to him, as Dr Baggaley summarised. During these proceedings, Dr Byrne has echoed what he previously said in acknowledging he was wrong to discuss some matters in his personal life with Patient A and that he was 'too available'. Further, Dr Byrne accepted the inappropriateness of the email and text correspondence between him and Patient A.

28. Taking all of the above into account, the Tribunal concluded that Dr Byrne had engaged in an inappropriate relationship with Patient A in the sense that there was a breakdown of the acceptable boundaries of a therapeutic relationship. As such, the Tribunal found sub-paragraph Paragraph 1(a) proved."

Allegation 2: actions in allegations 1(a) to (d) sexually motivated

48. Having found allegations 1(b) to (d) proved (as set out in paragraphs 56 to 58, 68, 72 and 76 below), the Tribunal addressed allegation 2 at paragraphs 47 to 50 as follows:

> *"47. During his oral evidence, Dr Byrne informed the Tribunal of another patient at the Trust who had taken their own life. He stated that the Trust had been criticised for its care and that he worried about Patient A because of her suicidal thoughts. The Tribunal noted that this may have contributed to the level of therapeutic involvement that Dr Byrne engaged in with Patient A and the crossing of acceptable boundaries between a therapist and a patient.*
>
> *"48. The Tribunal noted that the intimate actions it found to have occurred at sub- paragraphs 1(b)-1(c) took place in therapeutic sessions whilst discussing traumatic and difficult life events. The Tribunal therefore found it more likely that they stemmed from Dr Byrne's desire to comfort Patient A rather than a sexual desire. Whilst the Tribunal found Dr Byrne's actions were inappropriate and crossed acceptable therapeutic boundaries, it did not find them to be sexually motivated at the outset.*
>
> *49. The Tribunal considered whether Dr Byrne's actions in giving Patient A gifts was sexually motivated as alleged at paragraph 1(d). In her witness statement, dated 12 September 2018, Patient A states that the gifts were given to her to use as a strategy to help her when Dr Byrne was not physically available for support. The Tribunal noted Dr Byrne's oral evidence that he gave a cat to another patient for company as she had no family on the Isle of Man. Taking this into account, it appeared to the Tribunal that Dr Byrne has given gifts to his patients where he feels that it may assist with their treatment. The Tribunal had insufficient evidence before it to safely conclude that Dr Byrne had sexual motivation for giving Patient A gifts.*
>
> *50. Therefore the Tribunal found paragraph 2 not proved in relation to sub-paragraphs 1(a)-1(d)."*

49. Then, after concluding its analysis of each of allegations 3 to 5, at paragraph 76 the Tribunal summarised its "Overall Determination on the Facts", finding all allegations proved except allegation 2. The Decision then addressed, in turn, the "Determination on Impairment", the "Determination on Sanction", and the "Determination on Immediate Order". Those determinations are not directly relevant to this appeal.

The Appeal

The Grounds of Appeal

50. The Appellant contends as follows:

(1) The Tribunal's decision on the facts in relation to each of allegations 1(b)(i) to (iv), 1(c), 1(d), 3(a) to (c) and 4(a) to (c) were wrong and/or irrational.

(2) The determination on impairment and sanction of erasure were wrong, in so far as they were based on the erroneous findings of facts.

(3) The Decision was unjust and/or unfair due to serious procedural irregularity arising from the adjournment between 17 July 2019 and 10 March 2020 during the Tribunal's deliberations on the facts (combined with the concern arising from the Tribunal's stated wish to recall Patient A following the conclusion of the evidence and submissions on the facts).

51. As regards Ground 1, the Appellant challenges each of the allegations of fact found proven by the Tribunal, other than its findings in respect of allegations 1(a). Ground 2 follows on from the challenge made under Ground 1. Ground 3 is a distinct procedural challenge.

Ground 1: The determination on the facts on each allegation was wrong

The Appellant's overriding submissions

52. Before turning to the individual allegations, the Appellant submits that the case was of sufficient complexity and importance to warrant heightened examination of the facts and a fully reasoned decision, including an explanation of why his evidence had been disbelieved. He refers to the following unusual factors (which had also been drawn to the Tribunal's attention):

(1) Patient A's admitted sexual interest in the Appellant.

(2) Patient A's dreams and fantasies about the Appellant. Her journal entries describe scenarios (masturbating in her car and lying on top of the Appellant) similar to the alleged sexual misconduct.

(3) The absence of any contemporaneous note or account of the sexual acts described in allegation 3 or the conduct in allegation 1, despite the Patient A's preference for committing her thoughts and feelings to writing.

(4) The period of delay between the alleged incidents and Patient A's complaints. Most of the incidents took place more than three years before she raised her concerns with Mr Simoes. Further Patient A had the opportunity to raise those concerns with others in the same period.

(5) The piecemeal nature of Patient A's disclosures to Mr Simoes and the external investigators; and the fact that she only finalised her account after spending 6 months reviewing her records, which involved her revising dates in her own journal.

(6) The inconsistencies and contradictions both in her evidence (as found by the Tribunal) and in her behaviour at the time of the alleged incidents. Examples of the latter included the absence of any progress in the sexual relationship beyond the three episodes, the apparent ease with which she reverted to a

purely therapeutic relationship in mid 2013 and her readiness to allow the Appellant to communicate with her husband and to discuss with her inviting her husband to family therapy at the time that the alleged sexual relations were ongoing.

53. In the Decision, the Tribunal gave no adequate reasons as to why these points and the Appellant's evidence were rejected. The Tribunal fell into errors of the type identified in *Dutta.* It afforded primacy to the credibility of Patient A when her evidence (a) was uncorroborated by contemporaneous documentary evidence (b) required revision; (c) was based on events many years earlier and was at points inconsistent and contradictory. Further the Tribunal wrongly relied on interpretations of the evidence which had not been raised at the hearing. The Court is entitled to look at the cumulative effect of these concerns in relation to individual findings of fact: see *Tariquez-Zaman* v *General Medical Council* [2019] EWHC 2927 (Admin) at §89.

54. I consider these overriding submissions after considering the challenge relating to the specific allegations: see paragraphs 110 to 121 below.

Allegations 1(b)(i) to (iii): holding Patient A's hand, hugging and stroking hair

55. I consider these three allegations together.

The Tribunal's findings

Allegation 1(b)(i): holding Patient A's hand

56. The Tribunal addressed allegation 1(b)(i) at paragraphs 29 to 31 as follows:

> *"29. The Tribunal considered email correspondence from Patient A to Dr Byrne, dated 7 December 2011:*
>
> > *'…To sit there on Monday and want to be close, willing myself to move my fingers just ever so slightly when you had them in your hand, to share the moment, to share the caring, to take in what you were giving, but instead being paralysed and not knowing why.'*
>
> *If Dr Byrne had not held Patient A's hand, the Tribunal expected that Dr Byrne would have challenged this statement in his response to Patient A. However, Dr Byrne did not challenge this assertion in his email response, dated 8 December 2011.*
>
> *30. In Dr Byrne's witness statement, dated 18 June 2018, he states:*
>
> > *'At the end of the conversation patient A turned and rested her head on my shoulder and without thinking I put my arm round her shoulder.'*
>
> *The Tribunal noted that it is unclear as to the exact date that this took place. However, the Tribunal found it was*

clear that some physical contact had occurred between Dr Byrne and Patient A during her therapy sessions. The Tribunal considered this against the backdrop of their increasingly personal relationship and found it credible that Dr Byrne held Patient A's hand as a form of comfort during difficult conversations.

31. In all the circumstances, the Tribunal determined that on one or more occasions during consultations with Patient A Dr Byrne held her hand. Accordingly the Tribunal found sub-paragraph 1(b)(i) proved.

Allegation 1(b)(ii): hugged Patient A

57. The Tribunal addressed allegation 1(b)(ii) at paragraphs 32 to 35 as follows:

"32. The Tribunal had sight of a journal entry from Patient A, dated 13 October 2011, stating 'he said he loves me. He held me'.

33. The Tribunal had also sight of an email from Patient A to Dr Byrne, dated 4 December 2011:

> *'I want you to be real. I think that is why I wanted to hold you back. But why do you hold me – I think just because its [sic] just a ploy you are using to make me talk…I wanted to be able to talk, but I attacked; I want to push you away/attach me, but I let you hold me.'*

If Dr Byrne had not hugged Patient A, the Tribunal expected that Dr Byrne would have challenged this statement in his response to Patient A. However, the Tribunal has no evidence before it of Dr Byrne challenging this assertion. Furthermore, during his oral evidence, Dr Byrne admitted that he had put his arm round Patient A's shoulders and demonstrated to the Tribunal how he had squeezed her shoulder.

34. In light of the above, and set against the background of their increasingly personal relationship the Tribunal found it credible that Dr Byrne would hug Patient A as a form of comfort during or after difficult conversations.

35. Therefore the Tribunal concluded that on one or more occasions during consultations with Patient A Dr Byrne hugged her. As such, the Tribunal found sub- paragraph 1(b)(ii) proved. "

Allegation 1(b)(iii): stroked Patient A's hair etc

58. The Tribunal addressed allegation 1(b)(iii) at paragraphs 36 and 37 as follows:

> *"36. The Tribunal heard evidence from both Dr Byrne and Patient A stating that during Patient A's therapy sessions at times they would sit closely together due to Patient A being very softly spoken to enable Dr Byrne to hear her. The Tribunal found it credible that if Patient A was upset and Dr Byrne comforted her with physical affection, this would credibly extend to stroking her hair/ear area.*
>
> *37. In all the circumstances, the Tribunal concluded that on one or more occasions during consultations with Patient A Dr Byrne stroked her hair and/or face and or/ears. Therefore the Tribunal found sub-paragraph 1(b)(iii) proved."*

The Appellant's case

59. As regards these allegations, the Appellant contends as follows.

Allegation 1(b)(i): holding hands

60. First, the Tribunal's reliance (at paragraph 29) upon the Appellant's failure to challenge what was said by Patient A in her email of 7 December 201 was not put to the Appellant in the course of the hearing and not even relied upon by the GMC in argument. Secondly that email contained a lot of detailed information. There was no need for the Appellant to deal with each and every point made in that email. There are many reasons why he did not deal with each point or, specifically, the handholding. Thirdly, Patient A's account was not corroborated by any contemporaneous documentary evidence. The Tribunal provided no reasoning as to why the Appellant's evidence was not accepted. Fourthly, it was not reasonable to infer from the Appellant's account of a single occasion of placing his arm around her shoulder that there were multiple episodes of handholding. Moreover, that occasion occurred in June 2012 at the earliest and the Tribunal was wrong to use this as support for the handholding which is said to have taken place in December 2011.

Allegation 1(b)(ii): hugging

61. Again, the Tribunal's reliance upon the Appellant's failure to challenge what was said by Patient A in her email of 4 December 2011 was neither put to the Appellant nor relied upon by the GMC. Secondly, there was no response to the email at all and, even if he had responded, no reason why the Appellant would object to this particular point, amongst the other points raised in such a lengthy email. There was no reason to infer that by not responding he was accepting that there had been a hug. Thirdly, the Tribunal's decision is based on the credibility of Patient A's account, when the email of 4 December 2011 (the only documentary evidence) is open to different interpretations, and has to be seen in the context of her mental health problems. Finally, the Tribunal provided no reasoning as to why the Appellant's evidence was not accepted.

Allegation 1(b)(iii): stroking hair

62. First, it was wrong for the Tribunal to rely upon the fact that the Appellant and Patient A would sit close together so that he might hear in order to corroborate Patient A's account of stroking. There was other good reason for them to sit close together: the Appellant has a hearing impairment. Secondly, no other explanation was given as to why Patient A's account should be preferred to the Appellant's where there was no corroborating documentary evidence. There is no analysis of the Appellant's contrary account.

The GMC's case

63. The GMC submits that allegations 1(b)(i) to (iii) fall to be considered together. They are part of a course of conduct in the summer of 2011 and were all happening at the same time. The findings were based on Patient A's account in her evidence, which was supported, cumulatively and in respect of all of the allegations, by a number of further strands of evidence. The Court should assume that the Tribunal had taken into account all of the evidence. These factors, cumulatively, are the reason for the Tribunal preferring the evidence of Patient A over the Appellant's account. The Appellant's account, in his witness statement is largely denials. The emails of 4 and 7 December 2011 were part of the GMC evidence and were exhibited to Patient A's witness statement. The Appellant knew all along that these emails were relied upon by the GMC. The failure to put to the Appellant the absence of response to the emails did not render proceedings unfair. Unlike the position in the case of *Dutta*, this was not a new case theory. Rather it was just one evidential point relied upon to establish the factual allegation, which had not changed at all. The emails were just part of the evidence upon which the Tribunal relied to find proved Patient A's account that had not changed.

Discussion and conclusion

64. It is appropriate to consider the three aspects of allegation 1(b) together. Patient A's evidence, forming the foundation of the allegations, is set out in three paragraphs of her witness statement under the heading "physical contact" where she describes, compendiously, and in some detail, handholding, hugging, hair stroking and other forms of contact (holding, playing with earlobes and cradling the side of her head). By contrast the Appellant's evidence comprised principally simple denials, supplemented by a statement that he did not greet patients in general nor Patient A in particular, with any physical contact and that Patient A herself avoided any form of physical contact.

65. As regards Patient A's emails of 4 and 7 December 2011, both were long and discursive, expressing a variety of emotions, in the course of which there was some reference to holding and handholding. At the time, the Appellant did not respond to the former and responded briefly to the latter, but did not refute the reference to handholding. I accept the Appellant's submission that the absence of response at the time to the specific issues of holding and handholding was neither put to the Appellant in cross-examination nor relied upon expressly by the GMC at the hearing. Nevertheless Patient A's emails themselves were in evidence, referred to in Patient A's witness statement and, in that way, relied upon by the GMC. They were not addressed by the Appellant in his evidence, in circumstances where he was fully aware of the nature of the allegations and of the emails. I consider that the failure to put to the Appellant the absence of response did not amount to procedural unfairness

or irregularity. The absence of response was not a "new case theory"; rather it was one particular strand of additional evidence, in circumstances where the emails themselves were in evidence. However, I agree with the Appellant that the inferences to be drawn (at paragraphs 29 and 33) from the absence of response at the time are weak and provide little, if any, support by way of corroborating Patient A's account. The references to holding and handholding were made amongst a variety of points covered by the emails and the failure to deny does not necessarily infer acceptance of the particular assertions made by Patient A in those emails. Similarly, I accept that the mere fact of them sitting close to each other does not *necessarily* corroborate her account of hair stroking, particular where there was good other reasons for sitting close together.

66. Nevertheless, and despite the weakness in some of the Tribunal's specific reasoning, I am satisfied that there was more than sufficient evidence before the Tribunal upon which it was justified in finding each of these three allegations proven. The essential foundation for those findings is Patient A's own witness statement evidence. It is clear that the Tribunal accepted this account as credible, at least implicitly. That evidence was corroborated by the contemporaneous emails themselves (regardless of the Appellant's reaction); by the journal entry stating that "he held me"; by the Appellant's admission (despite his evidence (at paragraph 64 above) of shirking physical contact) that there was some physical contact (i.e. putting an arm around her (in the context of kissing)); an increasingly intimate relationship (evidenced by the fact that allegation 1(a) is now accepted); and the fact that they did sit close to each other. The Tribunal did not assess the credibility of her oral evidence separately from its assessment of other uncontested evidence. Moreover, in assessing Patient A's credibility in respect of these allegations, the Tribunal was entitled to take account of the fact that it found her evidence concerning the more serious allegations in allegation 3 to be credible.

67. For these reasons, the Tribunal's findings at paragraphs 31, 35 and 37 were neither plainly wrong nor so out of tune with the evidence properly read as to be unreasonable.

Allegation 1(b)(iv): told Patient A that you loved and/or cared for her

The Tribunal's findings

68. The Tribunal addressed allegation 1(b)(iv) at paragraphs 38 to 41 as follows:

> *"38. The Tribunal noted email correspondence from Dr Byrne to Patient A, dated 23 October 2011:*
>
> *'[XXX] needs you and your love and I care for you as if you were my daughter and will do my best to help you.'*
>
> *39. The Tribunal had regard to Patient A's witness statement, dated 12 September 2018:*
>
> *'Another memory I have…is his telling me he loves me or cares for me as much as his daughter…I remember*

> *feeling special when he said that too, because I could tell he loved her a lot by the way he spoke of her, but I felt it a bit odd for him to have used her and I as a comparison, as they wouldn't kiss like we did.'*
>
> *40. The Tribunal noted the oral evidence of Patient A in which she stated, 'I felt he was saying he loved me without actually saying it'. The written and oral evidence of Patient A could appear contradictory, but the Tribunal found it probable that Patient A remembered Dr Byrne saying that he cared for her like his daughter, which she interpreted as meaning 'loved', even if he did not use the word. It acknowledged that Dr Byrne may not have intended this interpretation and that he was likely comparing his affection to the careful love of a child and not implying sexual or inappropriate feelings. However, given Patient A's vulnerabilities the Tribunal determined that Dr Byrne should have exercised more caution in expressing himself.*
>
> *41. The Tribunal therefore found sub-paragraph 1(b)(iv) proved."*

The Appellant's case

69. At paragraph 40, the Tribunal recognised the apparent contradictions in Patient A's evidence, but provided no reasoning as to why it preferred her account to that of the Appellant. Whilst acknowledging what is in the Appellant's email (referred to at paragraph 38), the Tribunal's approach to inconsistency was misguided. It was prepared to accept and excuse the contradictions in elements of Patient A's account, but did not show the same leniency towards the Appellant's inconsistencies.

The GMC's case

70. First, the Tribunal did provide an explanation of its reasoning. At paragraph 40, after pointing out the apparent contradiction between her written and oral evidence, the Tribunal found it probable that Patient A remembered the Appellant saying that he "cared for her" which she interpreted as meaning "love", even if the words were not used. Secondly, the conclusion is supported by a journal entry of 13 October 2011 "why did you say you love me?" Further, allegation 1(b)(iv) is that he told her that he "loved and/or cared for or words to that effect". This is a broad allegation. The evidence was not just the email of 23 October 2011, but also Patient A's evidence in her witness statement.

Discussion and conclusion

71. In my judgment, first, the suggested contradiction in Patient A's accounts is not as great as suggested by the Tribunal. The passage in her witness statement refers to him saying "he loves me or he cares for me"; the quote in the first sentence of paragraph

40 accepts that he had not expressly said "he loves me". In fact that quote is a quote from Patient A's witness statement (rather than her oral evidence). When that statement was put to her in cross-examination, she accepted that she had interpreted his reference to his daughter as meaning that he loved her, Patient A. In that cross-examination, she also referred to a page in her journal where she had written "why did you say you loved me". Overall, the Tribunal's analysis in paragraph 40 was, in my judgment, correct. Secondly, as for the treatment of inconsistencies in the *Appellant's* account, in so far as this refers to his inconsistency in relation to allegation 3(a), the Tribunal was entitled to treat that inconsistency as being of far greater significance (see paragraph 84 below). Other than that inconsistency, most of the Appellant's evidence consisted of denials. Thirdly, and, most critically, the *allegation* which the Tribunal found proved was that the Appellant told her the "[he] loved and/or cared for her as much as [his] daughter or words to that effect". In his witness statement, the Appellant's evidence was that he had never said that "he loved her", although he acknowledged and explained the content of the email of 23 October 2011. Nevertheless in cross-examination he said "*... I did say I loved her, that I cared for her like I cared for my daughter"* [2]. In any event, to find *the allegation* proved, the Tribunal did not need to find that the Appellant had expressly said that he "loved her". On the evidence of the email, the journal entry and Patient A's oral and written evidence and indeed the Appellant's evidence, it is clear that he had said, at least, that he cared for her or words to that effect. The Tribunal's finding at paragraph 41 was neither plainly wrong nor so out of tune with the evidence properly read as to be unreasonable.

Allegation 1(c): entered Patient A's house unannounced

The Tribunal's findings

72. The Tribunal addressed allegation 1(c) at paragraphs 42 to 44 as follows:

> *"42. The Tribunal had regard to Patient A's witness statement, dated 12 September 2018:*
>
> > *'On this occasion, Dr Byrne had been trying to persuade me to come in, but the more he tried the more distressed I became, until eventually I had to leave the situation all together and not see him that day. I returned home to calm down and I set about doing some tasks. As I came in through the back door from putting the washing out in the garden, I was shocked to see Dr Byrne had entered my house and was looking for me without my knowing he was there or even coming to the house.'*
>
> *43. The Tribunal considered Dr Byrne's oral evidence in which he recounted another patient at the Trust who had taken their own life. The Tribunal acknowledged that this may have increased Dr Byrne's concern for other suicidal patients. The Tribunal found it likely that in*

[2] Day 2/46A-B

> *refusing to see him, Patient A had raised Dr Byrne's concerns. In these circumstances, the Tribunal found it credible that Dr Byrne would visit Patient A to ensure that she was safe.*
>
> *44. Accordingly the Tribunal found sub-paragraph 1(c) proved."*

The Appellant's case

73. It was illogical for the Tribunal to rely on the death of another patient to support Patient A's account that the Appellant entered her house unannounced. The inference drawn from the position of another patient was weak. Moreover the association between the death and the alleged incident was not put to the Appellant. The Tribunal provided no explanation as to why Patient A's account was not only credible, but preferred to that of the Appellant. There was no corroboration from contemporaneous documentation (such as in emails or texts or her journal). Since this is not an aspect which could be said to be embarrassing to Patient A, there is no reason for it not be have been recorded or to have been subsequently deleted. Moreover there is considerable uncertainty on the part of Patient A as to the dates. In her witness statement she merely stated that this happened between 2011 and 2013. This is the type of event she would be expected to remember and she should have been able to give further details.

The GMC's case

74. This was a conclusion which was open to the Tribunal on the evidence of Patient A. The failure to put to the Appellant specifically the other patient's suicide as a reason for attending unannounced did not create any unfairness to the Appellant. The Appellant's case was that the visit simply did not happen; putting a motive to him for a visit that he said never happened did not take matters further. Secondly the Appellant volunteered that he was very concerned about the risk of suicide and that his concerns were heightened by the death of another service user. This was relevant background to the allegation in question. There was no requirement for direct corroborating evidence.

Discussion and conclusion

75. There is some force in the Appellant's argument here. The Tribunal's reasons are somewhat brief. The Appellant's evidence was to deny the allegation. He accepted that he did attend at her house when she refused to come to the clinic, but this was always by prior arrangement and never unannounced. The absence of any documentary support for Patient A's account carries some weight. However, in my judgment it was not irrational of the Tribunal to rely on the Appellant's own, volunteered, oral evidence about another patient's suicide in circumstances where he was concerned about Patient A. The Appellant himself explained that he was too emotionally involved with Patient A because of his concern about *her* risk of suicide and the previous experience where he and his team had been criticised by a coroner for not visiting a distressed patient who subsequently committed suicide. This is an explanation of why he had made himself too available and supports the finding of the unannounced visit, at a time when Patient A had shown significant distress. The

Tribunal was entitled to conclude that this evidence provided corroboration for Patient A's evidence (set out at paragraph 42). The Tribunal's finding at paragraph 44 was neither plainly wrong nor so out of tune with the evidence properly read as to be unreasonable.

Allegation 1(d)(i) and (ii): gave Patient A gifts

The Tribunal's findings

76. The Tribunal addressed allegation 1(d)(i) and (ii) at paragraphs 45 and 46 as follows:

> *"45. In her witness statement dated 12 September 2018, Patient A states that the gifts were given to her to use as a strategy to help her when Dr Byrne was not physically available for support. During his oral evidence, Dr Byrne discussed giving a cat to another patient. The Tribunal found it credible that Dr Byrne had given Patient A the gifts. However, the Tribunal found it was wholly inappropriate in the circumstances of this particular therapeutic relationship.*
>
> *46. Accordingly the Tribunal found sub-paragraphs 1(d)(i) and 1(d)(ii) proved."*

The Appellant's case

77. The Tribunal's reliance upon the fact that the Appellant had given another patient a gift to support his allegation was illogical, particularly where the reasons for the gift of the cat were not explored with the Appellant in his evidence. The Tribunal provided no other explanation as to why Patient A's account was to be preferred to that of the Appellant. There was no corroboration from documentary or photographic evidence and Patient A conceded that her memory of receipt might be awry by as much as two years. This is an allegation which is neither embarrassing nor sensitive. There is no logical reason why there would not be a reference to gifts in exchanges between the Appellant and Patient A in emails or in her journal which dealt with all manners of things, some of them pretty mundane.

The GMC's case

78. First, Patient A gave a clear account of receiving the gifts. As regards the absence of documentary or photographic evidence, Patient A explained that she gave the scarf back and disposed of the handkerchief. The accepted fact that the Appellant had given a gift to another patient was relevant to the Tribunal's assessment of the likelihood that he had given gifts to Patient A. The gift given to the other patient was put to the Appellant in cross-examination. There was no unfairness in the Tribunal placing reliance on that other gift amongst other factors to support its conclusion that he gave gifts to Patient A. The uncertainty as to date on which she received the scarf arose only because she went to the same competition on two occasions in different years and she could not recall which of those two years it was.

Discussion and conclusion

79. The Appellant's evidence was that he had never given Patient A any gift and certainly not a scarf or handkerchief. In my judgment the Tribunal was entitled to accept Patient A's evidence that he had. Whilst the absence of reference to the gifts in any document may be noteworthy, there were other factors to support the Tribunal's conclusion. First, the detail of her evidence supported her account. She provided a description both of the scarf (brown checked) and the handkerchief (white with his aftershave). Furthermore she recalled that the scarf was given to her specifically to take away to a competition to help her cope. The fact that she was not sure of the date was explained by the fact that she had gone to the same competition on two different occasions. The detail of her recollection of the scarf having been given for a competition is a detail which corroborates her evidence, regardless of the fact that she could not remember which date it was.

80. Secondly, the evidence concerning the gift of a cat to another patient supported her evidence. Significantly that gift was first referred to by Patient A. It was in the context of being introduced to that other patient who told her about that gift, that Patient A first raised in her witness statement the gifts given to her. When that passage in Patient A's witness statement was put to the Appellant in cross-examination, he confirmed that he had indeed given the other patient a cat. That provided corroboration for Patient A's initial account. The underlying reason for the gift to the other patient was not significant; rather the fact of gift of the cat and Patient A's unprompted (and confirmed) recollection of it was. Further I accept the GMC's submission that it is unusual for a psychiatrist to make a gift to a patient and the fact that the Appellant had done so before goes to the likelihood of him doing it. For those reasons, the Tribunal's finding at paragraph 46 was neither plainly wrong nor so out of tune with the evidence properly read as to be unreasonable.

Allegation 3(a): kissing Patient A on the lips

The Tribunal's finding

81. The Tribunal addressed allegation 3(a) at paragraphs 51 to 56 as follows:

> *"51. The Tribunal acknowledged Dr Byrne's admission that Patient A had kissed him on one occasion. The Tribunal considered Dr Byrne's account of this as set out in his witness statement, dated 18 June 2019:*
>
> > *'At the end of the conversation patient A turned and rested her head on my shoulder and without thinking I put my arm round her shoulder. Patient A then lifted her head and kissed me on the lips. I was taken by surprise and moved away. I recall patient A apologised for kissing me. I made my excuses and as our session had ended I then left.'*
>
> *The Tribunal was therefore satisfied that Dr Byrne and Patient A had kissed on one occasion. However, the Tribunal found Dr Byrne's account of the admitted kiss in*

his oral evidence was inconsistent with his accounts given in the documentary evidence. In Dr Byrne's oral evidence he stated that the kiss occurred on the side of his cheek and partially on his lips. However, in his witness statement, dated 18 June 2019, he refers only to being kissed on the lips. Furthermore, in Dr Byrne's account given at the Trust investigation meeting, he states 'the patient kissed me on my lips…I extricated myself from the situation and I think the patient apologised for kissing me'. The Tribunal took the view that Dr Byrne was attempting to minimise the incident.

52. *The Tribunal had regard to Patient A's witness statement, dated 12 September 2018, in which she details another incident of kissing:*

> *'I had a flashback about the teasing about my teenage kissing whilst Dr Byrne and I were kissing on the sofa on 4 July 2012 during another home visit and I blurted out to him what had happened back then. Dr Byrne laughed sympathetically and told me that I 'kiss beautifully' more than once after he knew this.'*

53. *The Tribunal considered the oral evidence of Patient A. The Tribunal found Patient A to remain consistent in her evidence regarding this encounter. When questioned about the event, she remained steadfast, stating 'it did happen and he knows it did'. In light of the inconsistencies in Dr Byrne's account, the Tribunal preferred Patient A's evidence regarding the incidents of kissing.*

54. *Having regard to the email and text exchanges between Dr Byrne and Patient A from 2011 to 2016, the Tribunal was satisfied that their relationship had become intimate.*

55. *The Tribunal determined that two people can share kisses without there being any sexual connotations. However, in this instance, these were kisses on the lips, in the context of Patient A having shared her sexual desire towards Dr Byrne with him. Therefore, the Tribunal determined that at this point, any kisses between the two would amount to a sexual relationship.*

56. *Therefore, the Tribunal found Between June 2012 and June 2013 Dr Byrne engaged in a sexual relationship with Patient A in that on at least two occasions he and Patient A kissed on the lips. As such, the Tribunal found sub-paragraph 3(a) proved."*

The Appellant's case

82. First, the Tribunal was wrong to dismiss as inconsistent the Appellant's account of the single incident. The distinction between a kiss on the lips and a kiss partly on the cheek and partly on the lips is not sufficient to warrant rejection of his evidence. The Appellant had been entirely open and otherwise consistent in his account and is a man of good character. Secondly, the Tribunal's analysis of Patient A's account fails to have sufficient regard to the lack of contemporaneous evidence to support the allegation of kissing on at least two occasions. Thirdly, the Tribunal does not explain how unidentified emails and text exchanges (referred to at paragraph 54) support the existence of such intimacy as would involve kissing as part of sexual relationship. There is nothing in those exchanges relating to the kiss or to sexually inappropriate behaviour. Fourthly, in considering the credibility of her evidence, the Tribunal did not consider Patient A's documented sexual fantasies about the Appellant. Further the Tribunal gave no explanation as to why it did not accept the Appellant's evidence. In contrast with the position with Patient A, there was a lack of readiness to consider a trivial inconsistency on the part of the Appellant. Finally, there is no explanation by the Tribunal why it found that he kissed her rather than she kissed him.

The GMC's case

83. Here the Appellant did give a competing version of events and therefore the Tribunal had to consider credibility and consistency. It gave clear reasons for preferring Patient A's account of the kiss and its assessment was reasonable. She had been consistent in her account over time. The Tribunal was entitled to rely upon the inconsistency in the Appellant's evidence. The Tribunal took account of the Appellant's partial admission and of his good character. Whilst there was no documentary evidence to support this directly, Patient A had offered a good explanation as to why she did not record such matters (see paragraph 32 above). The Appellant was minimising the kiss. There was an important difference between a kiss partly on the cheek and a kiss fully on the lips. The history of emails and texts, and including the admission of allegation 1(a), are a proper and reasonable basis for the conclusion.

Discussion and conclusion

84. Here, in respect of this allegation of kissing, there were competing accounts positively put forward by Patient A and the Appellant. The Tribunal therefore properly considered the relative credibility of their evidence. Patient A's evidence was that on 25 June 2012 the Appellant kissed her on the mouth, and referred to another occasion of kissing on 4 July 2012. As recorded in paragraph 51 of the Decision, the Appellant's written evidence was that she kissed him on the lips, but his oral evidence in cross-examination was that she kissed him partly on his cheek and partly on his lips. In my judgment, the Tribunal was properly entitled to treat this inconsistency as of considerable significance; the change in his account being evidence of his seeking to downplay the significance of the kiss. At the time of his evidence, the Appellant was aware of that significance. In cross-examination, the Appellant accepted[3] that there is a very clear distinction between a deliberate kiss on the lips and a peck on the cheek, and that the latter did not have any sexual connotation. It is noteworthy too that later, when pressed on this by a Tribunal member, he gave a contradictory answer[4],

[3] Day 2/38D-E
[4] Day 3/5D-F

appearing to backtrack on the significance of the distinction. Secondly, the Tribunal's reference, in the last two sentences of paragraph 51, to the Appellant's account (of a kiss on the lips) at the Trust investigation meeting is particularly significant, when seen in the context of his contradictory evidence in cross-examination[5] that he had previously said, in that investigation, that it was *not* a kiss on the lips. (Moreover, in my judgment, the Tribunal's finding of lack of credibility on this issue is of wider importance for his credibility as a whole). Thirdly, at paragraph 53, the Tribunal, in contrast to the Appellant's evidence, properly referred to and relied upon the consistency of Patient A's evidence and, based on that contrast, was entitled to prefer her evidence. Finally, nothing turns on whether Patient A kissed the Appellant or the Appellant kissed Patient A. The allegation itself was that the Appellant kissed Patient A; Patient A's evidence, accepted by the Tribunal, was that the first kiss was to similar effect. The finding of fact at paragraph 56 was simply that "they kissed on the lips" and the Appellant thereby engaged in a sexual relationship. For these reasons, the Tribunal's finding at paragraph 56 was neither plainly wrong nor so out of tune with the evidence properly read as to be unreasonable.

Allegation 3(b): placed Patient A's hand on erect penis

The Tribunal's findings

85. The Tribunal addressed allegation 3(b) at paragraphs 57 and 58 as follows:

> *"57. The Tribunal had regard to Patient A's witness statement, dated 12 September 2018:*
>
> > *'Whilst we were kissing he took my left hand and he put it on his erect penis over his trousers. He then excused himself to the bathroom and when he came back he joked about not having any spare trousers with him and wouldn't have been able to go into work in those ones if he'd had an accident.'*
>
> *The Tribunal considered the level of detail in Patient A's account. It determined that the detail was inconsistent with being a part of a romantic fantasy and therefore unlikely to be a fabrication.*
>
> *58. The Tribunal therefore determined that between June 2012 and June 2013 Dr Byrne engaged in a sexual relationship with Patient A in that in or around July 2012 he placed Patient A's hand on his erect penis whilst kissing Patient A."*

The Appellant's case

86. The Appellant contends that the Tribunal provided wholly inadequate reasoning to support its finding of what was such a significant allegation. This allegation requires heightened examination and scrutiny. Yet it attracts just a single paragraph of the

[5] Day 2/38A-B

Decision, despite its very serious nature. There was no such scrutiny. The only reason given for accepting Patient A's evidence - inconsistency between the detail of her account and possible romantic fantasy – took no account of the existence of detailed sexual fantasies in the journal or the piecemeal and inconsistent manner in which this account had been provided or the time and effort she had devoted to finalising her account. The Tribunal should not base its finding on the detail of an account which had varied and been developed over time. It was not safe to make a finding solely on the basis of Patient A's account when there were other concerns about fantasies, sexual interest in the Appellant and in the absence of documentary evidence: see *Gestmin*. Further there was no general relative assessment of credibility as between the Appellant and Patient A. The Appellant invites the Court to conclude that the Tribunal's finding here was wrong and to proceed to make a finding that the allegation is not proved.

The GMC's case

87. The Tribunal's determination on this allegation must be read alongside its reasons for finding the other allegations proved. In particular, whilst the reasoning here was brief, it must be looked at in the context of allegation 3(c). (Fantasies were addressed in relation to the latter allegation.) Neither the existence of sexual fantasies nor the suggested piecemeal manner in which the account was provided nor the time and effort devoted to finalising her account provide reasons for disbelieving the Appellant's account. Patient A's core allegations have not varied over time. The manner in which they were disclosed reflects her psychological condition. Further the Tribunal was perfectly entitled to base its findings on Patient A's oral account. Such an approach is commonplace in allegations of this nature, turning on one person's word against another.

Discussion and conclusion

88. Considered in isolation, the Tribunal's reasoning here is slim, for what is a very serious allegation. Nevertheless its conclusion was one it was entitled to reach, for the following reasons. First, the level of detail of a witness's account of an event can properly be an indicator of the truth of that account; such detail might provide the "ring of truth". Here Patient A did not merely describe the sexual act, but went on explain, in very specific and perhaps unusual terms, what happened thereafter. In cross-examination, the Appellant responded only that the reference to "spare trousers" was a "complete mystery". As the Tribunal observed, this was an odd detail to have fabricated. The level of detail was a rational basis for its decision, Secondly, the Tribunal's assessment of Patient A's account was not based on her demeanour (the manner in which she gave her evidence); it was based on the content of what she said. Thirdly, Patient A's core allegation remained unchanged over time. Fourthly, as is common in an allegation of this kind, the issue came down to one person's word against the other's. The absence of documentary support is not surprising. The Appellant's case was simple denial; and thus effectively that Patient A was making it up - either by confabulation or dishonestly. There was no evidence of confabulation, so his case was that she was lying. Fifthly, as regards the suggested need for "heightened scrutiny", the need for better evidence is dependent on the inherent improbability of the event (see paragraph 22 above). However here the inherent improbability of the Appellant's conduct falls to be balanced with the inherent improbability of Patient A deliberately fabricating such a scenario of consensual

conduct. Finally, it is legitimate to take into account, in relation to this finding, the Tribunal's findings in respect of other allegations and in particular, its more extensive findings on allegation 3(c) (which are upheld below). Accordingly, the Tribunal's finding at paragraph 58 was neither plainly wrong nor so out of tune with the evidence properly read as to be unreasonable.

Allegation 3(c): masturbated Patient A

The Tribunal's findings

89. The Tribunal addressed allegation 3(c) at paragraphs 59 to 66 as follows:

> *"59. The Tribunal noted the account of Patient A from her witness statement, dated 12 September 2018:*
>
> > *'On the first two occasions this involved Dr Byrne masturbating me whilst I knelt up in front of him and he was seated. This happened through my clothing. These took place at late appointments during the summer months of 2012. I remember this because I left the building into bright sunshine and was terrified someone would see the state of my jeans before I could remove them when I got home. I was apprehensive about what we were doing, but it felt like a natural progression of things between us. On each of these occasions, when Dr Byrne masturbated me I climaxed and my jeans were wet. On the second occasion that Dr Byrne masturbated me, as I stood up I noticed a considerable wet patch on the floor where I had been kneeling which I thought I had caused. This made me extremely panicky and distressed as I thought someone might come in and see it and know what had taken place between us. Dr Byrne laughed and explained that it wasn't me that had caused it; it was in fact a stain on the floor that was already there. I discovered he was right when I touched it.'*
>
> *60. The Tribunal noted Patient A's concerns to be specific, graphic and mundane. The nature and level of detail she shared was not found to be consistent with invention.*
>
> *61. The evidence before the Tribunal overwhelming portrays Patient A as a private, reserved woman who is concerned with how she is perceived by other people. The Tribunal noted that in her own witness statement she refers to herself as 'sexually naïve' and 'inhibited'. Dr Baggaley agreed that Patient A struggled to make and maintain emotional relationships and had difficulties talking about intimacy. However, it also noted that Patient A has consistently stated that the encounters with*

Dr Byrne were consensual, which she did not have to do. It found her evidence to be credible.

62. *The Tribunal accepted the view that Dr Baggaley shared, which was that this was an unusual sexual interaction. He said he was surprised that matters between Dr Byrne and Patient A had not progressed further. Dr Baggaley said:*

> *'It is one of those aspects of – I have never come across – to some extent, with a lot of these cases, the trouble is they are often very individual and so it is difficult to have patterns. I suppose what struck me was unusual was the fact that the alleged behaviour occurred quite early on in the sort of intense therapeutic period and then did not progress and seemed to stop. To me, that seemed to be unusual.*

63. *The Tribunal recognised that Patient A was angry, albeit whether this was because she thought that Dr Byrne had failed her as a potential romantic partner, a therapist, or both, was unclear. The Tribunal noted what Patient A had said in her witness statement:*

> *'Around the time that we were physically intimate, Dr Byrne had said to me 'If things were different and we didn't have our families to consider....' This led to me day dreaming about us being together somehow in the future, because it sounded like he wanted us to be together properly and I thought if I could be with someone who knew me and understood me and accepted me like Dr Byrne did, then I might be ok.'*

However, this did not detract from her ability to give clear evidence as to her recollections. The Tribunal found her to be frank about her fantasies and her attraction to Dr Byrne and as a result regarded her as someone who was willing and able to give credible evidence.

64. *The Tribunal found that despite Patient A extensively recording her feelings for Dr Byrne within her journal, the Tribunal had no evidence of a contemporaneous journal entry recording an incident of Dr Byrne masturbating her. When questioned on this matter, Patient A informed the Tribunal that this was because she was concerned that someone else would read her journal. Whilst the Tribunal noted that there were other incriminating entries within her journal, including detail of her feelings towards Dr Byrne and reference to him holding her. The Tribunal did accept Patient A's explanation for not recording the masturbation within her*

journals, given the specifics of masturbation were intimate details that actually occurred, rather than the recording of dreams or feelings.

65. *The Tribunal noted an apparent inconsistency within Patient A's oral evidence, as she stated that she did not expect the relationship to progress, but in her witness statement she refers to the masturbation as feeling 'like a natural progression of things between us'. It considered this to reflect Patient A's confused understanding of their relationship, that was both therapeutic and increasingly (and wholly inappropriately) intimate. Given that Patient A's journal details her masturbation fantasies and that she has admitted having sexual fantasies about Dr Byrne, the Tribunal found it more likely that this had influenced the nature of their intimacy.*

66. *Accordingly the Tribunal found sub-paragraph 3(c) proved."*

The Appellant's case

90. The Appellant submits that, as in the case of allegation 3(b), this allegation required "heightened scrutiny". The Tribunal took no account of the existence of detailed sexual fantasies in the journal, the piecemeal and inconsistent manner in which this account had been provided or the time and effort she devoted to finalising her account. No attempt had been made to analyse the accuracy of her account against the similar sexual fantasies recorded in Patient A's journals. In one of those entries, it is clear that the doctor was in the dream. Reliance on detail has to be viewed with caution, because of the passage of time and similarities with vivid dreams. It was she who instigated sex and she admitted sexual fantasies. The conclusion at paragraph 64 that Patient A would have chosen to document fantasies but not actual events is illogical and demonstrates a readiness to accept Patient A's evidence over the contents of contemporaneous documents. In this way, the Tribunal wrongly gave primacy to Patient A's evidence over the contemporaneous evidence and the Appellant's evidence. The Tribunal did not deal with the Appellant's account. Further the Tribunal accepted that there was inconsistency within Patient A's oral evidence. The Tribunal's findings at the end of paragraph 65 were inconsistent with the GMC's case that these events were instigated by the Appellant and without her dreams being shared with him and that it was she who submitted to him.

The GMC's case

91. The GMC submits that considerations similar to those in relation to allegation 3(b) arise in respect of this finding. First the Tribunal did give consideration to the sexual fantasies recorded in the journals. The Tribunal properly relied upon the detail provided by Patient A of this incident. Patient A had no history of confabulation and the Tribunal found her to be a credible witness. It was not illogical for Patient A to document fantasies but not actual events. The Tribunal expressly addressed that issue at paragraph 64 and accepted Patient A's explanation. There was no contemporaneous evidence directly relevant to what happened on three occasions in a

private consultation room. The Tribunal had to base its determination in large part on the assessment of the credibility of the witnesses. It concluded that it preferred Patient A's account to that of the Appellant.

Discussion and conclusion

92. This allegation, again, turned upon one person's word against the other person's. The Appellant's witness statement evidence was a simple denial. By contrast with its reasoning in relation to allegation 3(b), the Tribunal's analysis in relation to this allegation was more substantial. It gave a number of carefully considered and detailed reasons for accepting Patient A's account, based both on the credibility of the account itself and upon her credibility as a witness. First, at paragraph 60 the Tribunal's reliance upon the detail of her evidence was appropriate and rational. Patient A provided precise and idiosyncratic details of what had happened, even more so than in the case of allegation 3(b). Secondly, its conclusion at paragraph 61 about being private and reserved was backed up, not only by Dr Baggaley's evidence, but also by that of Mr Simoes. Moreover, the Tribunal's further reliance upon the fact that she had said that the sexual encounters were consensual put her in a worse light and was less damaging to the Appellant was justified. This supported a finding that she was not lying, somehow out of vengeance. As regards paragraph 62, the Tribunal properly noted an unusual feature of the case, but, on the basis of Dr. Baggaley's expert evidence, decided that this was not a reason not to accept her evidence. As regards paragraph 63 and dreams and fantasies, the Tribunal made specific findings as to her credibility.

93. As regards paragraph 64, I do not accept that it is illogical for Patient A to have kept a record of sexual fantasies, but not of actual sexual activity. First, I do not accept that the actual sexual activity was similar. In her dream about masturbation in a car, there is no evidence that the dream was about the doctor or that he was present in the dream or that she was fantasising about him whilst dreaming. In a second dream, in which the Appellant did feature, she describes herself as lying on top of him fully clothed – there is no reference to masturbation or to his penis. Secondly, the Tribunal gave a rational explanation for why she did not record the intimate details of what had actually occurred. Finally, as to paragraph 65, in the first part, the Tribunal deals appropriately with the apparent inconsistency in Patient A's evidence which it had noted. The final sentence appears to deal with a different issue and is not easy to understand. Nevertheless such difficulty does not undermine the overall conclusion on allegation 3(c): the Tribunal's finding at paragraph 66 was neither plainly wrong nor so out of tune with the evidence properly read as to be unreasonable.

Allegations 4(a) and (b): failure to record and report kiss and/or intimacy

The Tribunal's findings

94. In the Decision, the Tribunal formally recorded, in respect of each of allegation 4(a) and (b), that the allegation had been admitted as regards one kiss (i.e. the subject of allegation 3(a)) and went on to find the allegation proved "in relation to findings at paragraph 1" (i.e. allegations 1(a) to (d)). As pointed out below, this gives rise to some confusion. Nevertheless the Tribunal went on to set out its findings as follows.

95. The Tribunal addressed allegation 4(a) at paragraphs 67 and 68 as follows:

> *"67. The Tribunal had regard to Dr Byrne's statement (following Investigation Report), dated 3 April 2017, in reference to the admitted kiss:*
>
> > *'I would emphasise that I recognise now that this is something that I should have documented and taken more seriously at the time.'*
> >
> > *The Tribunal noted that Dr Byrne accepts that he should have documented the kiss that occurred between him and Patient A and concluded that this duty extended to any other kiss and/or intimacy. The Tribunal determined that in not recording details of any kiss and/or intimacy that occurred between him and Patient A, Dr Byrne had put himself at risk and not given any future therapist of Patient A's a complete record.*
>
> *68. Accordingly the Tribunal found sub-paragraph 4(a) proved." (emphasis added)*

96. The Tribunal addressed allegation 4(b) at paragraphs 69 to 71 as follows:

> *"69. The Tribunal accepted Dr Byrne's concession that he should have taken the admitted kiss more seriously at the time and determined that he should also have reported any other kisses to his employer.*
>
> *70. The Tribunal noted the evidence of Dr Hudson who stated that not all physical contact is reported on, however, given Patient A's background, the Tribunal took the view that it was incumbent upon Dr Byrne to do so.*
>
> *71. Accordingly the Tribunal found sub-paragraph 4(b) proved." (emphasis added)*

The Appellant's case

97. The Appellant submits that the Tribunal's finding that this allegation was proved in relation to all the findings in *allegation 1* was in contrast to the case advanced by the GMC (which was a failure to record and report the facts the subject of allegations 3(a) to (c)). The latter allegations were "the intimacy" which the GMC was alleging was not reported. If and in so far as the appeal in respect of allegations 1 (b) to (d) succeeds, then the finding on allegation 4 should be limited to the extent of the Appellant's admission of this allegation i.e. failure to report and record the kiss.

The GMC's case

98. The GMC accepts that the Tribunal found that the "intimacy" referred to and proven was that covered by allegation 1 and that the GMC, in the allegation itself, was referring to the intimacy comprised in allegations 3(a) to (c). There was, and is, no point in making a finding of failure to record and report allegations 3(a) to (c) because

the substantive allegations are far more serious and it would add nothing. Since the findings in relation to allegation 1 were correct, the conclusion on this allegation flows inevitably from those findings. No unfairness arises from the erroneous approach of the Tribunal. Ultimately the challenge here stands or falls with the Court's decisions on allegations 1(b) to (d).

Discussion and conclusion

99. It is common ground that the *allegations* here comprised a failure to record or report the facts the subject of allegations 3(a) to (c). The Tribunal's formal finding however related to allegations 1(a) to (d), whilst its reasons are ambiguous as to what it is that the Appellant failed to report or record. The GMC has conceded that it does not press for a distinct finding of failure to record or report the facts the subject of allegations 3(a) to (c). Moreover, if and in so far as the Tribunal found a failure to record or report the facts the subject of allegations 1(a) to (d), then, in my judgment those findings did not address the allegations made by the GMC and, for that reason, were wrong or unjust by reasons of a serious procedural irregularity. Even though I have dismissed the appeal in relation to those substantive allegations, I consider that the finding in relation to findings at paragraph 1 cannot stand. The above highlighted passages in paragraphs 67, 69 and 70 seem to be inconsistent with an intention to make a finding in respect of those allegations 1. Thus, as regards allegations 4(a) and (b), only the admitted finding in relation to the kiss can stand.

Allegation 4(c): failure to record details of consultations

The Tribunal's findings

100. The Tribunal addressed allegation 4(c) at paragraphs 72 to 75 as follows:

> *"72. <u>25 June 2012</u>*
>
> *In her oral evidence, Patient A was steadfast in her account. She stated that the consultation took place at her house and that she was aware of the date because it was the day after her mother's birthday. Dr Byrne denied that this consultation took place at Patient A's house, citing Patient A's Rio medical notes and his Outlook calendar. However, the Tribunal preferred Patient A's account finding that she would be more likely to remember the nexus with her mother's birthday, but also because the first kiss between herself and Dr Byrne would have had more significance to her. The Tribunal therefore found that Dr Byrne did not accurately record the details of his consultation with Patient A in the medical records in this instance.*
>
> *73. <u>4 July 2012</u>*
>
> *The Tribunal had sight of the Rio medical notes of Patient A, noting that they do not detail a location for*

the consultation. The Tribunal found this to be inadequate.

74. *10 August 2012*

The Tribunal had regard to Patient A's witness statement, dated 12 September 2018:

> *'A note text entry was not completed for an appointment on 10 August 2012. I find this odd and consider it may have been around the time that Dr Byrne and I became more intimate together.'*

The Tribunal noted that no entry was completed on Patient A's Rio medical notes. The Tribunal took account of Dr Byrne's explanation that sometimes he would complete Patient A's notes retrospectively due to the amount of sessions that she attended, but nevertheless determined this amounted to inappropriate recordings.

75. *28 Sept, 9 Oct, 24 Oct 2012*

The Tribunal had regard to Patient A's witness statement, dated 12 September 2018:

> *'There are no note text entries in my patient notes for dates 19 and 28 September 2012, 9 October or 24 October 2012. I find this odd and consider these dates may therefore have been around the time that Dr Byrne and I were intimate again. I also remember it being a dark evening when it took place'.*

The Tribunal noted that no entry was completed on Patient A's Rio medical notes. The Tribunal took account of Dr Byrne's explanation that sometimes he would complete Patient A's notes retrospectively due to the amount of sessions that she attended, but nevertheless determined this amounted to inappropriate recordings."

The Appellant's case

101. In relation to the entries for 25 June 2012 and 4 July 2012, the Tribunal was wrong to prefer Patient A's account (that the appointment took place at her home) when it was uncorroborated by any contemporaneous evidence and contrary to the information in the RiO notes and the Appellant's Outlook diary. Secondly, as regards 25 June 2012, the Tribunal failed to have regard to Patient A's inconsistent evidence as to the date of her mother's birthday. As regards the remaining entry dates, the Tribunal was wrong

to prefer the evidence of Patient A over the contents of the clinical records. The Tribunal's readiness to accept Patient A's factual account, despite contradictory contents of contemporaneous clinical records, illustrates the flawed approach of the Tribunal to the evidence more generally.

The GMC's case

102. There is no automatic requirement for written records to be preferred over oral evidence. It was a matter for the Tribunal to assess the oral evidence against the contemporaneous documentary evidence. The Tribunal gave clear reasons for preferring Patient A's account. As regards remembering the date of the kiss by reference to her mother's birthday, Patient A's evidence has been consistent. On the other hand, there was good reason to be cautious about accepting the accuracy of the written record. The Appellant had a potential motive for concealing details of appointments when inappropriate conduct took place. There are numerous other inaccuracies and inconsistencies in the records generally and there were inconsistencies in the written record for the specific dates of 25 June and 4 July 2012. As regards the remaining dates, the Appellant's challenge is misconceived. The Tribunal's findings were not based on Patient A's memory but rather on the contemporaneous clinical records that were referred to and exhibited to Patient A's witness statement. Those records prove Patient A's case that appointments took place on these dates that were not recorded.

Discussion and conclusion

103. Allegation 4(c) concerns consultations on six dates as set out in Schedule 1 to the charges (and as referred to in the Decision). The relevant written records are the Appellant's personal Outlook calendar, and the hospital's RiO medical notes, which are in two parts: (i) entries showing the date, time and location of an appointment ("RiO location entry") and (ii) text entries by the doctor, noting the content of the appointment ("RiO text note"). I address the six dates in three groups.

25 June 2012

104. The allegation here was that the appointment was recorded as being at the health centre, when in fact it took place at Patient A's house. Patient A's evidence was that it took place at her house. The Appellant's evidence was that it took place at the health centre. His Outlook calendar showed that the appointment took place at the health centre and also that he had a subsequent meeting at the hospital. The relevant RiO location entry also showed the appointment as taking place at the health centre. The RiO text note did not assist with the location.

105. The Tribunal preferred Patient A's oral account over the written records in the Outlook calendar and the RiO location entry. Whilst this might be regarded as unusual, the Tribunal (at paragraph 72) gave its reasons for doing so. She had identified the appointment as taking place at her home, both by reference to the date being close to her mother's birthday and by reference to recollection of the first kiss (about which the Tribunal had accepted her evidence). As to the suggested inconsistency in her evidence about her mother's birthday, in her witness statement she said that the date of the home visit was 25 June "*as it was my mother's birthday the following day"*; in cross-examination, she confirmed the date of that visit in the

following terms: *"It was 25 June. I do remember that date because it was my mum's birthday".* However I do not accept that there was any relevant inconsistency. First in her earlier disclosures to Mr Simoes in September and October 2016, she had consistently said that the date of the kiss was the day *before* her mother's birthday. Secondly, in cross-examination she did not state that the *kiss* took place *on* her mother's birthday, but only that she remembered the date by reference to her mother's birthday; the word "*it"* does not clearly refer to "*that date*", but could equally be a general statement that her birthday was happening (i.e. around that time). I further accept that, given the Tribunal's findings about the increasing intimacy between the Appellant and Patient A at that time, the Appellant had a motive for not disclosing that the appointment had taken place at her home. Moreover, as pointed out by the GMC in argument, there were inconsistencies within the RiO records as to the location of other appointments. On the evidence, the Tribunal was entitled to reach the conclusion it did in the last sentence of paragraph 72.

4 July 2012

106. The allegation here was that the appointment was recorded as being at the health centre, when in fact it took place at Patient A's house. Patient A's evidence in her witness statement, confirmed in cross-examination, was that it took place at her house. The Appellant's evidence was that it took place at the health centre as shown in his calendar; his secretary had reserved the consultation room. The Outlook calendar showed that the appointment took place at the health centre, referring specifically to the "Fam rm". The relevant RiO location entry also showed the appointment as taking place at the health centre. The RiO text note did not assist with the location.

107. The Tribunal's reasoning at paragraph 73 is difficult to understand. First, it states that "the Rio medical notes … do not detail a location". This is wrong in fact. Whilst the RiO text note did not do so, the RiO location entry did state the location. Moreover, no consideration is given to the Outlook calendar entry. Secondly, the Tribunal fails to address directly the GMC's allegation. The allegation was not failure to record the location at all (which is the import of paragraph 73); the allegation was positively wrongly recording the location as being the health centre, when the appointment had taken place at Patient A's house. Whilst there was the Appellant's evidence on this, and whilst the Tribunal might have reached a similar conclusion here as it did in relation to 25 June 2012, in my judgment its reasoning here is based on a fundamental misunderstanding such that this specific finding should not stand.

10 August 2012, 28 September 2012, 9 and 24 October 2012

108. Here, the allegations were different. In respect of each of these dates it was alleged that no note text entry had been completed for this appointment. Patient A's evidence to this effect is set out at paragraphs 74 and 75 of the Decision. The Appellant's witness statement evidence was that, in each case, either Patient A had not attended, or that he did not have time to make a note. For each date, whilst both the Outlook calendar and the RiO location entry showed an appointment, there was no entry at all in the RiO text note. In my judgment, there is no basis for impugning the Tribunal's findings in respect of these four dates, and indeed in oral argument, Mr Davidson did not press the Appellant's appeal in this regard.

Conclusion on allegation 4(c)

109. The Tribunal's finding at paragraph 73 (in relation to 4 July 2012) was based on a fundamental misunderstanding and was wrong and/or unjust by reason of serious procedural or other irregularity. As to the remainder of paragraphs 72 to 75, the Tribunal's findings were neither plainly wrong nor so out of tune with the evidence properly read as to be unreasonable.

Ground 1: the overriding submissions

110. Having addressed the challenge to the findings in respect of individual allegations, I turn finally under Ground 1 to address the overriding submissions made by the Appellant (as set out in paragraphs 52 and 53 above).

Heightened scrutiny

111. First, the seriousness of an allegation does not of itself require more cogent evidence: as indicated in paragraph 22 above. Rather it depends on the inherent probability of the relevant conduct. In the present case, the relative improbability of the Appellant behaving as alleged was to be balanced against the relative improbability of Patient A fabricating the allegations and putting herself through the ordeal involved in doing so.

Assessment of credibility

112. Essentially this case turned upon the Tribunal choosing between the oral evidence of Patient A and that of the Appellant. There were certain particular features relevant to the Tribunal's assessment of their credibility.

113. First, save in relation to allegation 3(a), this is not a case where there were competing accounts of what had occurred. In respect of most of the allegations, the Appellant's evidence was a simple denial that the event or events had taken place. In such a case, the credibility of the denial can only be assessed by reference to the credibility of the evidence supporting the allegation which is denied. In respect of allegation 3(a), the Tribunal did make an appropriate assessment of the relative credibility of the competing accounts of the kiss (see paragraph 84 above). Having found Patient A's evidence on that allegation credible, the Tribunal was entitled to take that into account in assessing her credibility as a whole.

114. Secondly, Patient A's sexual interest was not a reason to disbelieve her evidence. The Tribunal addressed this and her frankness about her fantasies at paragraph 63, finding this to be a reason to regard her evidence as credible. As regards the content of her dreams and fantasies, there was no particular similarity between them and the actual conduct the subject of allegations 3(b) and (c). Mr Simoes and Dr Baggaley both considered that there was no evidence of confabulation on the part of Patient A.

115. Thirdly, where the case turns upon which oral account to accept, the approach of first considering documentary evidence before assessing the credibility of a witness's oral account (see *Dutta* §38) has less significance. Save in the case of allegation 4(c), this is not a case of positive documentary evidence with which oral evidence is inconsistent. Rather, the tension is said to be between the oral evidence and *the absence* of documentary evidence (in particular the absence of any record in the

journal or emails of the conduct in allegation 3 or allegation 1). Patient A explained in re-examination[6] and when questioned by the Tribunal[7] why she did not write about the sexual acts in the journal or in emails. The Tribunal specifically addressed this at paragraph 64 and reached a conclusion which was properly open to it. Given the nature of the conduct and the parties' respective positions, it is not surprising that there was no reference to it in emails or any of her medical notes. Furthermore, there is positive documentary support in Patient A's emails and journal for aspects of earlier physical and emotional intimacy, the subject of allegation 1.

116. Fourthly, any delay and the piecemeal fashion of Patient's reporting of the matters can be properly explained by her mental state, her sense of shame and difficulties in talking about such sensitive matters, as attested to by Mr Simoes in his written and oral evidence. She explained why she did not make disclosure to Kael Cockcroft or Dr Hudson. Despite modification following review of her medical records, her core allegations remained consistent. In any event the Tribunal properly considered possible inconsistencies in matters of detail: see paragraphs 71 and 93 above. Moreover, looking at the overall picture, including the agreed facts, the Appellant's acceptance now of an inappropriate relationship and the kissing incident and the admitted failure to record and report it, the Tribunal was entitled to conclude that Patient A gave credible evidence.

117. As regards inconsistencies in her behaviour (and in particular the absence of progress in the sexual relationship) at paragraph 62, the Tribunal addressed this and accepted the expert evidence of Dr Baggaley. In this regard, I bear in mind that the Court should not make assumptions as to what might be considered a normal response to sexual misconduct (see, by analogy, the guidance on sexual offences in section 20 of the *Crown Court Compendium*).

Adequacy of Reasons

118. Finally, I consider whether the Tribunal gave adequate reasons for its findings of fact. There are two issues: first, whether the Tribunal gave adequate reasons for, in general, believing Patient A and disbelieving the Appellant; and secondly, whether it gave adequate reasons for all or some of its conclusions on specific allegations.

119. As to the assessment of credibility, the Appellant, relying heavily on *Southall* at §§56 and 59, submits that this case is not straightforward, but exceptional and that the Tribunal should have expressly addressed why it rejected the Appellant's evidence and arguments. First, whilst noting that in cases "concerned with comparatively simple conflicts of evidence, it will be obvious whose evidence has been rejected and why" (*Southall* §55) I accept that the present case was not straightforward (not least because of Patient A's sexual interest and her dreams and fantasies). On the other hand, the factual issues arising on the individual allegations were not of the same complexity and nuance as those arising in *Southall* (see §§56 to 59). Moreover, *Southall* is not authority for the proposition that specific reasons for disbelieving a practitioner are required in every case where his defence is rejected. Secondly, Mr Mant accepted that, in many cases, it is the practice of the Tribunal to have a specific part of its decision, often at the outset, addressing the relative credibility of the

[6] Day 1/59G-60B
[7] Day 1/67F and 68A-B

witnesses. Here there was no such distinct assessment of credibility. There is no rule nor even invariable practice requiring such a distinct assessment: see paragraph 26(2) above. In any particular case, it may be more appropriate for credibility to be assessed in the course on considering the particular allegations. Nevertheless, in my judgment, and in line with *Southall*, in the present case, it would have been helpful if the Tribunal had given more explicit and distinct reasons for rejecting the Appellant's evidence.

120. As to the Tribunal's conclusions on specific allegations, in my judgment there are aspects where its reasoning was too brief and/or not entirely clear; in particular its reasoning in respect of allegations 1(b)(i) to (iii), 1(c) and 1(d). As regards allegation 3, whilst its reasons in respect of allegation 3(b) were brief, when considered together with the reasons in respect of allegations 3(a) and (c), I conclude that overall the reasons were adequate. As regards allegations 4(a) and (b) and allegation 4(c) as regards paragraph 73, these findings will be set aside in any event. Overall, despite some considerable weaknesses, I conclude that there was no breach of the duty to give adequate reasons. Reading the Decision as a whole, the reasons given are sufficient to enable the Appellant to understand why he lost and have allowed him to put forward his appeal.

121. However, even if I had concluded that the reasons were inadequate, I have concluded above that, subject to minor exceptions, the determination on the facts in the Decision was neither wrong nor unjust due to procedural irregularity. This is because, in any event, with the benefit of consideration of the evidence before, and the submissions made to, the Tribunal, I have been able to understand why the Tribunal reached the conclusions which it did reach and to identify reasons for its conclusions which cogently justify the Decision, even if the Tribunal did not itself clearly identify all those reasons. For this reason, I would have concluded that any inadequacy of reasons would not have warranted allowing the appeal.

Ground 2: misconduct, impairment and sanction

122. Under this Ground, the Appellant's case was that the decisions in relation to misconduct, impairment and sanction relied heavily on the Tribunal's findings of fact, which it contends were wrong. The parties put forward a range of submissions on the issues of impairment and sanction under Ground 2, depending on the Court's conclusions on the Tribunal's findings of fact. A number of permutations were suggested, including quashing of the sanction and remittal, or being invited to make further submissions to this Court. However, ultimately Mr Davidson accepted that, in the event of Court dismissing the appeal against either or both of allegations 3(b) or 3(c), the Tribunal's findings in respect of current impairment of fitness to practise and sanction should remain, regardless of the outcome of other parts of the appeal. Mr Mant agreed.

123. Save for allegations 4(a) and (b) and one aspect of allegation 4(c), I have concluded that the Tribunal's findings in respect of all allegations, and in particular allegations 3(b) and (c), were well founded. In my judgment, my conclusions in relation to allegation 4 have no material effect on the Tribunal's findings of impairment or sanction. Accordingly, as recognised by Mr Davidson, there is now thus no need for any further submissions, and no basis for impugning the Tribunal's findings of impairment of fitness to practise and sanction. Ground 2 is therefore dismissed.

Ground 3: procedural irregularity

The Appellant's case

124. The Appellant contends that there were two procedural irregularities in the course of the Tribunal's fact-finding stage, namely:

(1) the eight-month adjournment between 17 July 2019 (when the Tribunal had retired to consider their findings) and 10 March 2020 when the findings of fact were handed down;

(2) the Tribunal's invitation to the parties to provide further submissions in relation to the re-calling of Patient A after they had retired to consider the evidence.

125. As regards the eight-month adjournment this was a serious irregularity as it inevitably adversely affected the Tribunal's ability to assess the witness evidence. The benefit of observing the witnesses giving live evidence was extinguished if there was then a period of many months between hearing that evidence and producing a determination. This is particularly so in a case such as the present where the key allegations fell to be decided on an analysis of the credibility of the two key witnesses. This is reflected in the inadequate reasoning provided in support of the Tribunal's findings of fact. The overall impression is that after such a delay the Tribunal decided to get on and make the decision quickly.

126. The Appellant relies upon the case of *R v United Kingdom Central Council for Nursing Midwifery and Health Visiting, ex-pate Thompson, Machin and Wood* [1991] COD 275. Relevant factors in considering whether delay amounts to an abuse of process or a breach of natural justice include the nature of the charges and the issues, the state of the evidence, the timescale and the fact that the tribunal had no alternative but to adjourn the matter as it did.

127. As regards the consideration of recalling Patient A, this raised serious concerns as to whether in fact there was a sufficient evidential basis on which to find proved one or more of the heads of allegations. If a fact-finding tribunal is struggling to determine a charge on the basis of the available evidence then, absent receipt of further evidence, it should find that charge not proved.

The GMC's case

128. Neither of the matters relied on can be characterised as procedural irregularity and in any event did not give rise to any injustice. As regards the adjournment, the delay was unavoidable and did not cause any prejudice to the parties. There is nothing to suggest that delay had any material impact on their decision. As regards the possibility of recalling Patient A, this could not be a procedural irregularity. The Tribunal did not provide any detail of the matters on which it thought further evidence might be helpful. The Tribunal ultimately decided it was not necessary to recall Patient A and there are no grounds for questioning its case management decision in that regard.

Discussion and conclusions

129. First, as regards the eight-month delay, as stated in case of *ex parte Thompson* relied upon by the Appellant, whether or not there was prejudice amounting to a breach of natural justice or abuse or process is a matter of degree depending on all the circumstances of the case. Whilst the allegations were of the utmost seriousness, in the present case the Chair had indicated before the adjournment that they had already considered all but one of the allegations. It had already heard all the evidence and over the same period of time. There is nothing to suggest that delay had any material impact on their decision. Having heard submissions for part of 16 July 2019, the Tribunal deliberated on 16 and 17 July 2019. (Whilst the transcript suggested that they resumed deliberations on 18 July 2019, it is not known whether this took place.) Thus, the Tribunal had at least one and half days in which to deliberate. Further on 17 July 2019, the Chair indicated that the Tribunal had reached conclusion on all but one of the allegations. If and in so far as demeanour of the witnesses played a part in their assessment of the evidence, there is no reason to think that over that period they would not have had in their mind their impression of them. They also had available to them, at that time and throughout, the transcripts and their own notes. In so far as brevity of the Tribunal's reasoning is relied upon under this Ground, I have already addressed this issue in paragraphs 118 to 121 above. Here there was an unfortunate delay. But on balance I am satisfied that there was no prejudice to the Appellant and no injustice arising from that delay.

130. Secondly, as regards the suggestion of recalling Patient A, it is not known precisely why this was raised or as to what matter it was directed. Seeking to identify the reasons would be no more than speculation. The Chair appeared to suggest that, in part at least, the Tribunal was considering putting points to Patient A which the Appellant had raised relatively late in the case. However and most notably, the Appellant positively objected to the suggestion, on the grounds that recalling Patient A would be unfair to him; and the Tribunal decided it could carry on without further evidence. Any suggestion now that the Appellant was unfairly prejudiced by Patient A not being recalled has to be seen in this light.

131. For these reasons the Decision was not unjust by reason of serious procedural or other irregularity and Ground 3 is dismissed.

Conclusions

132. Whilst I have concluded that certain, limited, findings of fact cannot stand, in the light of my conclusions at paragraphs 67, 71, 75, 80, 84, 88, 93, 105, 109, 120, 123 and 131 above, I conclude that the Decision (i.e. of erasure) was neither wrong on the facts nor unjust because of any serious procedural or other irregularity. Save to the extent indicated at paragraphs 99 and 107 above this appeal is therefore dismissed. I will hear argument on the appropriate order to take account of my findings in relation to allegations 4(a) and (b), and (c), and any consequential matters.

133. Finally I am most grateful to counsel and solicitors for the high quality of the argument and the helpful way in which this appeal has been dealt with, not least in the circumstances of the Covid-19 pandemic.