Neutral Citation Number: [2023] EWHC 1895 (Admin)

Case No: CO/2380/2023

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN LEEDS

Leeds Combined Court Centre
1 Oxford Row, Leeds LSD1 3BG
Date: 18/07/2023

Before :

HH JUDGE DAVIS-WHITE KC

(SITTING AS A JUDGE OF THE KING'S BENCH DIVISION)

- -

Between :

SOCIAL WORK ENGLAND **Claimant**

- and -

MARK SIMON RICHARD BURNHAM **Defendant**

- -

- -

Mr Matthew Edwards (instructed by **Capsticks Solicitors LLP**) for the **Claimant**

Mr Burnham in person

Hearing date: 18 July 2023

- -

Approved Judgment

HH Judge Davis-White KC :

1. This is an approved written version of the judgment handed down orally on 18 July 2023. In preparing this written version of my judgment I have re-organised and added to/varied the content as I indicated that I might.

2. I have before me an application by Part 8 claim form issued on 23 June 2023 seeking the extension of an interim order pursuant to para 14(2) of Schedule 2 of the Social Workers Regulations 2018 (the "2018 Regulations").

3. In this case the interim order is an interim suspension order. It was made in the context of a fitness to practise (as a social worker) investigation into specific conduct of Mr Burnham, the Defendant.

Outline of the regulatory regime

4. Under the 2018 Regulations, the regulator, now Social Work England ("SWE"), the Claimant, is obliged to cause such an investigation to be carried out where satisfied that there are reasonable grounds for investigating whether a social worker's fitness to practice is impaired.

5. In broad summary, the process is that investigators are first appointed. The result of their investigation must then be reported to case examiners. The case examiners must consider the position. If of the view there is no realistic prospect that adjudicators (appointed under the Regulations) would determine that the social worker's fitness to practise is impaired, then the case examiners have various powers ranging from taking no further action to issuing a warning to the social worker regarding their future conduct or performance. However, if of the view that there is such a realistic prospect, the case examiners must refer the matter to a fitness to practise hearing, conducted by adjudicators in accordance with the Regulations. If the adjudicators find that the social worker's fitness to practice is impaired they have a range of sanctions that they can apply.

6. As is common with medical and health professionals, the 2018 Regulations also provide for the possibility of interim orders. An interim order may suspend the social worker from practising ("an interim suspension order") or impose a restriction or condition which the social worker must comply with (an "interim conditions of practise order"). Either form of interim order is interim in the sense that it is put in place pending the outcome of the relevant investigation.

7. Investigators or case examiners may refer the question of whether an interim order should be made to the regulator. The regulator then appoints a panel adjudicators to determine whether to make an interim order. An interim order can only be made if the adjudicators are of the opinion that an interim order may be necessary for the protection of the public or in the best interests of the social worker. If of that opinion, the adjudicators may make an interim order for a period of up to 18 months. The Court is given power to extend such an interim order by paragraph 14(2), (3) of Schedule 2 to the Regulations which provide:

> "*(2) The regulator may apply to the High Court to extend, or further extend, the period for which an interim order has effect.*
> *(3) On an application under sub-paragraph (2) the High Court may—*
> *(a) substitute a different period for which the interim order has effect, or*
> *(b) confirm the order."*

This application

8. The interim suspension order in this case was imposed on 29 July 2021 for an 18 month period expiring in January 2023. This was reviewed and continued on various occasions by panels of adjudicators acting pursuant to the relevant Regulations.

9. By claim form dated 29 November 2022 a 12 month extension to the interim order, from 28 January 2023 to January 2024 was sought from this court. On 18 January 2023, the Court granted a 6 month extension, but refused to grant a 12 month extension, so that the interim order is currently due to expire on 27 July 2023.

10. A final fitness to practise hearing is currently listed for 6 days between 4 and 11 December 2023 as provided for by case management directions made on 15 May 2023. At the time of the hearing in January 2023, no date for the final hearing had been set. The extension now sought is for just under 9 months until 26 April 2023 to allow for any possible overrun or need to relist the December hearing.

11. The application is resisted by the former social worker concerned, the defendant, Mr Burnham. He submits that on the merits a further extension is inappropriate and unjust. He relies upon three matters. First, the absence (so he says) of any need for an interim order. Secondly, the length of time taken to pursue the investigation to date, and thirdly the effect of the order upon him to date, particularly as regards his health. In part, he also relies upon the fact that the court in January 2023 refused to extend the order for any longer than until the end of July 2023.

12. At the hearing, conducted remotely by Teams, Mr Matthew Edwards represented the Claimant. The Defendant, Mr Burnham, appeared in person. I am grateful to both of them for their realistic, helpful and measured submissions. Mr Burnham, who is not a lawyer and who is, understandably frustrated by a process which is currently due to end in a hearing taking place over 5 years from the first involvement of his regulator, in particular presented his case in a measured, full and helpful manner.

13. The primary evidence before me was the witness statement dated 26 June 2023 of Ms Eleanor Poole, the Head of Hearing Operations and Case Review at SWE. In addition, Mr Burnham lodged a document called "Report to Leeds Court" dated 2 July 2023 which in its nature was a skeleton argument together with some 20 documents.

14. At my request, the electronic hearing bundle for the hearing on the separate claim form dealt with by this Court in January 2023, and SWE's skeleton argument for that hearing were also provided to me.

The history

15. The history of the matter can be summarised as follows. Some of the information set out below is taken from the determination of the 6th Interim Order Review Meeting held on 28 April 2023 (the "6th IORM"). I should add that exhibited to the witness statement in support of the application before me was a chronology. That chronology was helpful but not as helpful as it should have been. Indeed, it did not mention the court hearing and extension to the period of the Interim Order made in January of this year. Indeed, any detail about the relevant application and hearing was sadly lacking from the evidence (and original skeleton argument lodged on behalf of the Claimant) before me.

16. The following summary does not set out every single event but I have the full history well in mind. In broad terms, the conduct of Mr Burnham which has been in question comprises certain of his dealings with a service user, referred to as "AC". "AC" was, at the time, a young person of the female sex aged under 17. In broad terms, the concern had been (and is) whether or not he engaged in inappropriate and unprofessional behaviour towards and in communication with AC and, if so, in what respects and with what motivation.

17. The 6th IORM states:

> "*19. Mr Burnham was employed as a social worker at Warwickshire County Council (the council) between 1997 and December 2020. Mr Burnham was working with vulnerable young people who were 'care leavers', in his role as a social worker.* [I interpose to add that he was employed as a Social Work Practitioner within the Leaving Care Team in the Children and Families, People Directorate. His role was to provide statutory support to young people who were Children in Care, subject to either a Section 20 Order or a Full Care Order under Section 31 of the Care Act 1989, and who live independently or are in supported accommodation.]
>
> *20. Mr Burnham was the subject of allegations in 2008 which resulted in disciplinary proceedings by the council. Those allegations were of a similar nature to the current concerns. Mr Burnham received a 'final written warning' which was live for a period of 2 years*. [I interpose here to say that, as I understand it, Mr Burnham disputes the characterisation of the 2008 allegations as being of such a similar nature but that is not a matter that I can resolve on this hearing.]
>
> *21. In August 2018, following the receipt of information alleging inappropriate behaviour on the part of Mr Burnham, including the 'grooming' of a service user, the council restricted Mr Burnham in his employment.*
>
> *22. The council referred its concerns about Mr Burnham to the Health and Care Professions Council (the HCPC), Mr Burnham's former regulator on 05 November 2018.*
>
> *23. Mr Burnham was suspended from his employment on 09 November 2018…."*

18. The matter was also reported to the police. On 31 January 2019, Mr Burnham was arrested at his home in the early hours of the morning. A police investigation followed.

19. In September 2019, the Police determined that no further action would be taken by way of the criminal process, due to insufficient evidence.

20. In December 2019, SWE replaced the HCPC as the relevant regulator for social workers.

21. In December 2020, Mr Burnham was dismissed from his employment by the council. The dismissal followed a disciplinary hearing on 15 December 2020, adjourned from July 2020, and as set out in letter dated 18 December 2020 from the council to Mr Burnham. A number of allegations were found to be proved and a number were found not to have been proved. As regards one of the allegations (of grooming) the Police concluded that there was no grooming involved and the Council accepted this conclusion.

22. According to the 6th IORM:

> *"25. On 06 May 2021, the Disclosure and Barring Service (the DBS) contacted Social Work England and advised they were completing an investigation in relation to Mr Burnham following a referral they had received from the council. Following this contact from the DBS, Social Work England started a review of the case.*

23. By letter dated 15 June 2021, an investigator from SWE wrote to Mr Burnham updating him on the status of the relevant investigation and saying (among other things): .

> "*I am writing to provide you with an update about your case and to inform you that your case has now been transferred to a new investigator.*
>
> *On becoming the regulator for social workers, we received a high number of fitness to practise cases from the HCPC. We have now carried out an initial review of the risk and complexity of all the cases that were transferred to us. Your case has been transferred to a new investigator to ensure that we are able to progress all cases as quickly as possible.*
>
> *I can confirm that the investigation is continuing, and you are free to practise as a social worker whilst our consideration of these concerns is ongoing, unless an interim order is issued to restrict your practise as a social worker. If this is the case, you will be informed.*
>
> *What happens next?*
>
> *I am now the investigator with responsibility for your case and will be your primary point of contact whilst the investigation is ongoing.*
>
> *I will continue with the investigation and will provide you with a further update on the progress of the investigation in 6 weeks."*

24. According to the 6th IORM:

> *"26. Mr Burnham renewed his request to be removed from the Social Work England register on 16 June 2021. He said this would save 'a lot of time and unnecessary*

distress'. He confirmed he was not working as a social worker and did not intend to seek further social work employment."

.

25. On 29 July 2021, the interim order was imposed following a remote hearing.

26. By email dated 1 December 2021, SWE wrote again to Mr Burnham following a complaint from him at the length of time the investigation was taking. In part the email stated:

> *"I can see that your case was referred to us from the HCPC, who transferred a high number of fitness to practise cases to us when we became the regulator for social workers. Over the past year, we have reviewed and prioritised these cases by risk and progressed them alongside new referrals. However, due to the high number of both HCPC cases and new referrals, and the impact of the Covid-19 pandemic, we have not been able to progress the HCPC transferred cases as expected. To address this, we have created two new teams to progress these cases as quickly and effectively as possible. These two teams are focussed exclusively on progressing cases such as yours, that were transferred from the HCPC. I understand that your case has been going on for some time, and I appreciate it must be frustrating for you.*
>
> *I have copied in the investigator allocated to your case who will update you on the investigation as and when required."*

27. By letter dated 11 December 2021, the Disclosure and Barring Service ("DBS") wrote to Mr Burnham confirming that it had concluded that he had formed an inappropriate relationship with AC (and setting out particulars of the same), that it had considered including him in the Children's Barred list and/or the Adult's Barred List but that it had decided not to do so "at this time" (my emphasis). Mr Burnham asserted to me that this amounted to his name being cleared but I consider that it may be neutral because the letter is also consistent with the Service awaiting the outcome of the SWE investigation. In any event, in terms the letter refers to the possibility of the decision being reviewed in the event that further information is received in the future.

28. The Fitness to Practice Case Investigation Report ("PCIR") prepared by the investigator is dated 5 January 2022. It was subsequently updated on 15 February 2022 following Mr Burnham's response. The main concerns were identified as being that between December 2017 and July 2018, Mr Burnham had (1) breached professional boundaries with AC in a number of specific respects (some of which Mr Burnham apparently admitted); (2) that the actions in question were sexually motivated (though the investigator originally recommended closure of this concern, the case examiners later requested that it be added as a separate regulatory concern for reasons set out in the revised PCIR); (3) failed to follow management instruction in relation to his involvement with AC ; (4) failed to keep full and accurate records of his visits to AC.

29. The PCIR also records that:

> ***"*** *Throughout the case, the social worker has been clear in his request to be removed from the register, confirmed by his most recent correspondence (p.692).*

Voluntary removal was considered, but as the social worker is not providing observations and has not accepted the regulatory concerns in full this was not deemed appropriate by the investigator."

30. I am told later applications voluntarily to come off the register are unresolved.

31. On 15 February 2022, having been sent the PCIR and the evidence bundle, Mr Burnham advised SWE that he did not intend to make further observations.

32. On 28 March 2022, the case examiners suggested amendments to the regulatory concerns. These included the inclusion of the concern regarding sexual motivation but also involved some further particulars of the first concern regarding the breaching of professional boundaries. The matter was referred back to the investigator to give Mr Burnham an opportunity to comment and for the further information to be obtained.

33. The investigator sought information as requested regarding Mr Burnham's health and from the police. As regards health, the case examiners had considered that information should be sought from Mr Burnham's GP about how he manages his health. Initially, Mr Burnham consented to his GP being contacted but then withdrew his consent. That line of investigation could be taken no further. As regards the police, a request for further information was made and the police responded on 9 April 2022. Further chasers were sent but no response received.

34. Mr Burnham was asked to comment on the further amended draft PCIR but declined on 8 September 2022. The PCIR was amended and finalised on 8 September 2022. It was referred to the case examiners on 20 September 2022.

35. On 28 September 2022, the matter having been referred back to the case examiners, the latter concluded that it was in the public interest for the matter to be referred to a public hearing. The concerns referred by the Case Examiners to a hearing are as follows:

"*Whilst registered as a social worker:*
1. Between December 2017 and July 2018, you breached professional boundaries with SU [service user] *AC in that you:*
a) Contacted AC using your personal mobile phone
b) Made inappropriate comments to AC
c) Shared information about your personal relationships with AC
d) Purchased items for AC that you paid for yourself and/or which were above her allowance
e) Conducted visits to AC that were excessive in length and/ or outside of working hours
f) Allowed AC to drive your car
g) Bought AC an alcoholic drink
2. Your actions at (1) were sexually motivated.
3. You failed to follow management instruction in relation to your involvement with AC.
4. You failed to keep full and accurate records of your visits to AC.
5. You have a health condition that affects your fitness to practise.

Your actions at (1), (2), (3) and (4) amount to the statutory ground of misconduct. Your fitness to practice is impaired by reason of your misconduct.

By reason of regulatory concern (5) your fitness to practice as a social worker is impaired by reason of adverse physical and/or mental health."

36. Ms Poole in her witness statement summarises Mr Burnham's position as follows:

> "*30. The Social Worker provided the Claimant with a document that outlined his response to the Council's disciplinary investigation, and a document which outlined his response to the Claimant's regulatory concerns….In these documents:*
> *i. The Social Worker accepted that some of his practice was not appropriate, and would not be expected of a social worker of his experience and that at times he overstepped boundaries by being "overly parental and overly caring".*
> *ii. The Social Worker submitted that his actions were not the actions of a social worker attempting to isolate or groom a service user;*
> *iii. The Social Worker submitted that the use of the term 'grooming' has pejorative implications, and there is a lack of clear evidence.*
> *iv. The Social Worker analysed the evidence used, and argued the Council's investigation was biased and closed minded.*
> *v. The Social Worker advanced mitigating factors for consideration. The Social Worker submitted that he was not properly supervised, that at the time of the allegations he was not well as he was suffering from high anxiety that was not addressed by his manager, and cited 23 years of good conduct as a social worker.*
> *vi. The Social Worker asked for his name to be removed from the Claimant's register."*

37. I apprehend that Capsticks LLP, (described by Ms Poole as SWE's "legal provider") was brought into the case to assist and advise on carrying it forward to a final hearing at some time after 28 September 2022. Mr Burnham suggests that the firm was involved prior to that date but, even if it was, it would have been with a different remit.

38. An interview of one witness was conducted on 16 January 2023.

39. Meanwhile attempts had been made to contact AC through a "single point of contact" at Warwickshire Council given that AC was still a service user and considered to be vulnerable. On 16 December 2022, advice was given by the Council to SWE that numerous attempts had been made to contact AC without success but that she had agreed to talk to the single point of contact that day. However, in a later email that day SWE was advised that she did not answer calls despite numerous attempts. This position was confirmed again on 4 January 2023.

The hearing before the Court in January 2023

40. Meanwhile, on 29 November 2022, an application had been made to this Court to extend the interim order, due to expire at the end of January 2023. The evidence in support was a witness statement of Hannah Appleyard, then Case Review Manager at SWE.

41. As regards events since the decision of the case examiners to refer the matter to a further hearing, the exhibited chronology referred solely to a review of the interim

order, which took place on 14 November 2022, and the date of its then expiry, 28 January 2023. The body of the witness statement simply said the following:

> "*41. Since the Claimant's Case Examiners referred the case to a final hearing, the Claimant has instructed its legal providers to prepare the case for the final hearing, including obtaining witness evidence. Witness evidence is being sought from the service user (AC) and the manager who supervised the Social Worker whilst he was employed at the Council.*
> *42. The Council's 'Single Point of Contact' (who is a representative of the Council who assists with the Claimant's fitness to practise requests for information) has been contacted to assist because AC is still a service user and is considered vulnerable. Social Work England wish to ensure AC is supported by their key worker when giving evidence. Social Work England are still seeking contact details for the Social Worker's manager who has since left the Council.*
> *43. The Claimant's Hearings Team have not been able to identify a hearing date yet as the Claimant's legal providers have not yet established contact with the witnesses to confirm their availability. Once contact has been established, steps can be taken to identify a listing date."*

42. The skeleton argument, as regards the then current position and the issue of delay simply said:

> *"There have been delays in progressing the matter due to the Claimant's Case Examiners requesting amendments be made to the regulatory concerns, which required the Social Worker to be given a further opportunity to make submissions. The Case Examiners also requested further evidence be gathered from the Police, as well as amendments. There was a 3 month delay in receiving a response to this request. Once these enquiries had been made, the matter was then returned to the Claimant's Case Examiners, who on 28 September 2022 referred the matter to a Final Hearing. The Claimant's Legal Providers are now preparing the matter for a Final Hearing, and have contacted the witnesses."*

43. As regards the evidence before me as to what the court was told and why the court only extended the order for 6 months rather than 12 as requested, the witness statement of Ms Poole simply stated:

> *"2….. An application was made by the Claimant to extend the Interim Suspension Order. The application was heard on 18 January 2023 and the Interim Suspension Order was extended until 27 July 2023."*

44. This was in stark contrast to the original imposition of the interim order and its subsequent reviews where the position was set out in detail and the relevant decisions, with their reasons, exhibited in full.

45. The initial skeleton argument (signed by Capsticks Solicitors LLP) simply dealt with the reviews of the interim order, but did not expressly refer to the fact the Court had already extended the interim order nor the fact that it had refused to extend it for 12 months as sought.

46. As I have said, I asked for copies of the original materials put before the court in January 2023. That also resulted in a revised skeleton being lodged (still signed by Capsticks Solicitors LLP although I understand the skeleton to be that of Mr Edwards whom I understand to be a barrister). The revised skeleton said the following about the earlier court hearing:

> "*32. This is the second application to the High Court for an extension of the interim order. The first application was heard on 18 January 2023. On that occasion the Applicant sought an extension of the Interim Suspension Order for a period of 12 months. It was submitted at that hearing that the Interim Suspension Order continued to be necessary for the protection of the public which included the need to maintain public confidence in the social work profession.*
>
> *33. Whilst no final hearing for the conclusion of this matter had been set at the time of the previous application to the High Court, an extension of the Interim Suspension Order was sought for 12 months which, if granted, would have resulted in the Order expiring on 27 January 2024. It was believed at the time of making that application that an extension of 12 months would be sufficient time in which to bring the substantive proceedings to a conclusion.*
>
> *34. The Defendant attended the hearing on 18 January 2023, and in opposing the application, made submissions relating to the impact these proceedings were having on his mental health.*
>
> *35. At the conclusion of that hearing the Interim Suspension Order was extended to expire on 27 July 2023, an extension of six months (**Page 277-278**). Whilst there is no written judgment of that decision, enquiries with counsel who conducted that hearing revealed that the Judge on the previous occasion formed the view that an extension in excess of the 6 months that was given would have been "excessive*"."

47. Mr Burnham told me that he dropped off the remote call prior to the learned Judge announcing his decisions and reasons and that he could not assist with regard to the same.

48. Mr Edwards was unable to assist further as to what further oral submissions were made or what the reasoning of the learned Judge was.

Following the January 2023 hearing

49. After the January court hearing, matters were pursued with the police and as regards AC as a witness.

50. As regards AC I was told that efforts to contact AC have been ongoing since December 2022. The most recent attempt was made on 13 June 2023. The position was summarised in the revised Skeleton Argument as follows:

> "*40. In light of the difficulties encountered in making contact with AC, a decision was made to:*

40.1 Obtain evidence from the social worker allocated to AC after the Defendant. An interview took place with this witness on 18 May 2023 and a signed statement was received on 9 June 2023.

40.2 Instruct a tracing agent on 22 June 2023, with a view to locating AC. As of the drafting of this document AC had not been located."

51. As regards the police, I understand the relevant material is now all to be to hand but that SWE had been seeking to have that material introduced into evidence through a witness statement from a member of the police force concerned. The position as explained in the revised Skeleton Argument is as follows:

"41. During the course of the investigation it has been necessary to obtain material from the police generated during the course of their investigation. An initial request for material was sent to Warwickshire Police on 23 February 2023. A response to this request was received on 28 April 2023 indicating that the material had been collated and a production statement was being prepared. A subsequent communication from the police on 7 June 2023 revealed that the original officer that prepared the response/material has since moved roles and the Police have raised additional questions regarding the request.

42. Despite the Claimant's representative responding the same day to these queries, a substantive response from the police is still awaited. As a result a decision has now been made to proceed in the absence of the statement from the police with the material being introduced into evidence via a production statement from the Claimant's legal representatives.".

52. Meanwhile, the Interim Order (as extended by the High Court) was reviewed again on 28 April 2023. The continuation of the extended interim order was approved. In their conclusions the panel of adjudicators said the following:

"*35. The panel considered whether there was a prima facie case. Since the last interim order review hearing in November 2022, Social Work England has taken steps to advance the case to a final hearing including obtaining witness statements. The panel was satisfied that there was a cogent body of material available to it to conclude that there was a prima facie case.*

36. The panel then considered whether there was a continuing necessity for an interim order.

37. The panel considered that the regulatory concerns raise significant public protection concerns. Social workers hold a position of trust in society as a whole and in respect of service users who are often vulnerable. Their honesty and integrity are paramount, particularly given that they are required to exercise judgement that may have significant consequences on the lives of service users. The panel was satisfied that the allegation raises concerns about Mr Burnham's ability to respect professional boundaries, which could pose a risk to the public and may expose service users to harm.

38. In particular, allegations of acting in a sexually motivated way are very serious.

39. The panel considered that a reasonable member of the public with full knowledge of the facts of this case would expect restrictions to be maintained pending the final outcome of this case. Mr Burnham was entitled to maintain his denial of some concerns and admit others however the concerns are serious. In the circumstances, the panel determined that an interim order remained necessary in the wider public interest of maintaining trust and confidence in the profession.

40. The panel did not consider that it had been provided with any information for it to conclude that an interim order was necessary in Mr Burnham's own interests at this point in time."

53. Having considered the approach required of imposing a proportionate and fair order as required in the public interest the Panel went on:

"42. The panel observed that Mr Burnham admits to a blurring of professional boundaries, although he does not accept the grooming concerns. The behaviours alleged suggested to the panel a pattern of behaviour with profound implications for the safety of service users and the wider public. The panel considered that there were no conditions which it could formulate which would be sufficient to protect the public pending the resolution of this matter. Any interim conditions would be so restrictive as to be tantamount to an interim suspension order.

43. The panel therefore concluded that an interim suspension order remains the appropriate and proportionate order. The panel considered that this interim order will prevent Mr Burnham from working as a social worker and as a consequence Mr Burnham may be caused financial and professional hardship etc. However, the panel determined that, in these circumstances the need to protect the public outweighed Mr Burnham's interests in this regard."

54. On 15 May 2023 case management directions were given for this matter to proceed to a final fitness to practise hearing in December 2023.

55. In answer to questions from me, Mr Edwards, having taken instructions, confirmed that

(1) the 15 May was the earliest date after the January court order by which the making for directions could be brought before and actioned by the relevant responsible party (the hearings case manager for the relevant adjudicators);

(2) the December date was the earliest available date for listing the case.

He gave an undertaking to file and serve a witness statemen confirming what I was told.

56. Mr Burnham not surprisingly, is concerned that an extension to the timetable has already been sought by SWE so that its duty to disclose its draft statement of case, all relevant evidence and a response form for Mr Burnham has slipped from 28 June 2023 to 26 July (with a consequential effect on later directions but the trial date

remains the same). Under the directions order in its original form, the last main procedural steps before the trial in December itself were to take place by 9 August 2023 with final bundles to be lodged by 9 October 2023. Although here was some room for slippage in the timetable the room is limited.

The law regarding extensions to interim orders (leaving aside earlier court extensions)

57. The criteria and approach to be applied in an application to extend an interim order in this sort of context were set out by Arden LJ (as she then was) in *General Medical Council v Hiew* [2007] EWCA Civ 369. In that case she was considering the then regulatory regime applying to medical practitioners which, so far as material for present purposes, is extremely similar to that applicable in this case:

> *"[28]..[T]he criteria must be the same as for the original interim order…, namely the protection of the public, the public interest or the practitioner's own interests. This means…that the court can take into account such matters as the gravity of the allegations, the nature of the evidence, the seriousness of the risk of harm to patients, the reasons why the case has not been concluded and the prejudice to the practitioner if an interim order is continued. The onus of satisfying the court that the criteria are met falls on the…applicant for the extension…the relevant standard is the civil standard, namely the balance of probabilities….*
>
> *…*
>
> *[31] The statutory scheme thus makes it clear that it is not the function of the judge under section 41A(7) to make the findings of primary fact about the events that have led to the suspension or to consider the merits of the case for suspension. There is, moreover, no express threshold test to be satisfied before the court can exercise its power under section 41A(7), such as a condition that the court should be satisfied that there is evidence showing that there is a case to answer in respect of misconduct or any other matter. On the other hand, if the judge can clearly see that the case has little merit, he may take that factor into account in weighing his decision on the application. But this is to be done as part of the ordinary task of making a judicial decision, and a case where a statutory body makes an application on obviously wholly unsupportable grounds is likely to be rare.*
>
> *[32] The evidence on the application will include evidence as to the opinion of the GMC, and the IOP or Fitness to Practise Panel, as to the need for an interim order.*
>
> *[33] The court is not expressing any view on the merits of the case against the medical practitioner. In those circumstances, the function of the court is to ascertain whether the allegations made against the medical practitioner, rather than their truth or falsity, justify the prolongation of the suspension. In general, it need not look beyond the allegations. If the medical practitioner contends that the allegations are unfounded, the medical practitioner should challenge by judicial review the original order for suspension or the failure to review it and make some other decision in accordance with section*

41A(2). On such an application, the decision of the IOP or Fitness to Practise Panel will then be examined on well-established judicial review grounds…"

58. I would add the following gloss to paragraph [30] of Arden LJ's judgment. In considering the public interest it seems to me that the Court should have regard to s37 of the Children and Social Work Act 2017:

> ***37 Over-arching objective***
>
> *(1) The over-arching objective of the regulator in exercising its functions is the protection of the public.*
>
> *(2) The pursuit by the regulator of its over-arching objective involves the pursuit of the following objectives—*
>
> > *(a) to protect, promote and maintain the health, safety and well-being of the public;*
> >
> > *(b) to promote and maintain public confidence in social workers in England;*
> >
> > *(c) to promote and maintain proper professional standards for social workers in England."*

59. The pursuit of the public interest and the protection of the public by these objectives (and I would also add by deterrence (at least in some regimes)) is inherent in most regulatory regimes even when statute does not expressly spell them out (see e.g. the regime for the disqualification of company directors contained in the Company Directors Disqualification Act 1986 and see e.g. *Re Grayan Building Services Ltd, Secretary of State for Trade and Industry v Gray* [1995] Ch 241 at 253 and 257, and later cases dealing in particular with the protection of the public said to be achieved not just by keeping the person "off the road" but also by the deterrent effect of disqualification and the raising of standards).

60. One further issue arises when the Court has already extended the period of an interim order. By paragraph 14(2),(3) of Schedule 2 of the 2018 Regulations, the court has power to further extend the order. How should it exercise such power in the light of the earlier decision? This was a matter that I received limited submissions upon and no reference to authority.

61. My initial view is that the court should take account of what has been decided on the earlier occasion. Further, the earlier decision, the basis for it in terms of evidence and reasoning and any comments of the court may be of considerable, even decisive, importance. In large part this is, as I go on to explain, on the basis that once issues have been determined the court should not have to reconsider them again and address them afresh on a further application.

62. Although each determination under paragraph 14(3) of Schedule 22 to the 1918 Regulations is in effect "final", the ability of the court to entertain a further application means that the position is much more akin to an interim decision or case management decision (including a decision granting interim remedies) with liberty to

apply, than a final decision after a trial. At one extreme: if the court has refused to extend an order for the period asked on the basis that, within the shorter period ordered by the Court, a final decision should be capable of being achieved such that an extension beyond that date is no necessary, a further application seeking a further "bite of the cherry" is unlikely to succeed. The usual remedy would be to appeal. On the other hand, if there has been a change of circumstances since the extension was granted or the extension was granted in circumstances where it was expressly envisaged that there might be a further extension, then a further application may be more likely to be successful.

63. Although by way of broad analogy only, I consider that the approach in general is not dissimilar to the approach that the court takes when considering the variation or revocation of interim orders under CPR r3.1(7) or its review powers under the Insolvency Act 1986 (and, in the case of Company insolvency, the relevant Insolvency Rules). In broad terms a party is not entitled to fight again a battle that it has lost unless there are good grounds, such as a material change of circumstances. I did not understand Mr Edwards to dissent from the general view that I take.

64. This is why it is, in my judgment, essential that, on a further application for an extension of the period of an interim order, the court is fully informed as to (a) the earlier order; (b) the evidence and submissions made to the court; (c) the court's order and the reasons given for it and any observations that the court made. In an ideal world a transcript of the judgement would be available o the later court but at the very least I would expect to be provided with a note of the judgment also noting any material submissions or information provided to the court outside the skeleton argument/evidence submitted and any material observations of the Judge. I find it surprising that SWE should (rightly) feel it necessary to put into evidence what the decisions have been of various panels of adjudicators when reviewing the interim order but not a like amount of evidence (indeed hardly any evidence at all) of the result of an application to the court to extend the period of the interim order. I should add that I have made this point on other applications but feel like a voice crying in the wilderness. My observations in previous cases appear not to have been acted upon.

Application of the Principles to this case

65. First I deal with the earlier court order. Mr Burnham submits that in light of the refusal of the court in January to extend the interim order beyond July, I should not do so either.

66. In my judgment, I can assume that the Judge in January considered that

(1) any delays in the investigation (including any prejudice to Mr Burnham thereby caused) up and until January 2023 were not of themselves sufficient to outweigh the factors pointing in favour of an extension;

(2) any final hearing could be accommodated and take place by the end of July 2023, and that any extension beyond that was unnecessary if SWE acted promptly and properly. If he did not consider that to be the case, then there was no point in him extending the period of the order until July. If he thought that the hearing could not be accommodated by the end of July, it would have been pointless extending the order only until July (unless he had, perhaps and by way of example. indicated

that a further application could be made if the hearing proved impossible to list in that period).

67. I now have new evidence that the trial will take place in December and an undertaking to produce evidence confirming that SWE have pursued the setting of a final hearing date with all dispatch in that, in the period after the Court order of January, it was not possible to obtain directions before 15 May and the then earliest available date was December. The preparation of the case or any delays in it after January 2023 have not therefore delayed the setting of the earliest possible date for the final hearing. Further it was not possible to list it before the end of July.

68. Of course, it would have assisted me to know whether it was explained to the Judge that a final hearing date before the end of July was simply not possible and, if it was, whether and why he disagreed.. However, I infer neither of these things happened.

69. In those circumstances, I do not consider that the January order in any way prevents me from extending the interim order if I otherwise consider it appropriate to do so.

70. I turn to consider Mr Burnham's three objections, though of course they are inter-related and have to be considered or weighed against factors pointing in favour of an extension.

71. First, the question of risk to the public. Essentially I agree with the conclusion of the 6th IORM that there is a relevant risk to the public being a strong factor justifying the extension of the interim order and that that also brings to bear the separate public interest not only of "keeping him off the road" as a social worker as an interim measure but also maintaining public confidence in social workers and the regulatory system generally.

72. Mr Burnham's main point was that he did not pose a relevant risk because of the factors below. I set out my comments on them also.

(1) He had no intention of practising as a social worker: As I pointed out to him, subject to him being able to obtain employment, that intention could change and in any event, leaving no legal restriction would not inspire public confidence.

(2) The allegations he admits are not serious and the others are not made out or have been found by others not to be made out. First, the criminal standard of proof (and the constituents of a criminal offence) are different to those applying in the regulatory field regarding conduct justifying action. The police determination to take criminal matters no further does not therefore assist him. Secondly, as I have pointed out, the DBS position is neutral. Thirdly, and most importantly, there is credible evidence supporting the case against Mr Burnham as now referred by the Case examiners and on an application like this it is not for me to reach a view that the case or any part of it will fail. Clearly different people (e.g. the Council (his employer) and even the SWE investigator in the first instance), came to a different view to the SWE case examiners regarding the grooming or sexual motivation allegation. However, there is evidence supporting that allegation and the case examiners' position is not demonstrably wrong That issue is a matter to be determined at the final hearing.

(3) His record pre and post the alleged misconduct shows no risk of repetition In this respect, the many years that Mr Burnham operated as a social worker prior to the events complained of carry little, if any, weight as regards risk. As regards the five years or so since the events in question, again little weight can be accorded to them. During much of that time Mr Burnham has not been working as a social worker in the same role as previously and in any event, the alleged misconduct is so serious that I do not accept that the fact that it is 5 years ago with no complaints in the meantime, is such that, in all the circumstances, it can be assumed there is no or little risk. I take into account that no other allegations in relation to others (under a "Me Too" response, as Mr Burnham put it) have emerged but this goes to mitigation or perhaps to lessen but not remove the risk to the public if the interim order is not extended.

(4) The person concerned has not complained and will not give evidence There may be reasons for this quite different to Mr Burnham's position that this stance is taken because there is nothing (or little) to complain about. However, in any event that has been taken into account by SWE and evidence from other sources is relied upon.

73. Finally, I should add that although I have considered these matters, they may well have been considered by the court in January (or they should have been raised then). The court clearly considered there remained a risk and that the public interest required the interim order to be extended, as I did. Nothing new has arisen regarding absence of risk. There is in fact no good reason why this case and these matters should be allowed to be raised again.

74. I turn now to delay and consequent ill health. Again, these matters up until January 2023 could and should have been raised with the court at the hearing in January. Ill health actually was and I suspect the same is true as regards delay. Again, this is why a note of the hearing would have been useful. If I am right then I should only consider events post the court hearing in January 2023.

75. I have however considered all the matters of delay and ill health relied upon by Mr Burnham prior to January 2023. Although delay (and consequential prejudice) is a factor to take into account in considering an extension I do not regard the delays, such as they have been, are such as to require an extension (either in January or now) to be refused.

76. As regards delay after January 2023, I have not identified any culpable or unsatisfactory delay.

77. Accordingly, delay is not a factor outweighing the public interest in the continuation of the interim order over until after a determination of the final fitness to practise hearing.

78. As regards causal loss, I accept that the proceedings have caused Mr Burnham loss and mental ill-health or that they have at the least exacerbated his position. In this respect Mr Burnham has produced a number of doctor's sick notes arising from stress and an Occupational Health Assessment from Coventry City Council, being the report of Angela White, Occupational Health, Safety and Wellbeing Service Manager dated 17.11.20 part of which is in the following terms:

"***Is the Anxiety continuing? If so:***

a. ***Does the impairment continue to have an adverse effect on Mark's ability to carry out day to day activities****?*

Mark's anxiety does not show signs of abating. He is taking prescribed medication to help manage his mental health. He has also undergone counselling and has been re-referred to the Mental Health Crisis team.
He tells me his day to day activities are impacted, including disturbed sleep.
It is unlikely that his heightened mental distress will show any significant improvement with unresolved disciplinary issues outstanding.

b. Is that effect substantial (i.e. more than trivial?)

With a referral to the Mental Health Crisis team it would appear that the effect is more than trivial.

c. Is the impairment long term (i.e. had it lasted or was it likely to last 12 months or more?)

In my opinion he is likely to be diagnosed with PTSD when he sees the clinical psychologist. As you may be aware, individual's with PTSD can be triggered into distress by events and situations which have some resonance with the original trauma."

79. He has also provided me with a Doctor's assessment letter dated 15.06.2023 from the Abbey Medical Centre in Kenilworth and signed by a Dr V Balasubramanian, in which it is said**:**

"*Regarding Mark Burnham, I am writing to confirm that he suffers from anxiety and depression following a work place issue since 2018. He suffered from PTSD which affected his work and as a result he was off for many months and needed treatment from medications, he was also under talking therapy to improve his symptoms."*

80. I agree with Mr Edward's submission that it appears that any prejudice to Mr Burnham's health is primarily caused by the regulatory investigation/proceedings themselves rather than the interim order or its continuation/extension and/or review but I accept that reviews and applications for extensions can bring their own added stress.

81. I do not consider that these matters, relating to Mr Burnham's health, are sufficient to outweigh the public interest in the extension of the interim order. Further, this matter having been raised at the January hearing, Mr Burnham should not be allowed to raise it again except and insofar as there is a relevant change in position. I do not detect any.

Conclusion

82. In conclusion, the public interest justifies an extension of the interim order until after the final fitness to practice hearing is concluded and a decision reached. None of the factors identified by Mr Burnham outweigh that public interest or negate it.

83. In large part, Mr Burnham's complaint is not so much about the interim order but about the time the investigation and the fitness to practice proceedings have taken and

are taking, However, the Court on this application cannot control that. If appropriate, (and I express no view) Mr Burnham can make an application to the adjudicators handling the fitness to practice proceedings and, if that fails, consider an appeal (if available) or judicial review.

Length of extension

84. In my judgment an extension until the end, or nearly the end of April 2023, as sought, is excessive. I consider that I should allow time for the panel to consider its decision and deliver the same but, at least at this stage, consider that the end of January should be a sufficient end date for that to be done.

85. I do not consider that I should allow for other unforeseen contingencies. I am concerned that the timetable has already slipped. I would not like to give any encouragement to a situation where SWE considers that it need not worry about the interim order and having to justify its position to the court if the final fitness to practice hearing is delayed beyond December. Were that to happen then a further application under paragraph 14(2) of Schedule 2 of the 2018 Regulations should be made and the then position explained to the Court on proper evidence.

Order

86. My order will provide that, on any further application for an extension to the period of the interim order, a copy of this judgment should be made available to the court hearing that application. It is to be hoped that there will not be any need for any further application because the final hearing will take place and be completed within the period of the interim order as further extended.

87. It seems to me that, as a matter of routine, court extensions to the period of an interim order should normally contain a provision that either a judgment or a note of the judgment should be provided on any later extension and that any bundle and skeleton argument used at the earlier hearing should also be made available to the court hearing the later application.