Neutral Citation Number: [2022] EWHC 3345 (Admin)

Case No: CO/1463/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2022

Before :

THE HONOURABLE MRS JUSTICE COLLINS RICE

- -

Between :

DR SHAWN JOSEPH **Appellant**

- and –

GENERAL MEDICAL COUNCIL **Respondent**

- -
- -

Mr Philip Dayle (instructed by Charles Morgan Law) for the **Appellant**
Mr Peter Mant (instructed by GMC Legal) for the **Respondent**

Hearing date: 8th December 2022

- -

Approved Judgment

This judgment was handed down remotely at 4pm on 21st December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

THE HONOURABLE MRS JUSTICE COLLINS RICE

Mrs Justice Collins Rice :

Introduction

1. Dr Joseph exercises his right of appeal (section 40, Medical Act 1983) against a decision of a Medical Practitioner's Tribunal on 18th March 2022 to erase his name from the medical register.

2. The allegations before the MPT were about his conduct towards another doctor, a female colleague more junior than him and significantly younger, between January 2013 and August 2014. The MPT's findings of fact included that (in summary):

    a) on 20th January 2013, Dr Joseph searched for and accessed a CT scan of the complainant, without her consent and without a clinical reason, and told her it indicated a brain pathology that resulted in sexual disinhibition;

    b) on 26th April 2013, Dr Joseph sexually abused the complainant by administering a substance without her knowledge and raping her by vaginal and anal penetration with his penis while she was unconscious, causing her physical injuries;

    c) over a period between March 2013 and August 2014, Dr Joseph pressured the complainant to live with him, and sent her unwanted and inappropriate texts and emails that were sexually motivated and caused harassment, alarm and distress.

3. Dr Joseph challenges the MPT's findings of fact in relation to the 26th April 2013 incident (the allegation of sexual abuse), and the sanction of erasure in consequence.

The MPT decision challenged

4. The MPT's decision on the sexual abuse allegations begins by addressing itself (correctly) to the burden and standard of proof, and to the guidance of the decided authorities on assessing the credibility of witnesses, including with regard to the impact of the passage of time on the accuracy of memory.

5. It was common ground that Dr Joseph had arrived at the complainant's flat on the evening of the day in question, bringing pizza. The complainant had let him in and gone into her bedroom to change out of exercise clothes, and returned to her sitting room to eat with Dr Joseph. After about 20 minutes she had risen abruptly, left the sitting room, entered the bedroom and closed the door.

6. It was also common ground that the complainant did not report rape to anyone at the time, but had gone to the police in 2017, some four and a half years later. Her (former) flat was then forensically examined, but no trace of Dr Joseph's DNA was found. He was not charged.

7. The MPT received written and oral evidence from both Dr Joseph and the complainant, and from other witnesses, including as to the antecedent and subsequent history between the two individuals. As to that, it found as fact that he had sent her an email at work on 28th December 2012 from which at least some degree of attempted flirtation could be inferred. It had found the CT scan incident on 20th January 2013, with its sexually motivated comment, proven. There was undisputed evidence he had sent the complainant Valentine's day flowers on 14th February, together with a small gift. He accepted she mentioned to him a few days later 'what you are hoping is never going to happen'. Although he denied he was 'chasing' her at this time, an email from him later that year said that was exactly what he had been doing 'until she shooed him off'. The MPT found as fact that that, antecedently to the April incident, Dr Joseph was sexually attracted to and pursuing the complainant notwithstanding rebuff. It also found proven the allegations of harassment by inappropriate and sexually motived emails and texts.

8. As to the April incident itself, it was the complainant's evidence that on the evening in question Dr Joseph had arrived smartly dressed, smelling of aftershave, and bringing a bottle of red wine with the pizza. She said 'it was clear he thought that this was date night'. When she returned from changing, two glasses of wine had already been poured. She said she had drunk no more than half a glass before feeling very suddenly ill: nauseous, dizzy and faint. She felt she needed to get away from Dr Joseph, so she went and locked herself in her bedroom. She said Dr Joseph responded by banging and kicking the bedroom door, but that his tone then softened, he apologised, and he asked to be let in. She then lost consciousness.

9. Dr Joseph denied bringing wine. In his witness statement he had said there had been a number of previous occasions on which he and the complainant had shared pizza at her flat, and that 'on no more than three occasions did I bring wine to these meals', but told the MPT that was a typographical error. The MPT found that implausible, and noted the specificity of his evidence otherwise. It concluded it was more likely than not that he had brought wine on 26th April.

10. There was no direct toxicology evidence arising out of the night in question. The MPT had received expert evidence in relation to the administration of noxious substances. It accepted the complainant's account of the sudden onset of her symptoms, and her fear of their connection with Dr Joseph. It concluded the symptoms were consistent with a range of drug-induced effects. It eliminated as relatively improbable any other explanation. It found the complainant's evidence 'consistent, credible and reliable', but Dr Joseph's as being inconsistent in relation to his antecedent interest in the complainant, inconsistent on the matter of bringing wine, and less compelling than the complainant's as to the narrative of events. It concluded it was more probable than not that Dr Joseph had drugged the complainant's wine.

11. It was the complainant's evidence that when she regained consciousness she was naked and immediately aware of symptoms of rape: anal pain and bleeding, vaginal discomfort and tampon displacement, thigh injury, discharges of blood, faecal matter and semen. The MPT found her evidence consistent and compelling. It warned itself not to make assumptions about credibility merely by reference to her distressed demeanour nor to assume that merely because an account was vivid and graphic it was more likely to be true.

12. It dealt with the challenge made to her late reporting to the police. It accepted this had arisen out of a conversation with trusted colleagues that had taken a long time for her to bring herself to; that she had felt disempowered and feared senior colleagues would not believe her; and that the process of reporting to the police had itself triggered PTSD, professionally diagnosed and treated as such. It found the late reporting more consistent with the honesty and accuracy of the complainant's evidence than with Dr Joseph's bare denial of the assault and imputation of making a false report. It found the complainant's evidence, including a number of points adverse to herself (she had no memory of how she came to be naked, and could not answer definitely as to whether she might have taken her own clothes off), to be 'resolute and consistent'.

13. Dr Joseph's account had been that the complainant had abruptly left the sitting room and gone to her bedroom without explanation. After about ten minutes, he had knocked on the bedroom door but received no reply. He then left. He had considered her behaviour 'strange' and 'rude'.

14. In that connection, the MPT noted an email from Dr Joseph to the complainant two weeks later on 10th May 2013. It said this (in full):

> Still after everything, you still make me a bit jittery … even though I try to cover it by saying stuff. It is rather a strange thing because I don't get that feeling in resus or dealing with trauma in events.
>
> :/ Its still makes me feel really unsettled physically, all the psychosomatic symptoms, not able to see you on some sort of regular bases. [complainant's name] please fix that ASAP.

15. The MPT reminded itself that it did not necessarily have a full account of the emails between Dr Joseph and the complainant, and needed to guard against any speculative interpretation of this email. It found it inconsistent with Dr Joseph's account of unexplained rudeness by the complainant, found it indicative of a more significant event, and considered it more consistent with the complainant's account than Dr Joseph's. It found it more probable than not, in all the circumstances, that Dr Joseph had had sexual intercourse with the complainant, without her consent, by penetrating her vagina and anus with his penis while she was unconscious.

16. The MPT also accepted as truthful the complainant's account of the injury to her thigh. It further noted that photographic evidence provided by the police, taken several years later, showed residual scarring. It found it more likely than not that her injuries were inflicted by Dr Joseph before or during penetration.

Grounds of appeal

17. Dr Joseph's formal grounds of appeal are that the MPT's decision on the facts were wrong and/or irrational, and that the determination on impairment and sanction was wrong as being based on these erroneous findings of fact. He says the MPT misdirected itself and was wrong to accept the complainant's uncorroborated evidence, particularly as the complainant claimed no memory of the alleged sexual abuse and did not report it until many years later. Such evidence as was before the MPT was incapable of supporting its findings. And in particular, the MPT failed to give any or any adequate

consideration to the evidence that the complainant had locked her bedroom door from the inside, or to deal with the question of how, in those circumstances, Dr Joseph could have entered the bedroom as alleged.

18. At the appeal hearing, Mr Dayle, Counsel for Dr Joseph, asked me to concentrate on the bedroom door issue, which he said was the high watermark of his case, and to which he addressed the greater part of his oral submissions. Before doing so, however, I deal with the general evidential points raised by this appeal, relied on to at least some extent by Mr Dayle, and developed in the skeleton argument submitted on Dr Joseph's behalf by different Counsel earlier this year. And I start by recording the approach I am required to take to any appeal of this sort

Legal framework

(a) Appeals against primary fact finding

19. The test I have to apply on any s.40 appeal is to see whether the MPT's decision was either 'wrong', or unjust because of serious procedural or other irregularity (Civil Procedure Rule 52.21). An appeal is by way of 'rehearing' rather than review, but on the basis of the evidence before the MPT rather than by receiving that evidence afresh or by receiving any additional evidence.

20. This case involves a challenge to primary fact finding – the determination of historical events. The GMC asked me to direct myself to what is said about that in *Byrne v GMC [2021] EWHC 2237 (Admin)* at [12]-[16] and I have done so. My starting point is that an appeal court will be very slow to interfere with findings of primary fact: (a) not having the MPT's advantages of having seen and heard witnesses and of 'total familiarity' with the evidence in the case more generally, and (b) owing respect to the more general expertise of a forum such as an MPT in making determinations of fact.

21. The sort of circumstance in which an appeal court will interfere with primary fact-finding is described in different ways in the caselaw, for example: where any advantage enjoyed by the tribunal by reason of having seen and heard the witnesses could not be sufficient to explain or justify the tribunal's conclusions; where findings are sufficiently out of tune with evidence to indicate with reasonable certainty that the evidence had been misread; where findings are plainly wrong or so out of tune with the evidence properly read as to be unreasonable; or where there is no evidence to support a finding of fact or the tribunal's finding was one which no reasonable judge could have reached.

(b) Corroboration and credibility

22. This is also a case challenging a tribunal's assessment of credibility. Dr Joseph directs my attention to the authority of *R (oao Dutta) v GMC [2020] Med L R 426* and particularly what is said there at [38]-[39] about fact finding based on an assessment of a witness's credibility when that is uncorroborated and involves recall of events many years earlier. Where memory is concerned, strength and vividness are not a reliable indicator of accuracy, the process of litigation itself creates biases, emotion and rationalisation must be allowed for, and demeanour is not a sure guide to truthfulness.

23. *Dutta* and some of the authorities cited there were reviewed in *Byrne*. The Court there confirmed that the best evidence on which to base fact finding will always be objective

matters shown by contemporaneous documentation. But that is not always required and may not always be available; and then substantial reliance may properly be placed on the oral evidence of a complainant, including in preference to that of a respondent. Where reliance has to be placed on witness recollection, demeanour may in an appropriate case be a significant factor and the lower tribunal has the advantage there. And *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* (citing *Mubarak v GMC [2008] EWHC 2830 (Admin)* at [20]).

(c) Reasons

24. *Byrne* also addressed the extent of the duty to give reasons for findings of fact. Reviewing the authorities, and in particular the decision of the Court of Appeal in *English v Emery Reimbold & Strick [2002] 1 WLR 2409*, the court distilled the following (at [24] and [27]):

> [T]he purpose of [the] 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.
>
> …
>
> [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 (citing *English v Emery Reimbold* at [89] and [118]).

25. The extent of the duty to give reasons is however fact sensitive. The Court of Appeal in *Southall v GMC [2010] EWCA Civ 407* said this (at [55]-[56]):

> 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. …
>
> When, however, the case is not straightforward and can properly be described as exceptional, the position is and will be different.

26. That formulation was reviewed in *Casey v GMC [2011] NIQB 95* at [15], and concluded to boil down to an essential test of what fairness requires in all the circumstances of any case. Dr Joseph relies in particular on these observations:

> Ultimately, the court is the arbiter of what procedural fairness requires. In the present case, whether one applies a test of fairness, a test of exceptionality, or a test of lack of straightforwardness, the circumstances in this case called for an explanation as to why the evidence of the doctor was rejected. The assertion that the patient was a consistent, reliable and credible witness when the circumstances clearly undermined her consistency and reliability points to a lack of focused reasoning as to why she should be considered reliable on the one remaining allegation that she had not abandoned. It calls into question the reasoning process that led the panel to conclude that, by necessary inference, the doctor was unreliable and incredible. It is not possible to see the chain of reasoning which led to this ultimate conclusion. This is one of those cases of which Leveson LJ spoke in *Southall* in which the doctor is entitled to some explanation dealing with the salient issues explaining why his evidence was rejected even if only be reference to his demeanour, his attitude or his approach to specific questions. As in that case, in this case the matter ultimately turned on the question of the honesty and integrity of the witnesses. In looking at the issue of honesty and integrity it was highly relevant to balance properly the way in which the patient had formulated and pursued her complaints over time and the way in which the doctor dealt with the case against him bearing in mind that sexual impropriety by a doctor is something which has an intrinsic unlikelihood.

27. The Court of Appeal in *English v Emery Reimbold* had also emphasised ([17]) that there is no duty on a tribunal, in giving reasons, to deal with every argument put in support of a case; it is sufficient if a tribunal shows the parties and if need be an appellate court the basis on which it has acted. It set out this approach for an appellate court dealing with a challenge to adequacy of reasons ([26]):

> the appellate court should first review the judgment, in the context of the material evidence and submissions at the trial, in order to determine whether, when all of these are considered, it is apparent why the judge reached the decision that he did. If satisfied that the reason is apparent and that it is a valid basis for the judgment, the appeal will be dismissed.

28. The Court further noted in that case ([118]) that in each of the appeals before it the judgment had created uncertainty as to the reasons for the decision, and that two general lessons followed. The first was that reasons may perfectly acceptably be brief, but a judgment should have a clear explanation for the result. The second was that unsuccessful parties should not seek to upset a judgment on the ground of inadequacy of reasoning unless, despite the advantage of considering the judgment with knowledge of the evidence given and submissions made at trial, that party is unable to understand why it is that the judge has reached an adverse decision.

Analysis

(i) Overview

29. Mr Dayle fairly accepted that this appeal has evolved to some extent in its focus and presentation over time. In the skeleton prepared last May, it was put squarely on a basis of irrationality. There was said to be an absolute insufficiency of evidence to support the facts found on the balance of probabilities, bearing in mind: (a) the lack of any objective physical evidence for the administration of a drug or an assault, (b) the limits of the contemporaneous documentary evidence in the form of emails and texts, (c) the lack of contemporaneous witness evidence, the accounts relied on being given long after the alleged event, and (d) alleged deficiencies and inconsistencies in the complainant's own evidence in any event. The MPT's analysis of the complainant's evidence was said to be inconsistent with ***Dutta***. The skeleton also suggested the complainant's evidence, even taken at its highest, was consistent with honest but mistaken belief on her part and this was not addressed.

30. Before me, however, while an irrationality challenge was maintained, the appeal had more focus on challenging the MPT's analysis and reasons, with particular reference to the locked door issue. It was said Mr Joseph – and I – had no basis in the determination for understanding how it was that the MPT was, or could have been, satisfied a rape took place notwithstanding a locked door. I have focused on this issue as requested, but I have thought about all the points raised on Dr Joseph's behalf, and start with the broader perspectives on the case engaged by this appeal.

31. A rationality challenge is a challenge that the MPT's primary fact finding was 'wrong' – radically unsupported, out of tune with, or misunderstanding, the evidence, outside the reasonable range available, or defective on the basis of any of the other descriptions in the caselaw. A challenge based on inadequacy of reasons is a challenge that the fact finding was 'unjust by reason of procedural irregularity' – a failure either properly to evaluate the evidence or sufficiently to explain its conclusions. The hurdle to be overcome by an appellant on either basis is a relatively high one, on the authorities. I am warned to be circumspect before disturbing primary fact finding, especially where, as here, it is highly dependent on assessment of the credibility and evidence of witnesses I have not seen or heard.

32. I start by stating the obvious, which is that the task facing the MPT was a paradigm of its type in many ways. It had before it an allegation of serious sexual assault first reported after a significant lapse of time, together with the competing accounts of the alleged perpetrator and victim, but little direct physical or contemporaneous documentary evidence. That is entirely characteristic in such cases. This allegation also had the less common, although by no means exceptional or unusual, feature of the

'date rape drug' allegation, and the associated absence of any account of the actual alleged attack. It therefore inevitably had to rely on evidence of, and make findings of fact about, what happened before and after the alleged attack to make inferential deductions about what happened in the period of alleged unconsciousness.

33. Equally obviously, none of that absolved the MPT from its duty to make findings of fact in accordance with the law, nor were these features by themselves incompatible with the possibility of a fair and rational finding adverse to Dr Joseph. The MPT's task was to examine and evaluate the whole of the evidence before it, consider whether on the balance of probabilities the GMC had discharged its burden of proof (bearing in mind that the allegation amounted to conduct of a criminal nature and needed to be examined with particular anxiety as a result), and give sufficient explanation for its conclusions.

34. I also say at the outset that I am unable to fault the MPT's express legal self-direction in this case, as to burden and standard of proof, and as to its general approach to the evaluation of the complainant's evidence in all the circumstances – including by reference to ***Dutta***. It had received clear and accurate legal advice. This is not a case in which error of law on the face of the decision is suggested or apparent. The questions raised on appeal are about the MPT's application of the law to the materials and evidence before it.

35. A generalised irrationality challenge is not now urged as a primary submission, but it is helpful in any event to begin by considering the relevant fact finding and evidence as a whole. So I start with the MPT's consideration of the relevant antecedents to the alleged attack.

36. The starting point here is the now undisputed finding that Dr Joseph had accessed the complainant's CT scan in circumstances which were sexualised, non-consensual and unprofessional. Dr Joseph had changed his account of this over time, at first denying, but before the MPT accepting, that he had accessed the scan at all. He then claimed he had had consent; even so, the MPT found it would have been odd, personalised and unprofessional conduct without any clinical justification. But the MPT had found there was no consent and that the explanation for Dr Joseph's discrepant evidence was untruthfulness. There were also the emails both before and after the CT incident which the MPT found, and I am satisfied were entitled to find as a matter of interpretation, sexually suggestive. There were the Valentine flowers with the ensuing rebuff – also in themselves reasonably capable of being understood as being sexualised and non-consensual context, and so found by the MPT.

37. So the antecedent context for the allegation of drugged rape, as unchallenged now by Dr Joseph, was that he had had an established, sustained and unwanted sexual interest in the complainant, associated with medically unprofessional conduct and untruthfulness. The two individuals were also, objectively, in a situation of unequal power by reason of their relative age and professional seniority – Dr Joseph led the team in which the complainant worked. I find no fault or deficiency in the MPT's establishment of that general antecedent context on the materials before it – and indeed I did not hear any suggested.

38. Turning to the context after the alleged attack, the MPT gave some, but careful, weight to the 'jittery/psychosomatic' email two weeks later, finding a 'disconnect' between

this and Dr Joseph's account of the complainant absenting herself in her bedroom as an act of unexplained rudeness; it was satisfied it 'suggested something more significant had occurred'. It had also satisfied itself as to subsequent communications by Dr Joseph to the complainant of an unwanted, harassing and sexualised nature

39. Then the MPT had had a detailed narrative, corroborated by other witnesses, of the circumstances surrounding the complainant's report to the police, which it found a wholly compelling account of the delay in doing so, and a better explanation than Dr Joseph's (undeveloped) suggestion of a false report. Again, I find no fault in the MPT's careful and meticulous examination of this material, and the reasoned conclusions drawn from it – and again I did not hear one suggested.

40. So in turning finally to the MPT's examination of the events of the 26th April 2013 themselves, I can see that the MPT also had before it a measure of agreement that Dr Joseph had attended with pizza, the complainant had gone to change her clothes, the meal was embarked on, and the complainant had left abruptly, gone to her bedroom and shut the door. It found it more probable than not that Dr Joseph had brought a bottle of wine, bearing in mind the discrepancies in his account of having brought wine on other similar occasions, and rejecting his explanation for those discrepancies as objectively implausible.

41. The remainder of its findings turn on an acceptance of the complainant's account of becoming ill, going to her bedroom, passing out, and waking to find herself naked, injured, and experiencing the symptoms of a double rape. In doing that, it directed itself with care, and by reference to ***Dutta*** as relevant on the issues of memory and demeanour. It did take her distressed demeanour, the vivid detail of her narrative, and its consistency over time and under cross-examination, into account in assessing her truthfulness. That is consistent with the authorities, not least in a case in which there is no available direct evidence. It also noted a number of gaps and potential points of discrepancy in her narrative, on which she was cross examined, and it accepted her explanations, for reasons which appear to give an adequate and reasonable account of proper evaluation. It further noted that these gaps and discrepancies were indeed distinctively more consistent with honest if imperfect attempts to recollect detail than with fabrication or false memory. Again, that was a matter properly for it to evaluate, and its conclusions are supported by the reasons it gave. These were all distinctively evaluative and clearly articulated conclusions, which I have been given, and can see, no basis for thinking 'wrong'.

42. The MPT further took into account the agreed or established context of the antecedent and subsequent events. And in particular, it took into account and gave weight to several points of significant discrepancy in Dr Joseph's account over time – including as to the CT scan incident, as to his practice in bringing wine with pizza suppers to the complainant's flat – and to the objective implausibility of the accounts he gave to explain those discrepancies.

43. Standing back then to look at the finding of a drugged rape as a whole, I can see from the determination, and the evidence on which it was based, that it was reached for a composite of reasons going to the truthfulness of the complainant and the consistency of her account not only within itself but with all of the other available evidence and findings *apart* from Dr Joseph's account, together with the discrepant nature of Dr

Joseph's account and the inherent implausibility of his explanations for those discrepancies to a degree which it found repeatedly inconsistent with truthfulness.

44. It is right to say the determination places heavy weight on the truthfulness of the complainant's account. But it does not place exclusive, unsupported or unexamined weight on it. It deals carefully with the pitfalls in relying on evidence of this sort at a distance of time from the facts, and considers fairly the shortcomings in her evidence. It acknowledges, as it was bound to do, the lack of physical evidence (although the puncture-wound scar on her thigh was a small, but not irrelevant, detail noted). It does not shy away from testing the strength of the complainant's evidence, and does not make the mistake of simply inferring Dr Joseph's dishonesty about this matter from his dishonesty about other matters. It was clearly impressed with the complainant's testimony. I can see why that was so, and that is an evaluation the authorities direct me to show a degree of respectful deference to. I can see no general reason to do otherwise.

45. Reading the determination of the drugged rape allegation as a whole and in context then, I find it to be apparently scrupulous, fair, reasoned and within the range properly available to the MPT for the reasons it gave. It addressed itself properly to the task of determining whether the core allegations were true. It had the advantage of having seen and heard the complainant and Dr Joseph give evidence under sustained cross examination. It made some important choices between their accounts and said why. Its findings are not 'out of tune' with the evidence or indicative of misreading. They are not unreasonable or suggestive of error or defect, and were reached following the guidance of the decided authorities. They do not appear 'wrong'. That is the *general* overview I had reached.

(ii) The matter of the locked door

46. Mr Dayle, however, says that notwithstanding all of that, the entire architecture of the decision comes crashing down over the matter of the locked door. He says there is a fundamental gap or fault-line in the narrative because of this: unless an explanation appears clearly of how it is said Dr Joseph got through a locked door, the whole account of the alleged rape makes no sense. He points out that the determination simply does not deal with this at all: does not acknowledge and analyse the problem, does not make findings of fact, does not deal with the issue it raises about the credibility of the complainant. And in all the circumstances, bearing in mind the general limitations of the evidence relied on, this is fatal to the rationality and fairness of the decision. It vitiates the MPT's reliance on the complainant's credibility. It undermines the rationality of its findings of fact. And it leaves Dr Joseph unable to understand how or why he has lost his professional livelihood.

47. Mr Dayle described the locked door issue as the 'central controversy' of the case. The GMC told me it was not put or experienced as such before the MPT. So I have gone back to what was said about this in the record of the proceedings.

(a) Evidence

48. In her witness statement, the complainant describes arriving home that evening and finding Dr Joseph waiting outside her block of flats. They went up to her flat and she told him she was going to change out of her riding breeches. Then:

> I left my handbag on the sofa and took my keys. I went to my bedroom, unlocked the door to my room, and changed into some jeans. I returned to the living room, leaving my bedroom door unlocked. I put my keys back in my handbag.

After describing becoming ill and disorientated after drinking the wine, her account continues:

> I got up and he went to get up as well, which made me bolt for the door. I was unsteady on my feet, and my left shoulder collided with the door frame as I turned into the hall.
>
> I got to my room and I shut the door behind me. I locked it from the inside and sat down against the door crying. Dr Joseph was banging and kicking the door. I hoped that the lock would hold.
>
> …
>
> Dr Joseph's tone then seemed to soften, and he said he was really sorry. He asked me to open the door so that we could talk. I didn't open the door to him. This is the last thing that I remember.

49. The MPT hearing took place over 14 days, and the transcript runs to 422 pages. The complainant gave oral evidence over days 1 and 2, taking up about a hundred pages. Cross examined by Counsel for Dr Joseph at the hearing, the exchange on the matter of the locked door was as follows, starting with the first passage of the complainant's witness statement reproduced above:

> Q: So, it would seem clear from that entry, Person A, that even though you are within the confines of your flat, you still have a separate lock for your bedroom door. Is that right?
>
> A: That's correct. It was hospital accommodation, so each of the two bedrooms had a lock on them.
>
> Q: Is it also correct that once your bedroom door is closed that you cannot get back into it without using the key?
>
> A: True.
>
> Q: Dr Joseph, as you know, lived in similar accommodation, didn't he, in a different block?
>
> A: Yes.

Q: His recollection is, he's speaking about his own room, that on the inside of the bedroom door there was a door latch, a means by which you could lock the door from the inside?

A: Yes.

Q: And that once the door had been locked from the inside, somebody would not be able to get in from the outside even with a key?

A: No, I think you could use the key to – I never tried it, but I think you could use the key to get in.

Q: So, does it follow from that that you've never experienced that with your –

A: No.

Q: No. So, you don't actually know?

A: No, I don't.

Q: Having said in paragraph 24 that you put your keys back in your handbag, can you help us, please, as to where your handbag was?

A: In the living room on the sofa.

Q: Is that where your handbag remained throughout?

A: Yes.

Q: In summary, your account is that you go into the flat, you used your bedroom door key to go into your room. Having got changed you then returned to the living area and put the bedroom door key back in your handbag which was in the living room on the sofa?

A: Yes.

Q: And that's where it remained?

A: Yes.

50. Moving on with the complainant's narrative until it reached the point where she said she locked herself in her bedroom, the exchange went like this:

> Q: When you went into the room, did you lock the bedroom door behind you?
>
> A: I think I – yes, I think I'd – so not with the key but there was like a dial on the back that you could just turn it and it would lock the door from the inside, but as far as I'm aware, if you had a key you could open it from the other side, but I never had a reason to try it.
>
> Q: But it is your recollection you'd locked the door when you went in?
>
> A: Yes.

51. A short while later, the exchange picks up:

> Q: In order for anybody to get into your bedroom, they would have had to have got through that locked door. Is that right?
>
> A: Yes.
>
> Q: Also you were sat with your back up against it?
>
> A: But I don't know how long I was there. I don't remember anything after that.
>
> Q: Where were your room keys?
>
> A: In my handbag on the sofa in the living room.
>
> …

> Q: Is it that you are telling the police officer you don't recall the point at which you found your keys?
>
> A: Yes, I don't know at what point I went back to my handbag to find the key.
>
> Q: And that you don't recall feeling surprised as to where they might be?
>
> A: Yes, because I know that I'd put them back. I don't recall going – when I found my keys, so I don't – I don't suppose – it's not a detail that I remembered them being anywhere different from where I thought I'd left them.
>
> Q: That's what I want to ask you about, you see, because your evidence a moment ago was that the keys were in your handbag.
>
> A: Yes, because I put them back in my handbag after I'd got changed.
>
> Q: Can you look, please, at your statement to the GMC, page 14, paragraph 42. What you say at paragraph 42 in relation to your keys is *I have no specific recollection of finding my keys, so they mustn't have been anywhere unusual or difficult to find.* What you aren't saying in your statement to the GMC is, *I recall having found my keys in my handbag*.
>
> A: I don't recall that specific moment, but if they hadn't been in my handbag, then I probably would have recalled the fact that I had lost my keys because it's quite stressful when you can't find your keys.

52. In Dr Joseph's evidence in chief, the matter of his own bedroom door was addressed, and this exchange took place:

> Q: You have left your bedroom door to go to the living room, for example, and the bedroom door has closed behind you, but you have a key in the living room, would you be able to get back into the bedroom door?
>
> A: If you have the key, you can.

> Q: I interrupted you. You were about to say something else.
>
> A: Yes. If you don't have the key or even if you have the key and somebody has locked the door from inside, you cannot, and the reason I say this is that I on few occasions left my key inside the bedroom, locked myself out, had to go to the security officer to let me in, and I remember on one occasion he told me that if the door is locked from inside even with the key you won't be able to get in.

53. In cross-examination it was put to him that, once the complainant had interrupted the meal and gone into the bedroom, he 'went back into the living room, got her keys and used them to open her door', to which he said 'incorrect'. I cannot see that his evidence about the locking mechanism was pursued.

(b) Submissions

54. In closing submissions, Counsel for Dr Joseph addressed this evidence as follows. First, under the topic of the complainant's 'consistency and reliability', he gave as an example a discrepancy between her evidence that the bedroom key had been in her handbag ever since she put it there after changing, and an account given by another doctor that the complainant had told her she thought she had left it in the kitchen.

55. Turning then to the allegations, Counsel pointed out Dr Joseph's opinion that once doors of this sort were locked from the inside they could not be opened even with a key, and that the complainant had not been sure whether or not that was the case.

(c) Consideration

56. The MPT's determination does not mention the locked door issue. It does expressly reject the submission that there were inconsistencies in the complainant's evidence about where her handbag had been on the night, saying this did not undermine her credibility. But it did not deal explicitly with the matters that had been canvassed in cross-examination about the locking mechanism or the whereabouts of the keys.

57. In considering what to make of this, I start from the fact that this issue of the locked door arises, at all, only on the basis of the complainant's own narrative. And I remind myself that Mr Dayle suggests it is of potential relevance to (a) the complainant's credibility, (b) the rationality of the finding of fact and (c) the fairness of the process of finding facts and giving reasons for them.

58. Looking then at the material before the MPT, there was some conflict of evidence about whether the complainant had unlocked the flat in the presence of Dr Joseph in the first place (he said not), but it had an uncontroverted account from the complainant that, once inside, in the presence of Dr Joseph, she took the bedroom key, opened the door, went in and changed, and returned the key to her handbag. And the GMC's case – that he had thereby had a clear opportunity, which he took advantage of, to note where the bedroom key was, use it to open the door, and replace it afterwards – had been put squarely to Dr Joseph and met with a bare denial.

59. It is clear therefore that there was evidence before the MPT, which had been fairly put to Dr Joseph and which it was in principle entitled to accept, that Dr Joseph could have, and did, gain access to the locked bedroom by taking the key from the complainant's handbag, on the basis he knew it was there. It was entitled to view the complainant's evidence about the opportunity for him to do so as clear, and any hesitations over it as immaterial. It was entitled to attach little or no weight to Dr Joseph's evidence that access was not possible with a key when the door was locked from the inside, since it was (a) internally inconsistent – he had said at first that this *was* possible, (b) uncorroborated hearsay and (c) unspecific to the complainant's door. And it was entitled to choose not to accept, in all the circumstances, Dr Joseph's bare denial that that is what in fact happened.

60. Rather, therefore, than having to regard this is a fault-line in the consistency of the complainant's narrative, it seems to me that the MPT was entitled, on the materials, to consider it had been given an account by her of Dr Joseph's opportunity to enter the bedroom which it was properly open to it to accept. As already noted, this was a case in which establishing the facts of an alleged attack committed while the complainant was unconscious and which Dr Joseph denied, was inevitably a matter of inference from the antecedent and subsequent evidence. There was, on a proper examination, no inevitable or patent inconsistency in the complainant's account. On that account, she fell unconscious in her bedroom after being taken ill and came round with multiple symptoms of rape. If Dr Joseph had put a date-rape drug in her wine, then, given the opportunity to do so, it is an entirely rational further inference that he waited until he thought her unconscious, took the key from the place he had seen it put, opened the door, committed the rape, and replaced the key afterwards. Indeed, that course of conduct would have been consistent with his seeing the locked door as a positive opportunity to cover his tracks, which he calculated and took.

61. On the basis that the MPT was *otherwise* properly and fairly entitled to regard the complainant's evidence as credible and weight-bearing, as I am not persuaded to dissent from, and on the basis of its findings of fact that Dr Joseph had drugged the complainant and that she had been raped, then the inference of his having found and used the bedroom door key is both rational and supported – indeed obvious and inescapable. It is after all a part of the narrative which, on her account, belongs to the complainant's period of unconsciousness, in relation to which fact finding could proceed only by inference alone.

62. There had been no submissions before the MPT to the effect that the locked door issue was a fundamental issue, or that it was something on which a finding of fact was needed. As can be seen, some attempt was made by Dr Joseph to suggest to the MPT that it was potentially *impossible* that this rape had happened because it was *impossible* for the bedroom to have been accessed. But the MPT had been given no sufficient basis which could fairly have justified a finding of impossibility: Dr Joseph's hearsay evidence on that point was plainly limited, and there was nothing else. The matter the MPT had to be satisfied of then, on a balance of probabilities, was that it was *possible* for the bedroom to have been accessed and that there was accordingly a basis for inferring from the antecedent and subsequent evidence that Dr Joseph did so.

63. It clearly was so satisfied, and I see no reason to doubt it was entitled to be so on the material before it. It was entitled to view the only basis it had been given to doubt that possibility – the complainant's own evidence of locking the door in the first place before

passing out, and what Dr Joseph had said about the impossibility of external access with a key – as not, considered in context, outweighing the probability that that is what happened. It was indeed entitled to regard her account of having locked the door, together with other aspects of her evidence which did not neatly serve her own interests, as being more characteristic of honesty than fabrication, and as reinforcing rather than undermining her account. That is quintessentially the sort of judgment call a tribunal of fact has to wrestle with, and with which an appellate court will be slow indeed to interfere.

64. It seems to me, in the end, that Mr Dayle's substantive attack may rely on a premise that the MPT should have dealt with the locked door as a kind of *preliminary* issue – a starting point for approaching the whole of the evidence and the assessment of the complainant's credibility, without resolving which it was not entitled to proceed to consider any other aspect of the case. If so, I am unpersuaded of that; it assumes what it sets out to prove, namely the significance of this issue. It was in the end a detail of the complainant's account that the MPT was entitled to consider, in the context of all the other details of her account as a whole, for the light it shed on the real core issue of whether the attack did take place. That was a composite task requiring consideration of opportunity certainly, but also motivation, context and the weight-bearing quality of her account as a whole. It was a matter for the MPT to decide what the salient issues were – that was a core part of its task. If it considered this particular detail to be just that – a detail and not a cornerstone – that is an approach which, consistently with its evaluation of the case as a whole, cannot be said to have been wrong. It is the whole analysis, not necessarily its starting point, which is the important thing.

65. So I turn finally to the issue that the MPT determination did not deal expressly with this point, neither making express findings nor giving reasons. Here, I have to start with what the MPT *did* find, before considering the question of whether there was a material gap. It had found, as fact, based on the complainant's evidence, that she had been taken ill in her sitting room and woken up with physical symptoms of rape in her bedroom. Accepting her evidence necessarily meant accepting there were spaces in her narrative account during which she was (a) in her bedroom changing and unaware of Dr Joseph pouring wine and later (b) unconscious. The GMC asked the MPT to infer, from the account that they had accepted of her symptoms, that she had been drugged and raped. The MPT so inferred.

66. I remind myself that the purpose of the duty to give reasons is to enable the losing party to know why he has lost. *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.* There is no duty on a tribunal to deal with each and every point it encounters in the course of a hearing.

67. I have no hesitation in concluding that the reasons for the MPT's finding of a drugged rape in this case are plain. They are extensively and carefully set out. Exactly what happened while the complainant was unconscious (as it had found) was always and necessarily a matter of inference. The MPT set out expressly the basis on which it inferred Dr Joseph had attacked the complainant with anal and vaginal rape and with injury. It did not otherwise speculate on the precise nature and order of every step Dr Joseph took while the complainant was unconscious – his access to and exit from the

room, the removal of the complainant's clothes, the moment-by-moment details of the attack – because it did not need to. It can be *readily inferred* from the decision and the materials before it that the MPT accepted the complainant's account of using the key and returning it to her handbag in Dr Joseph's presence, thereby giving him a plain opportunity to access the bedroom. It can be *readily inferred* that it rejected Dr Joseph's denial that he did so by that means.

68. I remind myself that *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*.

69. I have looked at the underlying material in this case. I entirely understand the MPT's reasoning. I have identified reasons for its conclusions which in my view cogently justify its conclusions. I am satisfied that this reasoning is apparent from the decision in the context of the materials before it, and that it is a valid basis for the decision.

70. I have reflected on the observations in *Casey v GMC* on which Dr Joseph particularly relies. I consider the requirements of procedural fairness satisfied in this case. Dr Joseph's own evidence about the locked door issue was either immaterial (a report of what he said a security officer told him about his own door) or a bare denial. The complainant's account did not *clearly undermine her consistency and reliability* because it was an account which included giving Dr Joseph a plain opportunity to access her bedroom by leaving her keys in a place he knew about. The MPT did not make a *bare* inference that Dr Joseph's denial of doing so was *unreliable and incredible*, because, consistently with (a) the uncontroversial facts and (b) its other findings of fact which are not challenged in these proceedings, it had established an antecedent and subsequent history of his inappropriate and unwanted sexual interest in the complainant accompanied by unprofessional conduct and dishonesty; and it had also given a fully-reasoned and cogent account of its assessment of the credibility of the complainant in its own right. It had, and gave, reasons to prefer her evidence to his.

71. The fact that the determination does not deal in terms with the locked door does not, in all the circumstances, *point to a lack of focused reasoning*; nor does it *call into question the reasoning process*. On the contrary, I find the analysis and reasoning of this MPT's determination, in dealing with a case of such obvious sensitivity, to be of a high calibre, and to demonstrate – both in the decision itself and in the handling of the oral evidence during the hearing – a meticulous concern for scrupulous fairness to both Dr Joseph and the complainant, each in a position of obvious vulnerability and jeopardy. Both contending propositions – that a doctor should have raped a colleague, and that a doctor should have fabricated a rape allegation against a colleague – were shocking. The MPT in my view handled this highly sensitive case in an exemplary fashion, without for a moment taking its eye off the applicable burden and standard of proof.

72. It is entirely *possible to see the chain of reasoning which led to this ultimate conclusion*. Dr Joseph cannot be in any real or fair doubt about how the MPT squared the locked door issue with its conclusions. It accepted the complainant's evidence that the key was, in his plain view, left in a place where he could easily find it. It rejected his bare

denial that he found it and used it. Considering all the material before it, and reading the determination fairly and as a whole, it made a sustainable and supported – I might say '*obvious*' – narrative inference, inevitably implicit in its other findings.

Conclusion

73. I remind myself again of the guidance of the authorities to exercise caution before interfering with primary fact-finding, and not to allow an appeal based on insufficiency of reasoning unless I have reached a position where I do not myself understand why the tribunal reached the conclusions it did. If I am satisfied that the reasoning is apparent and that it is a valid basis for the judgment, the appeal stands to be dismissed.

74. As to interfering with primary fact-finding, this is a case in which particular respectfulness for the previous careful and sensitive process of eliciting and evaluating evidence is both appropriate and important. As to reasoning, I am entirely satisfied of the rationality and clarity of the MPT's reasoning, and of its fairness to Dr Joseph. The locked door issue was not, in context, a matter about which it was necessary, or even perhaps appropriate, to articulate findings. It was an inevitable matter of inference, and not one about which, in the end, there was - then or now - any real obscurity.

75. For the reasons given, I am unable to conclude that the decision challenged in this case is either wrong, or unjust by reason of procedural irregularity. The MPT discharged its duties carefully in sensitive circumstances. The appeal is dismissed.