



Neutral Citation Number: [2020] EWHC 846 (Admin)

Case No: CO/2396/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8th April 2020

Before :

LORD JUSTICE DAVIS
and
MR JUSTICE HOLGATE

Between :

(1) GENERAL MEDICAL COUNCIL;
(2) PROFESSIONAL STANDARDS
AUTHORITY for HEALTH and SOCIAL
CARE
- and -
ASEF ZAFAR

Appellants

Respondent

Mr Ivan Hare QC (instructed by GMC Legal) for the First Appellant
Ms Fenella Morris QC (instructed by Browne Jacobson) for the Second Appellant
Ms Mary O'Rourke QC (instructed by RLB London) for the Respondent

Hearing date: Wednesday, 11 March 2020

Approved Judgment

“Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties’ representatives by email and release to Bailii. The date and time for hand-down will be deemed to be 10:30 on 08/04/2020.”

LORD JUSTICE DAVIS:

Introduction

1. The respondent to this appeal, Asef Zafar, is a doctor. By a determination of the Medical Practitioners Tribunal (“MPT”) of 24 May 2019, his registration was directed to be suspended for a period of twelve months. Each of the appellants, the General Medical Council (“GMC”) and the Professional Standards Authority for Health and Social Care (“the Authority”), appeal against such determination. They maintain that, in all the circumstances, such a sanction was entirely unjustified and insufficient to protect the public and the only proper sanction was and is erasure.
2. There is one very unusual feature about this appeal. The Allegation advanced by the GMC before the MPT – the Authority played no part in those proceedings below – was expressed to be founded on a decision made in the High Court by Garnham J on 5 October 2018, whereby Dr Zafar was adjudged to have been in contempt of court in ten identified respects; and when he was on the same date committed to prison for six months, suspended for two years. However, that sentence, by permission of the trial judge himself, was then the subject of an appeal by the claimant in the underlying proceedings, Liverpool Victoria Insurance Co. Limited (“LVI”). It argued that the sentence of Garnham J was unduly lenient. In a detailed judgment handed down on 19 March 2019 and which has since been reported ([2019] EWCA Civ 392, [2019] 1 WLR 3833) the Court of Appeal allowed the appeal. It agreed that the sentence was unduly lenient: albeit it indicated that, in the circumstances, a declaration to that effect would suffice and thus it did not actually increase the sentence. The unusual feature of the present appeal is that that decision of the Court of Appeal, which antedated the final hearing in the MPT by some two months, was not made known to the panel of the MPT determining the case. On the contrary, it was withheld from the MPT by the agreement of those then representing the parties, who at that stage were the GMC and Dr Zafar.
3. It is now said by the GMC and by the Authority that that was gravely wrong. The MPT should have been apprised of the Court of Appeal decision for the purposes of its consideration of sanction; and this court should itself have regard to it for that purpose. That is disputed on behalf of Dr Zafar. It is said that it was correct not to place the Court of Appeal decision before the MPT; and in any event, where this happened by agreement between the parties, the appellants should not, and cannot properly, be permitted now to adduce the Court of Appeal decision as a form of fresh evidence in this court.
4. Before us, the GMC appeared by Mr Ivan Hare QC. The Authority appeared by Ms Fenella Morris QC. Dr Zafar appeared by Ms Mary O’Rourke QC. None of them had appeared in the MPT proceedings below.

Background Facts

5. The background facts are fully recounted in the reserved judgment of Garnham J in the contempt proceedings before him, following a nine day hearing: [2018] EWHC 2581(QB). That judgment was immediately followed by his decision on sentence (albeit, of course, it was not a criminal sentence as such). I will give only a brief summary of the background facts here.

6. Dr Zafar was at all material times employed within the NHS as a General Practitioner. In addition, however, he engaged on his own account in private practice, providing medical reports for low-level personal injury claims. He, remarkably, seems to have developed a system where he apparently could examine a patient or client and produce a report in the space of approximately 15 minutes. He was to say that he might produce some 5,000 reports a year, with an annual gross income of around £350,000. Quite how he was able to fit all this around his NHS responsibilities is not clear: and at all events it seems that his NHS premises were frequently used for his private medico-legal practice. The judge, in his sentencing remarks, in fact was to describe this medico-legal practice as a “report writing factory.” Dr Zafar started his medico-legal practice in 2006. He continued with it until October 2018.
7. The matters giving rise to the civil contempt proceedings brought against him by LVI occurred in the following circumstances.
8. In December 2011 a Mr Iqbal, a taxi driver, was involved in a road traffic accident. The other driver was insured by LVI. Mr Iqbal sought compensation for the injuries and loss which he said that he had suffered and approached a claims management business. A firm of solicitors, TKW, was in due course instructed to pursue a claim against the other driver.
9. Dr Zafar was then instructed by TKW, via a company called Med-Admin Limited, to prepare a medico-legal report. The solicitor involved on behalf of TKW was Mr Khan. Dr Zafar in due course, on 17 February 2012, examined Mr Iqbal for around 15 minutes at his surgery. This was about 11 weeks after the collision. He produced his report, dictating it in the presence of Mr Iqbal. In the report, he recorded Mr Iqbal saying that he had mild pain and stiffness at the time but they had resolved, after a course of pain-killers, around a week after the accident. Dr Zafar reported that Mr Iqbal had fully recovered from his injuries and that examination showed his neck to be normal. Under the heading “Prognosis” it was reported that there had been full recovery. The report was signed by Dr Zafar electronically. It contained the usual Declaration and Statement of Truth. Those included statements as to his awareness of Part 35 of the Civil Procedure Rules, as to his obligations as an expert and as to the opinion expressed being his true, complete and independent professional opinion.
10. Mr Iqbal, on receipt of the report by post, expressed unhappiness with it. He among things said that, although the acute symptoms had abated, he had been experiencing on-going symptoms. Mr Khan in due course sent an e-mail to Med-Admin, which was forwarded on 24 February 2012 to Dr Zafar, reporting Mr Iqbal’s comments and stating that Mr Iqbal was still suffering severe to moderate pain in his neck and upper back. Dr Zafar was asked whether it was likely that he would recover in the next six to eight months and “if so, can you please amend your report in respect thereof”.
11. Dr Zafar was reminded by one of his secretaries of what he had said in his first report. Nevertheless, that same day and without further examination of Mr Iqbal, Dr Zafar produced a second report. This report, however, continued to bear the date of 17 February 2012. It made no mention whatsoever of the first report. It continued to include the same Declaration and Statement of Truth. However, by this second report it was now said that the pain and stiffness of Mr Iqbal in the neck area persisted and “will fully resolve six to eight months from the date of the accident.”

12. On receipt of this revised report, Mr Khan commenced proceedings on behalf of Mr Iqbal in the County Court, placing reliance on the revised report. During August 2013, a paralegal at TKW sent a proposed trial bundle to the defendant's solicitors. This bundle (by mistake, from TKW's point of view) included Dr Zafar's first report. In due course an amended bundle was sent, this time including the revised report. However, the discrepancies were noted by the defendant's lawyer and raised with the District Judge, who directed enquiries to be made.
13. An enquiry agent instructed by LVI then contacted Dr Zafar by telephone. There was a meeting. The upshot was that Dr Zafar on 20 August 2013 signed a witness statement, containing a Statement of Truth, to the effect that the original report was the correct report and that the alterations contained in the revised report had been made by someone else without his permission.
14. However on 5 September 2013, and following a discussion with LVI's solicitor, Dr Zafar changed his account. He now said that he should not have made his witness statement of 20 August 2013. He now accepted that he had, using the services of his secretary, amended the first report. But he claimed that the first report had only related to Mr Iqbal's "acute" symptoms. He made a further witness statement on 22 October 2013, again with a Statement of Truth, to this effect. This among other things stated that the revised report (which he had produced himself) was the correct one.
15. The further course of Mr Iqbal's proceedings are not relevant for present purposes. What is relevant is that LVI thereafter initiated contempt proceedings against Mr Khan, Dr Zafar and two other individuals. False, or falsely inflated, claims are the bane of every insurer. It is entirely laudable that they take active steps to expose and deter such conduct.

The Decision of Garnham J

(a) Contempt

16. The matter came before Garnham J for hearing in July 2018. Although this was a civil contempt claim, the standard of proof to be applied was the criminal standard, as is requisite in such cases. After a lengthy hearing, the judge rejected the claim of civil contempt on the part of the two other individuals. Contempt of court on the part of Mr Khan was found proved. As for Dr Zafar, of the sixteen grounds of contempt alleged against him the judge found ten to be proved. These were, in summary, as follows. Four related to specific false statements made in the revised report. A fifth related to his first witness statement dated 20 August 2013, in that he had falsely sought to blame someone else for introducing the amendments. The remaining five grounds all related to specific false statements contained in the second witness statement dated 22 October 2013, to the effect that the first report was erroneous and only represented acute symptoms and to the effect that the revised report was a true representation of the position.
17. As to the first four matters, it was LVI's contention that the statements in the revised report were deliberately false, Dr Zafar simply doing what Mr Khan, the solicitor, had asked him to do and without any further examination of Mr Iqbal. The judge rejected the allegation of dishonesty in these respects. But he found that Dr Zafar had been reckless in producing the revised report: "he did not care whether the amended contents of the report were true or false; all that mattered to Dr Zafar was getting another report

out”. The judge found that Dr Zafar just did as he was asked by the solicitor and had no proper basis for his new prognosis as recorded in the revised report. The judge found that Dr Zafar did not care whether or not the court was misled as a result.

18. As to the fifth matter, the witness statement dated 20 August 2013, the judge rejected Dr Zafar’s case and evidence that the errors in it were in some way attributable to the enquiry agent. The judge rejected Dr Zafar’s evidence that he believed that the witness statement was correct. The judge found that Dr Zafar had decided to seek to explain away the amendment of the first report by falsely blaming someone else. The judge in terms found him to have acted dishonestly in this respect; and, moreover, found that “he knew or believed that his own statement was to be used for court proceedings and must have known that what he said was likely to interfere with the course of justice”.
19. As to the remaining five matters, all concerning the second witness statement of 22 October 2013, the judge in effect tracked his approach with regard to the first four matters and found those false statements to have been made not dishonestly but recklessly. (The judge, rather oddly, did not here advert to the fact that in the interim Dr Zafar had, as found, knowingly made a false witness statement on these matters.)

(b) Sentence

20. After delivering his lengthy judgment on the allegations of contempt, the judge turned to the question of what may be called sentence with regard to Dr Zafar and Mr Khan, after receiving detailed submissions from counsel.
21. In sentencing, the judge said that false evidence of the present kind “causes serious damage to the administration of justice”. After referring to authority, he said: “Solicitors and expert witnesses who act dishonestly in the evidence they give to the court, whether in support of such claims or otherwise, must expect a similar outcome [going to prison].” So far as Dr Zafar was concerned, the judge described the lying first witness statement as “particularly despicable as you knew the truth, yet you tried to blame an innocent third party.” The judge further found that the various reckless statements were made to keep the “report writing factory” at full capacity and then by a “cowardly desire to cover up what you had done.”
22. The judge noted the mitigation advanced (which of course, could not extend to any early admissions, as the case had been vigorously contested). The judge indicated that there was “no suggestion that there was any corruption underlying your actions”; and noted that only one count involved dishonesty (as opposed to recklessness). The judge envisaged that the outcome would involve Dr Zafar’s “professional and financial ruin”. He also took into account the delay and strong testimonials for Dr Zafar as a doctor.
23. In the result, he committed Dr Zafar to prison for a period of six months, suspended for two years, as I have already said. The judge himself gave permission to appeal on sentence.

The Decision of the Court of Appeal

24. The appeal was heard on 12 February 2019 and the reserved judgment of the court (Sir Terence Etherton MR, Hamblen LJ and Holroyde LJ) was handed down on 19 March 2019.

25. Since the judgment is a public and reported decision of the Court of Appeal, I was rather bemused to find that this court was being invited to have initial regard to that decision on a de bene esse basis. But, given the nature of the arguments presented to us, we were prepared to proceed on that initial basis.
26. At the hearing in the Court of Appeal, Dr Zafar was represented by leading counsel and junior counsel, who had also represented him before Garnham J. LVI was itself represented by leading and junior counsel.
27. It is to be noted at the outset that, in setting out and evaluating the evidence, the Court of Appeal at no stage sought to depart from the primary findings of fact of the trial judge.
28. The Court of Appeal, after summarising the evidence and judge's findings, dealt with the overriding duty owed by experts to the court, referring among other things to CPR r. 35.3 and the related Practice Directions. It referred, with approval, to authorities such as *South Wales Fire and Rescue Service v Smith* [2011] EWHC 1749 (Admin) – to which Garnham J had himself referred – and to the general propositions of Moses LJ made at the outset of his judgment in that case, relating to the serious consequences for the proper administration of justice occasioned by false and lying claims. The Court of Appeal also referred to his statement: “Those who make such false claims should expect to go to prison.”
29. The court went on among other things to say this (at paragraph 59):

“We say at once, however, that the deliberate or reckless making of a false statement in a document verified by a statement of truth will usually be so inherently serious that nothing other than an order for committal to prison will be sufficient. That is so whether the contemnor is a claimant seeking to support a spurious or exaggerated claim, a lay witness seeking to provide evidence in support of such a claim, or an expert witness putting forward an opinion without an honest belief in its truth. In the case of an expert witness, the fact that he or she is acting corruptly and makes the relevant false statement for reward, will make the case even more serious; but it will be a serious contempt of court even if the expert witness acts from an indirect financial motive (such as a desire to obtain more work from a particular solicitor or claims manager), or without any financial motivation at all, and even if the expert witness stands to gain little financial reward by it. This is so because of the reliance placed on expert witnesses by the court, and because of the corresponding importance of the overriding duty which experts owe to the court (see [33-34] above).”

The court elaborated as follows at paragraph 61:

“As we have noted in [36] above, the essential feature of this form of contempt of court is the making of a false statement without an honest belief in its truth. In principle, where a false statement is made without an honest belief in its truth, a

contemnor who acts recklessly is less culpable than one who acts intentionally. The extent of that difference in culpability will, however, depend on all the circumstances of the case. Without seeking to lay down an inflexible rule, we take the view that an expert witness who recklessly makes a false statement in a report or witness statement verified by a statement of truth will usually be almost as culpable as an expert witness who does so intentionally. This is so, because the expert witness knows that the court and the parties are dependent on his or her being truthful, and has made a declaration which asserts that he or she is aware of his or her duties to the court and has complied with them (see [33] above). To abuse the trust placed in an expert witness by putting forward a statement which is in fact false, not caring whether it be true or not, is usually almost as serious a contempt of court as telling a deliberate lie”

30. Having so stated, the court expressed its disagreement with the trial judge’s evaluative finding that the telling of one deliberate lie [viz. in the first witness statement] was the most serious aspect of Dr Zafar’s conduct. Rather, as the court said (at paragraph 62):

“The seriousness of the case lies, in our view, in the putting forward of the revised report as if it represented the defendant’s honest and independent opinion based upon his own examination of Mr Iqbal.”

31. The court then noted the persistence in the cover-up and in making further false statements. It noted also (at paragraph 65) that:

“...it must be remembered that it is the professional standing and good character of the expert witness which enables him or her to act as an expert witness, and thus to be in a position to make false statements of this kind. Breach of the trust placed in an expert witness by the court must be expected to result in a severe sanction being imposed by the court in addition to any other adverse consequences.”

32. In expressing its ultimate reasons for disagreeing with the judge as to the appropriate sentence, the court said this:

“73. Our reasons are these. In the present case, the inherent seriousness of the defendant’s conduct in contempt of court – in particular, in the putting forward of the revised report as if it represented the defendant’s honest and independent opinion based upon his own examination of Mr Iqbal - was aggravated by a number of factors. First, the judge found it to have been motivated initially by a desire to keep his report-writing factory running at full capacity. The defendant was, therefore, at least indirectly motivated by a concern for financial profit. Secondly, the defendant persisted in the conduct which constituted his contempt of court, putting forward false statements on three different occasions. Thirdly, on one of those occasions he acted

with deliberate dishonesty. Fourthly, he sought on that occasion to cast the blame for his own misconduct on someone else. Fifthly, although he did not maintain that deliberate untruth for very long, he thereafter recklessly put forward another explanation which was also untrue. Sixthly, having regard to the terms of his declarations and his statement of truth, we are bound to say that we think that the recklessness which the judge found came close to the borderline between reckless and dishonesty.

74. We accept that there were a number of matters in the defendant's favour, to which some weight had to be given. It seems to us, however, that the judge gave disproportionate weight to one of them, namely the fact that in most respects the misconduct was reckless rather than intentional: for the reasons we have given, there was in the circumstances of this case little difference in culpability between those two states of mind. It also seems to us that disproportionate weight was given to what was referred to as delay, the majority of the passage of time being attributable to the defendant's choice to contest the proceedings throughout. The disproportionate weight which he gave to those considerations contributed, in our view, to his passing a sentence which was so lenient as to fall outside the range reasonably available to him. The judge did not identify any powerful factor or combination of factors in favour of suspension."

It indicated that an immediate sentence in the order of 12 months, and certainly not less than 9 months, imprisonment would have been appropriate.

33. The court thus allowed the appeal. However, it indicated that, in the circumstances, declaring the sentence to be unduly lenient sufficed. The sentence itself was not actually increased.

The Proceedings in the MPT

34. Inevitably proceedings were commenced against Dr Zafar in the MPT. Dr Zafar had in fact self-referred on 14 October 2017 (in terms whereby he stated that he was vigorously defending the contempt proceedings and that he denied submitting a misleading medico-legal report).
35. The matter eventually came on for hearing before a panel of the MPT – comprising a very experienced legal member, a medical member and a lay member – between 21 and 24 May 2019.
36. Dr Zafar faced the following Allegation:

“1. On 5 October 2018 at the Queen's Bench Division in the High Court of Justice, 10 counts of contempt of court were proven against you.

2. On the same date you were sentenced to 6 months imprisonment, suspended for 2 years

AND that by reason of the matters set out above your fitness to practise is impaired because of your misconduct.”

37. Relevant to the determination of the MPT was the Sanctions Guidance issued by the GMC in 2018. Among other things that, in dealing with erasure, sets out a number of factors (at paragraph 109) which “may indicate erasure is appropriate.” Those factors include (among others): a particularly serious departure from established principles; a “deliberate or reckless” disregard of such principles; abuse of position of trust; “dishonesty, especially where persistent and/or covered up”; and persistent lack of insight into the seriousness of actions or their consequences. At paragraph 124 it is further stated that, even if it may not result in direct harm to patients, “dishonesty ... (e.g. providing false statements or fraudulent claims for money) is particularly serious ... Evidence of clinical competence cannot mitigate serious and/or persistent dishonesty”. At paragraph 125, examples of dishonesty there set out include failing to take reasonable steps to ensure that statements made in formal documents are accurate. At paragraph 128 it is stated:

“Dishonesty, if persistent and/or covered up, is likely to result in erasure.”
38. Documentary evidence adduced before the MPT included (among other things) the judgment and sentencing remarks of Garnham J, along with certain other reports and statements and testimonials. No challenge was made as to the underlying facts as found by Garnham J. This Allegation, indeed, was admitted before the MPT; and inevitably was in due course found proved.
39. In this regard, although the substantive judgment and subsequent sentencing remarks of Garnham J were before the MPT and were accepted as being capable of being relied upon by the MPT, the now published decision of the Court of Appeal was not. At first sight and indeed at second sight that seems extraordinary. The relevant judicial evaluation on sentence being placed before the MPT was that of Garnham J. But it was now known that that evaluation had itself been the subject of further judicial evaluation (and indeed in a number of respects judicial correction) by the appellate court; yet the MPT was not being informed of that. How could that be?
40. All that we were told in the written arguments lodged prior to the hearing before us was that that outcome was agreed by those respectively appearing for the GMC and Dr Zafar in the tribunal proceedings. But *why* it was so agreed was left unexplained. In such circumstances, we pressed for greater amplification at the hearing before us.
41. What appears to have happened was this.
42. On 27 December 2018, the solicitors for Dr Zafar wrote to the GMC saying that Dr Zafar accepted the findings of Garnham J and did not wish to “relitigate the facts or seek to overturn findings made in the judgment”.
43. Following the handing down of the Court of Appeal judgment, the GMC indicated that it was proposed that such judgment be included in the bundle for the substantive hearing. The solicitors for Dr Zafar raised objection to that proposal; and said that if the matter was disputed the matter should be debated before a panel of the MPT (if need be, one different from that having conduct of the substantive hearing). This dispute was

briefly raised at a pre-hearing meeting before a case manager on 23 April 2019. On 29 April 2019 a legal advisor for the GMC saw fit to accede to the proposal that the judgment of the Court of Appeal should not be put in the bundle: and the matter was agreed on that basis. She stated in an email that “the issue has settled and the parties will not need to request an alternative Tribunal to consider the matter.” No reason for this still has been given – unless one is to infer that the GMC was persuaded to adopt an absurdly narrow reading of the Allegation as then formulated.

44. The case thus proceeded to the full hearing before the MPT on that basis. However, during the first day of the hearing the Chair of the Panel of the MPT hearing the matter perceptibly enquired (having noted that Garnham J had granted permission to appeal on sentence) whether there was an appeal. No express answer was given. Instead, at the request of counsel then appearing for Dr Zafar, a short adjournment was granted as: “It may be better if I speak to [counsel for the GMC] about it outside”. After an adjournment, counsel for Dr Zafar said this to the MPT:

“My learned friend and I have now had an opportunity to discuss the matter and it is I who delivers the form of words we have agreed upon, which is: following discussion the GMC do not seek to provide any further material in this case. They have provided all that they consider relevant.”

No further explanation or elaboration was given.

45. The hearing continued on that basis. The MPT on 22 May 2019 duly determined, without opposition, that Dr Zafar’s fitness to practise was impaired by reason of misconduct. In truth, the real issue was always going to be that of sanction. Dr Zafar gave evidence in that regard. In submissions, counsel for the GMC argued that the appropriate sanction was erasure. Counsel for Dr Zafar argued for suspension. Among other points, he emphasised that there had been but a single instance of dishonesty.
46. In its determination on sanction, delivered on 24 May 2019, the MPT reviewed the evidence. It noted Dr Zafar’s evidence that it was only after the judgment of 5 October 2018 that “he had time to reflect and realise his mistakes”: and indeed he stopped writing medico-legal reports from that date (but not before). It recorded at length the competing submissions on sanction. It stated that it had regard to the Sanctions Guidance. It set out at paragraph 31 what it viewed as the aggravating factors as follows:

“The Tribunal gave careful consideration to the aggravating and mitigating factors present in Dr Zafar’s case. The Tribunal had regard to the following aggravating factors:

- Dr Zafar was found guilty of ten counts of contempt of court in relation to his medicolegal work in which he was acting as an expert witness. He received a six months’ custodial sentence, suspended for a two year period.
- He revised a medicolegal report that he approved and this was approved whilst he was acting in his role as an expert and was prepared for court proceedings and contained a

statement of truth. Mr Justice Garnham described Dr Zafar's actions as reckless.

- Dr Zafar lied when he was confronted about the revised report by the insurance enquiry agent and tried to blame the medical agency for the changes in the revised report. In that regard he was dishonest.
- Further to the series of reckless statements in the revised report, Dr Zafar then made a witness statement to try and explain the differences.
- Dr Zafar fought the contempt proceedings and Mr Justice Garnham criticised him in quite strong terms in his judgment.
- Dr Zafar's actions seriously undermine the trust the public place in the medical profession.”

47. As to mitigation, the MPT at paragraph 32 said this:

“The Tribunal balanced the aggravating factors against what it considered to be the mitigating factors in this case:

- There is no suggestion of any corruption underlying Dr Zafar's actions.
- Three weeks after giving the statement to the insurance enquiry agent, Dr Zafar contacted the solicitors on both sides of the case to correct his lie.
- Dr Zafar has expressed profound regret for his actions. The Tribunal referred to his witness statement and was of the view that he has taken steps to address matters of remediation and insight. The Tribunal found that Dr Zafar is plainly devastated by his actions.
- There are no clinical issues about Dr Zafar's practice. He has produced a detailed CV and provided the Tribunal with a large volume of CPD documentation.
- Dr Zafar has provided a number of testimonials that speak highly of his abilities as a doctor, his dedication to medicine, and his politeness and caring nature towards patients, staff and colleagues.”

48. In discussing suspension, the Tribunal among other things said this:

“The court has found that there was both dishonesty and recklessness on Dr Zafar's part. The Tribunal concluded that either of these are important factors which diminish public

confidence in the profession. The Tribunal had regard to the six months' custodial sentence, suspended for two years, that was imposed by Mr Justice Garnham."

After further discussing the mitigation, it concluded that suspension was the appropriate sanction to protect the public interest. It said this at paragraph 47:

"The Tribunal determined to suspend Dr Zafar's registration. It concluded that this would be the appropriate and necessary sanction to protect the public interest in this case. The Tribunal determined that Dr Zafar has shown remorse, has made substantial attempts to remediate and is developing insight into his failings. The Tribunal was satisfied that the risk of repetition is negligible."

It had regard to the sanction of erasure but considered that, in the particular circumstances of the case, erasure would be disproportionate. It was also directed by the MPT that there be a review hearing shortly before the end of the period of suspension, which was stated to be twelve months.

49. It is from that decision on sanction that the GMC (pursuant to s.40A of the Medical Act 1983) and the Authority (pursuant to s.40B of the Medical Act 1983) appeal.

The Required Approach

50. Section 1 of the Medical Act 1983 stipulates that the over-arching objective of the GMC in exercising its functions is the protection of the public. That among other things includes, by s.1 (1B), pursuit of objectives to promote and maintain public confidence in the medical profession and to promote and maintain proper professional standards and conduct for members of that profession.
51. All such cases ultimately must depend on their own facts and circumstances. But so far as a court dealing with an appeal under s.40A is concerned, the following propositions (in no particular order of importance) can, I think, be taken as established and as having potential application in the present case. I do not consider it necessary expressly to refer to all of the many authorities which were put before us for this purpose.
52. (1) First, such appeals are subject to CPR Part 52. A court will allow an appeal if it is wrong or if it is unjust because of a serious procedural or other irregularity in the proceedings in the lower court: CPR r.52.21.
- (2) Second, a court will exercise the ordinary restraint appropriate when invited to set aside primary findings of fact by a Tribunal.
- (3) Third, an evaluative decision of a specialist Tribunal as to professional misconduct or impairment of fitness to practise, based on the primary findings of fact, ordinarily will only be interfered with by an appeal court if there is an error of principle or if it was an evaluative decision which fell outside the reasonable bounds of what a Tribunal could reasonably decide.

(4) Fourth, that general reluctance to interfere, or diffidence in interfering, applies particularly in cases of sanction, where the Tribunal will be the specialist body best equipped to assess the needs and demands appropriate for the particular profession.

(5) Fifth, however, that reluctance or diffidence in interfering may be modified in a sanction case where the Tribunal's assessment is as to the effect on public confidence of misconduct which does not relate to professional performance.

(6) Sixth, matters of mitigation, although always relevant, are likely to be of considerably less significance in professional disciplinary proceedings than in criminal proceedings involving retributive justice, because the overarching concern of the professional regulators is to protect the public (which can include maintaining public confidence in the profession and maintaining proper professional standards and conduct).

(7) Seventh, for all professional persons (including doctors) a finding of dishonesty lies at the top end of the spectrum of gravity of misconduct.

(8) Eighth, the reputation of the profession is more important than the fortunes of any individual member

53. Cases which establish such propositions include, among others, *GMC v Bawa–Garba* [2018] EWCA CIV 1879, [2019] IWL 1929; *Khan v GPhC* [2016] UKSC 64, [2017] 1 WLR 169; *GMC v Jagjivan* [2017] EWHC 1247 (Admin), [2017] 1 WLR 4438; *GMC v Chandra* [2018] EWCA Civ 1898, [2019] 1 WLR 1140; and *Bolton v Law Society* [1994] 1 WLR 512. But further extensive citation is not necessary, as these principles were not in dispute before us.

Submissions

54. Mr Hare QC, for the GMC, submitted that a sanction of suspension was and is not tenable. In particular, he submitted that the MPT was deprived, by erroneous concession, of knowledge of the decision of the Court of Appeal declaring the sentence of Garnham J to be unduly lenient. Had the MPT known of that judgment and its reasoning (as the MPT should have done) it never would or should have assessed matters as it did: and in particular it would not have highlighted perceived distinctions in this context between dishonesty and recklessness as it did. He submitted that the GMC should not, having regard to public interest considerations, be precluded from now relying on the decision of the Court of Appeal in this court, in particular where it was the legal team for Dr Zafar which had initiated the proposal to exclude it from the consideration of the MPT.
55. He further submitted that, overall, the MPT seriously underrated the gravity of Dr Zafar's conduct: as reflected in the judgment of the Court of Appeal. Further, the MPT gave far too much weight to the personal mitigation advanced (cf., for example, the case of *Bolton*, as cited above). A further submission was that the MPT had also failed to have any, or any sufficient, regard to the Sanctions Guidance issued by the GMC in 2018 in determining sanction. He said, overall, that erasure was the only proper sanction; and this court should so decide. There was no need for remittal.

56. For the Authority, Ms Morris QC submitted that the Authority had not been party to the agreement to exclude the Court of Appeal judgment from the MPT below and could not be bound by it. Indeed, as she submitted, one of the reasons why, under s.40B of the Medical Act 1983, the Authority might participate in an appeal is dissatisfaction with the conduct of the proceedings below. She too submitted that the decision of the MPT was vitiated by the failure to have regard to the Court of Appeal decision. She said that that was a serious procedural error.
57. In any event, she submitted, a sanction of suspension was wholly unjustified, given the findings of dishonesty and recklessness; and such sanction involved an unwarranted departure from the Sanctions Guidance. She complained that the MPT in effect engaged solely in a balancing of the perceived aggravating and mitigating factors, without giving proper weight to the aspects of maintaining public confidence in the profession in circumstances of dishonesty and recklessness such as this. She too submitted that erasure was the only proper sanction.
58. On behalf of Dr Zafar, Ms O'Rourke QC emphasised the usual diffidence which the appellate courts should adopt with regard to a decision on sanction of a specialist tribunal, which is ordinarily much better placed to decide such matters.
59. She went on to submit that the Court of Appeal decision was not relevant evidence or relevant material at all, and had rightly not been put before the MPT. The only findings of fact relevant to the Allegation were those of Garnham J. In any event, the GMC should not be permitted now to adduce that decision, in the light of the principles of *Ladd v Marshall* [1954] 1 WLR 1489. Indeed, she said that it was an abuse of the process for the GMC to seek to do so, when it had expressly agreed below that it should not be put before the MPT. She further said that the Authority should be in no better position.
60. She went on to submit that the sanction of suspension was an evaluative decision, properly open to the Tribunal; and an appellate court should not simply substitute its own potential view of matters. She also disputed that the MPT had failed to have proper regard to the Sanctions Guidance, in circumstances where it had expressly said that it had had regard to it.
61. Alternatively, even if the Court of Appeal decision was now to be taken into account, it would, she said, be wholly unfair to do so without Dr Zafar having the chance to represent his case. Consequently, the matter should at least be remitted to the (same) MPT for a further hearing.

Disposal

62. In my view, there is an air of unreality about much of this debate.

(a) Can the Court of Appeal judgment now be adduced?

63. There were before the MPT, by agreement, the complete substantive judgment and the complete sentencing remarks of Garnham J. The MPT had regard to them, not only as to the judge's primary findings of fact but also as to the judicial evaluation made by him. That is evident both from the structure and from the contents of the MPT determination on sanction; and was entirely sensible and understandable. But given that

that judicial evaluation of Garnham J had then itself been judicially re-evaluated in the Court of Appeal, how can it be anything other than logical (and sensible) that the Court of Appeal judgment itself likewise should have been available to the MPT for these purposes? In truth, the MPT was – through no fault of its own – being left to decide the matter on an incomplete (and misleadingly incomplete) basis. That is not a position which ought now to be sustained. It should, on the contrary, be put right.

64. Ms O'Rourke objected that the Court of Appeal judgment had not interfered with the actual sentence of Garnham J. That is true. It had not. (Indeed, as a matter of technicality, Mr Hare and Ms Morris were in turn no doubt right to say that the Allegation in the MPT proceedings thus had not needed formal amendment.) But the fact remains that the Court of Appeal had allowed the appeal and declared the sentence of Garnham J to be unduly lenient. Thus the sentencing remarks and sentence of Garnham J lost, in the respects identified by the Court of Appeal, the authority which the MPT had understandably accorded them. The fact that, as Ms O'Rourke said to us, Dr Zafar accepted and accepts the judgment of Garnham J but does not accept the judgment of the Court of Appeal is nothing to the point. The evidence in the Court of Appeal was the same as that before Garnham J. He was represented before the Court of Appeal and was able there to put his arguments (which the Court of Appeal rejected). There was no further evidence and no further arguments on these aspects which he could meaningfully give.
65. Ms O'Rourke necessarily accepted that the rules of evidence in MPT proceedings are much broader than those generally applicable in a court of law and accepted that the rule of evidence commonly known as the rule in *Hollington v Hewthorn* (see [1943] KB 547) did not apply as such in such a context: see Rule 34 (1) of the General Medical Council (Fitness to Practise) Rules 2004. She nevertheless stoutly maintained that in so far as the judgment of the Court of Appeal was potentially "evidence" it was of no or limited probative value. Indeed she said that it was irrelevant, as simply representing the views of three appeal court judges as to the seriousness of Dr Zafar's conduct: when such evaluation was for the MPT alone. On that basis, the only function of permitting such judgment to be deployed would, she said, be to create unwarranted and unjustifiable prejudice against Dr Zafar. When asked how it was, then, that the judgment and sentencing remarks of Garnham J were (in full) before the MPT by agreement, she in effect said that they provided the relevant primary factual background and "context". She referred us to the decision of Ouseley J in the case of *R (Squier) v GMC* [2015] EWHC 299 (Admin) in this regard.
66. These arguments are, in my opinion, wholly unsustainable.
67. It is quite true that, in terms of determining the appropriate sanction, it was for the MPT to decide, by reference to the protection of the public, what was required to promote and maintain public confidence in the medical profession and to promote and maintain proper professional standards and conduct. But the dishonesty and recklessness of Dr Zafar (as found) did not relate to his clinical practice at all. Rather, it related to his medico-legal practice: and, as Garnham J himself had inevitably found, such conduct causes serious damage to the administration of justice. As the judge said in his sentencing remarks, critical to the proper operation of the justice system is the trust that courts have to place in solicitors and expert witnesses appearing before them.

68. Thus for its purposes it was essential that, in considering sanction, the MPT should have the most authoritative judicial guidance, on the facts of this case, as to the gravity of Dr Zafar's conduct with regard to the good administration of justice. *That*, essentially, is why the judgment of the Court of Appeal was so relevant and why it was required to be placed before the MPT for its consideration. Once the MPT had such guidance (along with all other relevant matters) then the MPT would reach its own assessment of the gravity of Dr Zafar's conduct by reference to the protection of the public. And it undoubtedly had the entitlement to receive the Court of Appeal decision in considering sanction, given the wide provisions of the 2004 Fitness to Practise Rules.
69. I repeat that the Court of Appeal did not displace any primary findings of fact of Garnham J. But not only did the Court of Appeal pronounce, by reference to the assessed seriousness of Dr Zafar's conduct, that the suspended sentence of six months imprisonment was unduly lenient but also it gave valuable and important guidance as to the limited distinction properly to be drawn between dishonesty and recklessness in this particular context: a distinction which Garnham J (and in consequence the MPT) had emphasised but which the Court of Appeal corrected. Moreover, the Court of Appeal had corrected the error of the judge (as it concluded it to be) of taking the dishonest witness statement as the most serious aspect: whereas it lay (as the Court of Appeal held) in putting forward the revised report as his honest and independent opinion. Overall, had the MPT known, for example, that the sentence of Garnham J had been declared unduly lenient and had the MPT known of the limited distinction in this context to be attributed (in law) to the proven act of dishonesty and to the proven acts of recklessness and had the MPT known of the correction as to the most serious aspect of the case it is unthinkable, to my mind, that it would have expressed itself as it did. As Ms Morris put it, the Court of Appeal decision was "potently relevant".
70. There is, in my opinion, no unfair prejudice arising to Dr Zafar from such a conclusion. In truth the only "prejudice" arising (as is, for example, commonly also the situation arising in applications under s.78 of the Police and Criminal Evidence Act 1984) derives from the very relevance of this material.
71. So that leaves what ultimately, perhaps, became Ms O'Rourke's principal point. It would nevertheless, she said, be wholly wrong and unfair to permit the Court of Appeal judgment now to be relied upon: just because it had been excluded from the MPT by agreement.
72. There are, as I see it, two answers to that: one short, one long.
73. The short answer is that such an agreement as was made below could not bind the Authority, which had not been party to it. It was entirely open to the Authority, in exercise of its functions under s. 29 of the National Health Service Reform and Health Care Professions Act 2002 and pursuant to s. 40B (3) and (4) of the Medical Act 1983, to seek to rely on the judgment of the Court of Appeal as fresh material in this court without the potential constraints that might otherwise apply: cf. *Council of the Regulation of Health Care Professionals v GMC and Ruscillo* [2004] EWCA Civ 1356, [2005] 1 WLR 717, at paragraphs 28-29 of the judgment of the court.
74. The long answer (so far as the GMC is concerned) derives from the court's power under CPR r. 52.21 (2) to receive fresh evidence. The court ordinarily will have regard to the principles set out in *Ladd v Marshall* (cited above) and, where those criteria are not

satisfied, usually will be inclined not to receive the evidence. But, under the modern rules, there is no absolute prohibition (as Ms O'Rourke fairly accepted) on receipt of such evidence even where the *Ladd v Marshall* criteria are not met.

75. Ms O'Rourke, however, said that not only could the GMC not satisfy the *Ladd v Marshall* criteria, but here it actually had *agreed* that the Court of Appeal decision should not go before the MPT: an agreement made both in advance of the hearing and then again (on the MPT's perceptive query) at the hearing. The GMC should not, in such circumstances, now be permitted to go behind that, she said.
76. Were this what I might call "ordinary" civil litigation I would see the greatest force in such submissions. It may be that the reasons being advanced for excluding the Court of Appeal judgment were nebulous and would speedily have been exposed as such had this MPT (or another panel of the MPT) been asked to decide the issue as a preliminary matter. But the fact remains that, by agreement, the issue was resolved. And parties to litigation should ordinarily, in the interests of finality, be held to their compromises, be they wise or unwise.
77. But this is not "ordinary" civil litigation. These are proceedings conducted in the public interest and with the object of protecting the public. That consideration does not, I agree, necessarily of itself displace the usual need to satisfy the *Ladd v Marshall* criteria. But it is certainly a factor relevant to the overall exercise of discretion – see, for example, *GMC v Adeogba* [2016] EWCA Civ 162, [2016] 1 WLR 3367 at paragraphs 29 and 31 of the judgment of Sir Brian Leveson P. It seems to me that, in the circumstances of this particular case, that factor, taken with all the other circumstances, removes this case from some kind of norm. Given my clear opinion that the agreement to exclude the Court of Appeal decision was wholly erroneous and should never have been made, and given that it operated then to distort the hearing before the MPT and its attempt to achieve an informed and just outcome, I overall conclude that – assuming, for present purposes, that the published judgment of the Court of Appeal is to be styled "fresh evidence" – it should be adduced on this appeal on the application of the GMC.
78. Ms O'Rourke complained that, if that were to be so, then Dr Zafar had, by reason of the agreement, been deprived of his opportunity to debate the matter as a preliminary issue in the MPT proceedings. But in reality no unfairness arises. Ms O'Rourke accepted that she has been able to advance before us all the arguments relied upon on this issue. As a matter of law, there was no sustainable case (for the reasons I have given) for excluding the Court of Appeal judgment from the MPT in its decision on sanction. If and in so far as some residual discretion remained in this regard, then all I need say is that I can see no basis whatsoever, as a matter of discretion, for any reasonable panel of the MPT excluding the Court of Appeal judgment from the proceedings on sanction: on the contrary, there was and is every basis for including it.
79. Accordingly, the judgment of the Court of Appeal is formally to be admitted.

(b) Outcome on Sanction

80. Once this is done then on any realistic view the outcome for this appeal is, as I see it, clear.

81. I bear in mind Ms O'Rourke's understandably repeated emphasis on the need for caution and restraint where an appellate court is being invited to interfere with a sanction imposed by a specialist tribunal. But, as Lord Wilson explained in paragraph 36 of his judgment in *Khan* (cited above), a court can more readily depart from a tribunal's assessment of the effect of misconduct which does not relate to professional performance. That is assuredly so in the present case: where the misconduct relates to dishonesty and recklessness with regard to medico-legal reports, and moreover does so in the context of interference with the administration of justice.
82. But in any event, and even more fundamentally, it is now known that the MPT reached its determination on sanction on a mistaken basis: not knowing, for example, that the sentence of Garnham J had been declared unduly lenient; not knowing of the correct approach to be taken with regard to recklessness in this case; and not knowing where the true seriousness of the case, with regard to the good administration of justice, lay (as articulated in paragraphs 61 and 62 of the Court of Appeal judgment).
83. The MPT heard evidence from Dr Zafar on sanction. It accepted (as it was entitled to do) that he has shown considerable contrition and that his remorse is genuine. He has undertaken focused remediation. Further, there were many glowing testimonials of him as a doctor. But as the remarks of Sir Thomas Bingham MR in *Bolton* (cited above) show, such matters can, in a context such as this, amount to only so much (I add that, although *Bolton* was a case involving a solicitor, it has since been authoritatively held that the remarks of Sir Thomas Bingham MR apply as much to cases involving doctors). As the Sanctions Guidance also itself says, evidence of clinical competence cannot mitigate serious or persistent dishonesty.
84. In the present case, there was actual dishonesty in the form of a false witness statement, containing a Statement of Truth. In itself that was a very serious matter. There was also the sustained recklessness – being but little different in seriousness from dishonesty in this context, as the Court of Appeal has held – in circumstances where Dr Zafar's conduct was persisted in over a period of time and was designed to be a cover-up. What he did, exploiting his position as a doctor and as an expert witness, struck at the very heart of the administration of justice and involved an abuse of the trust which the courts have to accord to experts. In my clear opinion, in all the circumstances the only proper sanction is erasure. Any lesser sanction would, given the circumstances of this particular case, wholly fail to reflect the gravity of the misconduct involved and wholly fail to achieve the objectives of promoting and maintaining public confidence in the medical profession and in promoting and maintaining proper professional standards and conduct.
85. Ms O'Rourke nevertheless continued to maintain that, even if the original sanction could not stand, the matter should be remitted to the MPT for a further hearing. I do not agree. There is no further fresh evidence which Dr Zafar could give in the light of the Court of Appeal judgment, following a hearing in that court at which he was represented. There is no further argument available to him which was not presented either there or in the MPT below or before us. Put shortly, remittal would serve no purpose. No reasonable panel of the MPT, properly instructing itself, could do anything other than direct erasure. This case is much too grave for any lesser sanction to be considered appropriate or proportionate.

86. I have to say, in fact, that I would in any event reach that conclusion quite apart from factoring in the judgment of the Court of Appeal. It must not be forgotten that, irrespective of the actual sentence imposed, the judgment and sentencing remarks of Garnham J were damning. This, I repeat, was sustained dishonesty and recklessness which stood gravely to interfere with the administration of justice. Indeed, it is noticeable that it is not really explained by the MPT how it felt able to depart from the clear guidance given in paragraphs 109, 124 and 128 of the Sanctions Guidance (even accepting, of course, that it is guidance only).
87. Given the findings of dishonesty and recklessness, both the principles of *Bolton* (and other such cases) and the guidance in the Sanctions Guidance indicate that the personal mitigation, though of course relevant, was of limited ultimate weight. In any event, as the MPT itself noted, his insight only started on judgment day. Before that, he vigorously disputed any wrong-doing at all. Furthermore, aside from the personal mitigation (for what it was worth) there was no other real mitigation. The MPT, reflecting what Garnham J had said, stated that there was no suggestion of underlying corruption (doubtless meaning that no financial inducement as such was offered to persuade him to change the report). But that is scarcely a mitigating factor, rather it is merely the absence of an aggravating factor. Besides, a doctor running a medico-legal “factory” can be taken to calculate that a preparedness to change a report at the behest of a solicitor with a view to enhancing the underlying claim but without any medical basis for doing so will only tend to help advance his medico-legal business in the eyes of that solicitor, and no doubt of some other solicitors as well. Indeed, Garnham J himself had found that the motivation was in part to keep the report writing factory operating at full capacity. Moreover, it is, to my mind, also very hard to understand how the MPT came to consider as a mitigating factor (as it said that it did) that three weeks after the (dishonest) first statement he then contacted solicitors to correct his lie. But that is no real mitigation at all: because in correcting the first dishonest lie he then recklessly made further falsehoods. So this was if anything an aggravating factor: not a mitigating factor.
88. Thus even on the case as presented to the MPT erasure should, in my opinion, have resulted in any event. The position then becomes a fortiori when one has regard (as one must) to the Court of Appeal judgment.

Conclusion

89. In my judgment, the appeal succeeds. Remittal to the MPT would serve no function: erasure is the only proper sanction. Accordingly, I would direct erasure of Dr Zafar’s name from the Medical Register.

MR JUSTICE HOLGATE:

90. I agree.