Neutral Citation Number: [2019] EWHC 1841 (Admin)

Case No: CO/731/2019

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

Judgment handed down at:
Royal Courts of Justice,
Strand, London WC2A 2LL

Date: 12/07/2019

Before :

MR JUSTICE KERR

- -

Between :

DR RAJESH RAJU JAIN	**Appellant**
- and -	
GENERAL MEDICAL COUNCIL	**Respondent**

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- -

Mr Jayesh Jotangia (instructed by **Medical Defence Shield**) for the **Appellant**
Ms Alexis Hearnden (instructed by **General Medical Council**) for the **Respondent**
Hearing date: 11th July 2019

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APPROVED JUDGMENT

Mr Justice Kerr:

Introduction

1. The appellant (Dr Jain) is a doctor and psychiatrist. He appeals against disciplinary sanctions imposed on him by a tribunal of the Medical Practitioners Tribunal Service (MPTS). This was the culmination on 25 January 2019 of a process lasting nearly four years. The allegations arose from consultations with patients from February to April 2015. The tribunal

decided to impose conditions on Dr Jain's registration for 18 months, followed by a review at the end of that period.

2. The tribunal also made an immediate order preserving interim conditions of registration pending the outcome of this appeal. I am told the effect of the relevant rule is that if the appeal fails the period of 18 months does not begin to run until the conclusion of this appeal. Thus, a doctor who has the temerity to appeal to this court and whose appeal fails, often faces a lengthy addition to the period of any conditions imposed, over and above what the tribunal has decided is necessary to protect the public.

3. I question the fairness of this rule but cannot alter it. I wish those with the power to do so would exercise that power to change it. The sooner I can give my judgment, the less the injustice caused by delay consequent on exercising the right of appeal. I therefore hasten to give my judgment now, to minimise the impact of the arbitrary and penal consequence of exercising the statutory right of access to the High Court.

4. The respondent (the GMC) is responsible for ensuring appropriate standards of conduct and discipline in the medical profession. It operates the disciplinary regime for doctors pursuant to statutory provisions in the Medical Act 1983 and rules which set the standards of conduct required and the procedure for dealing with alleged breaches. Decisions are taken by an independent tribunal of the MPTS, established under the statutory provisions.

5. The conditions imposed by the tribunal on Dr Jain's registration are detailed. Some are confidential and relate to his health. Among those not confidential are that he must keep the GMC informed of his employment position, allow the GMC to exchange information with his employer and have a mentor and a reporting process. He must not work out of hours or on call, must not work more than nine sessions a week, nor work outside the United Kingdom. The GMC must approve any appointment.

6. Although the bundle of documents lodged (excluding numerous authorities) runs to 2,299 pages, photocopied single sided (in breach of the requirement in the Administrative Court Guide) in five lever arch files, nowhere among them has my attention been drawn by either party to any document setting out the allegations against Dr Jain. These must be deduced from the tribunal's determination of the facts, which does not include any introduction or context or any coherent chronological account of events.

Applicable Principles

7. The principles applicable in an appeal of this kind are now so well known that the field has become overburdened with hundreds of cases which, as I have commented previously, are often unnecessarily cited. The propositions to be applied were not controversial. They are briefly these.

8. I can only allow the appeal if I am satisfied the decision of the panel was wrong or unjust because of a serious procedural irregularity. Appropriate deference is due to the judgment of the tribunal below in view of its special expertise, especially in cases regarding professional practice. The court can correct material errors but its judgment on application of principles to the facts is a secondary one.

9. The court is reluctant to overturn findings of fact, in particular as to credibility of witnesses where that turns on demeanour and subtleties of expression which are only evident to someone at the hearing; and must respect the professional judgment of the panel below, especially in relation to failures in clinical treatment and care. On sanction, the court should not conduct a resentencing exercise, substituting its view for the tribunal's.

The Facts

10. Dr Jain was working as a locum adult psychiatrist in early 2015 for Plymouth Community Healthcare. While working there, he saw four patients, called patients A-D inclusive, from 11 February to 24 April 2015. The allegations arose from his conduct towards those four patients.

Complaints were made and on 1 May 2015 they were discussed between Dr Jain and his medical director, Dr Sant.

11. In August 2015, Dr Sant referred the matter to the GMC for investigation into four complaints from patients A-D. After that, the protracted investigation and evidence gathering process started, punctuated by interim hearings to determine whether interim conditions should be imposed. Interim conditions were in place for some but not all of the time leading up to the eventual substantive hearing.

12. A hearing lasting 15 days took place during July 2017. There were numerous witnesses. Further hearings took place on 14 December 2017 (further evidence), 29 January 2018 (closing submissions), 30 January 2018 (legal assessor's advice on the facts) and 15 February 2018 (submissions on amendment to the allegations). The tribunal then prepared its determination on the facts, which is dated 19 April 2018.

13. Many of the charges were found not proved. I will omit those matters from my account, though they are important as context, since the complaints included allegations that Dr Jain's conduct had been sexually motivated, a proposition the tribunal rejected and that he had acted dishonestly, which the tribunal also rejected. The allegations were many. The tribunal considered them in turn, explaining their reasoning in each case. They found 17 allegations proved.

14. The GMC sought interim conditions at a hearing before an interim orders tribunal. That tribunal refused to impose interim conditions, at a hearing on 7 June 2018. The matter then returned to the tribunal dealing with the substantive case on 16 July 2018. It was listed for four further days to consider the issues of misconduct, impairment of fitness to practise and sanction. Submissions were made on admissibility of evidence. Various rulings on satellite issues were made.

15. On the second of the four days, the tribunal decided to adjourn the matter for a health assessment in the light of written evidence from a Professor

Joyce (instructed by Dr Jain) who considered that Dr Jain was significantly depressed and anxious. The GMC was neutral on whether there should be an adjournment. Dr Jain opposed the idea of a health assessment; he felt his anxiety only arose from the disciplinary process and the inordinate amount of time it was taking. The adjournment occasioned yet more delay.

16. The GMC sought interim conditions in view of the adjournment for a health assessment. The tribunal agreed to this. The assessment was not available in writing until 30 November 2018. Two psychiatrists, Dr Feinmann and Dr O'Flynn, jointly stated that Dr Jain was fit to practise with restrictions and recommending that he should have a treating psychiatrist. The case then came not before the main tribunal but before an interim orders tribunal, on 7 December 2018.

17. Dr Jain, then represented by leading counsel, no longer opposed interim conditions restrictive of his right to practise. There was debate about the wording of the restrictions. An order for interim conditions was imposed, to last until 16 April 2019. Two days later, Dr Jain made a witness statement seeking the lifting of those restrictions. I was told at the hearing of the appeal that they have operated so as to render him virtually unemployable.

18. The disciplinary allegations were at last dealt with in January 2019, from 21 to 25 January. Evidence was heard from Dr Feinmann and Dr O'Flynn and others. Dr Jain produced a number of testimonials and other documents. On 24 January 2019, the tribunal produced a written determination of seven interlocutory issues forming annexes A-G of its written determination.

19. On the substance, the tribunal found in its written determination of 24 January 2019 that the charges that were proved amounted to misconduct and that Dr Jain's fitness to practise was impaired. Dr Jain's then counsel did not argue positively against those propositions, saying he would leave consideration of those issues to the tribunal.

20. The tribunal went through the charges that were proved in respect of the consultations with patients A, B, C and D and decided that the inappropriate

questioning and communications, inappropriate conduct, inaccurate record keeping and inappropriate prescribing practices fell below the standards of conduct reasonably to be expected and amounted to "serious misconduct" bringing the profession into disrepute.

21. They found Dr Jain's level of insight into his conduct to be "limited". The tribunal considered that his misconduct was "remediable". He needed to address the issues that were causing it. He had a "tic" disorder which should be addressed by cognitive behavioural therapy (CBT). There was a risk of repetition of his conduct and a continuing risk to patients, the tribunal said.

22. The next day, 25 January 2019, the tribunal addressed the question of the appropriate sanction for Dr Jain's misconduct. They considered the mitigating and aggravating features. Both counsel submitted that the appropriate sanction would be the imposition of conditions restricting Dr Jain's right to practise. The tribunal agreed, considering that he "still has some way to go in developing his insight". They imposed conditions, as I have mentioned, for a period of 18 months.

The Grounds of Appeal

23. There are six grounds of appeal. They are wide ranging and diffuse. This is not entirely a matter of Mr Jotangia's making. He was instructed as counsel for Dr Jain in the appeal only after Dr Jain had advanced his own grounds of appeal without the benefit of legal training or experience. Mr Jotangia did not address the grounds in the order in which they were advanced. I will not do so either.

24. The first ground is that there was inordinate delay. This is correct on the facts, since the process took nearly four years. That is because the way the rules are operated and the prevailing culture pay very little attention to the maxim that justice delayed is justice denied. The procedural regime and the

manner in which it is operated sacrifices speed and efficiency in favour of cumbersome procedural machinery and encouragement of satellite litigation.

25. But, though he might well have done, Dr Jain does not attack the length of time the process took as, of itself, affecting the fairness and justice of the proceedings. Rather, he invokes delay as affecting the reliability of the tribunal's findings, in various ways. I will address these, as the tribunal did, by reference to each of patients A-D in turn.

Patient A

26. The tribunal found that on 27 February 2015, at his only consultation with patient A that led to a complaint, Dr Jain failed to maintain a professional manner in that he moved very close to her, sat with his legs apart, rubbed his thighs, stared intently at her and darted his tongue in and out of his mouth. Patient A considered his behaviour and demeanour "sexualised", but the tribunal rejected that.

27. The tribunal noted that Dr Jain suffered from a "habit disorder" since childhood causing the involuntary movements without awareness of them at the time, though Dr Jain has been made aware of them by others. The tribunal accepted that these were mannerisms that could be off-putting to patients. They found that he had acted unprofessionally by not explaining his mannerisms to patient A.

28. Mr Jotangia submitted that Dr Jain had not become aware of his chronic motor tic disorder until April 2018 and that the tribunal had been wrong to hold it against him. Dr Jain had not had to warn patients in the past about his tic disorder. He should not have to declare a disability to patients and there was not a sufficient basis for finding misconduct.

29. I sympathise with the embarrassment Dr Jain feels when his mannerisms are discussed with him or when attention is drawn to them. But I reject the submission that the tribunal was not entitled to find that he was aware of his condition in early 2015, even if unaware of his actual body movements at the time; and that he needed to act professionally by heading off in advance

any discomfort they might cause to his patients. I find no fault with the tribunal's assessment of this issue.

30. Next, the tribunal found four linked charges proved concerning patient A: that Dr Jain did not make an accurate record of patient A's consultation in that he did not accurately record in his notes the questions he had asked her about her sex life; that he asked her inappropriate questions at length about her sex life; that he knew the record inaccurately omitted those questions; and that his actions were misleading (but not dishonest).

31. Dr Jain had denied asking intrusive questions about patient A's sex life, but said any he had asked were clinically appropriate. The tribunal accepted that it was legitimate to ask some questions about reckless behaviour, but that Dr Jain had gone into too much detail by asking her whether she had a boyfriend, how frequently she had sex and whether it was unprotected. His notes did not reflect these questions and he knew they were thus inaccurate.

32. Mr Jotangia's criticism of the tribunal's findings on these issues amounts to a challenge to their factual conclusions. He pointed out that the consultation was short, only about 15 minutes, and even suggested that the tribunal may have mixed up evidence about patient A and evidence about patient D. I find no support in the tribunal's decision for the latter proposition.

33. As for the attack on the findings of fact, those findings were properly made and not open to criticism merely because Dr Jain still denies asking the intrusive questions about patient A's sex life which the tribunal found he did ask her. Mr Jotangia also criticised the tribunal for apparently relying on evidence from an expert instructed by the GMC, a Dr Constable, whose evidence did not impress the tribunal. I do not see how that invalidates its findings of fact in relation to these allegations.

Patient B

34. Dr Jain had two relevant consultations with patient B. The first was on 26 February 2015. At that consultation, the tribunal found, Dr Jain failed to communicate appropriately to her by denying to her that memories of

childhood abuse "go that far back"; and failed to make an appropriate record of the consultation by copying parts of the letter reporting to her GP from an assessment made by a community nurse in 2014. Dr Jain admitted these allegations.

35. At patient B's second appointment on 24 April 2015, Dr Jain, the tribunal found, failed to prescribe medication appropriately by increasing her dose of sertraline without clearly explaining the reason for doing so. He also communicated inappropriately with her and her ex-husband, who was present, by asking whether she lined up her two ex-husbands and decided which to sleep with; and persisted in discussing her sex life after she and her ex-husband had said they did not wish to discuss this.

36. Mr Jotangia's submissions attempted to impugn these findings of fact by making forensic points. He complained that the tribunal should not have preferred the evidence for the GMC to that given by Dr Jain. He pointed out that Patient B was not called to give oral evidence, while her ex-husband, "witness F", was. He pointed to what he said were inconsistencies between the evidence of witness F and the written evidence of patient B.

37. I did not find the forensic criticisms of the tribunal's findings of fact persuasive. The tribunal was well aware that the weight to be attached to patient B's evidence was diminished by the lack of any oral evidence from her and the absence of testing of her written evidence through cross-examination. The tribunal made this point explicitly when stating their assessment of each witness at the start of the written determination.

38. It is well known that the function of finding the facts is properly that of the tribunal and I would have to convinced by more than forensic argument that a finding of fact was wrong before I could properly interfere with it. The inconsistencies relied on by Mr Jotangia were not, with respect, substantial and the evidence of witness F, given orally, and of patient B, in writing, was consistent with the findings made.

Patient C

39. Dr Jain saw patient C twice, so far as relevant for present purposes. The second time was on 10 March 2015. The tribunal found that on that occasion, Dr Jain failed to communicate appropriately with her in that when she stated that she had been raped, he responded along the lines that it was "impossible to be raped from both ends without lubrication being used".

40. Dr Jain denied saying these words. The tribunal simply preferred patient C's evidence to that of Dr Jain. He admitted a further allegation that he failed to make an adequate record of the second consultation by re-using material from previous letters and notes and from the first consultation which was on 11 February 2015.

41. Mr Jotangia complained of procedural irregularity in the way patient C gave her evidence. It was agreed that she was a vulnerable witness due to her fragile mental health. She gave her evidence over a video link. The tribunal had ruled that she should have assistance from an intermediary, a Ms Lorna Coulson who was a psychotherapist.

42. A concern arose that Ms Coulson, not visible over the video link but present in the room with patient C, might be influencing the content of patient C's evidence. Worse, she was not just an intermediary but had been involved in receiving patient C's complaint, making her a potential witness of fact. Worse still, it turned out that a complaints manager called Dawn Walbridge was also in the room but not visible over the video link.

43. When these matters came to light, the chair of the tribunal naturally became concerned and, first, established who was who at the other end of the video link. Ms Walbridge helpfully left the room. The chair then heard from the parties and sought advice from the legal assessor. The latter advised that the hearing needed to be fair. Counsel then appearing for Dr Jain agreed, as did counsel for the GMC.

44. The chair indicated that Ms Coulson was not an appropriate person to assist patient C. She wanted someone else to take over from Ms Coulson. Patient C, however, then indicated that she needed the support of Ms Coulson and

no one else would do. After much further discussion and further advice from the legal assessor, the chair permitted Ms Coulson to assist patient C, with a different neutral observer present, a Ms Jo Thompson. Ms Coulson had to be visible to the tribunal over the video link, the chair ruled.

45. I accept the submission of Mr Jotangia that there was a procedural irregularity in that Ms Coulson's involvement in the factual history ought to have been considered earlier than it was and Ms Walbridge ought not to have been present at all. But I do not accept that the irregularity was serious, so as to create a real risk of contamination of patient C's evidence, as Mr Jotangia suggested.

46. The chair dealt with the issue carefully and sensitively, balancing patient C's vulnerability against the need to ensure the fairness of the hearing. She was able to manage the issue, at the expense of some delay, without any real disagreement arising between counsel for the parties. No formal reasoned written ruling was necessary, setting out what had happened and the reasons for allowing Ms Coulson to continue supporting patient C. As Ms Hearnden pointed out, the transcript makes clear what happened and why.

Patient D

47. Dr Jain had only one relevant appointment with patient D, on 17 April 2015. On that occasion, the tribunal found, Dr Jain failed to obtain an adequate history from her; the consultation was dominated by excessive questions about her sex life and libido. He thereby also failed to communicate appropriately with her. He also, the tribunal found, communicated inappropriately with her by suggesting to her that if she carried on seeing a certain male friend of hers, he would have to admit her to hospital.

48. Yet further, the tribunal found that he failed to prescribe medication appropriately for her, in that he offered her a list of medications and asked her which she would like to try, or words to that effect; and did not follow authoritative guidance published by various organisations in respect of his

prescription of a drug called sodium valproate; and prescribed that drug which was not clinically indicated.

49. The tribunal's reasoning in support of those findings was detailed. It was set out over some nine pages in the written determination. The tribunal preferred the account of patient D and accepted evidence from Dr Constable that the questioning was inappropriate and excessive. They accepted patient D's evidence that Dr Jain "on the balance of probabilities … suggested to Patient D that if she carried on seeing a male friend, ... [Dr Jain] would have to admit her to hospital."

50. In relation to the inappropriate prescribing practice, the tribunal accepted patient D's factual account that Dr Jain had been offered a list of medications and asked which she would like to try. Dr Jain accepted having given her a list. The tribunal accepted expert evidence that it is appropriate to discuss a range of possible medications, but found that the possible side effects were not adequately discussed.

51. The tribunal also found that sodium valproate was not appropriate because patient D was of child bearing age and there was not sufficient need for patient D to take it nonetheless; while it is often given to women of child bearing age, that was a contra-indication and there were not sufficient adverse changes in patient D's mental health condition to justify prescribing it.

52. Mr Jotangia's criticisms of the tribunal's findings in relation to Patient D's care and treatment amounted to no more than forensic points about the evidence, quite inappropriate for an appellate hearing before a court which has not seen and heard the witnesses giving their evidence. He argued that patient D ought not to have been treated as a reliable witness because, in his phrase, "she was a worrier".

53. He said that her evidence had not been consistent but the examples he gave were minor. He said patient D was unclear on whether Dr Jain had overtly stated, or merely implied, that she, patient D, had "prostituted" herself; and

that patient D was unclear about whether Dr Jain's threat to have her admitted to hospital had been overt or merely implicit and veiled. These are, with respect, not points of any substance in an appeal such as this. I find no fault whatever with the tribunal's treatment of the facts.

Proportionality of the Sanction

54. Mr Jotangia criticises the severity of the sanction imposed on Dr Jain. He emphasises that there was no finding that Dr Jain's conduct was sexually motivated and no finding of dishonesty. He also relies on interim decisions on the question of conditions. He says the conditions are onerous and restrictive of Dr Jain's ability to find work.

55. I do not regard the tribunal's findings in relation to misconduct, impairment and sanction as properly open to criticism. The facts, as found, were clearly misconduct. Dr Jain's then counsel did not seriously argue otherwise. Nor did his then counsel positively argue against the proposition his fitness to practise was impaired.

56. At the sanctions stage, Dr Jain then counsel agreed with counsel for the GMC that the appropriate sanction was to impose conditions on his registration. I do not see how Dr Jain can now legitimately complain that the tribunal did exactly that. I sympathise with the adverse impact the current restrictions may have on his ability to find employment; but that cannot of itself mean the tribunal was wrong to impose the conditions for the protection of the public.

Conclusion

57. For those reasons, I do not consider that any of the grounds of appeal advanced have any merit and I dismiss the appeal.

58. I note that Dr Jain can apply for early lifting of the sanctions, under the rules. He can pray in aid, to the extent that it is relevant (and it may well be) the inordinate amount of time it has taken to reach a decision in his case and that the rules themselves then penalise him for appealing, by extending the

time during which he must observe the conditions on his registration over a period several months longer than that which the tribunal decided was necessary to protect the public.