IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2020] EWHC 3800 (Admin)

Nos. CO/4344/2019-
CO/4410/2019

Royal Courts of Justice

Thursday, 12 March 2020

Before:

MRS JUSTICE EADY DBE

B E T W E E N :

THE QUEEN
ON THE APPLICATION OF
(1) DR R FIJTEN
(2) DR Y GRAICHEN
(3) DR A PATEL
(4) DR P CAMERON
(5) DR J JAMES
(6) DR G JAYASINGHE
(7) DR A SARNOWSKI
(8) DR D WALKER
(9) DR R SMITH
(10) DR A TAPPOUNI

Claimants

- and -

GENERAL MEDICAL COUNCIL

Defendant

MR N. SHELDON QC (instructed by Radcliffe Learned friend Brasseur Solicitors) appeared on behalf of the Claimant.

MR P. MANT (instructed by GMC Legal) appeared on behalf of the Defendant.

J U D G M E N T

MRS JUSTICE EADY:

Introduction

1 This is the oral hearing of the claimants' renewed application for permission to apply for judicial review of the decisions of the General Medical Council ("GMC") case examiners to refer the claimants to the Medical Practitioners Tribunal ("MPT"). The claimants have also applied for an anonymity order.

2 In considering this matter on the papers, by order of 24 December 2019, Saini J refused the claimants' applications for permission and anonymity, save that he directed that the names of the claimants should be anonymised pending the determination of any renewed application for permission. Although each claimant is the subject of a different decision, it is accepted that the cases all arise out of a common factual context, and engage the same issues of law, and Saini J duly directed they should be case managed together.

3 As well as renewing their application for permission, the claimants also, again, ask that an order for anonymity be granted in respect of these proceedings.

Anonymity

4 The starting point is that, in accordance with the principle of open justice, the names of the parties to an action are to be made public when matters come before the court and are to be included in orders and judgments of the court.

5 That said, CPR 39.2(4) provides:

> "The court must order that the identity of any party… shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that party…"

As the rule recognises, party anonymity is a derogation from open justice and, accordingly, requires justification as being strictly necessary, and being no more than is strictly necessary.

6 The claimants seek an order for anonymity in these proceedings as they say they would otherwise suffer precisely the damage that this claim is intended to avoid; that is, a breach of their Article 8 rights to respect for their private correspondence.

7 Like Saini J, I am unable to see that this application demonstrates justification for the blanket anonymity sought. Any Article 8 rights for respect for the claimants' private correspondence can be, in my judgment, protected by maintaining confidentiality in relation to the content of that correspondence. Anonymity has been extended to this hearing to avoid any prejudice to the claimants and to permit full argument so that I may undertake a proper assessment of the issues on the anonymity application. That protection having been afforded to the claimants, I am not persuaded that there remains any proper basis for anonymity of identification to be continued further. As I have said, the legitimate interests of the claimants can be properly protected by avoiding reference to the content of the correspondence in any judgment that I give (and thereafter). I see no reason why the claimants should not be named as parties to the proceedings.

Background

8 The claimants are all doctors who were members of a closed encrypted WhatsApp Group ("the Group") between 28 February 2014 and 27 October 2016. As a result of a police investigation into a third party, messages between members of the group were brought to the attention of Health Education England ("HEE") which, in turn, made a formal referral to the GMC. Thereafter, the GMC obtained further information from the police and, pursuant to a court order of 13 July 2018, a full transcript of the messages between the Group for the relevant period was disclosed to the GMC.

9 The claimants were each notified of the allegations against them in materially similar terms, which related to the content of certain of the messages, or attachments, and each claimant's failure to remove himself from the Group, or to report the contents of the messages or attachments to the GMC, the police and/or their respective employers. It was alleged that each claimant's conduct in these respects had brought the profession into disrepute and in this regard each claimant's fitness to practise was impaired by reason of this misconduct.

10 Each claimant provided a detailed response to the allegations and evidence of their remediation work. All admitted they had been members of the Group and had sent and/or received the relevant messages; four admitted the failure to report; two admitted that they had "*failed to act with integrity and in a way which would justify patients' trust in [them] and the public's trust in the profession*". All denied impairment.

11 When an allegation is made to the GMC its investigating committee has a statutory duty, under s.35D(4) of the Medical Act 1983 ("the 1983 Act"); it is bound to investigate that allegation and decide whether it should be considered by the MPT. The investigating committee's function in this regard is delegated to independent case managers under Rule 8 of the GMC's Fitness to Practise Rules 2014 ("the 2014 Rules").

12 Upon these cases being passed to the GMC's case examiners, acknowledging that the allegations did not directly relate to clinical practise, the view was taken that this did not mean that the claimants' actions could not amount to misconduct or give rise to a finding of impairment to practise. Expressly referring to the GMC's statutory objectives (see s.1B of the 1983 Act) the case examiners determined there was a realistic prospect of the MPT finding, in the case of each claimant, that their fitness to practise was impaired by reason of misconduct in relation to their actions as members of the Group.

Grounds

13 The claimants seek to challenge these decisions of the GMC case examiners on three grounds; (1) that the decisions breached the claimants' Article 8 ECHR right to respect for their correspondence ("the Article 8 ground"); (2) that the decision that the maintenance of public confidence in the medical profession required that each of these claimants' cases be referred to the MPT was irrational ("the public confidence ground"); (3) to the extent that the case examiners relied on a duty to report, that the decisions were irrational and/or *ultra vires* ("the duty to report ground"). It is fair to observe that there is a degree of overlap between these grounds and, indeed, the focus of the claimants' submissions have been under the first heading, which also raises points relevant to grounds 2 and 3.

Submissions, discussions and conclusions

Submissions on the Article 8 ground

14 Under this heading, the claimants make the following points:-

(1) a decision to bring a disciplinary prosecution in respect of the content of private correspondence is, in itself, an interference with each doctor's Article 8 right to respect for his correspondence;
(2) as such, a decision to do so must be in accordance with the law - that concept requires there to be a clear legal regime set out in legislation and/or statutory guidance, making clear when and in what circumstance such interference may occur; the application of disciplinary charges in such circumstances must be reasonably foreseeable (see *P & Ors, R (on the application of) v Secretary of State for the Home Department & Ors* [2019] UKSC 3); it would be for the GMC (in the particular circumstances of these individual cases) to demonstrate that such interference was in accordance with the law, but it had failed to do so;
(3) the claimants say that there is no such regime, both in general terms and, more particularly, in respect of any obligation to report one's colleagues; this raised a novel point worthy of consideration by the court.
(4) The claimants further argue that, even if the decisions to prosecute were in accordance with the law, they would still have to be proportionate for the purposes of Article 8(2); an assessment which has to be undertaken in the light of the alternative options available to the case examiners when the material decisions were taken.

15 In making these submissions, the claimants acknowledge there have been previous instances in which it has been held lawful to bring professional disciplinary proceedings in respect of private conduct. They object, however, that this would not explain why the decisions to prosecute in this case were not an interference with their Article 8 rights or why, assuming they were, such interference was in accordance with the law within the meaning of that concept as defined in the authorities.

16 The claimants further contend that it is no answer to this challenge to say they can make their submissions to the MPT. The decisions to bring disciplinary prosecutions are freestanding decisions taken by a public authority and, as such, constitute the interference of which the claimants complain. Accepting that it may be open to them to argue at a later stage that a decision on the part of the MPT to proceed with the allegations amounts to a breach of Article 8, they submit that is no answer to the challenge to the decision of the prosecuting authority to bring the charges in the first place; the MPT cannot cure that breach of the claimants' Article 8 rights.

Discussion and conclusions on the Article 8 ground

17 Accepting that the claimants have Article 8 rights in respect of their private communications as members of the Group, it is also right to note that those private communications have already been disclosed to the police, to HEE, and then onto the GMC, with further disclosure being provided pursuant to the court order. The MPT is functionally independent of the GMC as a whole, but it has no separate legal personality. Disclosure of correspondence to the MPT does not, therefore, constitute a separate interference. The claimants say this gives rise to a further interference arising from the very decision to formulate disciplinary charges, but I do not see how that addresses the point that the disclosure to the GMC has already been made. As for what the formulation of disciplinary charges might say more generally: at this stage I, again, cannot see how that, of itself, constitutes a further interference. Of course, a question might then arise as to what the MPT does with the correspondence, but that stage has not yet been reached. The MPT may decide to sit in private (see Rule 41 of the 2014 Rules), or take other measures to ensure the privacy of the content of the claimants' correspondence. In the circumstances, I cannot see that the decision to disclose the correspondence to another part of the GMC of itself gives rise to a separate interference with the claimants' Article 8 rights, such as to found a proper basis for the current claim.

18 If I am wrong about that, and Article 8 is engaged by the decisions under challenge, the next question is whether that is in accordance with the law. In this regard, the GMC is, in my judgment, entitled to rely on the legal framework, the clear and detailed rules under which all decisions to prosecute regulatory proceedings are taken (as set out in the GMC's Fitness to Practise Rules 2004 (as amended)), with such decisions being informed by reference to relevant case law (for example, *Remedy UK, R (on the application of) v GMC* [2010] EWHC 1245, which confirms that professional misconduct encompasses dishonourable or disgraceful conduct unrelated to clinical practice where this conduct brings the profession into disrepute).

19 Having regard to the correspondence in issue in these cases, I do not consider it is arguable to suggest that the standard by which the impugned conduct was judged does not stand up to objective scrutiny. Nor do I consider it arguable that the GMC was required to formulate and communicate a more precise test or standard (see the contentions in the claimants' skeleton argument at para.31). Inevitably, the circumstances in which the private actions of doctors (which might potentially engage Article 8) could bring the profession into disrepute are plainly so many and so varied that it would not be practical or realistic to expect the GMC to publish an exhaustive guidance. That said, in these cases, I do not consider it to be arguable that the claimants would not have been aware that it would not have been reasonably foreseeable to them that the kind of correspondence in issue in this matter could not give rise to disciplinary charges of the nature involved in this case, which would then be a matter for the MPT to decide whether that was conduct that brought the profession into disrepute.

20 As for proportionality, I bear in mind that the court is not entitled to substitute its decision for that of the judgment of a specialist decision-taker. In this case, once the case examiners had determined that there was a realistic prospect of the MPT finding that the claimants' fitness to practise was impaired, they were bound to refer the cases to the MPT. As the claimants say, however, the assessment of Article 8 proportionality in this context is for the court and the court cannot discharge that obligation by simply deferring to the view taken by the specialist decision-takers, notwithstanding the particular context in which they operate.

21 I note that, in reaching their decisions, the case examiners had regard to the GMC's statutory objectives, which included the promotion and maintenance of public confidence in the profession and the promotion and maintenance of proper standards and conduct for the profession. As the claimants accept, private communications are not exempt from consideration in professional disciplinary proceedings. In my judgment, it is unarguable that a professional body must be entitled to seek to uphold proper standards with the profession, even in relation to what would otherwise constitute private conduct. Given the safeguards that remain under MPT procedures, it is fanciful to suggest that it would be other than a proportionate inference with the claimants' Article 8 rights for this matter to be referred to the MPT.

22 For completeness, and overlapping with the second and third grounds, I should address the claimants' suggestion that their private correspondence will only come to the public's attention, and thereby risk undermining public confidence, as a result of a decision to refer these cases to the MPT. That submission, first, fails to have regard to the broader statutory objectives of the GMC, and, second, suggests that public confidence would not be promoted or maintained by the knowledge that appropriate action will be taken where a matter of serious concern is raised with the GMC (see the point made by Saini J at para.14 of his order in this matter).

23 I accept that there is a need to assess how far it is right to interfere with the claimants' Article 8 rights in these circumstances, but I am equally satisfied that there is no arguable case that

the line has been crossed at this stage. Any further consideration of this question must be a matter for the MPT.

The public confidence ground

24 That, it seems to me, also disposes of the second ground of challenge. Under this head, the claimants have again objected that the correspondence in question - sent and received in private over an encrypted platform - was not the subject of any further action by either the police or HEE (although I note that HEE did, of course, refer this matter to the GMC), and they contend that the correspondence would not otherwise be the subject of any public concern but for the decision of the GMC to bring public disciplinary proceedings. For the reasons I have already set out, I do not consider this to be an arguable ground and these are not arguable propositions. The claimants are failing to engage with the wider notion of public confidence allowed for and this provides no separate arguable ground of challenge.

The duty to report ground

25 The claimants also contend that the concept that a doctor owes a professional obligation to report a colleague to the police, the GMC or his employer if that colleague does something which (I quote from the claimants' skeleton argument) "*according to the GMC is offensive*" is a significant proposition for which no authority has been identified. Again, I disagree. Again, it seems to me unarguable that, given the wider concept of public confidence that I have already outlined, this is a matter that falls squarely within the discretion of the MPT to consider as to whether or not it gives rise to a matter that needs to be taken further.

Alternative Remedy

26 That brings me onto the general observation in relation to alternative remedy, as to which the claimants object that it is insufficient to suggest that these are all matters for the MPT. Again, I disagree. Although the courts may intervene with prosecutorial decisions by way of judicial review, that would be in exceptional circumstances. There are no such exceptional circumstances here. There is no reason, even if the claimants are right on their Article 8 arguments, why these matters should not be considered by the MPT. It will be for the MPT to decide what degree of further interference with the claimants' Article 8 rights is then to be allowed and at that point the claimants can be heard and may have cause for further complaint should they be so advised. In these cases there is an alternative remedy for the claimants, which is in the proceedings before the MPT, which can now take place.

CERTIFICATE

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Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

This transcript has been approved by the Judge.