Neutral Citation Number: [2021] EWHC 1511 (Admin)

Case No: CO/801/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/06/2021

Before :

THE HON. MR JUSTICE HOLGATE

Between :

GENERAL MEDICAL COUNCIL	**Appellant**
- and -	
DR AZUBUIKE VALENTINE UDOYE	**Respondent**

- -
- -

Ivan Hare QC (instructed by **GMC Legal**) for the **Appellant**
Daniel Matovu (instructed by **Direct Access**) for the **Respondent**

Hearing date: **25th May 2021**
- -

Approved Judgment

Mr Justice Holgate :

Introduction

1. This is an appeal brought by the General Medical Council ("GMC") under s.40A of the Medical Act 1983 ("the 1983 Act") against the decision dated 30 January 2020 by the Medical Practitioners Tribunal ("the Tribunal") dismissing certain allegations against the Respondent, Dr Udoye, and determining that his actions had not amounted to misconduct. Consequently, the Tribunal did not go on to consider whether his fitness to practise was impaired. The GMC considers that the Tribunal's determinations were not sufficient to protect the public (s.40A(3)).

2. The GMC raises two grounds of appeal. First, the Tribunal misunderstood allegation (5) and, in particular, GMC's case on what it alleged. Second, the Tribunal misapplied the law on whether an adverse inference should be drawn from a doctor's decision not to give evidence at a hearing as set out in *R (Kuzmin) v General Medical Council* [2019] 1 WLR 6660. That second ground gives rise to an issue raised by the Respondent, namely whether the Tribunal's rejection of allegation (5) should be upheld because it ought to have decided that the Respondent had no case to answer. The Respondent also seeks to rely upon a further point which, it is said, would result in the decision being upheld even if either or both of the grounds of appeal succeed. I will consider that last point at the end of this judgment.

3. Mr Ivan Hare QC appeared on behalf of the GMC and Mr Daniel Matovu appeared for Dr Udoye. I am grateful to them both for their submissions.

Factual background

4. Dr Udoye qualified as a doctor in 1999 in Nigeria. He worked there as a house officer from 1999 to January 2001, and as a general practitioner ("GP") from 2001 to 2005. In 2005 Dr Udoye moved to the UK and worked as a hospital doctor. He undertook a clinical attachment with Calderdale Royal & Huddersfield Hospitals from October 2005 to 2006. From 2007 he worked as a Foundation Year 1 doctor at the Doncaster Royal Infirmary in Surgery and Medicine, and as a Foundation Year 2 doctor in GP, Ophthalmology & Medicine. Between September 2009 and May 2010, Dr Udoye was employed at Hull Royal Infirmary as a senior house officer in Neurosurgery, and between June 2010 and August 2010 as a senior house officer at the Walton Centre in Neurosurgery.

5. In 2010 Dr Udoye applied for a GP training post. He undertook his first year of training in Scotland. From August 2010 to February 2011 he trained in GPSTR Orthopaedics and from February 2011 to August 2011 in Accident and Emergency. But in his second year Dr Udoye had to cease GP training as his immigration status did not permit him to continue.

6. In order to qualify and pursue a career as a GP in this country, Dr Udoye considered taking the alternative route of obtaining a Certificate of Eligibility for GP Registration ("CEGPR"). On 29 April 2016 in Dubai he had been awarded International Membership of the Royal College of General Practitioners ("MRCGP(INT").

7. On 21 September 2016, Dr Udoye applied to the GMC for a Certificate of Eligibility for GP Registration ("CEGPR"). His application was refused on 13 April 2017. Dr Udoye sought a review of that refusal, which was in turn refused on 28 June 2018. The GMC considered that he needed more training and experience in certain areas of general practice. It advised that experience could be achieved through general practice training in the UK or by gaining the necessary competencies in other posts.

8. On 20 April 2016, and before he applied for a CEGPR, Dr Udoye had contacted Dr Iain Lawther, the Head of Continuing Practice in Health Education England ("HEE"), Postgraduate School of Primary Care, to explore ways in which he could work as a GP in the UK. They discussed him applying to join the NHS's GP Induction and Refresher Scheme ("the I&R scheme"). On 2 May 2016 Dr Udoye signed and submitted to the NHS's National Recruitment Office ("NRO") his application form to join the I&R scheme. He did this before making an application for a CEGPR. He was offered a placement for 6 months on the scheme under the supervision of Dr Richard Tranter, GP training Programme Director, North-East at the Mansion House Surgery, Whitehaven. It is common ground that he undertook this placement between 30 August 2017 and 16 March 2018. In other words, he joined the placement after he had been refused a CEGPR and before he knew the outcome of his request for a review.

9. In March 2018 NHS England referred Dr Udoye to the GMC in relation to his work at the Mansion House Surgery. At a hearing on 15 June 2018 the Interim Orders Tribunal ("IOT") imposed conditions on his registration which included a requirement that he should not work as a GP. In December 2018 the IOT lifted that condition because it was satisfied that there was no real risk of Dr Udoye working as a GP at that time.

10. In September 2018 the GMC received a referral from Health Education England concerning monetary claims made by Dr Udoye in relation to his placement under the I&R scheme.

11. In summary, the allegations against the Respondent related to three matters. First, on 2 May 2016 Dr Udoye completed a registration form for the GP Induction and Refresher Scheme in which he stated that he was on the GMC's GP Register when he knew that he was not so registered. It was alleged that he had acted dishonestly (allegations (1) to (3)). Second, between 30 August 2017 and 16 March 2018 Dr Udoye undertook the placement in Whitehaven as part of the I&R Scheme. Whilst on that placement between 4 September 2017 and 26 February 2018 he practised as a GP, when he knew that he was not eligible to do so because he was not on the GMC GP Register and/or the National Medical Performers List ("the MPL"). These actions were alleged to have been dishonest (allegations (4) to (7)). Third, between September 2017 and March 2018 Dr Udoye submitted ten claims to the NRO arising from his placement for a contribution to the cost of indemnity cover, his GMC Annual Retention Fee and monthly bursary payments, when he was not eligible to make those claims. These actions were also said to have been dishonest (allegations (8) to (10)).

Registration as a GP, the National Medical Performers List and the I&R Scheme

12. The GMC is now established under s.1 of the 1983 Act. Its over-arching objective is the protection of the public (s.1(1A)). By s.1(1B) that objective includes the pursuit of the following more specific objectives:-

> "(a) to protect, promote and maintain the health, safety and well-being of the public,
>
> (b) to promote and maintain public confidence in the medical profession, and
>
> (c) to promote and maintain proper professional standards and conduct for members of that profession."

13. Section 1(3) provides for the GMC to have a number of Committees including Registration Panels and Medical Practitioners Tribunals.

14. Section 2 requires the Registrar of the GMC to maintain a register of medical practitioners registered under the 1983 Act. By s.2(3) a practitioner is to be entered in the register as "fully" or "provisionally" registered in accordance with Parts II and III of the Act and also in the appropriate list of the register of practitioners provided for by Part IV. Part II deals with medical education and registration for persons qualifying in the UK. Part III deals with the registration of persons who have qualified overseas.

15. Under Part IV s.30 provides that there shall be, in addition to the register of all medical practitioners, the General Practitioner Register ("the GP Register") and the Specialist Register. Each register is to state *inter alia* whether a person also holds a licence to practise or not (s.30(3)(c)). Part IIIA is concerned with licences to practise.

16. Section 34C deals with the GP register. Subsection (2) provides that the Register is to contain:-

> "(a) registered medical practitioners who hold a CCT in general practice;
>
> (b) registered medical practitioners who have an acquired right to practise as a general practitioner in the United Kingdom pursuant to section 34G(1); and
>
> (c) registered medical practitioners falling within such other categories as the Privy Council may by order specify."

17. CCT refers to a Certificate of Completion of Training which is awarded to graduates who complete at least 3 years training and assessments on a course approved by the GMC for GP training in the UK. Section 34H(1) requires the GMC to lay down the standards and requirements for the award of a "CCT in general practice". Section 34I enables the GMC to approve programmes for CCT training and s.34L provides for the award of the certificate.

18. Section 34C enables a medical practitioner to obtain registration as a GP by other routes. One route is the CEGPR, which the Respondent applied for and failed to obtain. That enables a practitioner from overseas to demonstrate that he has qualifications, training and experience as a GP abroad sufficient to be eligible for GP registration in this country. If the GMC approves an application for a CEGPR the applicant is entered on the GP Register.

19. Section 49 of the 1983 Act provides for a criminal sanction against a person who *inter alia* wilfully and falsely uses a description implying that he is registered under the Act.

20. The NHS Commissioning Board is required by regulation 3 of The National Health Service (Performers Lists) (England) Regulations 2013 (SI 2013 No. 335) ("the 2013 Regulations") to maintain the MPL. The 2013 Regulations were made under the National Health Service Act 2006. The MPL is not the responsibility of the GMC. Subject to certain exceptions, the provision of "primary medical services", that is essentially work as a GP, can only be carried out by a "general medical practitioner" (see regulation 24), who must be either a "GP Registrar" or a medical practitioner included on the GP Register kept by the GMC (see regulation 23). A "GP Registrar" is a registered medical practitioner" who is being *trained* in general practice by a GP Trainer, "whether as part of training leading to a CCT or otherwise". However, this case is not concerned with that part of the definition because in his application dated 9 May 2016, Dr Udoye stated that he wished to join the MPL as a "GP locum", not as a GP registrar. A GP locum would have to be on the GMC's GP Register to qualify for inclusion on the MPL. Regulation 26 makes it clear that a person who is not a GP Registrar can only apply to be included in the MPL if they are registered in "both registers" (ie. the GMC's register of medical practitioners and the GP register – see regulation 23) as well as holding a licence to practise. The application form contained a declaration that the person signing was "fully registered" with the relevant professional body and licensed to practise.

21. The NHS's I&R scheme is not a statutory scheme and so the principles or provisions of the scheme are not set out in legislation. The scheme has been described in a document entitled "GP Induction and Refresher Scheme 2015-2018" which was before the Tribunal (see para. 16 of decision). The version before the court was published in June 2015. Mr Matovu relied upon that document.

22. Paragraph 1.1 explains that the scheme provides an opportunity for GPs who have previously been on the GP Register and on the MPL to return safely to general practice following a career break or time spent working abroad. In that particular context this is a *refresher* scheme. But Dr Udoye had never been included in the GP Register. Paragraph 1.2 states that the scheme also provides *induction* for "the safe introduction of overseas GPs who have qualified outside the UK and have no previous NHS GP experience." Doctors in that category "require a …. CEGPR as well as a licence to practise before they can legally enter UK general practice."

23. The scheme provided "supervised placement of up to a maximum of six months …. in general practice" (para. 2.4). Those accepted onto the scheme would receive funding support including a monthly bursary (para. 2.5).

24. The aim of the I&R scheme is to provide a period of "supervised practice" as a GP to support applicants and bridge any gaps in their knowledge or skills "relating to general practice in England" (para. 5.2). An assessment is carried out to determine the structure and duration of placement required for each individual. The placements involve supervised practice for between 4 weeks and 6 months. In some cases a simulated surgery assessment is also required, the latter being conducted in London by the Royal College of General Practitioners (paras. 5.2 and 6.1-6.2). HEE is responsible for the I&R scheme, which is run through its NRO (para. 10.1). Thus, "supervised practice" under this refresher or induction course is not to be confused with the extensive

"training" which is required before a doctor may be registered as a GP in this country, whether as a result of having followed the CTT or the CEGPR route. This was clearly explained to the Tribunal in submissions by Mr Horgan who appeared as counsel for the GMC in the disciplinary proceedings.[1] A doctor admitted to an I&R placement would be practising as a GP by providing medical services to members of the public, albeit subject to supervision and review. So it is hardly surprising that they should have to satisfy GP registration requirements applicable in this country.

25. Annex 1 to the 2015 document contains a diagram showing three "I&R pathways" towards inclusion on the MPL. Two of the pathways involved a placement under the I&R scheme: "Previous UK GP experience more than 2 years out of practice" and "Holds CEGPR - No previous UK GP work experience". Both of those pathways required "Full GMC registration and GP Licence" before undertaking a placement. I accept the submission of Mr Hare QC that this document confirmed that a doctor working in the I&R scheme had to be on the GMC's GP Register.

26. Mr Hare QC also stated that a person's successful completion of the I&R scheme would ordinarily lead to inclusion on the MPL maintained by NHS England, thereby enabling a doctor to practise independently as a GP in this country.

27. I also note the explanation provided in paragraph 12 of Dr Lawther's witness statement. For a doctor to begin a placement under the I&R scheme he or she had to be registered on the GMC GP register and included at least "conditionally" on the MPL. That condition would be lifted upon successful completion of the course. Although a doctor does not have to be on the GP register or on the MPL at the time when the I&R application is made or prior to acceptance onto the scheme, Dr Lawther stated that he must be included in both lists before the placement *begins*. That explanation is consistent with the note at the top of page 1 of the application form signed by Dr Udoye on 2 May 2016 that an applicant should enclose a copy of the GMC GP Registration if available.

The proceedings before the Tribunal

28. The hearing before the Tribunal took place initially between 24 June and 2 July 2019 and then went part-heard. It recommenced on 22 January and concluded on 31 January 2020.

29. The allegations against Dr Udoye may be summarised as follows:

> (1) on 2 May 2016, he completed a registration form for the GP Induction & Refresher Scheme in which he confirmed that (a) he was on the GP register and (b) his status entitled him to work as a GP;
>
> (2) which assertions were both (a) untrue and (b) known by him to be untrue; and
>
> (3) he was dishonest in relation to (1) by reason of (2);

[1] See para. 18 *et seq* of response to submission of no case to answer.

> (4) between 30 August 2017 and 16 March 2018, he undertook a placement at Mansion House Surgery Whitehaven as part of the scheme ("the placement");
>
> (5) between 4 September 2017 and 26 February 2018, he practised as a GP whilst on the placement;
>
> (6) when he knew he was not eligible to do so because he was not (a) on the GP register or (b) the National Medical Performers List; and
>
> (7) he was dishonest in relation to (4) and (5) by reason of (6);
>
> (8) between September 2017 and March 2018, he submitted 10 claims in respect of the placement totalling £26,455 to cover the cost of (a) indemnity cover, (b) the GMC Annual Retention Fee and (c) bursary payments;
>
> (9) when he was not eligible to make the claims at (8) by reason of (6); and
>
> (10) he was dishonest in relation to (8) by reason of (9).

30. Dr Udoye admitted allegations (1), (2a), (4) and (8) and in its decision the Tribunal found those allegations proved.

31. At the close of the GMC's case Mr Matovu made submissions under Rule 17(2)(g) of the General Medical Council (Fitness to Practise) Rules 2004 ("the 2004 Rules") that there was no case to answer in relation to the remaining disputed allegations.

32. On 2 July 2019 the Tribunal decided that there was no case to answer in respect of allegations (2) and (3) as they applied to allegation (1b), namely that Dr Udoye knew that his statement that his "status" entitled him to work as a GP was untrue and he had acted dishonestly in that respect. The Tribunal decided that "status" was insufficiently clear and could have been answered, for example, by reference to immigration status or the qualification in Dubai (paras. 41-42 of Annex B).

33. However, the Tribunal decided that, taking the GMC's case at its highest, there was a case to answer in respect of the other allegations. They explained that it could be inferred that Dr Udoye must have known that his statement on the NRO application form that he was on the GP Register was untrue (allegation (2b)). They went on to say that, having taken into account potentially innocent explanations advanced by Mr Matovu and summarised at paragraph 8 of Annex B, allegation (3) was capable of being proved (para. 46 of Annex B). I also note the Tribunal's observations in paragraphs 54 to 61 of Annex B that there was evidence to show that in April 2016 and also in August 2017 before beginning the placement, Dr Udoye was aware of the requirement that he had to be on the GMC's GP Register and knew that he was not.

34. In its final decision dated 31 January 2020 the Tribunal summarised legal principles on the drawing of an adverse inference where a doctor does not give evidence, the legal test for dishonesty and the good character direction (paras. 18-33).

35. At paragraphs 35-62 the Tribunal rejected allegation (2b) as it applied to allegation (1a) and found that it had not been proven that the Respondent had known that his statement in the NRO application form that that he was on the GMC GP register was untrue. They decided at paragraph 63 that it followed "automatically" that allegation (3) in relation to allegation (1a) failed.

36. At paragraphs 64-86 the Tribunal dealt with allegation (5) together with the first part, or stem, of allegation (6), namely that between 4 September 2017 and 26 February 2018 the Respondent had "practised as a General Practitioner" and had known that he was doing this. They decided that those allegations had not been proven, essentially because (a) they believed the GMC's case to have been that the allegation "practised as a GP" meant "practised as an *independent* GP" (i.e. someone who was practising without supervision) and (b) the GMC's evidence showed that he had been working as a GP under supervision and not independently.

37. In paragraph 87 the Tribunal decided that, given its determination that Dr Udoye had not been practising as a GP, the remaining disputed allegations (7), (9) and (10) fell away "automatically".

38. At paragraphs 18 to 27 of its decision on impairment the Tribunal decided that the allegations admitted by Dr Udoye did not amount to misconduct. In relation to allegations (4) and (8) they referred to evidence that Dr Udoye had disclosed to NHS England in August 2017 the fact that he was not registered on the GMC's GP Register before starting his I&R placement.

39. Because the Tribunal found that there had been no misconduct, it did not go on to consider impairment of fitness to practise (para. 28).

Legal framework for the GMC's appeal

40. Section 40A of the MA provides (in so far as is relevant):-

> "(1) This section applies to any of the following decisions by a Medical Practitioners Tribunal—
> (a) ……..;
> (b) …….;
> (c) …….;
> (d) a decision not to give a direction under section 35D;
> (e) …….;
> (f) ……..
> (2) A decision to which this section applies is referred to below as a "relevant decision".
> (3) The General Council may appeal against a relevant decision to the relevant court if they consider that the decision is not sufficient (whether as to a finding or a penalty or both) for the protection of the public.
> (4) Consideration of whether a decision is sufficient for the protection of the public involves consideration of whether it is sufficient—
> (a) to protect the health, safety and well-being of the public;
> (b) to maintain public confidence in the medical profession; and

> (c) to maintain proper professional standards and conduct for members of that profession.
> (5) ……;
> (6) On an appeal under this section, the court may—
> (a) dismiss the appeal;
> (b) allow the appeal and quash the relevant decision;
> (c) substitute for the relevant decision any other decision which could have been made by the Tribunal; or
> (d) remit the case to the MPTS for them to arrange for a Medical Practitioners Tribunal to dispose of the case in accordance with the directions of the court, and may make such order as to costs . . . as it thinks fit.
> (7) ……"

41. Under s. 40A(1)(d) the Court has jurisdiction to entertain this appeal by the GMC against the Tribunal's decision (*Raychaudhuri v General Medical Council* [2019] 1 WLR 324 at [47]-[53]).

42. The principles to be applied by the Court on an appeal under s.40A were summarised by the Divisional Court in *General Medical Council v Jagjivan* [2017] 1 WLR 4438 at [39-40] and need not be repeated here. *Jagjivan* was cited with approval by Singh LJ in *Hussain v General Pharmaceutical Council* [2018] EWCA Civ 22 at [66] and by the Court of Appeal in *General Medical Council v Chandra* [2019] 1 WLR 1140 at [81]. The summary in *Jagjivan* should also be read in the light of the decision in *Bawa-Garba v General Medical Council* [2019] 1 WLR 1929.

43. Although this court may be asked to determine whether the decision of a tribunal was "wrong" in the sense explained in those decisions, the grounds of appeal in this case are both concerned with whether the Tribunal made an error of law.

Ground 1

44. This ground relates to the Tribunal's decision that allegation (5) and the stem of (6) was not proved. This part of the decision has been summarised in [36] above. The GMC submits that its case before the Tribunal was that allegation (5) did not relate to Dr Udoye working as an independent GP. Instead, the allegation concerned the Respondent's practising "as a GP whilst on the Placement." Straightforwardly, a GP working on such a placement would be a GP working under supervision, in this case by Dr Tranter. That is plain from the I&R Scheme. The evidence called by the GMC was to the effect that Dr Udoye had been working in that manner and not as an independent GP, or a fully-fledged GP no longer under supervision. On this basis the GMC submitted to the Tribunal that allegation (5) was proved.

45. The GMC submits that this ground involves no challenge to the Tribunal's factual findings on the evidence called by the GMC. It simply relates to the Tribunal's clear misunderstanding as to what was the GMC's case on the meaning of the language used in allegation (5).

46. It is clear from the written and oral submissions of Mr. Horgan to the Tribunal that the GMC's case under allegation (5) was that Dr Udoye had been practising as a GP under the I&R scheme and that the word "independent" should not be read into the allegation

(see for example paragraphs 18 and 19 of the GMC's written response to the Respondent's submission of no case to answer).

47. It is plain from its decision on whether there was a case to answer that at that stage the Tribunal understood this to be the GMC's case. Indeed, it expressly quoted a key part of the GMC's written submission (para.51 of Annex B). The Tribunal then went on to accept that that was the correct meaning of allegation (5) at paragraph 52 of Annex B:-

> "The Tribunal therefore was persuaded that the phrase 'you practised as a GP' was essentially qualified by the subsequent phrase in paragraph 5, 'whilst on the placement' and that it was not being alleged that Dr Udoye was practising as an independent GP. The Tribunal was further persuaded that paragraph 5 should be read in conjunction with paragraph 4, which Dr Udoye has admitted. Therefore, the Tribunal understood paragraph 5 to mean, 'doing the work of a GP' whilst on the I&R scheme."

I acknowledge that in the following paragraph of its decision the Tribunal said that it had "potentially clarified" the meaning of the allegation, but at that stage it did not explain what that ambiguous phrase meant. In my judgment the meaning of allegation (5) was a straightforward, objective question of interpretation.

48. In paragraph 28 of its written closing submissions the GMC plainly stated that it adopted its "half-time submissions" on allegation (5), including paragraphs 18-19 to which I have referred. In his oral closing submissions counsel for the GMC again confirmed that he relied upon paragraphs 18-24 of his written submissions on the no case to answer issue. He offered to provide the document again when he saw the chairman of the panel looking for it. The chairman said, "I think we probably still have it." Two pages further on in the transcript the chairman returned to the same point asking, "just remind us again how you want us to interpret "practised as a GP"". Mr. Horgan responded unequivocally that he relied upon his "half-time submission." The chairman said that he was content with that answer "as long as it is in writing somewhere." It is a pity that the Tribunal did not confirm that they had the document in question and that they had re-read the relevant passage before the hearing closed.

49. In its final decision at paragraph 80 the Tribunal said:-

> "The Tribunal accordingly noted that, although Mr Horgan reaffirmed that the GMC put its case on the basis that the words 'you practised as a General Practitioner' meant 'you practised as an independent General Practitioner' and did not mean that the Doctor 'carried out work as a GP', the two witnesses called by the GMC who were most involved with the I&R Scheme both indicated that the work carried out by Dr Udoye was not that of an independent GP but as a GP in training. Consequently, it is clear that the GMC's case is not supported by the evidence of these two witnesses."

It is important to note that at the end of this paragraph the Tribunal found that GMC's evidence failed to support its "case", because that evidence had not shown that Dr Udoye had worked as an independent GP.

50. In paragraphs 81-82 of its decision the Tribunal also accepted Mr Matovu's submission that unless allegation (5) was read as referring to practising as an independent GP, it added nothing of substance to allegation (4).

51. At paragraphs 83 to 85 the Tribunal then summarised evidence showing that the Respondent had not practised as an independent GP during the relevant period and so in paragraph 86 they found allegation (5) not proved.

52. I agree with Mr. Hare QC that the Tribunal failed to take into account GMC's case on the meaning of allegation (5), despite the fact that it had been set out by its counsel with complete clarity.

53. Mr. Matovu sought to meet this difficulty by suggesting that there were two sets of typographical errors in the first part of the first sentence of paragraph 80 of the decision, which should have read as follows[2]:-

> "The Tribunal accordingly noted that, although Mr. Horgan reaffirmed that the GMC put its case on the basis that the words 'you practised as a General Practitioner' meant 'you carried out work as a General Practitioner' and did not mean that the Doctor 'practised as an independent General Practitioner …..'"

54. Mr. Matovu's submission fails to take on board the fact that it was the GMC's case that the allegation, read together with the immediately following words "whilst on the Placement", meant "practising as a GP as part of the GP I&R scheme."

55. But in any event Mr Matovu's submission cannot possibly succeed. It completely ignores, and is inconsistent with, the Tribunal's reasoning in the second half of paragraph 80. They rejected allegation (5) on the basis that the evidence had failed to show that the Respondent had practised as an independent GP and therefore *failed to support the GMC's case*. Mr. Matovu's submission would simply create a different legal flaw in the Tribunal's decision, namely an internal inconsistency within paragraph 80 as to what they had understood the GMC's case to be on the meaning of allegation (5). Ironically, the effect of Mr. Matovu's submission would be that this part of the appeal would certainly have to be allowed. But neither side suggests that the Tribunal was wrong to find that there was no evidence of the Respondent practising as an independent GP. So when the Tribunal said that the GMC's case was not supported by its evidence, it meant exactly what it said. It is therefore impossible to accept that the first part of paragraph 80 contained the typographical errors suggested by Mr Matovu.

56. Since the meaning of allegation (5) is an objective question of interpretation, I have considered whether in any event it was proper for the Tribunal to read into the allegation the word "independent." In my judgment it plainly was not.

[2] See paragraph 34(i) of the Respondent's skeleton.

57. Mr Matovu's submission that unless that construction was adopted allegation (5) would add nothing to allegation (4) is incorrect. Allegation (4) simply referred to Dr Udoye being on a placement whereas allegation (5) referred to him practising as a GP under supervision whilst on the placement.[3] The period covered by allegation (4) is longer than that covered by allegation (5) and is relevant also to the payments sought by the Respondent during that overall period, including two payments relating to dates when he was not practising as a GP (see allegation (8)).

58. It was common ground in the hearing before me, that both allegations (4) and (5) were related to the allegation that the Respondent was not on the GP Register. Allegation 6 confirms that understanding and introduces the additional factor of knowledge. Allegation (6) then led on to allegation (8) regarding the payments.

59. Read properly, allegation (5) simply meant "practising as a GP under the GP I&R scheme." In other words it referred to the Respondent practising as a GP under supervision. That is how the scheme operated. The GMC's interpretation did not require the reading in of any additional wording. There was no justification for the Tribunal to add the word "independent" to the allegation. Mr. Matovu's submissions on this point only introduced unnecessary confusion when the language of allegation (5) was perfectly straightforward and clear.

60. In paragraphs 22 and 23 of his skeleton and in his oral submissions Mr Matovu sought to rely on views expressed by two GMC witnesses to support his contention that a person practises as a GP when they practise independently. I very much doubt whether that was a permissible exercise for interpreting allegation (5). But in any event, those passages in the evidence were not purporting to give an opinion on the meaning of the language expressly used in allegation (5) "practising as a GP whilst on the placement". Indeed, that evidence, properly understood, was not inconsistent with the GMC's interpretation. Unfortunately, however, the Tribunal was led by the Respondent's approach into making the same error at paragraphs 78-79 of its final decision and thereby to depart from the straightforward and correct approach it had taken to the meaning of allegation (5) in its ruling on the submission of no case to answer. The Tribunal was wrongly persuaded to focus on what "practising as a GP" could mean in "common parlance" rather than just keeping to the wording of the allegation.

61. Accordingly, the Tribunal's interpretation of allegation (5) was legally flawed

62. For all these reasons, I uphold ground 1, subject to considering one point raised in the Respondent's Notice (see [104]-[109] below).

Ground 2

63. The GMC submits that when the Tribunal determined allegation (2b) in relation to allegation (1a), it erred in law by misapplying *Kuzmin* on whether an adverse inference should be drawn from the Respondent's decision not to give evidence. It is necessary to begin by identifying the principles laid down in *Kuzmin*.

64. In general a fact-finder such as a disciplinary tribunal has an implicit power to draw such inferences as it considers appropriate from the primary facts. Inferences may be

[3] See also paragraph 29 of the Respondent's skeleton.

impermissible in certain circumstances, for example, where they involve "*procedural* unfairness" or an "unacceptable risk of *such* unfairness" ([31]) (emphasis added). Where a person who has a case to answer chooses to remain silent then, by a normal process of reasoning and common sense, it may be reasonable to infer that he is unable to answer that case in whole or in part ([33]).

65. Disciplinary tribunals are part of the regulatory scheme governing the relationship between professional associations and individuals who practise that profession and, as a condition of doing so, sign up to that scheme ([34]). Where a professional person faces serious allegations, he would be expected by the public to give an account of his actions. There is a burden on medical practitioners, as with all professionals, to engage with the regulator, both in relation to any investigation and the ultimate resolution of any allegations made against them. That is part of the responsibility to which they signed up when they joined the profession. These principles are reflected in paragraph 73 of the GMC's "Good Medical Practice." Consequently, a Medical Practitioners Tribunal has the power to draw adverse inferences from silence. That power is rooted in the public interest ([55]-[56]).

66. Drawing an adverse inference from the silence of a practitioner in disciplinary proceedings does not involve any reversal of the burden of proof borne by the professional body ([49]).

67. Disciplinary proceedings are civil and not criminal proceedings. Even so, procedural fairness sometimes requires specific steps to be taken just as in a criminal trial, for example, ensuring that the practitioner is properly informed about the nature of the disciplinary charges he faces ([34]-[38]). But beyond certain common norms (e.g. the allegations against an individual must be made known to him and clear and he must not bear the burden of proof), the requirements of procedural fairness in any particular case are fact-sensitive. Whether proceedings are fair involves looking at the process as a whole ([39]).

68. An adverse inference cannot be drawn where it would be "procedurally unfair" to the individual to do so. Whether that is so is quintessentially dependent on the particular circumstances of the case. For example, it is likely to be unfair if the practitioner is not given prior notice that an adverse inference may be drawn if he does not give evidence or answer a particular question. But it is not procedurally unfair for an adverse inference to be drawn from silence on notice where it is reasonable to expect a person to explain why charges, in respect of which there is a *prima facie* case, are not good. The fact that that person might in those circumstances feel compelled to give evidence which would make the disciplinary proceedings more difficult for him would not render the drawing of an adverse inference against him unfair ([58]).

69. Based upon these principles Hickinbottom LJ held:-

> "60 …. In my view, it is open to an MPT to draw adverse inferences from the failure of a charged registered medical
>
> practitioner to give evidence, including, in an appropriate case, the inference that he has no innocent explanation for the prima facie case against him, subject to such an inference not being procedurally unfair.

> 61 However, whilst emphasising that whether an adverse inference is drawn will be highly dependent upon the facts of the particular case, it seems to me that, generally, no inference will be drawn unless: (i) a prima facie case to answer has been established; (ii) the individual has been given appropriate notice and an appropriate warning that, if he does not give evidence, then such an inference may be drawn; and an opportunity to explain why it would not be reasonable for him to give evidence and, if it is found that he has no reasonable explanation, an opportunity to give evidence; (iii) there is no reasonable explanation for his not giving evidence; and (iv) there are no other circumstances in the particular case which would make it unfair to draw such an inference."

70. There may be a number of reasons which a tribunal may accept as a reasonable explanation for a practitioner not giving evidence on a particular allegation. For example, they may decide that he has no relevant evidence to give on that allegation or that he is unable to give evidence because of physical or mental health issues. However, it is not a reasonable explanation for a practitioner merely to say that he disagrees with the tribunal's ruling that there is a case for him to answer, absent some new factor which for some good reason had not previously been raised. The Tribunal was entitled to give short shrift to Dr Udoye's attempt to do that in relation to allegation (2b) (paragraph 43 of the final decision).

71. The GMC's ground of appeal relates to criterion (iv) in [61]. It is plain from the preceding passages in *Kuzmin*, not least [60], that criterion (iv) is only concerned with procedural unfairness. Paragraph [60] made two further points clear. First, where criteria (i) to (iv) are satisfied, a tribunal is not obliged to draw an adverse inference. It may exercise its judgment on whether to do so and, if it decides to draw an adverse inference, on how much weight to give to this factor. Second, one adverse inference which may be drawn is that the practitioner has no innocent explanation for the case against him.

72. The criteria in *Kuzmin* at [61] are expressions of the principle of *procedural* fairness applied to the issue whether an adverse inference should be drawn against a practitioner. Satisfaction of those criteria does not require an assessment to be made by the tribunal of the merits of the allegation. A tribunal should not examine all the evidence for or against an allegation in order to decide whether any of the procedural criteria in *Kuzmin* at [61] is met. This point is illustrated by the Respondent's submissions in this case (see below). Instead, where the *Kuzmin* criteria are satisfied, the tribunal should go on to consider whether it is appropriate to draw an adverse inference from silence (bearing in mind the important public interest considerations referred to in [65] above).

73. Where a decision-maker does consider it appropriate to draw an adverse inference, that *by itself* cannot be determinative of the allegation in issue. As the Tribunal said in this case, any such adverse inference is one factor to be taken into account in the balance when deciding whether an allegation is proved to the civil standard (para. 28 of decision). At that stage the Tribunal would take into consideration the GMC's evidence produced, its factual findings and inferences drawn from those findings, both for and against the allegation, along with any good character direction and any evidence on good character. It would also decide how much weight to give to the adverse inference.

That last factor may be influenced by any issues or questions which would have merited being explored in cross-examination of the practitioner. For example, in some cases that could have involved testing the credibility of the practitioner's evidence and the merits of any innocent explanation for the alleged conduct introduced solely by way of submission. One possible outcome is that the decision-maker may judge that no significant weight should be attached to any adverse inference from silence, but even so, that factor will have been taken into account and not disregarded.

74. What did the Tribunal do here? At paragraphs 41 to 43 of its decision the Tribunal explained why criteria (i) to (iii) in *Kuzmin* at [61] were satisfied.

75. At paragraph 44 the Tribunal said that it was required to consider whether there was an innocent or negligent explanation for Dr Udoye to have stated on his application form that he was already included in the GP Register. Such an explanation could include making a simple error when completing the form and not appreciating that the answer given was untrue. They appear to have derived this approach from their earlier self-direction at paragraph 29 of the decision when dealing with the legal test for determining whether conduct is dishonest. In that context Mr Matovu had cited authority for the proposition that "account has to be taken of an innocent or negligent explanation."

76. At paragraph 45 the Tribunal said:-

> "Accordingly, the Tribunal has concluded that *the requirement to consider other possible explanations for his actions* does make it unfair *immediately* to draw the adverse inference that the Doctor 'is unable to answer that case in whole or part' since the Tribunal is duty-bound to consider overall the possibility that an innocent explanation exists even through the Doctor has not given specific evidence on the point. The Tribunal is aware that it can consider circumstantial evidence when deciding this issue (and that seems to have been accepted by the parties)." (emphasis added)

So it is clear that the Tribunal conflated the "innocent explanation" point relevant to determining whether conduct is dishonest with the issue raised by *Kuzmin* at [61(iv)] whether there were other circumstances making it unfair to draw an adverse inference from silence.

77. The Tribunal then set off on an overall evaluation of the evidence for and against the allegation, including whether there was an innocent explanation, the issue of dishonesty and the propensity limb of the good character direction (paragraphs 46-62). This turned out to be its final determination of the merits of the allegation. They did not return to answer the question posed by the criterion in *Kuzmin* at paragraph [61(iv)].

78. The Tribunal concluded at paragraphs 61-62:-

> "61. Accordingly, the Tribunal considered that the evidence regarding whether Dr Udoye knew that he had given an untrue answer to the question 'Are you on the GMC GP Register' was finely balanced. It is therefore led to the conclusion that the

> weight of the evidence in favour of the GMC's case is balanced equally by the fact there is compelling evidence for an alternative explanation to Dr Udoye answering 'yes' on the NRO form, namely that Dr Udoye made an innocent, negligent or mistaken error.
>
> 62. The Tribunal was accordingly not satisfied, on the balance of probabilities, that the GMC has discharged the burden of proof upon it that Dr Udoye, at the time of completing the NRO form, knew that he untruthfully answered 'yes' to the question 'Are you on the GMC GP Register.' The Tribunal was satisfied, given: the supporting documents Dr Udoye provided with the NRO form; his failure to indicate on other parts of the form that he was on the GMC's GP Register; and the all-round confusion by those responsible for monitoring and delivering the I&R Scheme, that sufficient evidence exits to give rise to a compelling argument that he made an innocent, negligent or mistaken error when completing the form. Accordingly, the Tribunal found paragraph 2b in relation to paragraph 1a not proved. "

79. Mr Matovu submitted that the Tribunal had not acted improperly in taking this course, relying upon two authorities he had cited to them. In my judgment, those decisions have no relevance to the application of [61(iv)] of *Kuzmin* and provide no basis for supporting the approach taken by the Tribunal.

80. The passage cited from *AA (Nigeria) v Secretary of State for the Home Department* [2010] EWCA Civ 773 at [68] simply formed part of the court's reasoning as to why the word "false" had to mean "dishonest" rather than "incorrect" in an immigration rule requiring mandatory refusal of entry clearance on the ground that "false representations" had been made.

81. The decision in *Soni v General Medical Council* [2015] EWHC 364 (Admin) was also of no assistance on the correct approach to deciding whether an adverse inference may be drawn from silence. The case involved no discussion of the principle which has since been set out in [61(iv)] of *Kuzmin*, or how it should be applied. In that case the doctor did not give evidence and the tribunal decided not to draw any adverse inference on that account. The High Court dealt with an appeal by the doctor. It did not have to determine whether the tribunal had erred in deciding not to draw that adverse inference, but observed at [32] that it had been correctly advised on that point. At all events, there were serious medical reasons involving the doctor's immediate family which explained why he had not given evidence [13], matters which would now be considered under [61(iii)] of *Kuzmin.*

82. In my judgment the Tribunal's approach to the adverse inference issue, and hence its decision on whether the allegation was proved, was legally flawed for several, separate reasons.

83. First, the Tribunal did not answer the question posed by the criterion in [61(iv)] of *Kuzmin*, by identifying any "other circumstances in the particular case" making it unfair to draw an adverse inference from the Respondent's decision not to give evidence.

Instead, it embarked upon a full evaluation of the merits of the allegation disregarding the issue of whether an adverse inference should be drawn.

84. Mr Matovu's submitted that it would have been unfair in this case for an adverse inference to be drawn from silence because of the conclusions to which the Tribunal came in paragraphs 61-62 of its decision. The cases for and against the allegation were equally balanced and therefore the GMC failed to prove its case. In those circumstances he says that it would have been improper or unfair to have drawn an adverse inference against Dr Udoye because that, of itself, would have tipped the balance in favour of the GMC's case (see e.g. para. 51 of the Respondent's skeleton). As I have said, the Tribunal did not reach a conclusion on the application of *Kuzmin* [61(iv)], and so they did not adopt this approach. In any event, it is unsound.

85. What would happen if a tribunal conducted the same sort of evaluation of the evidence as in this case but concluded that the overall balance (without drawing an adverse inference) weighed significantly *against* the allegation? If the adverse inference was then taken into account, there would be two possible outcomes, depending on the weight given to it. Either the balance might still weigh against the allegation or it might become tipped in favour of it. Because Mr Matovu's submission is that an adverse inference could only be drawn where that did *not* result in the balance being tipped against the practitioner, it would follow that it could only be taken into account where the GMC would succeed in any event, even without that inference. In other words, the power to draw an adverse inference would be completely nugatory. If, on the other hand, an adverse inference could be drawn in this second example even though the balance would tip against the practitioner, then what happened in the present case cannot be distinguished and Mr Matovu's submission is irredeemably flawed.

86. These unavoidable, illogical consequences of the Respondent's argument demonstrate that it is not founded on any coherent principle. It is clear that there is no proper legal basis for making the decision on *whether* to draw an adverse inference turn on an assessment of all the evidence apart from that inference. The satisfaction of the requirements of procedural fairness in *Kuzmin* to determine whether it is appropriate to draw an adverse inference should not be confused with the substantive evaluation of all the evidence, including how much weight to give to that inference in any particular case. Accordingly, the decision on whether an adverse inference should be drawn in any particular case, and if so how much weight to give to that factor, should not be made after all the evidence on the allegation has been evaluated and findings made.

87. However, even if the Tribunal had been entitled to have regard to the merits of the evidence and the allegation, there was in any event a second flaw in this part of the Tribunal's decision. At paragraphs 44-45 the Tribunal had said that it would be "unfair immediately" to draw an adverse inference that Dr Udoye was unable to answer the case in whole or in part without considering the possibility that there was an innocent explanation. But having considered the innocent explanation issue, the Tribunal never returned to the question it had posed for itself. It did not determine whether or not criterion (iv) was satisfied and, if so, whether in its judgment an adverse inference should be drawn and how much weight given to that factor. This is plain from paragraphs 61 to 62 of the decision. The error is compounded by paragraph 58 which purported to note an earlier finding that it would be inappropriate to draw an adverse inference from silence in this case. That was incorrect, as is clear from paragraphs 44-45 of the decision.

88. Third, in its decision the Tribunal disregarded and therefore did not evaluate the lack of any opportunity to test the Respondent's case in cross-examination, for example, on points summarised in paragraph 36 of the GMC's skeleton. Those points had been identified to the Tribunal in the GMC's submissions. In view of the equal weight given by the Tribunal to all the other matters for and against the allegation, the issue of whether an adverse inference should be drawn, and if so, how much weight should be given to it, was obviously material. If instead the Tribunal had also taken into account the inference and given it significant weight, I do not see how, on the findings it reached, the Tribunal could not have found the allegation proved.

89. For these reasons, individually and cumulatively, the Tribunal erred in law in the manner in which it purported to deal with the criterion in *Kuzmin* at [61(iv)].

90. In paragraphs 23-24 of the Respondent's Notice it is said that the Tribunal's decision not to have drawn an adverse inference should be upheld on an alternative ground. "When the [Tribunal] went on to consider [in its final decision] the evidence adduced by the GMC with greater care than it had done before when considering the Respondent's no case to answer submission ……., it concluded that the evidence in favour of GMC's case was balanced equally by compelling evidence for an alternative explanation", although the evidential position had not changed since the earlier decision. Accordingly, it is submitted that the Tribunal ought to have concluded that there was no case to answer, the criterion in *Kuzmin* at [61(i)] was not satisfied, and an adverse inference could not have been drawn for that reason alone.

91. This point has only been pursued in the Respondent's Notice as a ground for upholding the Tribunal's decision and not as a cross-appeal against the Tribunal's ruling on the submission of no case to answer given at half-time. If such a cross-appeal were to succeed, it would follow that the case on allegations (2b) and (3) should not have gone any further and there would have been no question of drawing of any adverse inference from the Respondent's silence. His case would not have been reached. The criteria in *Kuzmin* only fall to be applied where the Tribunal has decided that there *is* a case to answer.

92. But the Respondent's argument is in any event untenable. It would mean that a tribunal's decision rejecting an allegation on the merits could never be appealed by the GMC on the ground that the tribunal had failed to consider the *Kuzmin* criteria or drawing an adverse inference from silence. With respect, the submission confuses the different exercises which a tribunal has to perform (a) when considering whether there is a case to answer and, if there is, (b) when reaching its final conclusions on the evidence and determining whether an allegation is proved.

93. A submission that there is no case to answer is determined by applying the familiar tests in *R v Galbraith* [1981] 1 WLR 1039 at 1042B-D:-

> "(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vague-ness or because it is inconsistent with other evidence, (a) Where the judge comes to the conclusion that the prosecution evidence,

> taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

94. It has never been suggested that this part of the case fell within *Galbraith* category (1). The Tribunal concluded under category (2) that, taking the GMC's evidence at its highest, there was sufficient evidence upon which it could find allegation (2b) proved (para. 35 of Annex B).

95. Mr Matovu submitted, without citing any authority, that unless the Tribunal had been able to exclude the possibility of there being an innocent explanation for Dr Udoye stating on the application form that he was on the GP Register, it had to rule that there was no case to answer. The conclusions reached by the Tribunal in paragraphs 61-62 of its final decision showed that an innocent explanation could not be excluded and therefore the Tribunal had been wrong to decide that there was a case to answer on allegation (2b). The court suggested to counsel during the hearing that that approach does not accord with established case law, but Mr Matovu maintained his submission on behalf of the Respondent.

96. The correct legal position is summarised in, for example, Archbold 2021 at 4-365.

97. In *R v Darnley* [2012] EWCA Crim 1148 Elias LJ said at [21]:-

> "As we have said, we think that the focus should be on the traditional question, namely whether there was evidence on which a jury, properly directed, could infer guilt. It is an easier test, not least because it focuses on what a reasonable jury could do rather than what it could not do. Reasonable juries may differ because the assessment of the facts is not simply a logical exercise and different views may reasonably be taken about the weight to be given to potentially relevant evidence. The judge must be alive to that when considering a half-time application. Of course, if the judge is satisfied that even on the view of the facts most favourable to the prosecution no reasonable jury could convict, then the case should be stopped. As Moses LJ points out, that conclusion will necessarily involve accepting that not all realistic possibilities consistent with innocence can be excluded. It does not, however, follow that the tests are equally appropriate or that either can be adopted by a trial judge."

In *R v Khan* [2013] EWCA Crim 1345 at [14] Hallett LJ endorsed the approach taken in *Darnley*.

98. Moses LJ had previously explained in *R v Jabber* [2006] EWCA Crim 2694 at [19]-[21] that a decision at the half-time stage that there is a case to answer does not depend upon the judge (or tribunal) being satisfied that, when the final decision comes to be made, all reasonable decision-makers evaluating the evidence would be bound to reject all innocent explanations for the matter alleged. Even if the final decision-maker would not be able to find an allegation proved unless he rejected any realistic possibility indicating an innocent explanation, that is not the test which the judge or tribunal has to apply when ruling on a submission of no case to answer. In other words, decision-making at the half-time and full-time stages should not be conflated. Likewise, in a situation falling within *Galbraith* category (2), the definitive evaluation of the reliability and weight of all the evidence is a matter for the final decision-making stage, not the decision whether there is a case to answer (*Galbraith* [1981] 1 WLR at 1041C and 1042C and *R v F* [2012] QB 703 at [10]-[12] and [48])

99. This line of authority has been applied by the courts to disciplinary proceedings (*Solicitors Regulation Authority v Sheikh* [2020] EWHC 3062 (Admin) at [9]-[10]). Davis LJ held that the key question at the half-time stage is whether, on *one possible view of the evidence*, there is evidence upon which *a* reasonable tribunal, *not all* reasonable tribunals, could find the matter proved when making the final adjudication. If the answer is yes, then there is a case to answer.

100. Paragraphs 61 to 62 of the Tribunal's decision set out its final determination at the end of the case in relation to all the evidence relating to allegation (2b). In my judgment, that had no bearing whatsoever on the correctness of its earlier conclusion that there was a case to answer. Mr Matovu's reliance upon the fact that there was no additional evidence between half-time and full-time is nothing to the point. The Tribunal's functions at those two different stages were different. The fact that at half-time the Tribunal considered that on one view, and taking the GMC's case as its highest, allegation (2b) *could* be proved, did not mean that when it came to make its final determination the Tribunal would necessarily have to find that allegation proved. Likewise, the fact that in this case the Tribunal finally decided, after evaluating all the evidence, that the allegation was not proved cannot be used to undermine its earlier conclusion that there was a case to answer. The Tribunal's decision that the evidence for and against the allegation was equally balanced makes no difference to this analysis. Paragraph 62 makes it perfectly plain that what the Tribunal was deciding there was whether the GMC had succeeded by the end of the hearing in discharging the burden of proof in relation to the allegation, and not the question at the end of GMC's case whether the Tribunal *could* on at least one view properly reach that conclusion. In paragraph 62 it did not purport to revisit its half-time decision. It had no reason to do so.

101. Mr Matovu is also incorrect to suggest that the Tribunal's final determination in paragraphs 61-62 of its decision meant that they ought to have decided that criterion (i) in *Kuzmin* at [61] was not satisfied. Criterion (i) is based upon principles stated in *Kuzmin* at [33] and [58]. It is satisfied by a decision that there is a case to answer before the person charged has to decide whether or not to give evidence. It has nothing to do with whether or not a tribunal finds an allegation proved in its final decision or judgment at the conclusion of the case. Once again the Respondent's submission confuses the satisfaction of the *procedural* criteria in *Kuzmin* at [61] with the *substantive* evaluation of the evidence and the merits in the Tribunal's final

determination. As we have seen, the Tribunal fell into a very similar error, in that they made an overall evaluation of the evidence in this case as if that absolved them from the requirement to answer the procedural question identified in *Kuzmin* at [61(iv)]. Plainly, it did not.

102. It follows that there was no inconsistency between the Tribunal's conclusion that the criterion in *Kuzmin* at [61(i)] was met (para. 41 of the decision) and its determination on allegation (2b) (paras. 61-62 of the decision).

103. For all these reasons, I uphold ground 2, subject to considering one point raised in the Respondent's Notice (see [104]-[109] below).

Regulation 24 of the 2013 Regulations

104. Mr. Matovu relies upon regulation 24(1), (3) and (4) of the 2013 Regulations which provide:-

> "(1) A medical practitioner who is not—
>
> (a) employed by or, in the case of a locum agency, registered with a body prescribed by regulation 4 of the Medical Profession (Responsible Officers) Regulations 2010 (designated bodies); or
>
> (b) granted permission, by a person managing a hospital owned or managed by such a body, to practise as a medical practitioner in that hospital,
>
> may not perform any primary medical services ……. unless that person is a general medical practitioner included in the medical performers list. This is subject to paragraphs (2) to (5)
>
> (2) …….
>
> (3) A registered medical practitioner who falls within paragraph (4) may perform primary medical services when not included in the medical performers list in so far as the performance of those services constitutes a part of a programme of post-registration supervised clinical practice approved by the General Medical Council ("a post-registration programme").
>
> (4) A registered medical practitioner falls within this paragraph if that medical practitioner—
>
> (a) is not a GP Registrar;
>
> (b) is undertaking a post-registration programme;
>
> (c) has notified the Board at least 24 hours before commencing any part of such a programme in England; and

> (d) has, with that notification, provided the Board with sufficient evidence to satisfy it that the medical practitioner is undergoing a post-registration programme."

105. Mr Matovu submits that the I&R scheme was a "programme of post-registration supervised clinical practice approved by the General Medical Council" and so Dr Udoye was entitled to perform primary medical services when not included in the MPL. He also says that this dispensation applied "by analogy" to any requirement to be on the GP Register. On that basis he submits that no disciplinary proceedings should have been brought against Dr Udoye in respect of the disputed allegations.

106. There are a number of reasons why this line of argument does not provide any basis for upholding the Tribunal's decision, whether in relation to ground 1 or ground 2.

107. First, it is plain that regulation 24 only imposes a requirement to be included in the MPL. It does not purport to address any requirement, whether legal or administrative, for a doctor to be in the GP Register. Regulation 24(3) and (4) creates a dispensation solely in relation to the MPL. It does not create a dispensation from any requirement to be included in the GP Register. Inclusion on that Register is dealt with under a separate statutory code. Mr. Matovu was unable to explain what he meant in law by "application by analogy" or how that could be justified here, or how the dispensation could apply more widely than stated by Parliament in the language it has used In my judgment, regulation 24(3) and (4) goes no further than to disapply the prohibition in regulation 24(1) on performing primary medical services without being included in the MPL.

108. Second, and in any event, the Tribunal found in paragraphs 71 and 72 of its decision that, on the basis of the evidence of Ms. Kirkpatrick (an Assistant Director at the GMC), the I&R scheme was not "a programme of post-registration supervised clinical practice" which had been approved by the GMC. The witness explained that the scheme had been established by NHS England and HEE and that the GMC has no involvement in the scheme. The GMC has a list of programmes it has approved, which do not include the I&R scheme. The GMC's approval of programmes relating to general practice concerns only the training of doctors leading to entry on the GP Register. Programmes post-GP qualification have not been approved by the GMC. Accordingly, I accept the submission of Mr. Hare QC that the Tribunal's finding that the I&R scheme did not fall within regulation 24(3) and (4) is not open to challenge in these proceedings.

109. Mr. Matovu also submitted that the Tribunal had nevertheless erred in law because they had asked themselves whether the whole of the I&R scheme had been approved by the GMC, rather than just the part that involved the performance of primary medical services, or the placement "at a GMC approved training practice." But this involves a mis-reading of regulation 24(3) and (4). Plainly these provisions do not ask whether the GMC has approved a training practice at which a doctor is to be placed, or in this case whether the GMC had approved the Mansion House surgery and Dr Tranter for training. Instead, the issue under regulation 24(3) is whether the GMC has approved a programme answering to the description in regulation 24(3). The Tribunal found that it had not and in my judgment there is no basis for going behind that finding. In any event, even if the Tribunal were to be treated as having erred on this point, that would not detract from my earlier conclusion that regulation 24 of the 2013 Regulations had no impact on any requirement to be included in the GP register.

Conclusions

110. For the reasons set out above, I uphold the GMC's grounds of appeal. I reject those contentions in the Respondent's Notice which remain live. The GMC's appeal must be allowed. Accordingly, the Tribunal's determination on allegations (2b), (3), (5), (6), (7), (9) and (10) and on misconduct must be quashed and the matter remitted to the Medical Practitioners Tribunal Service to redetermine the allegation in the light of the Court's judgment and to proceed to determine, if appropriate, misconduct, impairment and sanction. I direct that the matter must be heard by a differently constituted panel.