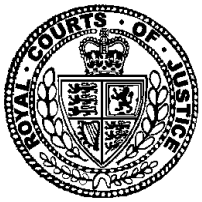

Neutral Citation Number: [2022] EWHC 817 (Admin)

Case No: CO/4126/2021

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

Exeter Combined Court Centre
Southernhay Gardens, Exeter, EX1 1UH

Date: 06/04/2022

Before :

THE HON. MRS JUSTICE STEYN DBE

- -

Between :

DR MXM	**Applicant**
- and -	
GENERAL MEDICAL COUNCIL	**Respondent**

- -
- -

Lydia Barnfather (instructed by **MDU Services Limited**) for the **Applicant**
Heather Emmerson (instructed by **GMC Legal**) for the **Respondent**

Hearing date: 17 March 2022

- -

Approved Judgment

MRS JUSTICE STEYN :

A. Introduction

1. By this application under section 41A(10) of the Medical Act 1983 ('the 1983 Act') the Applicant, a doctor in general practice, challenges the interim suspension order imposed on him on 9 November 2021 by an Interim Orders Tribunal ('the IOT') of the Medical Practitioners Tribunal Service of the General Medical Council ('the GMC'). The effect of that order was to suspend his registration for 18 months.

2. The Applicant submits the order should be terminated or, alternatively, the period of suspension should be shortened. The Applicant relies on four grounds in support of his contention that the IOT's decision to make an interim suspension order in his case was wrong. In short:

   i) The IOT failed to differentiate between those aspects of the allegations which are proper matters for consideration in fitness to practise proceedings and those which are of an intimate and personal nature removed from the practice of the Applicant's profession, and irrelevant to the IOT's consideration.

   ii) Having regard to the nature of the allegations, the IOT misidentified, and erred in its assessment of the risk to (a) public safety and (b) the public interest.

   iii) The IOT failed to give appropriate consideration to the principle of proportionality, both in respect of the nature and the duration of the order.

   iv) In support of the first three grounds, the Applicant contends that the IOT failed to provide adequate reasons for its decision.

3. The GMC did not seek an interim suspension order before the IOT; it sought an interim order imposing conditions on the Applicant's registration. Nevertheless, the GMC resists the application contending that an interim order suspending the Applicant from practice for 18 months was necessary and proportionate. The GMC also contends that the IOT's reasons were adequate and intelligible.

4. I have been greatly assisted by the written and oral submissions of Ms Barnfather, Counsel for the Applicant, and Ms Emmerson, Counsel for the GMC.

B. Anonymity order

5. At the outset of the hearing I granted the Applicant's application for an anonymity order and gave reasons for that decision. In summary, the application was made on the grounds that certain matters raised in the complaints made against the Applicant regarding the nature of the sexual practices in which he and 'ER' engaged are liable to attract negative and potentially sensationalist publicity, which would be likely to have a detrimental impact on the mental health and welfare of his four children (of whom the younger three are between the ages of 10 and 16). The GMC took a neutral position on the anonymity application; and no member of the press or public made any representations on it.

6. CPR 39.2 provides that "*the general rule is that a hearing is to be in public*". CPR 39.2(4) provides:

> "the court must order that the identity of any party or witness 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 or witness."

7. Section 12 of the Human Rights Act 1998 applies whenever a court is considering whether to grant any relief which might affect the exercise of the right to freedom of expression. It was engaged in considering this application.

8. I approached the application in accordance with the guidance given by the court of Appeal in *XXX v Camden London Borough Council* [2020] EWCA Civ 1468. It is necessary to balance the article 8 rights to private and family life of the Applicant and his family against the article 10 rights of the press and the public. I did so applying the well established test described by Lord Steyn in *In re S (A child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593 at [17]. I determined that, in this case, the article 8 rights of the Applicant and his young children outweigh the article 10 rights of the press and the public in being able to identify him as the Applicant in these proceedings.

9. In evaluating the interference with article 10 rights, I bore in mind the fundamental importance of open justice and the importance of the press interest in the names of parties as explained by Lord Rodger in *Re Guardian News and Media Ltd* [2010] 2 AC 697 at 723. I noted the scope of the restriction sought does not inhibit the press or public knowing any of the details of the case, other than identifying details.

10. In evaluating the interference with article 8 rights, I bore in mind the ages of the children which make them particularly vulnerable to being made aware by fellow pupils of the nature of the evidence, if the Applicant were to be identified in the press. I noted the evidence of the detrimental impact on the 16 year old child of being informed of these matters by TR. I assessed that the concerns for the welfare of the children were genuine and well-founded. I also bore in mind that at this stage the matter is under investigation and it is only because the Applicant considers the IOT has erred in imposing an 18 month suspension order that he pursues this application, bringing the matter into the public arena.

C. The legal and regulatory framework

The IOT's power to impose an interim order

11. The power of the IOT to impose an interim order on a doctor (of suspension or imposing conditions) is contained in s.41A(1) of the 1983 Act, which provides:

> "Where an Interim Orders Tribunal … are satisfied that it is necessary for the protection of the public or is otherwise in the public interest, or is in the interests of a fully registered person, for the registration of that person to be suspended or to be made subject to conditions, the Tribunal may make an order –
>
> (a) that his registration in the register shall be suspended (that is to say, shall not have effect) during such period not

> exceeding eighteen months as may be specified in the order (an "interim suspension order"); or
>
> (b) that his registration shall be conditional on his compliance, during such period not exceeding eighteen months as may be specified in the order, with such requirements so specified as the Tribunal think fit to impose (an "order for interim conditional registration")."

12. In this case, only the first two bases ("*necessary for the protection of the public*" or "*otherwise in the public interest*") are relevant: there is no suggestion that an interim order was in the Applicant's interests. The test of 'necessity' attaches to the "*protection of the public*", rather than the "*public interest*" limb of the test. The court must be cautious about superimposing additional tests over and above those which Parliament has set. Nonetheless, the implication of the provision is that for a doctor to be the subject of interim suspension "*in the public interest*", such suspension must be at least desirable in the public interest. See *R (Sheikh) v General Dental Council* [2007] EWHC 2972 (Admin), Davis J at [15]-[16], *Sandler v GMC* [2010] EWHC 1029 (Admin), Nicol J at [14], and *Harry v GMC* [2012] EWHC 2762 (QB), Burnett J at [2].

The IOT Guidance on the test to be applied

13. The Medical Practitioners Tribunal Service of the GMC has published guidance entitled "*Imposing interim orders: Guidance for the Interim Orders Tribunal, Tribunal Chair and the Medical Practitioners Tribunal*" ('the IOT Guidance'). The current version of the IOT Guidance was issued on 30 October 2018. The IOT Guidance does not have statutory force, but as Bennathan J observed in *AB v GMC* [2022] EWHC 186 (Admin) at [19]:

> "it is the obvious starting point in considering how the power to suspend should be used, and reflects the accumulated knowledge, experience and wisdom of the medical profession's regulator."

14. The IOT Guidance addresses the test to be applied in these terms:

> "23 The IOT must consider, in accordance with section 41A, whether to impose an interim order. If the IOT is satisfied that:
>
> a in all the circumstances that there may be an impairment of the doctor's fitness to practise which poses a real risk to members of the public, or may adversely affect the public interest …;
>
> and
>
> b after balancing the interests of the doctor and the interests of the public, that an interim order is necessary to guard against such risk,
>
> the appropriate order should be made.

> 24 In reaching a decision whether to impose an interim order an IOT should consider the following issues:
>
> a The seriousness of risk to members of the public if the doctor continues to hold unrestricted registration. In assessing this risk the IOT should consider the seriousness of the allegations, the weight of the information, including information about the likelihood of a further incident or incidents occurring during the relevant period.
>
> b Whether the public confidence in the medical profession is likely to be seriously damaged if the doctor continues to hold unrestricted registration during the relevant period.
>
> …
>
> 25 In weighing up these factors, the IOT must carefully consider the proportionality of their response in dealing with the risk to the public interest (including public safety and public confidence) and the adverse consequences of any action on the doctor's own interests." (Emphasis added.)

15. The protection of the public limb is further addressed at paragraph 28:

> "**Allegations of poor performance/substandard clinical care**
>
> 28 The test for imposing an order may be met where there is information that a doctor's clinical skills and/or professional knowledge and competence are, or are likely to be, such that they pose a real risk to members of the public if there were to continue without restriction. Such cases may include either a series of failures to provide a proper standard of care, or one particularly serious failure. Consideration should be given to making an order both for the protection of the public and in the public interest including to maintain public confidence and to maintain and promote proper professional standards and conduct for doctors."

16. The public interest limb is further addressed at paragraphs 29 to 31:

> "**Allegations of sexual misconduct**
>
> 29 In general, where allegations involve sexually inappropriate behaviour towards patients or the doctor is under police investigation for a sexual criminal offence, particular consideration should be given to the impact on public confidence if the doctor were to continue working unrestricted in the meantime.

> 30 The following factors are likely to indicate, balanced alongside other considerations, that a case is likely to raise significant public confidence issues if no interim action is taken:
>
> a Information that a doctor is under investigation by police in connection to serious offences such as rape or attempted rape, sexual assault or attempted sexual assault or sexual abuse of children.
>
> b Allegations that a doctor exhibited predatory behaviour in seeking or establishing an inappropriate sexual or emotional relationship with a vulnerable patient.
>
> c Serious concerns about a doctor's sexualised behaviour towards a patient in a single episode.
>
> d Allegations of a pattern of sexually motivated behaviour towards patients.
>
> 31 Where a doctor is under investigation for any other serious criminal offence, particular consideration should be given to the impact on public confidence if the doctor were to continue working unrestricted in the meantime."

Good medical practice and the Maintaining professional boundaries guidance

17. In assessing whether there may be an impairment of the doctor's fitness to practise, a further GMC publication, "*Good medical practice*", provides guidance as to the standards expected of doctors. This includes requirements to "*refer a patient to another practitioner when this serves the patient's needs*" (para 15(c)); "*to treat patients fairly and with respect*" (para 48); and to "*make sure that your conduct justifies your patients' trust in you and the public's trust in the profession*" (para 65). Paragraph 53 of *Good medical practice* provides:

> "You must not use your professional position to pursue a sexual or improper emotional relationship with a patient or someone close to them."

18. Further guidance published by the GMC, entitled "*Maintaining a professional boundary between you and your patient*" ('*the Maintaining professional boundaries guidance*') explains how doctors can put into practice the principle identified in paragraph 53 of *Good medical practice*. It provides:

> "**Doctor-patient partnership**
>
> 3. Trust is the foundation of the doctor-patient partnership. Patients should be able to trust that their doctor will behave professionally towards them during consultations and not see them as a potential sexual partner.
>
> **Current patients**

4. You must not pursue a sexual or improper emotional relationship with a current patient.

…

Former patients

8. Personal relationships with former patients may also be inappropriate depending on factors such as:

a the length of time since the professional relationship ended (see paragraphs 9-10)

b the nature of the previous professional relationship

c whether the patient was particularly vulnerable at the time of the professional relationship, and whether they are still vulnerable (see paragraphs 11-13)

d whether you will be caring for other member's of the patient's family

You must consider these issues carefully before pursuing a personal relationship with a former patient.

Timing

9. It is not possible to specify a length of time after which it would be acceptable to begin a relationship with a former patient. However, the more recently a professional relationship with a patient ended, the less likely it is that beginning a personal relationship with that patient would be appropriate.

10. The duration of the professional relationship may also be relevant. For example, a relationship with a former patient you treated over a number of years is more likely to be inappropriate than a relationship with a patient with whom you had a single consultation.

Vulnerability of the patient

11. Some patients may be more vulnerable than others and the more vulnerable someone is, the more likely it is that having a relationship with them would be an abuse of power and your position as a doctor.

…

Social media

14. You must consider the potential risks involved in using social media and the impact that inappropriate use could have on your

> patients' trust in you and society's trust in the medical profession. Social media can blur the boundaries between a doctor's personal and professional lives and may change the nature of the relationship between a doctor and a patient. …"

The IOT Guidance on the two stages of analysis

19. In considering whether to make an interim order there are two stages of analysis: IOT Guidance, paragraph 33. The first stage involves determining "*whether it is necessary to impose an interim order to protect the public and or desirable to maintain public confidence and uphold proper standards of behaviour*". If the IOT decides to impose an interim order, then it moves to the second stage of the analysis which involves considering whether to impose *interim conditions* on the doctor's registration and, if it considers an interim order for conditions inappropriate, whether to impose an *interim suspension* order.

20. The IOT Guidance addresses the approach to determining whether an interim conditions or interim suspension order is appropriate as follows:

> "**Interim conditions or interim suspension?**
>
> …
>
> 34 In deciding the appropriate action, the Tribunal must very carefully consider the issue of proportionality in weighing the significance of any risk to patient and public safety or public confidence, for example in no suspending the doctor against the damage to him by preventing him from practising. [Sandler 2010].
>
> 35 Under s41A(1) Medical Act 1983 the suspension of a doctor on 'public protection' grounds can only be done if it is necessary but there is no such qualification on suspension where it is desirable in the 'public interest' to maintain public confidence. [Sandler 2010].
>
> 36 When considering the imposition of conditions the IOT must ensure that any conditions imposed are workable, enforceable and will protect the public, the wider public interest or the doctor's own interests. Conditions should normally follow the format set out in the Interim Conditions bank.
>
> 37 The following factors may also be relevant:
>
> a Whether the practitioner has complied with any undertaking given to the GMC or conditions previously imposed under GMC fitness to practise procedures.
>
> b The practitioner's history with the GMC (if any).
>
> **Sexual misconduct**

> 38 Where allegations involve sexual misconduct, there may be a significant risk to patient safety and public confidence in the profession if decisions at the interim stage are not seen to reflect the seriousness of the individual case.
>
> …
>
> **Public confidence**
>
> 40 The public has a right to know about a doctor's fitness to practise history to enable them to make an informed choice about whether to seek treatment. To balance this with fairness to the doctor, allegations leading to the imposition of interim conditions are not published or disclosed to general enquirers. It is therefore the responsibility of the IOT to consider whether, if allegations are later proved, it will damage public confidence to learn the doctor continued working with patients while the matter was investigated.
>
> 41 With this in mind, the presence of one or more of the following factors are a strong indicator that conditions may not be adequate to maintain public confidence in the profession or the medical regulator.
>
> a Information that a doctor has been charged by police in connection to serious offences such as rape or attempted rape, sexual assault or attempted sexual assault or sexual abuse of children.
>
> b Allegations of a pattern of sexually inappropriate conduct towards patients.
>
> 42 In exercising their discretion in relation to the particular facts of each case the IOT should also consider any immediate risk to patient safety [Yeong 2009]. However, there are circumstances in which it is necessary to take action to protect public confidence even where there is no immediate risk to patients." (Emphasis added.)

The interim conditions bank

21. If an interim conditions order is made, the conditions imposed should ordinarily be taken from the 'Interim Conditions bank': IOT Guidance, para 36. The standard interim conditions for all doctors provide:

> "**IC1 Area: Notifying the GMC within seven days**
>
> You must personally ensure that the GMC is notified of the following information within seven calendar days of the date these conditions become effective:
>
> a of the details of your current post, including:

i your job title

ii your job location

iii your responsible officer (or their nominated deputy).

b the contact details for your employer and any contracting body, including your direct line manager

c of any organisation where you have practising privileges and/or admitting rights

d of any training programme you are in

e [for GPs only: of the organisation on whose medical performers list you are included]

f [of the contact details of any locum agency or out-of-hours service you are registered with].

IC2 Area: Notifying the GMC appropriately in future

You must personally ensure the GMC is notified:

a of any post you accept, before starting it

b that all relevant people have been notified of your conditions, in accordance with condition [insert sequence number of IC5]

c if any formal disciplinary proceedings against you are started by your employer and/or contracting body, within seven calendar days of being formally notified of such proceedings

d if any of your posts, practising privileges or admitting rights have been suspended or terminated by your employer before the agreed date within seven calendar days of being notified of the termination

e if you apply for a post outside the UK.

IC3 Area: Exchanging information

You must allow the GMC to exchange information with your employee and/or any contracting body for which you provide medical services.

IC5 Area: Informing others

You must personally ensure that the following persons are notified of the conditions listed at 1 to [insert number of last public condition]:

a you responsible officer (or their nominated deputy)

> b the responsible officer of the following organisations
>
> i your place(s) of work and any prospective place of work (at the time of application)
>
> ii all your contracting bodies and any prospective contracting body (prior to entering a contract)
>
> iii any organisation where you have, or have applied for, practising privileges and/or admitting rights (at the time of application)
>
> iv any locum agency or out-of-hours service you are registered with
>
> v if any organisation listed at (i to iv) does not have a responsible officer, you must notify the person with responsibility for overall clinical governance within the organisation. If you are unable to identify this person, you must contact the GMC for advice before working for that organisation.
>
> c [for GPs only: the responsible officer for the medical performers list on which you are included or seeking inclusion (at the time of application)]
>
> d [for F1 doctors only: the Director of your foundational school and the Dean of your medical school]
>
> e the approval lead of your regional Section 12 approval tribunal (if applicable) – or Scottish equivalent
>
> f your immediate line manager and senior clinician (where there is one) at your place of work, at least 24 hours before starting work (for current and new posts, including locum posts)."

22. A doctor who is subject to these conditions is subject to closer scrutiny and monitoring than would be the case for a doctor who is permitted to practise without restriction.

23. In addition to the standard interim conditions for all doctors, the bank includes other standard interim conditions applicable in certain cases (e.g. where there is a health issue), as well as a range of discretionary interim conditions, including restrictions on practice.

The principle of proportionality

24. The principle of proportionality is applicable at two stages: first, when the IOT determines whether an interim order should be imposed, and if so whether it should be a conditions or a suspension order; and second, when determining the length of any interim order.

25. In *Houshian v GMC* [2012] EWHC 3458 (QB) King J addressed the application of the principle of proportionality at [13]:

> "The importance of the principle of proportionality in determining whether an interim order should be made pending the resolution of as yet unproven allegations faced by the practitioner, cannot be overstated. A suspension has potentially three very important consequences for a practitioner. First there is the impact upon the person's right to earn a living: in this case the Applicant's pre-suspension salary was in the region of £150,000. Secondly, there is the obvious detriment to him in terms of his reputation. Thirdly it deprives the practitioner of showing that during the relevant period he has conducted himself well and competently and '*so as it were enhanced his prospects in front of the panel undertaking a final hearing*' (per Davis J, in Sheikh at paragraph 18). I note that in Sandler Nicol J. agreed that '*the Panel must consider very carefully the proportionality of their measure (weighing the significance of any harm to the public interest in not suspending the doctor against the damage to him by preventing him from practising)*'."

26. Davis J observed in *Sheikh* at [16] that in the context of imposing an interim suspension order on the basis that it is in the public interest:

> "the bar is set high; and I think that, in the ordinary case at least, necessity is an appropriate yardstick. That is so because of reasons of proportionality. It is a very serious thing indeed for a dentist or a doctor to be suspended. It is serious in many cases just because of the impact on that person's right to earn a living. It is serious in all cases because of the detriment to him in reputational terms. Accordingly, it is in my view, likely to be a relatively rare case where a suspension order will be made on an interim basis on the ground that it is in the public interest."

The length of the interim order

27. As the terms of s.41A(1) make clear, the maximum period for which an interim order (whether a conditions or suspension order) may be imposed by the IOT is 18 months. The IOT Guidance states:

> "**Period of order**
>
> 47 Where it imposes an interim order an IOT must specify the length of the order. The maximum period for which an initial order may be imposed is 18 months. It is important to bear in mind that if the IOT wishes to extend an order beyond the period initially set, the GMC will need to apply to the relevant court to do so.
>
> 48 In considering the period for which an order should be imposed an IOT should bear in mind the time that is likely to be

> needed before the matter is resolved (for example, the time needed to complete any investigation into allegations regarding the doctor's fitness to practise, including obtaining assessments of the doctor's health and/or performance, and for the case to be listed for hearing by a MPT). The IOT should also bear in mind that there is provision enabling it, or a MPT, to revoke, vary or replace an interim order on review…"

28. In *Harry* Burnett J observed at [18]:

> "It should not be overlooked that Parliament has provided that 18 months is the maximum period of suspension that the Panel can impose. There will be many cases in which suspension is proportionate for a short period but not for as long as 18 months, given the very serious consequences it has upon the doctor concerned. 18 months should not become a default position."

The requirement to give reasons

29. Rule 27(4)(g) of the General Medical Council (Fitness to Practise) Rules 2004 (as amended) provides that at "*an interim orders hearing - … (g) the Interim Orders Tribunal shall announce its decision, and shall give its reasons for that decision*". Rule 37 provides that the IOT "*must … record in writing their decision and the reasons for their decision*".

30. The approach to giving reasons is addressed in the IOT Guidance at paragraphs 51 to 52:

> "**Reasons for decisions**
>
> 51 Rule 27(4)(g) of the Rules makes clear that when announcing its decision the IOT "**shall** give its reasons for that decision" [emphasis added]. An IOT must therefore ensure that reasons are given for any decision taken, including decisions not to impose an order. The courts do not expect an IOT to give long detailed reasons but the reasons given must be clear and explain how the decisions were reached, including identifying the interest(s) for which the order is considered necessary.
>
> 52 Although IOT decisions should be fairly concise, they must include the following information with specific reference to the distinct features and particular facts of each individual case.
>
> a The risk to patients should be clearly identified to support the proportionality of any action it was necessary to take.
>
> b The risk to public confidence in the profession if the doctor continued working without restriction on their registration and the allegations are later proved, to support the proportionality of any interim action taken.

> c Where an order is made primarily because it is desirable in the public interest to uphold public confidence and there are no concerns about clinical practice specific reasons should be given for why this is appropriate.
>
> d Reasons for the initial period of time for which an interim order is imposed.
>
> e Where no order is imposed, clear reasons must be given."

31. In *Madan v GMC* [2001] EWHC Admin 577 ('*Madan (2)*'), Newman J, considering the adequacy of the reasons given in that case, said at [64]:

> "An essential point which, in my judgment, emerges from the cases is that adequate reasons will inform the recipient of the basis for the decision. A reason expressed as a conclusion will frequently not disclose the underlying basis for the decision. It follows that the applicant in this case, who had advanced a specific submission … to the effect that the public interest would be adequately protected and met by a conditional registration order as opposed to a suspension order, was entitled to expect illumination as to why that particular argument had been rejected."

32. In *Abdullah v General Medical Council* [2012] EWHC 2506 (Admin) Lindblom J observed at [102]:

> "… the GMC's guidance discourages the giving of "long detailed reasons". What the IOP had to do – no more and no less – was to explain why their decision was the one they had announced. In most cases, probably in every case, this can be done briefly. The IOP were exercising a statutory power framed in simple terms. Three interests are embraced in that provision: first, "the protection of members of the public", second, "the public interest", and third, "the interests of a fully registered person". The IOP had to exercise their judgment within those statutory parameters. And it is in this context that the adequacy of their reasons must be assessed. The parties knew what the contentious issues had been. They could expect to be told how those issues had been resolved and why the decision went the way it did. The losing side could expect to learn why it had lost. But the IOP did not have to provide an elaborate explanation of their decision. Reasons were required, but not reasons for reasons."

33. Any inadequacy in the IOT's reasons would not, of itself, provide a ground for terminating an interim order but if the reasoning is inadequate or opaque the weight to be attached to the professional opinion of the IOT will be diminished: *Harry* at [2]; *Hussain v GMC* [2012] EWHC 2991 (Admin), HHJ Pelling QC at [12].

The approach to an application under s.41A(10)

34. The application to this court challenging the interim suspension order is made pursuant to s.41A(10) which provides:

> "Where an order has effect under any provision of this section, the relevant court may –
>
> (a) in the case of an interim suspension order, terminate the suspension;
>
> (b) in the case of an order for interim conditional registration, revoke or vary any condition imposed by the order;
>
> (c) in either case, substitute for the period specified in the order (or in the order extending it) some other period which could have been specified in the order when it was made (or in the order extending it),
>
> and the decision of the relevant court under any application under this subsection shall be final."

35. There have been many cases on the exercise of this jurisdiction which have been helpfully drawn to my attention by both parties. It is unnecessary to refer to all of them. The powers conferred by s.41A(10) were described by Arden LJ in *GMC v Hiew* [2007] EWCA Civ 369, [2007] 1 WLR 2007 at [27] as "*original*", albeit in this context, unlike when considering an application under s.41A(7), there is an extant order of the IOT which the court would only terminate or shorten if it thought that order was wrong; the court is not confined to exercising a judicial review type jurisdiction: see *Sandler* at [12].

36. As Lindblom J observed in *Abdullah* at [87]:

> "The scope of the court's jurisdiction under section 41A(10) of the 1983 Act is well established. The relevant jurisprudence is clear. In a case such as this the court is not constrained by the principles of public law that govern a claim for judicial review. I must decide whether the IOP were right to suspend the claimant while the allegations he faces are investigated. I must judge whether their decision was, and is, both justified and proportionate. Suspension will have been justified it was necessary as a means of protecting members of the public, or if it was otherwise in the public interest, or if it was in the interests of the claimant himself as a registered person. I must look at the IOP's determination and consider what weight I should give to it, remembering that Parliament has entrusted to them the power in the first instance to make decisions on a doctor's freedom to practise while his or her fitness to do so is investigated, that they bring to bear on this task their own experience and expertise and their own knowledge of the public's expectations of the medical profession, and that it is not their responsibility – or the court's – to make findings of fact or to resolve factual disputes."

37. In deciding whether the IOT's decision is wrong, I must consider all the relevant evidence and arguments, not limited to that which was deployed before the IOT: *Sandler* at [12], *GMC v Anyuam-Osigwe* [2012] EWHC 3884 (Admin) at [13], [15]. The court will always be mindful that it is being asked to overturn a decision of a specialist disciplinary tribunal, but the weight to be given to the opinion of the tribunal is a matter for the court to determine, as it thinks fit in the circumstances of the individual case.

38. In a case such as this, where the IOT has imposed an 18 month interim suspension order, the court's powers are limited to upholding, terminating or shortening the suspension. The court has no power to substitute an order for interim conditional registration.

D. The facts

39. The Applicant is a General Practitioner (GP). He qualified in 2004 and has practised for more than 15 years. He has not previously been the subject of any fitness to practise complaints or findings. The evidence includes a number of positive appraisals and testimonials. Until August 2021 he was working as a GP at a practice where he had been a partner since 2014 ("the GP practice").

40. The Applicant had an extra-marital affair with 'ER' for a period of over three years. The affair came to an end on 17 August 2021 when ER's husband, 'TR', caught ER messaging the Applicant and she then disclosed the affair to her husband. The fitness to practise proceedings against the Applicant arose out of complaints made to the GMC the same day by TR and two days later by TR's mother, 'AR'. Subsequent emails have added to the matters that are the subject of investigation.

41. The GMC states in its skeleton argument that the investigation concerns a number of serious allegations including: (i) "*having a sexual relationship with a patient over many years*"; (ii) "*treating ER's husband, TR, as one of his patients during the affair (including for depression)*"; (iii) "*undertaking sexual activity in a clinical setting (both alone and with ER)*" and "*whilst on call*"; (iv) "*filmed and uploaded to the internet videos of his sexual activity with ER*"; and (v) "*sought to dissuade ER from seeking counselling and sought to persuade her to minimise the extent of their relationship*".

42. In relation to the allegation of having a sexual relationship with a patient, ER, the following matters are not in dispute:

    i) The Applicant first met ER in about 2013 outside the GP practice, when their children attended ballet lessons together.

    ii) ER worked in the pharmacy adjoining the GP practice. She was described by TR in his complaint, and by the GMC's representative before the IOT, as a "*colleague*" of the Applicant's (albeit both also described her as a "*patient*"). In formal terms, it is perhaps not accurate to describe her as the Applicant's colleague, but as Ms Barnfather put it, she was a "*quasi-colleague*".

    iii) The Applicant and ER began their affair in 2018 and it ended in August 2021. There is no suggestion that this was other than a consensual relationship between

two adults. There is no allegation (in relation to any of the matters being investigated) of any criminal misconduct on the part of the Applicant.

iv) ER was registered as a patient with the GP practice. The GP practice operated a general rather than a personal list system i.e. patients registered with the practice were not allocated to a specific GP. During their affair, ER had one consultation with the Applicant, on 15 April 2019, for "*an ear related matter*". There are no other consultations with the Applicant "*recorded after this or for 3 years prior to this*". The Applicant acknowledges he should not have seen ER for this consultation.

43. ER has not made a complaint to the GMC. The GMC has been in communication with her and is seeking a witness statement from her, but none has been provided as yet. However, there is a message from ER dated 29 September 2021 ("ER's message"), which is said to have been sent by her to the GP practice and subsequently provided by TR to the GMC, in which she states:

> "I do feel like I was used by Dr [MXM] to clearly fulfil his fetish's and needs. I don't want this happening to anyone again[.] … The affair spanned over 3 years but on reflection he only wanted me for one thing. … I did see him as a patient for which he treated me for an ear infection."

44. The Applicant does not accept that the relationship was as depicted in ER's message, which was written in circumstances where ER was seeking to be able to see her children. In particular, Ms Barnfather notes that the videos and images referred to were on ER's devices, the other items (such as sex toys) referred to by TR were in ER's possession, and the Applicant's position is that she was the more experienced of the two and the instigator of the sexual practices engaged in.

45. In relation to treating TR, the following facts are not disputed:

i) While having an affair with ER, the Applicant conducted one telephone consultation with TR, on 11 June 2021. The Applicant acknowledges he should not have undertaken this consultation with TR.

ii) TR was suffering with depression and he had previously been prescribed (by another GP) anti-depressant medication. During the consultation on 11 June 2021, the Applicant prescribed an increased dose of the same medication.

iii) The other partners of the GP practice subsequently reviewed the Applicant's "*note entry*" in relation to this consultation with TR and they consider the increased prescription was "*clinically safe and justifiable*".

iv) TR has referred to the Applicant putting him on anti-depressants while he was "*paranoid about my wife having an affair*"; his hunch that she was having an affair had "*caused great anxiety and paranoia*". TR has not suggested that he referred to this during the consultation with the Applicant and the transcript of the telephone consultation shows (I am told) that he did not. TR describes the anti-depressant medication as having numbed his emotions and killed his libido.

He states that in undertaking this consultation the Applicant "*has had zero respect for me – his patient*".

46. In relation to the allegation of undertaking sexual activity in a clinical setting:

i) TR has provided (from one of two mobile phones said to have been owned by ER) a short video clip of the Applicant engaging in sexual activity on his own on surgery premises.

ii) On 3 September 2021, during a meeting with partners at the GP practice, the Applicant denied engaging in sexual activity on surgery premises. Later the same day, when the video clip of him engaging (alone) in sexual activity on surgery premises was put to him during a telephone call, the Applicant admitted it. He also then admitted that at the surgery "*he did have sex with ER, and he is not sure if it was videoed, only once*". He said any such videos were private, not online.

iii) The *allegation* of sexual activity with ER on surgery premises which is being investigated extends to more occasions than those that were admitted by the Applicant on 3 September 2021. It has not been suggested that there is any video evidence of such activity on surgery premises. However, in ER's message she states that "*on numerous occasions*" the Applicant invited her to engage in sexual activity between 12.30 and 1.30 on a Friday on surgery premises. Her message states that he filmed "*some of those as well*".

iv) ER's message also states that the Applicant would meet her "*in laybys whilst on call*".

47. In relation to the allegation that the Applicant filmed and uploaded to the internet videos of him engaging in sexual activity with ER:

i) TR has stated that there are "*hundreds of images and videos*" on the two phones (belonging to ER) that he found. AR has described these as showing "*unnatural and abhorrent sexual practices between [ER] and [MXM], including a perverted fetish for including faeces and urine in sexual acts between the two*". A partner of the GP practice has referred to the graphic sexual content of a video he reviewed involving the Applicant and ER, as well as "*still images of a sexual act with the wording "Scatwhore and BBear'*"".

ii) TR has stated "*they were posting videos online and … had a huge reddit following*". A partner of the GP practice refers to "2 soundbites of Dr [MXM] stating, "*have you seen Reddit this morning, its [sic] gone mental" and "we need to be making more of these videos'*"". ER's message states:

> "Numerous videos and filming suggestions where [sic] made by him. "You know how to make me happy, film the most depraved stuff you can think off [sic]" Because of these requests I am unable to see my children … He opened online channels where he would post videos of us. He said it made him closer to me."

iii) TR has reported that ER told him they were "*also selling videos on anyvids and only fans*" (emphasis added) and that the posting online was "*all under his control and he was making money from it also into his bank account*".

iv) The Applicant does not deny that some videos or images of himself and ER engaging in sexual activity were posted, but he firmly denies there has been any uploading of images for profit and has offered sight of his bank accounts. There is no allegation within ER's message that the Applicant *made money* from posting videos online.

48. The allegation that the Applicant "*sought to dissuade ER from seeking counselling*" is denied by the Applicant. It is based on ER's message in which she said:

> "I went to seek councelling [sic] 6 months back as I couldn't cope anymore. [MXM] was concerned massively at me doing this and put me off. His main concern was that this was never mentioned, never got out. He wanted to protect his job, wife and children. He even wanted me to lie after it broke out[.] To say it only happened for months, not to mention anything else, keep quiet."

The Applicant was described as the mental health lead partner for the GP practice. TR has said that ER had "*various mental health issues over the years*". The Applicant's position is that he is unaware of her having such issues and, so far, no other evidence to support TR's statement, including from the GP practice, has been put forward. The part of ER's message quoted above also forms the basis for the allegation that the Applicant "*sought to persuade her to minimise the extent of their relationship*".

49. On the complaints being made, the Applicant immediately took a break from practice. He is no longer a member of the GP practice. Of his own volition, he began weekly counselling and undertook the Maintaining Professional Boundaries course. As a consequence of the interim suspension order, he has been unable to look for any work as a GP for nearly five months.

50. At present, the GMC is still investigating. No fitness to practise charges have yet been laid.

E. The IOT's determination

51. The IOT set out the nature of the complaints made by TR and AR in some detail, as well as ER's message. They noted that Counsel for the GMC, Ms Duckworth, "*submitted that an interim order of conditions is necessary and proportionate in order to protect the public and is otherwise in the public interest*" (emphasis added). The IOT noted that Ms Barnfather submitted that "*these are unique circumstances and something that Dr [MXM] is at no risk of ever repeating*", and that "*the allegations do not involve any concerns regarding Dr [MXM]'s clinical competence and his ability to provide safe care to his patients*". They noted that she submitted that whilst it was not denied that it was inappropriate for him to treat ER, "*the fact that he was a doctor and she was a patient was incidental and was not contributory to the relationship*".

52. The IOT stated their decision in paragraphs 28 to 29:

> "28. In accordance with Section 41A of the Medical Act 1983, as amended, the Tribunal has determined, based on the information before it today, that it is necessary to impose an interim order. It has determined to impose an interim order of suspension for a period of 18 months.
>
> 29. The Tribunal has determined that, based on the information before it today, there are concerns regarding Dr [MXM]'s fitness to practise which may pose a real risk to members of the public and which may adversely affect the public interest. After balancing Dr [MXM]'s interests and the interests of the public, the Tribunal has decided that an interim order is necessary to guard against such a risk."

53. It is common ground that the key paragraphs of the IOT's decision explaining their reasons for imposing an interim suspension order are paragraphs 30 and 31:

> "30. In reaching its decision, the Tribunal reminded itself that it is not its function to make findings of fact, but to assess potential risk based on the information before it. It was mindful of the concerns raised by Mr TR and Mrs AR regarding Dr [MXM]'s conduct whilst working as a GP. The Tribunal notes the concerns are serious and wide-ranging including that Dr [MXM] treated for depression, the husband of a patient he was having an affair with which the Tribunal considers potentially calls into question Dr [MXM]'s judgment in a clinical setting. The Tribunal also notes that Dr [MXM] is alleged to have engaged in sexual activities at the practice and in laybys whilst he was on call, some of which were videoed and posted online. The Tribunal was mindful of the allegations from Mr ER about Dr [MXM] interfering with her decision to seek help for her own mental health issues and also the allegation that she was encouraged to minimise the extent of the relationship. The Tribunal considers that if later found proved, the serious nature of the allegations could indicate a real risk to patient safety and the public interest. The Tribunal also noted the impact of the allegations on the Practice and identified a consequent risk to public confidence from a GP who had allegedly demonstrated such serious poor judgement over a prolonged period of time. It considers that a reasonable and well-informed member of the public would be shocked and concerned to learn that Dr [MXM] had been permitted to practise unrestricted whilst these concerns remain under investigation by the GMC. In all the circumstances, the Tribunal is satisfied that the statutory test for the imposition of an interim order is met in this case.
>
> 31. Whilst the Tribunal notes that the Order has removed Dr [MXM]'s ability to practise medicine, it is satisfied that the order imposed is the appropriate and proportionate response. After hearing detailed submissions from both parties, the Tribunal did not consider that conditions could address the risks identified, in

> particular the risk to the public, confidence in the profession and to the GMC as Dr [MXM]'s regulator. The Tribunal has therefore determined that suspension is both necessary and proportionate to manage the risks identified."

54. With respect to the period of suspension, the IOT stated:

> "32. In deciding on a period of 18 months, the Tribunal accepted the submissions of Ms Duckworth as to the likely timescales of the GMC investigation and the delays caused by the Covid-19 pandemic."

F. The parties' submissions

55. First, Ms Barnfather submits that the IOT failed to appropriately differentiate between those aspects of the allegations which may give rise to fitness to practise concerns falling within the GMC's remit as his regulator, and those which are intimate and personal and do not impinge on a doctor's fitness to practise.

56. The Applicant accepts that the following allegations are legitimate matters for investigation by his regulator: (i) treating ER for an ear infection while in a relationship with her; (ii) treating TR for depression while having an affair with his wife, (iii) engaging in and filming sexual activity on surgery premises.

57. The Applicant also does not dispute that (iv) posting videos of sexual activity online would be legitimate matters of concern for the regulator if the videos were of such activity *on clinical premises*, or of such activity *with a patient*, or if the doctor was *earning money* by posting such videos would in principle be legitimate matters of concern for his regulator. Nor does he dispute that (v) interfering with a patient's decision to seek help with mental health issues, for the doctor's own benefit would be such a matter. However, Ms Barnfather submits there is no allegation or evidence or that any of the videos or images that were posted online were taken on surgery premises; it is not fair or reasonable to categorise the Applicant's entire relationship with ER as a doctor-patient relationship, having regard to the facts referred to in paragraph 42 above; and the hearsay statement by TR reporting what ER is said to have said about him receiving payments for posting videos online (an allegation he denies) is very weak evidence which should be given no weight.

58. The matters which Ms Barnfather submits the IOT ought to have recognised were not properly the concern of the regulator are: the fact of an extra-marital affair conducted between two consenting adults; the nature of any sexual activities that they chose to engage in (in circumstances where there is no allegation of any criminal conduct); engaging in sexual activity while on call (in circumstances where there is no allegation that the Applicant's ability to respond in the event of a call was compromised, and being on call is not akin to being on surgery premises); private filming or posting online of their sexual activity (subject to the exceptions acknowledged in the paragraph above).

59. The Applicant submits the IOT failed to differentiate even though they were addressed by both parties on the distinction between the private and public aspects of the allegations. In opening the key paragraph giving their reasons (para 30), the IOT expressed themselves as being "*mindful*" of the concerns raised by TR and AR which

concerns, as set out by the IOT in their determination, included references to the fact that it was an "*illicit",* extra-marital affair and to the nature of the sexual activities in which the Applicant and ER are alleged to have engaged. In addition, Ms Barnfather submits the obvious inference from the references in the same paragraph to "*serious poor judgement over a prolonged period of time*" and the suggestion a reasonable and well-informed member of the public would be "*shocked*", is that the IOT failed to recognise that the matters referred to in the paragraph above were not material.

60. Ms Barnfather relies on *Beckwith v Solicitors Regulation Authority* [2020] EWHC 3231 (Admin) at [50] in which Swift J observed:

> "It is one thing to accept that any person who exercises a profession may need, for the purposes of the proper regulation of that profession in the public interest, to permit some scrutiny of his private affairs; to suggest that any or all aspects of that person's private life must be subject to regulatory scrutiny is something of an entirely different order."

61. She also relies on HHJ Kaye QC's observations in *Bradshaw v GMC* [2010] EWHC 1296 (Admin), a case in which serious allegations of dishonesty and fabrication of evidence resulted in the suspension order being upheld, at [24] to [25]:

> "24. Ordinarily I might agree with Mr Hugh-Jones that where allegations arise out of an alleged personal intimate relationship without more and absent any suggestion or criticism of clinical performance or abuse of patient care then interim suspension on those grounds alone might be viewed as disproportionate. These are matters much more likely to impinge on the personal as opposed to the private sphere. Moreover it must be remembered that in this case the Fitness to Practise Panel has not yet adjudicated on the allegations against Dr Bradshaw. There is, therefore, no question of the suspension being used in this case for example to set an example, or to deter or encourage others.
>
> 25. By the same token there is considerable force in Mr Hugh-Jones's analysis of the previous decisions of this court to the effect that to make an interim order for suspension on public interest grounds in cases of non-clinical allegations one would ordinarily expect something that might well impinge more directly on members of the public such as murder, rape or abuse of children. …"

62. Ms Barnfather submits the IOT failed to recognise the limitations of regulatory scrutiny and failed to recognise a doctor's article 8 rights. Members of the medical profession are not prohibited by virtue of their profession from conducting extra-marital affairs nor does public confidence in the profession demand of them that they engage only in more conventional sexual practices.

63. Secondly, the Applicant contends the IOT failed to recognise that the allegations do not concern his clinical performance and erred in assessing the allegations could indicate a real risk to patient safety. The IOT identified that treating TR called into question the

Applicant's judgment in a clinical setting, but failed to recognise that the failure was limited to not ensuring TR was seen by another GP. Ms Barnfather submits the other allegations do not provide any basis for inferring that patient safety was compromised or would be at risk.

64. In relation to the reference by the IOT to an allegation of interfering with ER's decision to seek help for her own mental health issues, Ms Barnfather submits this was unwarranted speculation based on a line in ER's message where she said that he "*put me off*", without any indication of what he is alleged to have said or done that might have deterred ER from seeking counselling. She submits the IOT should have scrutinised this vague and unproven allegation with care, paying attention to the (poor) quality of the evidence.

65. Further, the IOT failed to consider whether the risk of damage to public confidence was "serious". Ms Barnfather acknowledges that sexual activity on surgery premises may give rise to some limited public confidence concern, but submits there was no adequate basis to conclusion there exists a risk of *serious* damage to the profession if the Applicant were to continue to practise pending the resolution of these fitness to practise proceedings. The allegations are not at the most serious end of the spectrum, nor are they wide-ranging. In particular, they do not involve any allegation of exploitation of a doctor's position of trust.

66. Thirdly, Ms Barnfather submits the order is disproportionate, both in nature and duration, and the IOT failed to appropriately consider the issue of proportionality. Having undertaken the first part of the analysis in paragraph 30, and reached the conclusion that the Applicant should not be permitted to practise "*unrestricted*" in the interim, there was then no consideration of proportionality as between an order for conditions or suspension, nor in respect of the period of suspension. Beyond noting that the order removed the Applicant's ability to practise medicine, the IOT did not consider the Applicant's interests in assessing the proportionality of an 18 month interim suspension order.

67. In respect of duration, Ms Barnfather submits that this is a relatively simple case with very few witnesses. The instruction of an expert to review one entry in respect of TR's treatment cannot add any significant time to the resolution of these proceedings. Any anticipated delays going forward as a result of Covid-19 were not clearly identified. Indeed, although the IOT referred to Ms Duckworth's submissions regarding delays caused by the pandemic, it does not appear from the transcript of the hearing that she made any such submissions, at least orally.

68. Fourthly, the Applicant challenges the adequacy of the IOT's reasons. This is not a standalone ground, but Ms Barnfather relies on it in support of the submission that weight should not be given to the IOT's opinion. Specifically, the IOT failed to address the fact that the relationship between the Applicant and ER existed independently of the doctor/patient connection, did not involve an abuse of position of trust, and was between two consenting adults.

69. Ms Barnfather submits that in circumstances where the GMC sought an order for conditions, not suspension, the failure to explain why the IOT considered that it was necessary and proportionate to impose the most stringent order available to them is striking. It was not fair to do so without giving any indication that was what they were

considering. Ms Barnfather contends that it would have made a difference to how she presented the matter if she had known they were considering a suspension order, in particular she would have taken them to case-law and she might have presented further evidence, such as the Applicant's bank statements, to disprove the allegation of earning from the posting of pornographic videos.

70. Ms Emmerson submits that the IOT have particular expertise in determining what is necessary, in this context, to protect the public and maintain public confidence in doctors and their regulator. In the absence of special features, their judgement should be afforded substantial weight. In this case, they conducted the hearing fairly, considered all the relevant evidence and gave an immediate decision with relatively succinct reasons, meeting the standard required.

71. In relation to the fairness of the proceedings, Ms Emmerson referred to *AB* in which, as in this case, the IOT had imposed an 18 month interim suspension order in circumstances where the GMC had sought an interim order imposing conditions. Bennathan J dismissed the doctor's application. He observed at [28]:

> "As touched upon during the hearing before me, in my view it might have been better for the IOT to warn Counsel for the Applicant that they were considering a suspension and allow her to make any further submissions in opposition. That said, the Chair's opening remarks specified that possibility and the obvious submission that could have been made, about the financial loss to the Applicant, was obvious in any event. It does not seem to me at all likely that the outcome would have been any different if the extra warning had been given."

72. In *AB* the Chair foreshadowed the possibility of making an interim suspension order by remarking at the outset:

> "If we determine that an interim order is necessary, or otherwise required, we will consider first whether an interim order of conditions would adequately manage that risk. It would only be if we thought that an interim order of conditions would not adequately manage that risk we may impose an interim order of suspension. In doing so, we'll act proportionately; that's to say we will have regard to your interests as well as the public interest."

73. As Ms Emmerson acknowledges, no equivalent remarks were made in this case. Nonetheless, Ms Emmerson submits that it is unlikely to have made any difference if the IOT had expressly indicated they were considering imposing an order of suspension. They were addressed by Ms Barnfather regarding the Applicant's financial circumstances, the fact that his four children and wife were financially dependent on him, and that he had a mortgage, car loan and other loans to repay.

74. Ground 1 is, Ms Emmerson submits, factually misconceived because the IOT did not in fact rely on either the unusual sexual practices of the Applicant or the fact of an extra-marital affair *per se* as the basis for making the order. In stating that they were mindful of the concerns raised by TR and AR the IOT expressly qualified this with the words

"*regarding Dr [MXM]'s conduct whilst working as a GP*" (emphasis added). The allegations the IOT expressly identified in paragraph 30 of their determination as indicating a real risk to patient safety and the public interest were (i) treating TR for depression while having an affair with his wife, (ii) engaging in sexual activity at the practice, some of which was videoed and posted online and (iii) interfering with ER's decision to seek help for her own mental health issues. There is no basis for inferring that their decision was based on those aspects of TR and AR's complaints that address matters that are properly viewed as private.

75. Ms Emmerson submits the reference to demonstrating poor judgement "*over a prolonged period of time*" can fairly be understood to be a reference to the lengthy sexual relationship with a patient. The IOT made no error in characterising ER as the Applicant's patient in circumstances where she was registered as a patient with the GP practice where he worked and he saw her for a consultation during their affair. The significance for the regulator of the allegations of videoing, posting and taking part in sexual activity while on call is that this was sexual activity with a patient. It would raise concerns for the GMC, and risks for patients, if as Ms Barnfather contends ER should only be treated as being his patient on the day of the consultation. Ms Emmerson submits that there was no need for the IOT to address the fact that the Applicant and ER initially met outside the context of a doctor-patient relationship as this does not mitigate matters in any material way.

76. The Applicant's contention that the allegations are "*removed from the practice of medicine*" is misplaced and reveals a lack of insight on the part of the Applicant in relation to the nature of the alleged misconduct. *Bradshaw* and *Beckwith* both concerned relationships with colleagues. Whereas the allegations here are of (i) a lengthy sexual relationship with a patient, something that is expressly prohibited by Good medical practice, para 53 and the Maintaining professional boundaries guidance; (ii) sexual activity in a clinical setting, namely a GP surgery, including (on occasions) with a patient; (iii) the videoing and uploading of sexual activity with a patient; (iv) an attempt to dissuade a patient from seeking professional help for fear of the affair being exposed; and (v) treatment of TR, the husband of a person with whom the Applicant was having an affair.

77. Ms Emmerson submits the assessment of the risk posed to public safety and the public interest are quintessentially matters of judgement for the IOT in light of their experience and expertise. The court should exercise considerable caution before determining their judgement on such matters is wrong. Ms Emmerson submits that each of the three matters identified by the IOT in paragraph 30 (see paragraph 74 above) raises a question of clinical judgement going to patient safety.

78. As regards damage to public confidence, once the allegations are properly identified, Ms Emmerson submits it is clear that the IOT did not err in concluding that the allegations, whether considered individually or cumulatively were sufficiently serious to lead to significant damage to public confidence in the profession and in the GMC if the Applicant was permitted to practice unrestricted.

79. In relation to the allegation of deterring ER from seeking counselling, Ms Emmerson submits the IOT were entitled to have regard to the account submitted to the GP practice whilst the matters were being investigated. They did not treat it as an established fact; it is an allegation that is properly the subject of investigation.

80. As to the proportionality of an interim suspension order, first, Ms Emmerson relies on the Chair's opening remarks in which he said:

> "What we must do is look at the information presented to us, weigh that information and determine whether there may be an impairment of your fitness to practise such that it poses a real risk to either public safety, to the public interest or to your own interest. If the tribunal were to determine that that is the case it must go on then to determine whether it's necessary to impose an order in your case. Any order it considers must be proportionate having weighed the public interest and your interest."

81. It is, she submits, clear from the Chair's opening remarks that the IOT had well in mind the need for any order to be proportionate. Secondly, the IOT expressly referred in their determination at paragraph 22 to the financial pressures on the Applicant which had been identified by Ms Barnfather (and so did more than was required: see *AB* at [29]). Thirdly, the IOT expressly stated that although the order removed the Applicant's ability to practise medicine, they were satisfied it was an "appropriate and proportionate response".

82. Fourthly, the IOT's view that the risks they had identified could not be dealt with adequately by conditions was not wrong. Although the reasons they gave for that conclusion in paragraph 31 were succinct, the IOT were not required to give "*reasons for reasons*" (see paragraph 32 above). Ms Emmerson submits this conclusion is justified in circumstances where (i) there are no conditions which can be imposed on the Applicant which would restrict or prevent his contact with ER or other female patients outside of surgery hours or at surgery premises and (ii) given the Applicant's initial lack of openness and transparency with the GP partnership as to his sexual activity with ER, there is a legitimate basis for concern as to whether the Applicant could be relied upon to comply with conditions.

83. As regards the duration of the order, the IOT's conclusion was informed by the information provided by the GMC's representative as to the likely steps required as part of the investigation process, the likely timescales for formulating allegations and responding to them, and the likely time required to conclude the fitness to practise proceeding having regard to delays caused by the Covid-19 pandemic. The IOT's conclusion that 18 months was an appropriate period of time for the suspension order (which in any event is subject to regular review) is entirely appropriate.

G. Decision and analysis

84. In my judgement, the weight to be given to the IOT's decision in this case is limited. First, where allegations of sexual misconduct are raised, the court is well placed to assess what is needed to protect the public or maintain the reputation of the profession and is less dependent upon the expertise of the IOT than would be the case if the allegations concerned questions of clinical knowledge, skill or competence. Secondly, the reasoning of the IOT is very thin (a) at the second stage of the analysis (i.e. determining whether to impose a conditions order or suspension order); (b) in assessing the proportionality of imposing an interim suspension order; and (c) in assessing the proportionality of suspending the Applicant for 18 months on an interim basis.

85. Paragraph 31 of the IOT's determination does no more than state a conclusion that imposing conditions could not address the risks identified and that an interim suspension order is proportionate. I do not accept that in highlighting the lack of reasons for those conclusions the Applicant is seeking "*reasons for reasons*". What is lacking is reasons for those conclusions. In my judgement, the lack of reasons at the second stage of the analysis, and in respect of the proportionality of an interim suspension order, is particularly striking in circumstances where the GMC sought an interim order imposing conditions. It was not the GMC's position before the IOT that an interim suspension order was necessary, proportionate or the only order appropriate in this case; and the Applicant was given no forewarning that the IOT might take a different view.

86. In relation to duration, the reasons were also inadequate. The IOT accepted the GMC's submissions as to the likely timescale, but the proportionality of such a lengthy period of suspension had to be considered and was not. An 18 month period might have been proportionate if, as the GMC sought, the IOT had imposed an interim order imposing conditions. The IOT's decision that an interim suspension rather than an interim conditions order should be imposed had a profound effect on the proportionality of the timescale proposed. This is a relatively simple case. Greater urgency was clearly required if the Applicant was to be prohibited on an interim basis from practising his profession.

87. For the reasons I have given, I consider that ground 4 is well-founded. However, as Ms Barnfather acknowledges, success on the reasons challenge alone is not a basis for terminating or shortening the interim suspension order.

88. I have some sympathy with Ms Barnfather's submission that the way in which the complaint of AR, in particular, was detailed and then referenced in the key part of the reasoning gives rise to some concern as to whether irrelevant matters were taken into account. Nevertheless, although the IOT did not expressly differentiate those matters which are properly the subject of the regulatory proceedings and those that are not, ultimately, I am not persuaded that this application should succeed on ground 1. That is because, first, the three matters expressly identified by the IOT in paragraph 30 as giving rise to concerns (see paragraph 74 above) are properly to be regarded as matters raising fitness to practise concerns. And secondly, the IOT did not identify either the fact that Applicant engaged in an extra-marital affair or the nature of the sexual practices in which he and ER are alleged to have engaged as matters of concern.

89. However, I accept Ms Barnfather's submissions on grounds 2 and 3 that the IOT's evaluation of risk to patient safety and the public interest, and of the proportionality of the nature and duration of the order, was flawed.

90. A key aspect of the assessment involved considering the nature of the sexual misconduct alleged. While I accept Ms Emmerson's submission that the IOT were entitled to view ER as a patient, and consider the allegations in that context, it was incumbent upon them to consider the seriousness of the allegations and the likelihood of any further incident during the relevant period (see paragraph 14 above). I reject the GMC's contention that the fact that the Applicant's relationship with ER predated any professional connection, commenced independently of the Applicant's status as a doctor, and involved one consultation for an ear infection, is immaterial. On the contrary, it is highly material. It is significant that there is no allegation that the relationship arose or continued as a result of a breach of trust in the doctor-patient

relationship by the Applicant or that any of the factors identified in paragraph 30 or 41 of the IOT Guidance (see paragraphs 16 and 20 above) are engaged.

91. The relationship between the Applicant and ER ended in August 2021. In circumstances where the relationship did not arise in the context of a doctor-patient relationship, and there is no allegation of any pattern of sexualised behaviour towards patients, there is no real risk in the period prior to the determination of these fitness to practise proceedings, of the Applicant engaging in the type of behaviour towards a patient (or the partner of a patient) that is the subject of these proceedings.

92. I accept Ms Emmerson's submission that the allegations of treating both ER and TR, of engaging in sexual activity in a clinical setting, and of interfering with ER's decision to seek counselling are all matters of judgement in a clinical context. The latter allegation is one that, on the evidence before me, warrants limited weight given that the sole basis for it is a line in ER's message which leaves opaque what, if anything, the Applicant is alleged to have said or done to deter ER from seeking counselling, and whether putting her off is said to have been deliberate or inadvertent. On the other hand, in assessing the risk to patient safety if the Applicant's registration is not suspended during the relevant period, it is right to recognise that none of the allegations concern the Applicant's clinical knowledge, skill or care (save to the extent that clinical care includes treating a patient with respect, which it may be said the Applicant failed to accord to TR in treating him for depression while having an affair with his wife).

93. The allegations are serious and I do not consider that the IOT was wrong to take the view that the Applicant should not be permitted "*to practise unrestricted*" whilst these matters remain under investigation (i.e. without any interim order being imposed). However, on proper analysis, the risk in the relevant period is to public confidence in the profession or the regulator, rather than to patient safety. I do not consider that a fair minded member of the public appraised of the facts would be offended by the Applicant continuing to practise pending a full hearing fixed for resolution of the allegations at which he will have an opportunity to defend himself and his professional body will determine the appropriate sanction in respect of any fitness to practice allegations that may ultimately be found proved.

94. In the circumstances of this case, the risk is not such as to render it proportionate to impose an interim suspension order, still less for a period of 18 months, bearing in mind the grave effect of an interim suspension order on the Applicant's ability to earn a living, to support his family, and on his reputation and ability to demonstrate when any charges are determined that he can practise without incident. Accordingly, I will terminate the interim suspension order.

95. If I had the power to do so, I would have substituted an interim order imposing conditions. In particular, I consider that the standard conditions to which I have referred, providing as they do for the doctor to be subjected to greater monitoring and scrutiny than would otherwise be the case, are such as to address the risk to public confidence that I have identified. I do not have the power to impose conditions, but it is open to the GMC to apply for a new interim order.