Claim Form (CPR Part 8)

In the HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Claim no.

Fee Account no.

Help with Fees - Ref no. (if appli- H W F – – –

HIGH COURT OF JUSTICE
09 SEP 2021
LONDON
ADMINISTRATIVE COURT

Claimant

Dr. Samuel White

Defendant(s)

The General Medical Council

Does your claim include any issues under the Human Rights Act 1998? [X] Yes [ ] No

Details of claim (see also overleaf)

This is a Part 8 claim for a review of a decision by the Interim Appeals Tribunal of the General Medical Council, made on 17.8.2021, to impose conditions upon the medical practice of a doctor, pursuant to s 41A of the Medical Act 1983.

The grounds of the claim are set out in the attached Grounds of Claim and are supported by the evidence of the Claimant and the bundle of documents cited in his witness statement and (in large part) included in the Exhibit Bundle.

The remedy sought is the removal of all conditions.

Defendant's name and address

The General Medical Council
Regent's Place
350 Euston Road
London
NW1 3JN

	£
Court fee	528
Legal representative's costs	TBD
Issue date	

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When corresponding with the Court, please address forms or letters to the Manager and always quote the claim number.

Statement of Truth

I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

☐ **I believe** that the facts stated in these particulars of claim are true.

☒ **The Claimant believes** that the facts stated in these particulars of claim are true. **I am authorised** by the claimant to sign this statement.

Signature

Philip Hyland

☐ Claimant

☐ Litigation friend (where claimant is a child or a Protected Party)

☒ Claimant's legal representative (as defined by CPR 2.3(1))

Date

Day	Month	Year
07	09	2021

Full name

Philip Hyland

Name of claimant's legal representative's firm

PJH Law

If signing on behalf of firm or company give position or office held

Principal

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Claim no.

Details of claim (continued)

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Claimant's or claimant's legal representative's address to which documents should be sent if different from overleaf. If you are prepared to accept service by DX, fax or e-mail, please add details.

IN THE HIGH COURT OF JUSTICE Case No.:

QUEEN'S BENCH DIVISION

AND IN THE MATTER OF A PART 8 CLAIM PURSUANT TO SECTION 41A(10 OF THE MEDICAL ACT 1983, BEING AN APPLICATION FOR REVIEW OF A DECISION OF THE INTERIM ORDERS TRIBUNAL OF THE GENERAL MEDICAL COUNCIL

(IOT Case Numbers: C1-3117415358 and C1-3120224361)

B E T W E E N :

Dr. SAMUEL WHITE

Claimant/Applicant

-and-

THE GENERAL MEDICAL COUNCIL

Defendant/Respondent

GROUNDS OF THE CLAIM FOR A REVIEW AND SUBMISSIONS OF THE CLAIMANT

INTRODUCTION

1 This application concerns lengthy and severe restriction on a doctor's freedom of expression over perhaps the most pressing medical, social, political and economic issues of our time. The conditions are imposed in vague and unparticularised terms and restrict his speech even over matters outside medicine science more generally, rendering him unable to take part in free and democratic discourse in forums in which an ordinary citizen is most able to contribute to it.

2 The application is made by Dr Samuel White MBChB MRCGP, pursuant to s 41A(10) of the Medical Act 1983 ('**the 1983 Act**') and by a Part 8 Claim, to review the decision of the Interim Orders Tribunal ('**the IOT**'; '**the Tribunal**') of the General Medical Council ('**the GMC**') to impose conditions of registration upon preventing him from speaking in any way about 'the Covid-19 pandemic' on social media. They were

imposed on the GMC's application in response to complaints by anonymous medical professionals. The complaints concerned a widely viewed video in which Dr White set out statements of fact and opinions about pharmaceutical and non-pharmaceutical interventions in response to the pandemic. The complainants did not like or agree with those statements and many asserted that they contained 'misinformation'; and the complainants and the GMC considered Dr White should not be permitted to express them in public.

3 The material conditions, imposed after a hearing on 17.8.2021, prevent Dr White from saying anything on 'social media' (that is undefined[1]) about 'the Covid-19 pandemic' (also undefined) or 'associated aspects' (a phrase the IOT did not attempt to particularise) for the maximum period of 18 months (Condition 4); and required him to 'seek to remove' *any* social media posts he has shared relating to 'his views' of the (equally undefined or particularised) 'Covid-19 pandemic or its associated aspects' (Condition 5).

4 In its decision ('**the IOT Decision**') the IOT imposed the restrictions solely on the grounds that they were found to be necessary to 'protect the public' following a lengthy statement by Dr White about pharmaceutical and non-pharmaceutical responses to the pandemic. Having outlined at the outset of the hearing that it was not in a position to make findings of fact, the IOT found that Dr White's statement was alleged to have contained 'misinformation' without making any attempt to explain: which of his statements of fact was or might be factually incorrect and/or not supported by a reasonable body of medical or scientific opinion. It found – without citing any statutory, common law or other authority – that a doctor had a 'responsibility' to provide 'sufficient and balanced information about Covid-19 to allow any potential patients and other members of the public to assess the potential risks and benefits of any treatment or preventive measures under consideration and then make an informed choice', while failing to explain in what way Dr White had failed to do so. The IOT also took account of the fact that his comments would be viewed by 'a wide and possibly uninformed audience'. (IOT Decision, para 19.)

[1] For example, does it include video reports of interviews on television or radio channels that Dr White did not post? Does it include articles in journals or newspapers posted by others but not by Dr White?

5 It is noted that the suggestion by the IOT that there is a 'responsibility' to provide 'balanced' information (in para 19) would appear to suggest that any doctor who presents a particular argument directed for or against a particular treatment would be in breach of such a requirement unless he also put forward the arguments against his position. Moreover, any and every statement made on social media – with or without nuance or 'balance' – is made to a 'wide' and 'possibly uninformed' audience.

6 The Tribunal concluded that 'public confidence in the profession may be seriously undermined, if no order were made today' because the comments were made in public and to a 'large audience'. It professed its 'concern' about the 'impact' of such comments, without attempting to explain what that concern was, or why any particular comment led to that 'concern' (para 20). The Tribunal made no attempt to balance its particular interpretation of the 'public interest' against Dr White's right to freedom of expression, ignoring lengthy and detailed submissions about the appropriate way in which those potentially competing interests should be balanced.

7 The IOT also imposed conditions that Dr White must inform the GMC of his employment (Conditions 1 and 2) and that he informs persons within his employment about his conditions (Condition 6) and allows the GMC to exchange information with his employer or contracting body (Condition 3). Condition 6 can only be justified if there are other conditions that impose ongoing duties and/or obligations to desist from certain activities; and it is submitted that it could not be justified if those obligations (namely those in Conditions 4 and 5) are removed. Moreover, while Conditions 1-3 might be standard during an ongoing investigation, it is submitted that there can be no justification for an investigation into a contribution by a medical practitioner to public debate about pharmaceutical *and* non-pharmaceutical interventions in a pandemic; and there is thus no good reason to impose *any* conditions upon his practice. In considering this submission, the Court will note that Dr White remains under an ongoing professional obligation to keep the GMC of matters concerning his practice (the concern of Conditions 1 and 2) and that he would be in breach of his professional obligations if he attempted to obstruct the exchange of information between his employer/contracting body and the GMC. Consequently, Conditions 1-3 are otiose and unnecessary as well as unjustified by the nature of the investigation.

8 Finally, the Tribunal was also asked to take into account comments made by Dr White's former practice manager about his behaviour and health. However, it appeared to have no regard to those comments in its determination given the lack of any medical assessment; and it cannot have done so given that the conditions imposed (other than those concerning his duty to inform the GMC and his employer/contracting body of his circumstances, etc) had no bearing on his day-to-day practice but only on his freedom of expression on social media. Consequently, and since Dr White seeks removal of conditions affecting his freedom of expression, these Grounds do not address these matters further; and, although part of the IOT's hearing was held in private in view of the reference to his health, no such precaution need be taken in determining this review.

THE FACTS IN DETAIL

9 Dr White is a general practitioner. He had practised as a Partner in the Denmead Practice in Denmead in Hampshire until his resignation on 26.2.2021, since when he has practised as a locum GP with Pallant Medical Chambers. He has an unblemished career, most recently passing his evaluation in late 2020 with commendations on his work and diligence: a commendation by the evaluating GP that took into account CPD work by Dr White that included highly critical analysis of the government's and the NHS's response to the Covid-19 pandemic.

10 Dr White was suspended by directors of NHS England South East, pursuant to reg. 12 of the National Health Service (Performers Lists) England Regulations 2013 ('the 2013 Regulations') by letter dated 25.6.2021, following his the publication of a video on Youtube, expressing his disagreement with the government's and NHS's response to the Covid-19 pandemic. Dr White's suspension was revoked by the NHS on 21 July 2021. The reason given included this passage:

> For the above reasons, NHSEI does not accept that it has violated your client's right to a fair trial or your client's right to freedom of expression. Your client is entitled to express his views. *Your client's views were not the reason for his suspension* [which was on the grounds of the risk he might pose to patients]. We set out above why NHSEI considered it necessary and appropriate to impose a suspension on the basis of the information it had at the time, which suggested your client was not wearing a face mask in the clinical setting.
>
> (Emphasis added)

11 In the above letter, the NHS Board expressly accepted that there were no grounds to suspend Dr White to protect the safety of his patients.

12 Notwithstanding the above statement by the NHS Board – which stated expressly that Dr White was 'entitled to express his views' and that they did not and (impliedly) could not amount to grounds for suspension – the GMC commenced proceedings and, on 15.7.2021, referred Dr White to the IOT to consider restrictions on his practice. The IOT sat on 17.8.2021. Those proceedings were in accordance with reg. 27 of the General Medical Council (Fitness to Practice) Rules 2004 ('the Rules').

13 The allegations that were made by the GMC that led to the IOT imposing the conditions that are the subject of this appeal were set out in Appendix A to a letter to Dr White of 15.7.2021 (#) as follows:

a. Through a social media video, Dr White spread misinformation and inaccurate details about the coronavirus and how it's diagnosed and treated, including saying the vaccine is a form of genetic manipulation which can cause serious illness and death and that he advised against wearing masks.

b. Dr White has potentially put patients at risk and diminished the public's trust in the medical profession by disseminating misinformation and inaccurate details about the measures taken to tackle the coronavirus pandemic.

c. Dr White signposted viewers of his online video to comments and articles of others on the internet who share the same views as him and this raises concerns as those individuals also promote information that is inaccurate or untrue.

14 The above allegations were itemised after a relatively lengthy introduction, in which the GMC case examiner outlined the contents of the video published by Dr White. Dr White does not (and did not at the IOT hearing) take issue with the accuracy of the summary of his remarks in the video that were set out in Appendix A to the said letter and were as follows:

> In his seven-minute Instagram video Dr White looked to explain why he had resigned from his job as a GP. He laid out his experience as a doctor and advised he was leaving conventional medicine to pursue a career in functional medicine. He said he could no longer work in his previous roles *'because of the*

lies' surrounding the NHS and government approach to the pandemic which have been *'so vast'* he could no longer '*stomach or tolerate*' them. He claimed doctors and nurses were '*having their hands tied behind their backs'* preventing them from using treatments that had been established as being effective both as prophylaxis from Covid-19 infections and as treatments for it. He named hydroxychloroquine, budesonide inhalers and ivermectin as the drugs he was particularly concerned about. He called them '*safe and proven treatments'* and he raised concerns that he had been prevented from offering these drugs as a form of '*early intervention in the community'*.

Dr White went on to raise concerns about the safety of the Covid-19 vaccine and the need to have it. With no mention of the variety of vaccines available for Covid-19 he claimed the vaccine inserted a code for the spike protein of the vaccine.

He said that 99% of people who contract Covid-19 survive and that most of those who had died had also suffered from multiple medical problems.

He asked his viewers to do their own research online and signposted them to UK and USA websites which record the side effects of the vaccine. He asked the viewers to consider the number of deaths and serious side effects the vaccine was causing.

Dr White then went on to raise concerns about the method of testing for Covid-19, PCR. He claimed that once a PCR test has multiplied traces of viral code more than 24 times, the false positive rate was greater than 90% and as such he believed the use of the test was a fraud which '*vitiates everything'*.

He then discussed common law and the inability of the authorities to justify the '*civil rules and regulations'* that had been brought into force during the pandemic.

One of his final claims was '*masks do absolutely nothing'*.

15 In submissions before the Tribunal, Dr White contended that the GMC's proceedings were an abuse of process in view of the decision of the NHS Board, a body of parallel jurisdiction to the GMC charged with protecting the public, had decided that it did not consider that Dr White's statements put his patients at risk. That contention was ignored by the Tribunal (save by reference in the most general terms to Dr White's argument that the GMC's proceedings were 'abusive'), which made no findings about it. While Dr White does not raise the same arguments in this application for a review, he does ask the High Court to take account – as the IOT did not – of the fact that NHS Board expressly recognised Dr White's freedom of expression and that he was 'entitled to express his views', comments made in full knowledge of the contents of Dr White's video.

16 Dr White's submissions were accompanied by his witness statement, in which he set out the procedural history and his response to the allegations. In particular, he sets out the context, background and reasoning behind the public statements that are the subject of this investigation, as well as his response to the unsubstantiated gossip that remains within the GMC's allegations against him. As it was before the Tribunal, Dr White's witness statement is relied on in full, including those parts not directly cited in these Grounds; and it is relied upon for its recitation of the procedural history.[2]

17 Dr White's witness statement addresses each of the assertions he made as summarised in the above quoted passage by the GMC. In response to each, he has set out and exhibited evidence in support of his assertions and the body of scientific and medical opinion that supports them. In the IOT, Dr White relied on web-links to each of the sources relied upon. For the purposes of this review, an exhibit bundle has been collated in which a selection of the evidence is published; and the remainder remain accessible through hyperlinks within his witness statement.

18 In his witness statement, Dr White outlines his philosophical belief, informed by his libertarian principles, that the lockdowns and intrusive state interventions as a response to this pandemic (through both non-pharmaceutical and non-pharmaceutical interventions and including what he considers the coercive way the government has offered vaccines) are wrong and unethical. It was Dr White's case before the Tribunal, that he was entitled to the protection of the Equality Act 2010 ('**the 2010 Act**') against discrimination because of his protected characteristic as a person holding those philosophical beliefs; and that he had been discriminated against by the GMC. While Dr White does not pursue an independent ground of appeal in respect of discrimination, that he has a genuinely held, coherent philosophical belief about weighty matters enhances the protection to which his right to freedom of expression should be afforded when balancing those rights against other considerations.

[2] The words in the witness statement have not been changed in any way. However, tab and pagination references have been added to refer the Court to the Exhibit Bundle; and that bundle is filed as a separate bundle to allow the court to refer to it while it is also reading the witness statement and these submissions,

MISCONDUCT AND THE POWERS OF THE TRIBUNAL

19 The jurisdiction of the IOT and other professional bodies over cases of unacceptable professional conduct ('UPC') outwith his professional practice was set out by the High Court in *Remedy UK v GMC* [2010] EWHC 1245:

> "First, it may involve sufficiently serious misconduct in the exercise of professional practice such that it can properly be described as misconduct going to fitness to practise. Second, it can involve conduct of a morally culpable or otherwise disgraceful kind which may, and often will occur outwith the course of professional practice itself, but which brings disgrace upon the doctor and thereby prejudices the reputation of the profession…..Conduct falls into the second limb if it is dishonourable or disgraceful or attracts some kind of opprobrium; that fact may be sufficient to bring the profession of medicine into disrepute. It matters not whether such conduct is directly related to the exercise of professional skills".

20 Suspension or conditions may only be imposed if the Tribunal is satisfied that to do so is necessary for the protection of members of the public or is otherwise in the public interest, or is in the best interests of that person (Medical Act 1983, s 38(1) and (2)). In that regard, the Tribunal must have careful regard to the conclusion of the NHS Board that there was no evidence that Dr White's conduct was such that suspension would be necessary for the protection of members of the public.

21 A Tribunal must decide the appropriate standard to which each practitioner must adhere, and this is not a special standard greater than is ordinarily to be expected but the ordinary standard of the profession; and it may not regard a falling below the standards of practice set out in the General Medical Council's guidance to medical practitioners as itself sufficient to amount to serious professional misconduct: *Nandi v General Medical Council* ([2004] EWHC 2317 (Admin)). When considering whether a practitioner should be found guilty and, in that event, what action it is to take, the Tribunal is entitled to and must consider his previous conduct as a practitioner (*Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750 at 760)

22 In considering whether the Respondent's conduct amounts to UPC, the IOC should also bear in mind the case of *R (on the application of Pitt and Tyas) v General Pharmaceutical Council* ([2017] EWHC 809 (Admin)), in which it was found that behaviour remote from a professional practice may amount to UPC only if sufficiently

disgraceful. In deciding whether it does, the IOC should consider the potential damage caused by the Respondent's conduct to the public reputation of the profession.

23 Any UPC outwith professional practice must be serious (*Vranicki v Architects Registration Board* [2007] EWHC 506 Admin) such that it would attract a degree of opprobrium or harsh criticism. As was held in *Spencer v General Osteopathic Council* [2012] EWHC 3147 (Admin) "mere negligence does not constitute misconduct" and "a single negligent act or omission is less likely to cross the threshold of misconduct than multiple acts or omissions" (*R (Dr Malcolm Noel Calhaem) v General Medical Council* [2007] EWHC 2606 (Admin)).

24 Thus, where the conduct is 'outwith' the course of professional practice, the IOT may exercise its disciplinary jurisdiction only if the doctor engages in conduct that satisfies both the following criteria:

(1) It is so 'morally culpable' or 'disgraceful' that it 'brings disgrace upon the architect'; and

(2) It actually prejudices the reputation of the profession, not that it *might* do so.

25 In respect of the latter, the High Court found that the conduct must 'bring' about prejudice to the reputation of the profession (in *Remedy UK*). Moreover, that conduct must be such that it would still bring about that prejudice if a reasonable member of the public was aware of the full circumstances. A regulatory body could not discipline a professional because of the *belief* that his conduct was particularly reprehensible, even if that view would be displaced by a full awareness of the circumstances.

THE POWERS OF THE HIGH COURT ON A REVIEW

26 The IOT sat pursuant to a referral made by the GMC pursuant to s 41A of the Medical Act 1983 ('**the 1983 Act**'). Pursuant to s 41A(1)(b), conditions may be imposed on a doctors practice of medicine for up to 18 months.

27 The legal principles were set out by Julian Knowles J in *Agoe and another v General Medical Council* ([2020] EWHC 39 (Admin))

> 14. … Section 41A(1) of the MA 1983, as amended, provides:
>
> "(1) Where an Interim Orders Tribunal or a Medical Practitioners Tribunal in arrangements made under subsection (A1), or a Medical Practitioners Tribunal on their consideration of a matter, are satisfied that it is necessary for the protection of members 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')."
>
> 15. Section 41A(4) provides that:
>
> "No order under subsection (1) or (3)(b) to (d) above shall be made by a Tribunal in respect of any person unless he has been afforded an opportunity of appearing before the Tribunal and being heard on the question of whether such an order should be made in his case"
>
> 16. Section 41A(10) confers the right on a doctor to apply to this Court to have an order of suspension terminated. It provides:
>
> "(10) 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."

It will be noted that, while *Agoe* concerned an order for suspension, s 41A(10) applies to any orders under the whole of that section, including orders for conditional

registration, which is in any event also an order made under s 41A(1). The Court continued (in *Argoe*):

> 17. An application under s 41A(10) is statutory application which should be made by way of application under CPR Part 8 rather than by way of an appeal under CPR Part 52 or judicial review: *R(Madan) v General Medical Council* [2001] EWHC Admin 322, [4]-[6]. Under s 41A(10) the court exercises an original jurisdiction and is not confined to exercising a judicial review. It will show respect for and give appropriate weight to the decision of the IOT, given it is an expert body well acquainted with the requirements that a particular profession needs to uphold and with issues of public perception and confidence, but the court will nonetheless interfere with that decision if it is satisfied that the order was wrong: see *General Medical Council v Hiew* [2007] 1 WLR 2007, [27].
>
> 18. The approach set out by Mustill LJ in *Reza v General Medical Council* [1991] 2 AC 182 in the context of an application to the High Court under s 38(6) of the MA 1983 to terminate the order for immediate suspension imposed at the conclusion of fitness to practise proceedings, pending an order for erasure taking effect was cited with approval in relation to se 41A by Richards J in *Madan*, supra:
>
> > "[4].... 'It is vital to acknowledge that in matters of this kind that a committee such as that under review here reaches its decision in circumstances such as concern us as a matter of discretion. Therefore it must be recognised that unless it can be demonstrated that in exercising that discretion the committee has not taken account of something it should have done or has taken account of something it ought not to have done, it is unlikely that this Court would be in a position to say that the order of the committee appealed against was wrong unless it concluded that otherwise the decision was manifestly wrong'".
>
> 19. In *General Medical Council v Anyuam-Osigwe* [2012] EWHC 3884 (Admin) HHJ Gore sitting as a High Court judge reviewed a number of authorities and said:
>
> > "12. From those expressions of principle I come to the view that my approach must be as follows. First, I must decide whether the decision of the Interim Orders Panel was wrong. In making that decision what I have to consider is whether the material indicates that, firstly, the decision the Panel made was necessary for the protection of the public or otherwise is in the public interest, (there being no suggestion here of any legitimate basis for the making of the decision in question), and secondly, in accordance with paragraph 18 of the Interim Orders Panel Guidance, the Panel in deciding to suspend or impose conditions were entitled to have formed a view that there was an impairment of fitness to practise which posed a real risk to the members of the public, and the order was necessary after balancing the interests of the doctor, that

is to continue in practice and earn a living and the interest of the public to guard against the risk.

13. Secondly, in making that decision I exercise original powers as opposed to either appellate or for that matter what are sometimes called public law or judicial review powers and this calls upon me to consider all the relevant evidence and arguments, not only those that existed or were deployed at the time of the decision of the Panel, as indeed seems to me to have been the explicit judgment of Nichol J in *Sandler* at paragraph 12.

14. Thirdly, in coming to that decision, I must consider what weight, if any, to attach to the decision of the Panel but in doing so I must acknowledge that Parliament has entrusted that expert medical body of professionals powers to apply their own expertise and experience and their own knowledge of public expectations of the professionals they regulate and what is necessary in the public interest and I should not lightly substitute my own decision unless I determine that their view was wrong.

15. Fourthly, I am entitled in coming to that judgment to have regard to all the evidence and available material and not only that which was before the Panel; indeed both parties to these cases invite me to do so, the doctor wants me to take into account fresh evidence in the form of the witness statement and the Council wish me to take into account events and developments since the Panel came to the decision now challenged. Therefore there can be no dispute that I do not have regard simply to the material available to the Panel."

20. In *Houshian v General Medical Council* [2012] EWHC 3458 (QB) King J said:

"2. It was common ground before me that under section 41A(10) this court is exercising an original jurisdiction and is not confined to exercising a judicial review. It will show respect for and give appropriate weight to the decision of the Panel, given it is an expert body well acquainted with the requirements that a particular profession needs to uphold and with issues of public perception and confidence, but this court will nonetheless interfere with that decision if it is satisfied that the order was wrong. On this see *GMC v Hiew* [2007] 1 WLR 2007 at paragraph 27 per Arden LJ, and the observations of Davis J in *Sheikh v GDC* [2007] EWHC 2972 and those of Nicol J in *Sandler v GMC* [2010] EWHC 1029 (Admin).

12. As will be seen this case concerns an order imposed solely on the grounds of the public interest. Although of course the statutory grounds are no more and no less than those set out in the statutory provision. I do not disagree with the approach of Davis J in *Sheikh v GDC* [2007] EWHC 2972 when at paragraph 15 having observed that as matter of strict language, no grammatical interpolation of the word 'necessary' fell to be applied to the phrase 'or otherwise in the public interest', he said that if 'the public interest' is

to be invoked in this context, then 'that does at least carry some implication of necessity and certainly carries with it the implication of desirability' and when he further said at paragraph 16 that 'in the context of imposing an interim suspension order on this particular basis, that 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'. I accept also the observations of Nicol J in *Sandler v GMC* [2010] EWHC 1029 when he said (paragraph 14) in commenting upon these passages in Sheikh that the court should be cautious about superimposing additional tests over and above those Parliament has set, but I nonetheless agree with Davis J that it is 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".

21. As to reasons, Lindblom J, gave the following guidance in *Abdullah v General Medical Council* [2012] EWHC 2506 (Admin), [102]:

> "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".

(Emphasis added)

28 The Court will note that there is a potential disagreement between the judgment of the High Court in *Anyuan-Osigwe* that the test is whether the decision was 'wrong' and that of *Reza* that it must be shown to be 'manifestly wrong' unless relevant matters were not taken into account or irrelevant matters were taken into account. It is submitted that the test in *Anyuan-Osigwe* should be preferred: (a) Albeit approved in Maddon more recently, it was made 30 years ago, before the HRA and well before s 41A was introduced to the 1983 Act; (b) it was evidently approved by the Julian Knowles J only in 2020 in *Agoe*; (c) the reasoning in *Anyuan-Osigwe* is impeccable and takes particular account not only of the purpose of the procedure (review rather than an appeal on errors of law only) but of the weight that the Court must give to the rights of the doctor, in view of the Court's independent duty, pursuant to s 6 of the HRA, to safeguard the Convention rights of a doctor.

SUMMARY OF GROUNDS

29 The Court is asked to review a decision that 'there are concerns regarding Dr White's fitness to practise which pose a real risk to members of the public and which may adversely affect the public interest' and that 'after balancing Dr White's interests and the interests of the public… an interim order is necessary to guard against such a risk.' This decision was taken in consequence of the finding that Dr White spread 'misinformation' to the public, including those who were 'unqualified' to determine for themselves . The IOT's decision was flawed on grounds that the Tribunal:

(1) In making findings that Dr White had spread 'misinformation', erred in asserting an ability to determine matters of scientific and medical debate, which could not properly be determined by an interim orders tribunal of the GMC; and, having asserted that jurisdiction, determined issues of fact, namely that assertions made by Dr White amounted to 'misinformation' (which is to say, falsehoods), when it was not in a position to do so as an interim orders tribunal in which it had not considered and could not consider the evidence that would allow it to determine any issue of fact;

(2) Failed to explain its reasons for deciding that each or any of the impugned statements made by Dr White were false and thus expressed 'misinformation';

(3) Erred (whether or not anything said by Dr White was or might have been true and/or supported by a reasonable body of medical or scientific opinion) in failing to accord sufficient respect for Dr White's right to freedom of expression protected by the common law and Article 10 of the (European) Convention on Human Rights and Fundamental Freedoms ('the Convention'), that the IOT (as a public body) had a duty to protect pursuant to s 6 of the Human Rights Act 1998 ('the HRA');

(4) Failed to take into account the support for Dr White's position by respectable bodies of medical and scientific opinion, on which he would have been able rely had he conducted a particular form of treatment (*Bolam v Friern Hospital Management Committee* [1957] 1 WLR 583);Failed, against the weight of the evidence, to find that the GMC discriminated against Dr White contrary to s 13 of the Equality Act 2010 by treating him less favourably than a person who did not share his philosophical beliefs, through determining that his opinions were

false simply because he was hostile to medical and scientific opinion advocated by the government and NHS; and

(5) Failed to have any or any adequate regard to the high test that must be satisfied before a medical professional can be subject to restrictions 'in the public interest' for comments made outside his medical practice.

30 Submissions in support of each Ground are set out below.

GROUND ONE:

In making findings that Dr White had spread 'misinformation', the Tribunal erred in asserting an ability to determine matters of scientific and medical debate, which could not properly be determined by an interim tribunal of the GMC; and, having asserted that jurisdiction, determined issues of fact, namely that assertions made by Dr White amounted to 'misinformation' (which is to say, falsehoods), when it was not in a position to do so as an interim tribunal in which it had not considered and could not consider the evidence that would allow it to determine any issue of fact.

31 A finding that a person has spread *mis*information can only mean that the information that he has spread has been inaccurate. Aside from the imputation that the person did so with the intent to misinform, a conclusion that that person has spread 'misinformation' is thus a finding of fact.

32 It is conceded that there might be some circumstances in which a scientific or medical fact can be categorised – in a binary sense – as 'wrong' or right. For example, if it is asserted that a particular medication has a poisonous ingredient that it does not have or that it has gone through a full trial process when it has not. In most circumstances, however, medical and scientific questions are *not* binary – almost by definition. They involve consideration and quantification of evidence, data, scientific hypotheses and more. A scientist or a doctor can at best give his opinion about such matters. That opinion may be considered to be right or wrong by other scientists or doctors. But it cannot readily be described as 'wrong' save as a matter of opinion – even if that opinion can be asserted with considerable confidence.

33 So far as medical treatment is concerned, this principle is at the heart of the *Bolam* principles, considered in more detail below. But it has all the more force where it comes to the arrogation by an *interim* tribunal of the ability to determine that certain statements about contested medical or scientific propositions are true and others are false.

34 There can be no credible suggestion that any of the statements in his video highlighted by the GMC in Appendix A of their referral – which amounted to their particularised case against Dr White – are statements that can be described as 'true' or 'false' in a binary sense. Each of them were either opinions informed by an interpretation of facts (that the government and the NHS were 'lying'), evaluations about scientific or medical evidence or opinions about the efficacy of particular medical interventions.

35 First, the IOT can have no plausible jurisdiction to be able to determine *any* controversial question that is subject to medical or scientific dispute.

36 Secondly, it could not possibly do so at an interim hearing in which it had no opportunity to, was not asked to and could not make that determination. At the outset, the Tribunal chair (quite properly) informed Dr White that the IOT could not make any decisions of fact; and Dr White's case was that it could not and that he had the right to express *opinions* about matters of scientific and medical controversy that it was not possible for the IOT to determine.

37 Thus, the decision that it could be in the 'public interest' to silence Dr White *because* he had spread 'misinformation' and was at risk of doing so was flawed.

GROUND TWO

The Tribunal failed to explain its reasons for deciding that each or any of the impugned statements made by Dr White were false and thus expressed 'misinformation'.

38 The duty to give reasons is elementary for any court or tribunal and all the more so where its decision is dependent upon a finding that certain statements made by the subject of the proceedings are (or may be) false.

39 The IOT failed even to attempt to explain its basis for determining that any one of Dr White's statements was untrue. Thus, even if it had the ability to arrogate to itself the role of an arbiter of scientific and medical fact, its attempt to do so failed at the outset.

GROUND THREE

The Tribunal erred (whether or not anything said by Dr White was or might have been untrue and/or supported by a reasonable body of medical or scientific opinion)) in failing

to accord sufficient respect for Dr White's right to freedom of expression protected by the common law and Article 10 of the (European) Convention on Human Rights and Fundamental Freedoms ('the Convention'), that the IOT (as a public body) had a duty to protect pursuant to s 6 of the Human Rights Act 1998.

Freedom of expression: legal principles

40 Counsel settling these submissions is indebted to Ben Cooper QC and Anya Palmer, from whose (published) skeleton argument in the *Forstarter v CGD Europe and Others* the following submissions are taken.[3] These submissions rely on the highest authority were upheld by the EAT.[4] They are extensive but are relied upon in preference to the shorter judgment of the EAT, which went into less detail while upholding them. The GMC has taken it upon itself to investigate a doctor because of the expression of his philosophical belief. It is essential that the IOT appreciates, in evaluating a serious and unparticularised restrictions on the ability of a doctor to express his opinion on scientific and medical and even social, economic and political issues, the high degree of protection the courts give to the free expression of opinion.[5]

Relevant law

ECHR Articles 9 and 10

22. It is useful to begin with the relevant principles under Articles 9 and 10 of the European Convention on Human Rights and Fundamental Freedoms ('ECHR') because:

22.1. As will be seen, the principles developed in the domestic authorities as to the meaning and scope of the protected characteristic of religion and belief under EqA10, s10 are derived from the Article 9 jurisprudence and need to be understood in that context; and

[3] That appeal concerns the freedom of expression of an employee and her alleged discrimination because of her protected characteristic of her philosophical belief. While they are submissions and not the findings of a court, they bring together the legal principles – by reference to and derived from caselaw – admirably. Those and other submissions can be found here: https://hiyamaya.net/employment-appeal/.

[4] https://assets.publishing.service.gov.uk/media/60c1cce1d3bf7f4bd9814e39/Maya_Forstater_v_CGD_Europe_and_others_UKEAT0105_20_JOJ.pdf

[5] Footnotes to the *Forstater* submissions are included in the text using their original numbers to avoid confusion. Comments by counsel settling these submissions are [*in italics within squared brackets*]. It is considered unnecessary to provide (in the authorities' bundle) the many judgments and works of authority cited. The judgment in *Forstarter* and the recent judgment in *R (Miller) v The College of Policing* [2020] 4 All ER 31 (Admin) are both included in that bundle and both summarise and underline the principles outlined at somewhat greater length here.

22.2. By virtue of sections 3 and 6 of the Human Rights Act 1998 ('HRA'), the EqA10 must (so far as possible) be read and given effect in a way which is compatible with the Claimant's Convention rights: although there is no absolute rule that Convention rights should always be considered first, where they are relevant they must nevertheless be fully considered. In this particular case, it is appropriate to start with Articles 9 and 10 because they inform and shape the analysis under the EqA10 (cf Page v NHS Trust Development Authority [2021] EWCA Civ 255, §§37 & 74 *per* Underhill LJ).

Relevant provisions of the ECHR

23. Article 9 contains the right to freedom of thought, conscience and religion. It provides as follows:

> **Article 9**
>
> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

24. Article 2 of the First Protocol, concerning the right to education, is also relevant. It provides that the state shall *'respect the right of parents to ensure… education and teaching in conformity with their own religious and philosophical convictions'*.

25. Article 10 contains the right to freedom of expression. It provides as follows:

> **Article 10**
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder

or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

26. Finally, Article 17 concerns the necessary limits on the scope of Convention rights to prevent the protection of acts which are themselves aimed at destroying those rights:

Article 17

Nothing in this Convention may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

The foundations of freedom of thought and expression in democratic pluralism

27. The rights protected by Articles 9 and 10 are closely related[14]. Both concern the pluralism of ideas and their expression which is essential to a democratic society[15]. They complement and reinforce each-other: Article 9 protects not only the holding of a belief but also its manifestation and direct expression[16]; and under Article 10 a higher level of protection attaches to the expression of beliefs about important aspects of human life or behaviour that contribute to debate on matters of public interest[17].

28. Accordingly, where both Articles 9 and 10 are engaged but a case falls more naturally under one of them, the right approach is to examine the case under the more directly applicable Article but read in light of the other (see Ibragimov & others v Russia, 1413/08 & 28621/11, 4 February 2019 (unreported), ECtHR, §78[18]). This case falls most naturally to be considered under Article 9, but Article 10 is also engaged. Therefore, the right approach is to consider the case primarily under Article 9, read in light of Article 10 and its associated jurisprudence.

[*Dr White's case falls most naturally to be considered under Article 10 but, as with the case of Forstater but in reverse, those rights should be considered in the light of Article 9 rights to freedom of conscience.*]

[14] Ibragimov & others, §78.
[15] Ibid., §§88 & 91; see also Handyside v UK (1979-80) 1 EHRR 737, §49; Metropolitan Church of Bessarabia & others v Moldova (2002) 35 EHRR 13, §114; Vajnai v Hungary (2010) 50 EHRR 44 (2008), §46; Eweida & others v UK (2013) 57 EHRR 8, §79.
[16] Metropolitan Church of Bessarabia, §114; Eweida & others v UK, §§80-82; Ibragimov & others, §89.
[17] Perinçek v Switzerland (2016) 63 EHRR 6, §§197, 230 & 241; Annen v Germany, 3690/10, 26 February 2016 (unreported), §§53 & 64.

[18] Cf also an equivalent approach adopted in relation to claims which engage both Articles 10 and 11, which are similarly closely related: Palomo-Sanchez v Spain [2011] IRLR 934, ECtHR, §§52 & 61.

….

30. Thought and belief come first. The state must respect individual *'ethical independence'*, which requires that the law must remain neutral as between competing beliefs and should not coerce or restrict belief based on any assumption *'that one conception of how to live, of what makes a successful life, is superior to others'*[23]. Moreover, the boundaries of freedom of belief cannot be drawn at the point where conflicting beliefs cause hurt or offence: it is human nature that we may find views with which we disagree distressing or offensive – indeed, the more fundamentally important to human life and behaviour the object of disagreement, the more deeply the disagreement is likely to be felt and so the greater the risk of offence. It is, therefore, inherent in the diversity and pluralism of a democratic society that people who hold opposing beliefs that are offensive or upsetting to each other must be able to coexist. In those circumstances, *'the role of the authorities… is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other'*[24]. Or, as Baroness Hale put it in R (Williamson) v Secretary of State for Education and Employment [2005] 2 AC 246, HL, at §77:

> 'A free and plural society must expect to tolerate all sorts of views which many, even most, find completely unacceptable.'

33. Similarly, freedom to express our beliefs cannot be restricted to the inoffensive or anodyne. Democratic discourse depends upon the ability to challenge orthodoxy and advance controversial ideas and beliefs…

…

35. The same sentiment is reflected in the well-known dictum of Sedley LJ in Redmond-Bate v DPP [2000] HRLR 249, QB, §20[29]:

> 'Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having. What Speaker's Corner (where the law applies as fully as anywhere else) demonstrates is the tolerance which is both extended by the law to opinion of every kind and expected by the law in the conduct of those who disagree, even strongly, with what they hear. From the condemnation of Socrates to the persecution of modern writers and journalists, our world has seen too many examples of State control of unofficial ideas. A central purpose of the European Convention on Human Rights has been to set close limits to any such assumed power.'

…

Key principles

37. The following key principles, which are built upon and informed by the foundations outlined above, may be derived from the case law:

37.1. The state's obligation to secure the protection of the rights guaranteed by Articles 9 and 10 encompasses not only a duty not to interfere with those rights, but also a positive obligation in certain cases to protect against interference by private persons. In particular, the state's positive obligation is engaged where a private employer dismisses or discriminates against an employee for exercising the rights protected by Articles 9 and 10 (Palomo-Sanchez & others v Spain [2011] IRLR 944, ECtHR, §§59-62; Redfearn v UK [2013] IRLR 51, ECtHR, §§42-43; Eweida & others v UK (2013) 57 EHRR 8, §§83-84).

[*This must apply with more force where a public body, such as the ARB disciplines a person for exercising those rights.]*

37.2. Protection under Article 9 for one's internal thoughts and beliefs (the *'forum internum'*) is absolute and unqualified: the state has no business whatsoever controlling or restricting what people privately think or believe and *'[e]veryone… is entitled to hold whatever beliefs he wishes'* (R (Williamson) v Secretary of State for Education and Employment [2005] 2 AC 246, HL, §23 *per* Lord Nicholls; §76 *per* Baroness Hale; and see also: Eweida & others v UK, §80; Page, §42 *per* Underhill LJ).

37.3. Article 9 also encompasses freedom to express and manifest one's belief. This does not include every act that happens to be motivated or influenced by the belief, but does include both (i) direct statements or expressions of the belief; and (ii) manifestation of the belief through acts of worship, teaching, practice or observance which are *'intimately linked'* to the belief (Arrowsmith v UK (1981) 3 EHRR 218, §§70-71; Van den Dungen v Netherlands, 22828/93, 22 February 1995 (unreported), §1; Metropolitan Church of Bessarabia, §114; Eweida & others v UK, §82). Moreover, even where an act or expression that is motivated or influenced by the belief does not strictly fall within the scope of Article 9, it may nevertheless be protected by Article 10 (see e.g. Arrowsmith, §78; Van den Dungen, §2).

37.4. The right to express and manifest one's beliefs under both Articles 9 and 10 also encompasses a right not to be obliged to express or manifest beliefs that one does not hold (Lee v Ashers Baking Co Ltd & others [2020] AC 413, SC, §§50-52 *per* Baroness Hale).

37.5. Unlike the unqualified right privately to hold any belief, the right to express and manifest one's belief (including the right not to be obliged to manifest a belief one does not hold) is not absolute. There are two distinct ways in which the scope of that right is limited and it is important to distinguish between them because, as will be seen, one of the ways in which the Tribunal erred was by failing to do so.

37.6. The **first** way in which the right to express or manifest a belief is limited is by what may be described as 'threshold criteria' that need to be met in order to qualify for protection at all. In the case of the right to express or manifest a belief under Article 9, the threshold criteria are that the belief (i) should relate to matters that are more than merely trivial and which possess a sufficient degree of seriousness and importance; (ii) should attain a basic level of cogency and coherence in the sense of being intelligible and capable of being understood; and (iii) should be worthy of respect in a democratic society and not incompatible with basic standards of human dignity (Campbell and Cosans v UK (1982) 4 EHRR 293, §36; R (Williamson), §§22-23 *per* Lord Nicholls; §64 *per* Lord Walker; §76 *per* Baroness Hale). Overall, these criteria must be understood and applied as no more than *'modest threshold requirements'* which *'should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention'* (R (Williamson) [2003] QB 1300, CA, §258 *per* Arden LJ; HL, §§23-24 *per* Lord Nicholls).

37.7. The last of those criteria – that the belief should be worthy of respect in a democratic society and not incompatible with basic standards of human dignity – derives from the judgment of the European Court of Human Rights ('ECtHR') in Campbell and Cosans, which concerned Article 2 of the First Protocol, though it is clear that the same threshold criteria apply both to that provision and Article 9 (Campbell and Cosans, §36; R (Williamson), §24 *per* Lord Nicholls; §76 *per* Baroness Hale). That judgment makes it clear (at §36) that the criterion corresponds with the threshold set by Article 17 for excluding actions that are themselves aimed at destroying the rights protected by the ECHR. A point which merits emphasis here is that this threshold applies equally to Article 10 (R (Miller) v The College of Policing [2020] 4 All ER 31, Admin, §226 *per* Julian Knowles J): if a belief is 'not worthy of respect in a democratic society' then any statement, expression or manifestation of that belief will fall wholly outside the protection of both Articles 9 and 10.

37.8. The ECtHR has repeatedly emphasised that the general purpose of Article 17 is *'to prevent totalitarian groups from exploiting in their own interests the principles enunciated by the Convention'* and that it is therefore only applicable *'on an exceptional basis and in extreme cases'* where something equivalent to *'Nazi-like politics'* is at issue: it applies to the *'gravest forms of "hate speech"'* which seek *'to stir up hatred or violence'* or are *'aimed at the destruction of the rights and freedoms laid down in [the Convention]'* (Vajnai v Hungary (2010) 50 EHRR 44 (2008), §§21-26; Ibragimov & others, §§62-63; Lilliendahl v Iceland, 29297/18, 12 May 2020 (unreported), §§24-26; and see also *Belief vs. Action in Ladele, Ngole and Forstater*, R Wintemute, ILJ 50(1) 104, March 2021 at 113-115). It is to be emphasised that the *'destruction'* of another Convention right is a quite different concept from *interference* with another Convention right, which may, upon balancing the competing rights, justify imposing some restriction (as discussed further below). At this

preliminary stage, Article 17 and the test for whether a belief is so beyond the pale that it is not worthy of respect in a democratic society impose a *'high threshold'* that will not be crossed even where the actions in question are *'highly prejudicial'* but fall short of promoting totalitarianism or its equivalent: the protection of Articles 9 and 10 is therefore not wholly denied even to *'"less grave" forms of "hate speech"'* which *'promote intolerance and detestation'* of specific groups (e.g. strongly expressed views that gay people are sinful and 'deviant') (Lilliendahl, §§26 & 34-38).

37.9. The threshold criteria apply equally to religious and non-religious beliefs (R (Williamson), HL, §§75-76 *per* Baroness Hale). In assessing whether those criteria are met, the court or tribunal must take the individual's beliefs as it finds them and not seek to rationalise them for itself: it is *'emphatically… not for the court to embark on an inquiry into the asserted belief and judge its "validity" by some objective standard'* (R (Williamson), §22 *per* Lord Nicholls). Beyond those exceptional and extreme cases which fall within Article 17, courts and tribunals have no business assessing the 'legitimacy' of beliefs or the way they are expressed, or judging between competing beliefs or moralities. That is so even where the beliefs and/or the way they are expressed may be viewed as offensive or unacceptable by a majority of people: democratic pluralism requires that minority beliefs and those which are challenging, disturbing or offensive are protected just as much as those which are mainstream, orthodox or anodyne. Courts and tribunals must adopt a position of neutrality as between competing conceptions of human life and behaviour (Metropolitan Church of Bessarabia, §§116-117; R (Williamson), CA, §§257-8 *per* Arden LJ; HL, §22 *per* Lord Nicholls, §§76-77 *per* Baroness Hale; Eweida & others v UK, §81; Ibragimov & others, §90).

37.10. The **second** way in which the right to express or manifest a belief is limited is that restrictions that are prescribed by law may be justified if they are necessary in a democratic society to meet one of the objectives identified in Articles 9(2) and/or 10(2). Restrictions of this kind do not involve entirely excluding the belief or its manifestation or expression from protection, but instead require an *'intense focus'* on the particular circumstances in which the actual manifestation or expression of the belief takes place, in order to assess whether the specific restriction is proportionate, having regard to the relative importance of the legitimate aim(s) pursued and the value of the expression or manifestation of belief in light of the particular manner and context of its expression (Vajnai, §53; Trimingham v Associated Newspapers Ltd [2012] 4 All ER 717, QB, §55 *per* Tugendhat J; Perinçek v Switzerland (2016) 63 EHRR 6, §§207-8; Dulgheriu & another v London Borough of Ealing [2020] 1 WLR 609, CA, §91 *per* Sir Terence Etherton MR, King & Nicola Davis LJJ; R (Miller), §§240 & 275 *per* Julian Knowles J; Page v NHSTDA, §§59 & 101 *per* Underhill LJ).

37.11. The over-arching test to be applied at this stage of the analysis is the well-known four- part[31] test summarised in Bank Mellat v HM Treasury (No 2) [2014] AC 700, SC, by Lord Sumption at §20 and Lord Reed at §126: the court or tribunal must conduct *'an exacting analysis of the factual case advanced in defence of the [restrictive] measure'* in order to determine: (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

[31] The authorities recognise that the four elements of the test, whilst logically separate, inevitably overlap because the same facts are likely to be relevant to more than one of them.

37.12. Whereas, at the international level, the ECtHR [European Court of Human Rights] affords member states a 'margin of appreciation' in the application of this test, that doctrine has *'no application'* when domestic courts and tribunals give effect to Convention rights in domestic law pursuant to the HRA: constitutional principles concerning the separation of powers may mean that, when assessing a legislative measure or decision of an elected official, courts and tribunals will defer, on democratic grounds, to the considered opinion of the elected body or person and allow that body or person a *'measure of latitude'*, but otherwise *'a national court must confront the interference with a Convention right and decide whether the justification claimed for it has been made out'* (R (Steinfeld & another) v Secretary of State for International Development [2020] AC 1, SC, §§27-30 *per* Lord Kerr). In a case, such as the present, in which the Tribunal is required to give effect to the UK's positive obligations to protect the Claimant's rights under Articles 9 and 10 against the actions of a private employer, no question of democratic deference arises: once this stage of the analysis is reached, the Tribunal must therefore *'confront the interference'* and determine itself whether the restrictive effect of the employer's actions is justified, applying the requisite *'intense focus'* to the particular circumstances.

37.13. Although each case will turn on its facts, the jurisprudence at both ECtHR and domestic levels has established certain parameters and principles. For the purposes of this case [*and, it is submitted, Ms Dening's case*], the following five (non-exhaustive) propositions are of particular relevance:

(a) Since Articles 9 and 10 together protect not only ideas and statements that are inoffensive or a matter of indifference but also those that *'offend, shock or disturb'*, it will be difficult to justify any restriction on an expression or manifestation of belief that is *merely* offensive, disturbing or shocking to others (Handyside v UK (1979- 80) 1 EHRR 737, §49*;* Redmond-Bate v DPP [2000] HRLR 349, QB, §20 *per* Sedley LJ; Livingstone v The Adjudication Panel for England [2006] HRLR 45, Admin,§35 *per* Collins J;

Vajnai, §46). Again, where conflicting beliefs and their expression/manifestation are a source of tension and cause hurt or offence to their respective adherents, the role of the authorities (including courts and tribunals) is to remain neutral and *'not to remove the cause of the tensions by doing away with pluralism, but to ensure that groups opposed to one another tolerate each other'* (Metropolitan Church of Bessarabia, §116; Ibragimov & others, §90).

(b) Moreover, where the particular expression or manifestation contributes to debate on a question of political and/or public interest, there will be *'little scope'* for restricting it: *'heightened protection'* and a higher threshold of tolerance are required for ideas that contribute to such debates, since it is *'in the nature of political speech to be controversial and often virulent'* or *'intransigent'* (Vajnai, §§47, 51 & 57; Perinçek, §§197, 230-231 & 239-241; Annen v Germany, 3690/10, 26 February 2016 (unreported), §§53 & 64; R (Miller), §§252, 276 & 286 *per* Julian Knowles J):

> '… [A] legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs recognised in a democratic society, since that society must remain reasonable in its judgment. To hold otherwise would mean that freedom of speech and opinion is subjected to a heckler's veto.' (Vajnai, §57)

(c) It will, therefore, be particularly difficult, in a case involving the expression or manifestation of a belief that contributes to debate on a political or other matter of public interest, to justify any restriction based on a *'legal rule formulated in general terms'*: in such a case, the need to examine the justification for any restriction by reference to the specific context of the particular expression or manifestation becomes even more important (Perinçek, §275; Ibragimov & others, §98; R (Ngole) v University of Sheffield [2019] EWCA Civ 1127; [2019] All ER (D) 20 (Jul), §§5(1) & 123-129 *per* Irwin & Haddon-Cave LJJ & Sir Jack Beatson).

(d) Generally, in such a case, a restriction is likely to be justified only if the specific expression or manifestation, fairly construed and examined in its immediate or wider context, could be seen as either (i) a direct or indirect call for violence or as justification of violence, or (ii) an attack on a particular person or group which expresses such *'deep-seated and irrational hatred'* and/or such *'intolerance and detestation'* that it may be regarded as a form of *'hate speech'* (Perinçek, §§204-8; Ibragimov & others, §94; R (Ngole), §129 *per* Irwin & Haddon-Cave LJJ & Sir Jack

Beatson; R (Miller), §226 *per* Julian Knowles J; Lilliendahl, §§35-39).

(e) Finally, in the particular context of the state's positive obligation to protect the rights guaranteed by Articles 9 and 10 by preventing private employers from dismissing or disciplining employees for expressing or manifesting their beliefs, such action by a private employer will be regarded as representing a *'very severe measure'*. It will not, therefore, generally be justified by the mere expression or manifestation of beliefs on social media or elsewhere, but will generally only be justified where the employee's beliefs lead him or her to act in a way that actually discriminates against the employer's customers or other employees, or that has some other clear impact on the actual performance, safety or effectiveness of his or her work (Vogt v Germany (1996) 21 EHRR 205, §§60-61; Redfearn, §§45-47 & 56-57; Smith v Trafford Housing Trust [2013] IRLR 86, Ch, §§82-85 *per* Briggs J; Eweida & others, §§94- 95, 99, 102-106 & 107-109; Ngole §§129-130 & 134-136 *per* Irwin & Haddon-Cave LJJ & Sir Jack Beatson; Page v NHSTDA, §§54-55, 59-62 & 78 *per* Underhill LJ; and see generally *Belief vs. Action in Ladele, Ngole and Forstater*, R Wintemute, op.cit.).

[*A direct parallel can be drawn with the nature of the threshold where a doctor's comments can be considered to be sufficiently 'disgraceful' that, by itself, it actually brings the profession into disrepute.]*

41 As has been submitted, the protection to be afforded Dr White's freedom of expression is enhanced by the fact that he would fall within s 10 of the 2010 Act, having a *'religious or philosophical belief'*. In order to determine the meaning and limits of that definition, in *Grainger plc & others v Nicholson* [2010] ICR 360, EAT, Burton J reviewed the domestic cases concerning s10 as well as the jurisprudence relating to ECHR, Article 9 and Article 2 of the First Protocol – including in particular Campbell and Cosans and R (Williamson) – and extracted the following criteria (at §24):

(i) The belief must be genuinely held;
(ii) It must be a belief and not an opinion or viewpoint based on the present state of information available.
(iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour.
(iv) It must attain a certain level of cogency, seriousness, cohesion and importance.
(v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others.

42 Dr White's philosophical beliefs fall squarely within those that must be given the protection afforded by s 13 of the 2010 Act. In respect of the *Grainger* criteria:

(i) His beliefs are genuinely held;

(ii) They are a belief and not an opinion or viewpoint based on the present state of information available; in this regard, they are not only a response to scientific or other information available about the nature of SARS-CoV-2 or the most efficacious means of addressing it, but also concern how society is governed, the nature of freedom, the nature of responsibility and the appropriate consideration of the historical precedent of the manner in which pandemics should be addressed;

(iii) Beliefs about the appropriateness of 'lockdowns', other non-medical interventions and other medical interventions concern a 'weighty and substantial aspect of human life and behaviour': they have dominated the experience and public life of this country and all others for well over one year and will continue to do (including in respect of how they are reviewed and considered in retrospect) for some time to come;

(iv) Dr White's views attain much more than a 'certain level' of cogency, seriousness, cohesion and importance: they are detailed, carefully and intelligently considered and thoughtful; and

(v) His views are worthy of respect in a democratic society and are not incompatible with human dignity and do not conflict with the fundamental rights of others; this threshold is exceptionally high, equating to the promotion of totalitarianism or its equivalent (as set out in sub-paragraphs 37.7-37.8 of the *Forstarter* submissions and relying on the case law set out there): it could not possibly include a careful analysis of how totalitarianism must (in the author's view) be *avoided*.

43 A recent case in which a professional body did discipline a professional for the expression of (extreme, racist and discriminatory) opinion was *The Architects Regulatory Board v Kellow* (2020).[6] That case is an example of the type of statements that a professional disciplinary tribunal found to be so 'disgraceful' that they prejudice the reputation of the profession. In that case, Mr Kellow made a public statement in which he stated, without qualification, that members of the Jewish faith, the Sunni

[6] Available at https://arb.org.uk/complaints/arbs-complaint-process/professional-conduct-committee/previous-pcc-decisions/mr-peter-kellow/ and included within the authorities' bundle.

denomination of Islam and (albeit not quite acknowledged by the ARB) the Sikh faith should not be permitted to hold public office because of their membership of religions that he considered to be 'cults'. This was not only an expression of antipathy towards *beliefs* or contentious statements about religions; it was an express view that people should be deprived of their civic rights based solely on their religious beliefs (and, indirectly, their ethnicity) – and thus, their protected characteristics. It was thus, contrary to Article 17 of the ECHR, the support for the destruction of the very right – to freedom of conscience and expression – that Mr Kellow prayed in aid in advancing his defence.

44 The decision in *Kellow* demonstrates the chasm between the proper discipline of a professional person for the advocacy of the destruction of the civic rights of minorities – on the one hand – and the advocacy of political views that were *expressly* intended to advance the *defence* of civic freedoms. And, whether or not a person agrees or disagrees with the position of Dr White (and of course the GMC and the IOT should not have a view one way or another), it is undeniable that this was his objective in outlining his opinions.

Application of the principles

45 Dr White's video statement was a careful analysis of the evidence relating to medical and non-medical interventions. The GMC have outlined the parts of it that, they contend, is conduct that puts the medical profession into disrepute. Dr White has answered all of those contentions with a body of evidence and support from a reasonable body of scientific and medical opinion. Other opinions are purely political in nature and must be afforded protection by the IOT. His statement is deliberately detailed and is relied upon in full.

46 As has been submitted above, the IOT: (a) failed to apply any reasons for its decision that any one of Dr White's statements within the video that were misleading; (b) failed to take any account of the legal tests to be applied before deciding to find that the public interest was engaged before imposing any condition; and (c) in imposing conditions restricting a doctor's freedom of expression, failed to take any account of the extensive caselaw concerning the IOT's obligation (as a public body) to safeguard it.

47 **First**, the threshold that must be met by the IOT before it may properly discipline a doctor for conduct outside the practice of the profession is extremely high. There is no reasonable or rational basis on which Dr White's statements could be considered to 'bring disgrace' on him. And it could not be said by any reasonable observer that those comments could bring the profession into disrepute.

48 **Secondly**, the IOT must apply the detailed guidance of the courts concerning the protection of the Dr White's freedom of conscience and of his right to the expression of his beliefs. Having read the detailed submissions set out above and applied them to Dr White's evidence, it will be obvious that no court, tribunal or regulatory body could possibly discipline any person for expressing those views; and that any attempt to do so would be a grossly disproportionate interference with their rights under Articles 9 and 10 of the ECHR.

49 **Thirdly**, the protection to be accorded Dr White's right to freedom of expression – seen in the light of whether it could be in the 'public interest' to silence him – does not rely on his support by a reasonable or logical body of medical and/or scientific opinion. This is so <u>despite</u> the fact that Dr White <u>does</u> have the support of a large body of both in respect of <u>each</u> of the opinions he expressed in the impugned video (as outlined below under Ground Four.

50 The principles set out in *Bolam* and refined in *Bolitho v. City and Hackney Health Authority* ([1996] 4 All ER 771) establish that a medical practitioner cannot be guilty of negligence if, while undertaking or advising on <u>medical treatment</u> that advice or treatment accords with a reasonable body of medical opinion; and that a body of medical opinion cannot be reasonable if it is illogical (*Bolitho*). However, it is submitted that it is, nevertheless, unnecessary for the IOT to determine whether his publicly expressed views accord with that body of opinion. This is for two reasons:

(1) The IOT is not considering allegations relating to *treatment* or direct advice to patients. The *Bolam* principles do not extend beyond that: they are available as a defence to a doctor accused of negligent treatment only.

(2) There is strong support – over and above the intense protection that must be afforded to the freedom of expression and the protected characteristic of

philosophical that is set out above – for the contention that a scientist or medical professional must have a great degree of freedom to discuss and dispute scientific and medical hypotheses. While medical *treatment* should be within strict parameters of accepted practice derived from scientific discussion and empirical analysis, those parameters have come about only through discussion and analysis that must have had no limits. It is only through hypothesis, the testing of hypotheses through Socratic discussion and the study and empirical evaluation of them that scientific discovery is enabled; and only through that scientific process that better medical treatment and outcomes can be reached.

GROUND FOUR

The Tribunal erred in failing to take into account the support for Dr White's position by respectable bodies of medical and scientific opinion, on which he would have been able rely had he conducted a particular form of treatment.

51 If, contrary to the third submission in Ground Three (immediately above) the Tribunal was entitled to take into account whether Dr White had the support of a body of medical and/or scientific opinion that might fit the *Bolam/Bolitho* test in respect of medical treatment, he would easily satisfy that test.

52 Dr White relies on the support of a large, reasonable and logical body of medical and scientific opinion, supported by empirical evidence, which he sets out in his witness statement and exhibits. Aside from empirical data, the supporting material includes the statements of esteemed members of the medical profession around the world. Moreover, he relies on the fact – as also outlined in his witness statement with direct citations – that the approach to pandemic responses that he and that body of opinion advocate is the conventional modern approach supported by the pandemic planning of the UK, all other modern democratic states and the WHO (in their advice published as recently as October 2019). Lockdowns were not just unprecedented but beyond any consideration before 2020; and the advocacy of mandates requiring masking within the community were recommended against in the same pandemic plans.

53 Dr White is thus easily able to establish a body of support that would satisfy the *Bolam/Bolitho* tests were it appropriate to apply them to the expression of his opinion

(contrary to his primary case that that test should be restricted to medical treatment and advice about the same given to patients). Further and alternatively, the considerable body of opinion and evidence supporting Dr White's statements supports his contention that his freedom to express those views should be given the intense protection under Article 10 and the Equality Act.

GROUND SIX:

The IOT failed to have any or any adequate regard to the high test that must be satisfied before a medical professional can be subject to restrictions 'in the public interest' for comments made outside his medical practice.

54 The submissions in support of each of the above Grounds are repeated.

55 The IOT failed to direct itself – despite having been reminded of it by counsel to Dr White in the same terms as are outlined in these Grounds – to the test that must be satisfied before conditions are imposed 'in the public interest'. Given the paucity of the analysis (if any) in support of the decision, findings of fact made without justification and its failure to make any attempt to explain how it balanced the public interest against Dr White's right to freedom of expression, it cannot be assumed that the IOT 'had in mind' this test. Indeed, the evidence of its reasoning (such that it is) strongly suggests otherwise.

56 It is submitted, further and alternatively to the above Grounds, that even if a reasonably well-informed member of the public could reasonably have considered Dr White to have behaved below the standards of a medical professional (which is denied), he could not have concluded that his behaviour was so 'disgraceful' or 'morally culpable' that it 'brings disgrace upon the doctor' and/or that it actually prejudices the reputation of the profession. And, in determining this test, the High Court will have in mind the high level of protection that must be given to rights of freedom of expression, as outlined above; and the rejection of the paternalistic attitude of the IOT towards the ability of ordinary members of the public – however well informed – to inform themselves about matters of medical and scientific debate, particularly where it affects their decision to take medical treatment.

CONCLUSION

57 The comments made by Dr White do not arguably amount to conduct that brings the medical profession into disrepute.

58 The IOT has arrogated to itself the right to determine what a medical professional may be able to assert, in public, as fact and what is 'misinformation'; and has determined that Dr White has fallen foul of its arrogated position as an arbitrator of scientific and medical fact without attempting to reason how or why.

59 The continuation of conditions restricting his ability to contribute to the medical, scientific and political debate and has thus interfered disproportionately with the exercise of his right to manifest his freedom of conscience and express his beliefs, contrary to Articles 9 and 10 of the ECHR. Further and alternatively, it cannot be reasonable for the IOT to prevent a medical professional from advocating opinions on matters of medical and scientific debate that are shared by a logical and reasonable body of medical and scientific opinion.

60 In the premises, the IOT had no reasonable basis for imposing interim conditions restricting Dr White's freedom of expression; or, alternatively, it failed to apply the high test must be imposed before it may impose conditions to protect the public interest; and the Court is asked to quash all interim conditions imposed.

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