Neutral Citation Number: [2018] EWCA Civ 13

Case No: C1/2015/4253

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
His Honour Judge Milwyn Jarman QC
Sitting as a Deputy Judge of the High Court
20154253

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/01/2018

Before :

LORD JUSTICE GROSS
LORD JUSTICE McFARLANE
and
LORD JUSTICE SALES

- -

Between :

The Queen on the application of Thilakawardhana	**Appellant**
- and -	
Office of the Independent Adjudicator for Higher Education	**1st Respondent**
- and -	**Interested Party**
University of Leicester	

- -
- -

Mr Clive Newton QC (instructed by **Sinclairslaw**) for the **Appellant**
Ms Aileen McColgan (instructed by **E J Winter & Son LLP**) for the **First Respondent**
Ms Claire Darwin (instructed by **Gateley PLC**) for the **Second Respondent**

Hearing date: 2 November 2017

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Approved Judgment

Lord Justice Gross:

INTRODUCTION

1. A Fitness to Practise Appeal Panel ("the Appeal Panel") of the Interested Party, the University of Leicester ("the University"), upholding the decision of the University's Fitness to Practise Panel ("the Panel"), took the career-ending decision to terminate the Appellant's medical studies. The Appellant's complaint to the Respondent, the Office of the Independent Adjudicator for Higher Education ("the OIA") was held "not justified". The Appellant's claim for Judicial Review of the OIA decision was dismissed by HHJ Milwyn Jarman QC, sitting in the Administrative Court, for the reasons set out in his judgment dated 13th November, 2015 ("the judgment"). The Appellant now appeals to this Court, following a renewed oral application, with permission from Irwin LJ, solely in relation to *sanction*. That appeal is now before this Court.

2. The essential underlying facts were succinctly summarised in the judgment, at [1]:

> " In October 2013 the claimant having completed three years of courses leading to a degree in medicine at the University of Leicester (the university), commenced a gap Bsc degree there. That month a friend and fellow student (…PS) distributed some explicit photographs of a friend of the claimant which he, PS, had been sent by mistake. That led the claimant to post on the Facebook page of PS an image of a well known actor in a popular film with the words in capital letters 'I will look for you, I will find you. And I will kill you.' This sort of posting, known as a meme, was viewable by the Facebook friends of PS. At the same time the claimant wrote a private message to PS on Facebook containing about 170 words some of which were offensive and when taken in conjunction with the meme, could be construed as threatening. About a month later PS complained to university staff and to the police but chose not to pursue criminal proceedings. However, the university instigated disciplinary proceedings and the claimant was given a reprimand, the least serious of possible penalties. The claimant's conduct also gave rise to the distinct question of whether, as a medical student, he was fit to practise medicine. In April 2014 a panel of the university (the panel) decided he was not so fit to practise and that decision was upheld by an appeal panel of the university (the appeal panel) in July 2014. The claimant made a claim to the defendant [i.e., the OIA], which as its name suggests is independent of the university, about the termination of his registration as a medical student, but in May 2015 the defendant decided that the complaint was not justified. The claimant now seeks judicial review of that decision. "

3. It is at once apparent that a number of considerations loom large in this appeal:

   i) First, the public interest;

ii) Secondly, the seriousness of the consequences of the decisions thus far for the Appellant;

iii) Thirdly, the correct approach to be adopted by the Court to the decisions of the Panel, the Appeal Panel and the OIA;

iv) Fourthly, the need to keep well in mind that the Court is not the primary decision-maker.

There is, at the least, obvious potential for tension between the second and the remaining considerations.

4. The matter comes to this Court by way of an appeal from the Judge and, nominally at least, as a challenge to the decision of the OIA. However, as will be seen, the reality in this case is that the critical inquiry relates to the decision of the Appeal Panel.

THE HISTORY

5. *The Facebook message/s:* By way of brief expansion on the summary taken from the judgment, the private message sent by the Appellant on Facebook to PS, said the following (omitting still further obscenities):

> " you fucked up! you cock sucker…..When you mess with a lankan, you mess with all of us……i don't want to see you on a night out in Leicester, or in the UK. "

The Appellant was of Sri Lankan origin, hence the reference to "lankan".

6. *Disciplinary Proceedings:* It may be noted that the meme and the private message concerned PS sufficiently that, albeit after a delay of about a month, he drew the matter to the attention of the University authorities and reported it to the police, though he did not press charges. The University disciplinary proceedings, while imposing the least serious of the possible penalties, concluded that the Appellant had committed a "serious act of misconduct", which could not be ignored.

7. *The Panel:* Turning to questions of fitness to practise ("FTP"), the Panel met on the 10th April, 2014, to consider both the Appellant's threats to PS and the series of professionalism warnings he had received at the university. The Panel consisted of three lay members, including two doctors.

8. Minutes before the hearing started, the Appellant sent PS an e-mail and supplied a copy to the Panel. As the Panel observed, rightly in my view, that e-mail "was not expressed in terms of remorse and a genuine acceptance of your fault, but was conditional, and criticised …[PS]…for feeling threatened and for not responding differently". The Panel went on to conclude that the Appellant had not "properly accepted responsibility for your actions, had not tried to work out a plan to correct your mistakes, and lacked the necessary degree of insight, notwithstanding the opportunities for reflection which the disciplinary and fitness to practise proceedings had provided." Accordingly:

> " These failings gave the Panel little confidence in your capacity to reach the standards of professionalism which would be required to enter practice."

The Panel further commented adversely on the Appellant's response to the various professionalism warnings he had received at the university.

9. The Panel's overall conclusion was expressed in these terms:

> " The Panel reviewed its conclusions on the two allegations together [i.e., the incident concerning PS and the professionalism warnings] and agreed that you had substantially failed to meet the standards required to recommend you to the General Medical Council as fit to practise; and that your conduct was not of the sort which would be acceptable to the general public in a doctor. It considered whether there were any sanctions or remedial actions which could be put in place which might address the shortcomings before the completion of your course, but it concluded that your lack of insight and failure to respond in the past reflected a fundamental unsuitability for the profession of medicine which could not now be corrected. "

The Panel's decision was, therefore, that the Appellant's registration as a medical student should be terminated.

10. *The Appeal Panel:* The University Appeal Panel convened on the 27th June, 2014 and gave its decision on 4th July, 2014. Its membership consisted of two senior academics (the Senior Pro-Vice-Chancellor, who acted as Chairman and a Reader in the Department of English), together with a Consultant at the University Hospital, Leicester (the External Member)). As I understand it, the Appellant's grounds of appeal were prepared with the assistance of solicitors. The Appellant could have been accompanied at the (appeal) hearing but chose to appear on his own, a matter confirmed by the Appeal Panel. The Appeal Panel invited the Appellant to expand upon his grounds of appeal, asked him questions and invited him to make final comments (which he did).

11. The Appeal Panel rejected the "main point" made on the Appellant's behalf, described as one of "jurisdiction": namely, that as the matter had been dealt with under the disciplinary procedure, no further action was permissible under the FTP procedure.

12. The Appeal Panel accepted that there might have been confusion surrounding the Appellant's initial "qualified" apology, handed to the Panel and further accepted that the Appellant's subsequent apology of 25th April, 2014 was "unreserved".

13. For reasons which need not be expanded upon, the Appeal Panel chose to disregard the previous professionalism warnings, which had been taken into account by the Panel.

14. The Appeal Panel, exceptionally, took into account "new evidence" in the form of a letter from the Psychiatrist who had been treating the Appellant in Sri Lanka for depression.

15. In the event, the Appeal Panel determined the outcome of the Appellant's appeal solely on the basis of the "offensive message" to PS. The Appeal Panel recorded that the offensive message followed provocative behaviour on the part of PS. It held that the evidence from the psychiatrist was "largely irrelevant" to the offensive message (in effect, given the dates involved); overall, the Appeal Panel "did not regard this evidence as providing strong mitigation for what you did".

16. As to the impact of the offensive message on PS, the Appeal Panel noted that he had sought advice from the Police. It added that the decision of either the prosecuting authority or the victim not to prosecute did not indicate that no criminal offence had been committed. The fact that PS "reported the matter to the police and to the University indicates strongly that …[PS]….did feel threatened by the message".

17. The Appeal Panel had already quoted the meme. It went on to say this:

> " In addition to the words quoted above the message, which contained seriously obscene language which, in our view, adds menace to the words, are statements such as 'When you mess with a Lankan, you mess with all of us' and 'I don't want to see you on a night out in leicester (sic), or in the UK'. The Panel found it impossible to see how this could be taken in any other way than a threat of violence. While it is conceivable that …[PS]… might not have thought that he was actually going to be killed, it is abundantly clear to us that any recipient of such a message would have a real and justified fear that he would be subjected to violence. We find the sending of this message to be completely unacceptable behaviour and such that it renders the sender of it unfit to practise medicine. "

18. There followed the Appeal Panel's "Conclusion":

> " The Appeal Panel decided ….to consider the appeal on the basis only of the message posted on Facebook. We are aware that in determining that you were not fit to practise medicine the original panel took into account both this conduct and the previous professional warnings which had been issued. The Appeal Panel disregarded the latter issues. It nevertheless concluded that the original outcome was not unsafe in part and under Regulation 11.165 confirms the decision of the original Fitness to Practise Panel. This is because the Appeal Panel is under no doubt that the posting of the Facebook message is, of itself, conduct of a type which should inexorably lead to a finding of unfitness to practise."

Accordingly, the Appellant's appeal was dismissed.

19. *The OIA:* The Appellant did not seek Judicial Review ("JR") of the Appeal Panel's decision and, instead, complained to the OIA. However, on 8th May, 2015, the OIA confirmed that its final decision was that the Appellant's complaint was "Not Justified".

20. In its decision letter of 8th May, 2015 ("the decision letter"), setting out the "Complaint Outcome", the OIA stated (at [12]) that it "cannot interfere with academic judgment and will not generally interfere with professional judgment unless there is evidence of procedural irregularity, unfairness or bias." A decision as to whether a student was fit to practise in a particular profession was a "professional judgment" (at [35]).

21. The OIA highlighted the distinct purpose of the disciplinary and FTP processes (at [27]):

> " The disciplinary and Fitness to Practise processes may arise from the same misconduct, but their purposes are distinct: the role of the disciplinary process is to define, deter and punish behaviour which amounts to 'improper interference, in the broadest sense, with the proper functioning or activities of the institution, or those who work or study in the institution, or action which otherwise damages the institution'…. The purpose of the FtP regulations is to determine whether a student is fit to practise in a particular profession, where evidence emerges which calls that into question….."

22. The OIA was not persuaded that a later letter from PS saying that he would have thought twice about making the complaint had he realised how seriously it would be taken, would have made a material difference to the outcome (at [40]). Furthermore (at [45]), the OIA was not persuaded that the Appeal Panel's decision was unreasonable because it was taken on the basis of one incident alone. Nor was it necessary (*ibid*) for the Appeal Panel to give detailed consideration to lesser sanctions (see further below) because it had concluded that the Appellant's conduct was fundamentally incompatible with being a doctor.

23. The OIA's conclusions were set out as follows (at [56]):

> " In conclusion, we are satisfied that the University's regulations did not preclude a referral being made to the Fitness to Practise Panel after the conclusion of disciplinary procedures. We consider that the University acted reasonably in referring the matter for consideration under the FtP regulations given its duties imposed by the GMC; we are satisfied that a double penalty for the same misconduct was not imposed. We are satisfied that …[the Appellant]…was aware, as a medical student, of the professionalism requirements of his degree. Having been made aware of those requirements, the onus was on …[the Appellant]…to ensure that he behaved accordingly. Although …[the Appellant]… has expressed remorse for his actions in making the Facebook posts, and accepts that his actions were wrong, it was the professional judgment of the

> University, made after weighing-up all the evidence available to it at the time, that his actions were so serious that he was no longer fit to practise as a doctor, and that his registration should be terminated. In the absence of procedural irregularity, bias or unfairness, that is a judgment with which the OIA will nto interfere. For these reasons, we conclude that Mr Thilakawardhana's complaint to the OIA is **Not Justified**."

24. *The judgment:* Reference has already been made to the careful judgment of HHJ Milwyn Jarman QC. The proportionality of the sanction was addressed at [34] and following. At [35], the Judge said this:

> " It is clear ….from the decision letter that in the professional judgment of the appeal panel, one member of which was a hospital consultant, the posting and sending of the meme and message led inexorably to a finding of unfit to practise. Mr Newton complains that no consideration was given to the likelihood of repetition or counselling and that it is impossible to know from the decision letter the reasons of the appeal panel as to such matters. I do not accept that submission. The panel had clearly considered whether there were any sanctions or remedial actions which could be put in place which might address the shortcomings before the completion of the claimant's course, but concluded that the fundamental unsuitability for the profession could not be corrected. The appeal panel, in contrast, had regard only to the meme and the message but it clearly considered the decision of the panel. In my judgment it is unlikely that the appeal panel did not also consider other sanctions, as express reference was made to regulation 11.165. The reasoning, albeit brief, is adequate. As paragraph 117 of the [GMC] guidance states, expulsion should be applied if the student's behaviour is considered to be fundamentally incompatible with continuing on a medical course or eventually practising as a doctor. In my judgment it is sufficiently clear from the decision letter of the appeal panel that this is the conclusion to which it came. "

25. Accordingly (at [36]), it had not been shown that the OIA's approach to the decision of the Appeal Panel was irrational. The OIA was also entitled to conclude that the Appeal Panel had acted reasonably:

> "… in regarding the posting of itself as sufficiently serious to lead to the conclusion that the claimant is not fit to practise as a doctor and it was therefore unnecessary for detailed consideration to be given to lesser sanctions."

26. The Judge observed (at [37]) that the outcome may be seen by some as "harsh" but that was not the test he had to apply. Instead, the question for the Judge was "whether the decision is one to which no reasonable decision maker possessed of expertise reasonably to be expected of the defendant could have come". Adopting a "cautious

approach", the Judge could not be satisfied "that that high hurdle" had been reached "particularly as it involves professional judgment as to fitness to practise medicine".

THE RIVAL CASES

27. Following a renewed oral application, the Appellant was granted permission to appeal by Irwin LJ, limited to the question of sanction, on the basis that it was "just arguable that the reasons as to sanction and the process as to sanction starting from those findings were insufficiently structured".

28. For the *Appellant*, Mr Newton QC's submissions, thus confined to the question of sanction, were developed under three broad headings:

    i) The Appeal Panel's decision was inadequately reasoned ("Ground I: Inadequately Reasoned");

    ii) The sanction imposed by the Appeal Panel was disproportionate ("Ground II: Disproportionate Sanction");

    iii) The Appeal Panel failed or failed adequately to take into account the mitigating circumstances and/or the Guidance from the General Medical Council ("GMC") and the Medical Schools Council ("MSC") ("Ground III: Mitigation and Guidance").

29. Grounds I and III went together. Serious misconduct was admitted. The key question was whether expulsion or suspension with conditions or undertakings was the appropriate sanction. The nub of these Grounds was that the Appeal Panel had failed to explain why suspension was an insufficient sanction in all the circumstances. The Appeal Panel gave its conclusion but not the reasons for it. A structured approach had not been followed, proceeding from misconduct to impairment to sanction – and working upwards from the lowest sanction. This was not merely a call for an additional sentence in the Appeal Panel's decision; there was instead a need to explain why suspension was not sufficient. Mitigation was relevant to ensuring that a proportionate approach was taken to the decision on sanction. The same mistake had been made by the Panel, the Appeal Panel, the OIA and the Judge. The OIA ought to have picked up on an obviously unreasonable approach of the Appeal Panel. The judgment too could not be upheld.

30. Despite the wide margin accorded to the Appeal Panel, the thrust of the argument under Ground II was that expulsion was a disproportionate sanction and unsustainable.

31. It will be appreciated that should the Appellant succeed under Grounds I and/or III on the one hand or Ground II on the other, the consequences are different. Success under Ground II would effectively rule out expulsion as the sanction. Success under Grounds I and/or III entails that the body to whom the matter was remitted would be required to re-think the question of sanction but would not preclude it from coming to the same conclusion.

32. For the *OIA*, Ms McColgan placed her emphasis on the particular position of the OIA. She submitted that, even if we concluded that the Appeal Panel had fallen into error,

the OIA had not done so. This was a procedural *cul-de-sac* of the Appellant's own making. He could have sought JR against the University in respect of the Appeal Panel's decision; alternatively, he could have proceeded in contract. The OIA was not a legal body and it was, Ms McColgan submitted, wary of intervening in the case of an exercise of professional judgment on the part of the Appeal Panel. It was not appropriate to require the OIA to do more. In the vast majority of complaints, the OIA served a useful function. In any event it was to be noted that if the Appeal Panel had erred and the matter was remitted to the OIA, it [the OIA] could only recommend that the Appeal Panel revisit the matter – the OIA had no power to quash a decision of the Appeal Panel.

33. For the *University*, Ms Darwin, building on her very clear skeleton argument, addressed us under five headings:

i) The decision of the Appeal Panel was one it was entitled to reach under the GMC and MSC Guidance.

ii) The Appeal Panel had all the potential sanctions and thus the range of outcomes well in mind.

iii) The reasoning of the Appeal Panel was clear and ample in the circumstances. Expulsion was appropriate; the Appeal Panel was not required to explain why other sanctions were not appropriate.

iv) In considering whether the Appeal Panel's reasons were adequate, it was necessary to keep in mind that it was a lay panel.

v) The Appeal Panel took all relevant factors and mitigation into account.

34. By way of elaboration, Ms Darwin submitted that the Appellant's conduct had been at the serious, or extreme, end of the spectrum. The Appellant's case, in reality, invited the Court to substitute its own view for that of the Appeal Panel. Deference was due to the Appeal Panel, given the academic context in which the Appellant's conduct fell to be considered. Moreover, given that the issue went to FTP, it was to be underlined that the Appeal Panel included a hospital Consultant. Further, the Appeal Panel, unlike the Court, had heard from the Appellant himself. The Appeal Panel had given reasons for deciding on expulsion. It had implicitly given reasons for rejecting alternative sanctions to expulsion. However, if that was wrong, then the Appeal Panel was under no obligation to give reasons for the outcomes it rejected – even if, in retrospect, it would, or might, have been better to do so. The GMC and MSC Guidance was advisory, not mandatory but was in any event taken into account by the Appeal Panel, as were the various mitigating factors relied upon by the Appellant.

THE FRAMEWORK

35. *(1) The FTP regime:* In common with other professions, the medical profession has procedures in place to address practitioners' fitness to practise, so seeking to protect the public, to uphold professional standards and to maintain public confidence in the profession. Furthermore and as with some other professions, medical students hoping to enter the profession are also subject to fitness to practise procedures. As Irwin LJ, with respect, concisely expressed it (at [3]) when giving permission to appeal:

> " As a separate matter from the university disciplinary questions the University Medical School, as with other medical schools, is entrusted by the General Medical Council to ensure that students are not unfit to practise medicine and, if they are found to be unfit, that they should not be permitted to continue their training through to registration. "

Accordingly, FTP issues relating to medical students are for the university in question; the GMC has no direct authority to deal with or advise upon individual cases of fitness to practise. The GMC and MSC Guidance is clear in this regard (at para. 69):

> " Medical schools are responsible for determining the fitness to practise of individual medical students. The GMC does not have any direct authority to deal with or advise on individual cases of the fitness to practise or disciplinary issues of medical students."

36. *(2) Student discipline:* Pausing there, though disciplinary questions are distinct from FTP questions, there is a crossover, in the sense that the University's "*Regulations governing student discipline*" include (*inter alia*) the following regulation, namely Regulation 11.165, applicable to the Appeal Panel (and to which it referred):

> " Having considered all the evidence presented, the Student Discipline Appeals Panel shall determine one of the following outcomes to the Appeal:
>
> (a) confirm the decision(s) of the original Student Discipline Panel or Fitness to Practise Panel;
>
> (b) substitute a lower penalty except that, in so doing, the new, lower penalty must be consistent with precedent;
>
> (c) find that the original outcome was unsafe in part and find the student culpable of a lesser offence and impose a lesser penalty;
>
> (d) determine that the original outcome should be wholly overturned, exonerate the student and remove any penalty previously imposed;
>
> (e) determine that the circumstances of the case require a new hearing by a new Student Discipline Panel or Fitness to Practise Panel, of which the membership will have had no previous involvement in the case."

37. *(3) The GMC and MSC Guidance:* This Guidance, jointly issued by the GMC and MSC (and published in November 2009), is entitled "*Medical students: professional values and fitness to practise*".

38. The rationale for this Guidance is explained at para. 3:

> " Medical students have certain privileges and responsibilities different from those of other students. Because of this, different standards of professional behaviour are expected of them. Medical schools are responsible for ensuring that medical students have opportunities to learn and practise the standards expected of them."

Amplification is furnished by para. 11:

> " Although medical students have legal restrictions on the clinical work they can do, they must be aware that they are often acting in the position of a qualified doctor and that their activities will affect patients. Patients may see students as knowledgeable, and may consider them to have the same responsibilities and duties as a doctor. "

39. The status of the Guidance is made plain at para. 7:

> " In relation to the GMC's statutory role, this guidance is advisory rather than mandatory. However, GMC quality assurance reports on medical schools may recommend that they comply with the guidance or may commend an institution for good practice. Also, given that the GMC has to be satisfied that graduates applying for registration with a licence to practise are fit to practise, it would be surprising if a medical school thought it sensible to disregard this guidance."

40. Under the heading "Defining the threshold of student fitness to practise", para. 70 is in these terms:

> " A student's fitness to practise is called into question when their behaviour ….raises a serious or persistent cause for concern about their ability to continue on a medical course, or to practise as a doctor after graduation. This includes, but is not limited to, the possibility that they could place patients or the public at risk, and the need to maintain trust in the profession."

41. It may be noted that Table 1 (following para. 78 of the Guidance) lists as one of the most frequent areas of concern relating to student fitness to practise, "Aggressive, violent or threatening behaviour". The bullet points included under that area are assault, physical violence, bullying and abuse.

42. The Guidance deals with the role of the fitness to practise panel in some detail. Thus (para. 84), panels "should keep in mind the balance between patient and public safety, the interests of the medical student, and the need to maintain trust in the profession". All decisions (para. 85) should be taken in light of any GMC guidance and should be consistent with the regulations and procedures of the medical school. The standard of proof as to whether a student's fitness to practise is impaired is the balance of probabilities. Mitigating factors (para. 86) should be considered by a panel when deciding on the appropriate outcome only after finding that the student's fitness to practise is impaired. Due regard should be given to any evidence presented by way of

mitigation. Reasons should be given if any sanction is imposed (para. 87) and a written determination issued. Any sanction should be "proportionate to the behaviour" and must deal effectively with the fitness to practise concern.

43. Dealing with the outcomes of a student fitness to practise hearing, the Guidance provides as follows (at para. 89):

> " a. The student receives no warning or sanction.
>
> b. The student receives a warning as there is evidence of misconduct, but the student's fitness to practise is not impaired and does not require any of the sanctions listed below.
>
> c. The student's fitness to practise is judged to be impaired and they receive a sanction. Beginning with the least severe, the sanctions are:
>
> - conditions or undertakings
> - suspension from medical course
> - expulsion from medical course"

44. The approach to be followed in respect of outcomes is set out at para. 91:

> " Decision makers should consider the options available starting with the least severe and moving to the next outcome only if satisfied that the warning or sanction is not strong enough to protect patients and the public."

45. When a panel decides to impose a sanction, para. 102 requires that:

> " …they make it clear in their determination that they have considered all the options. They should also give clear reasons, including any mitigating or aggravating factors that influenced their decision, for imposing a particular sanction. In addition, the determination should include a separate explanation as to why a particular length of sanction was considered necessary. "

46. Coming to expulsion, para. 116 provides that a panel can expel a student from the medical school, "if they consider that this is the only way to protect patients, carers, relatives, colleagues or the public". Para. 117 follows and is in these terms:

> "Expulsion, the most severe sanction, should be applied if the student's behaviour is considered to be fundamentally incompatible with continuing on a medical course or eventually practising as a doctor. Although this list is not exhaustive, expulsion may be appropriate when a student:
>
> …..

- has behaved in a way that is fundamentally incompatible with being a doctor….."

47. *(4) The OIA:* The OIA is designated as the operator of the students' complaint scheme under s.13 of the *Higher Education Act* 2004 ("the 2004 Act"). Para. 2 of Schedule 3 of the 2004 Act obliges the OIA to provide a scheme ("the Scheme") for the review of "qualifying complaints", which include a complaint by a student or former student about an act or omission of a university, other than to the extent that "it relates to matters of academic judgment" (s.12).

48. The rules of the Scheme current at the material time include the following:

> " All Member Higher Education Providers agree to comply with the Rules, and the governing bodies of all Qualifying Institutions in England and Wales have a statutory obligation under ….the 2004 Act…to do so. Governing bodies should ensure that their procedures and regulations are compatible with the Rules.
>
> 1. Purpose
>
> The main purpose of the Scheme is the independent, impartial and transparent review of unresolved complaints by students about acts and omissions of Member HE Providers and, through learning from complaints, the promotion of good practice.
>
> 6. Review Procedures
>
> 6.2 In deciding whether a complaint is Justified the Reviewer may consider whether or not the Member HE Provider properly applied its regulations and followed its procedures and whether or not a decision made by the Member HE Provider was reasonable in all the circumstances.
>
> 6.4 The Reviewer shall not be bound by legal rules of evidence nor by previous decisions of the OIA."

49. As Ms McColgan was anxious to emphasise the OIA is not a court of law and does not function as such. Its reviewers are not generally legally qualified and complaints are not approached by way of a legal analysis.

50. In her witness statement dated 15th September, 2015, Ms Mitchell, the Deputy Adjudicator of the OIA stated that, between 2005 and 2014, it considered around 12,700 complaints. During 2014 (the year the Appellant's complaint was submitted), the OIA "closed" 2,040 complaints. Of those 2,040 complaints closed in 2014, 53 raised FTP issues, 7 involving medical students.

51. Ms Mitchell added this (at para. 7 of her witness statement):

> "Over the years we have developed considerable expertise in considering complaints relating to fitness to practise decisions.

> It is our view that considerable deference should be given to the decisions of fitness to practise panels. Those panels have the appropriate expertise and experience to weigh a student's behaviour….against the standards set by the relevant professional body, and to determine whether those concerns undermine that student's fitness to practise their chosen profession."

52. *(5) Authority:* Authority furnishes guidance in a number of respects. First, where professional discipline is concerned – and, for these purposes, FTP comes within the rubric of "professional discipline" – the relevant body is not primarily concerned with punishment, so that personal mitigation matters less than might otherwise be the case. Moreover, the reputation of the profession comes before the fortunes of any individual practitioner.

53. These matters were, with respect, helpfully encapsulated by Lord Rodger of Earlsferry, giving the judgment of the Board, in *Gupta v GMC* [2001] UKPC 61; [2002] 1 WLR 1691, at [21]:

> "….where professional discipline is at stake, the relevant committee is not concerned exclusively, or even primarily, with the punishment of the practitioner concerned. Their Lordships refer, for instance, to the judgment of Sir Thomas Bingham MR in *Bolton v Law Society* [1994] 1 WLR 512, 517-519 where his Lordship set out the general approach that has to be adopted. In particular he pointed out that, since the professional body is not primarily concerned with matters of punishment, considerations which would normally weigh in mitigation of punishment have less effect on the exercise of this kind of jurisdiction. …… Sir Thomas Bingham MR concluded, at p. 519: 'The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price.' *Mutatis mutandis* the same approach falls to be applied in considering the sanction of erasure imposed by the committee in this case."

54. Secondly and as is now (at the least) nearly a universal requirement, FTP panels must give adequate reasons for their decisions.

i) While recognising that grave consequences are at stake, "an elaborate formalistic product of refined legal draftsmanship" is not required from lay tribunals: Bingham LJ (as he then was) in *Meek v Birmingham City Council* [1987] IRLR 250, at [8], cited in *Phipps v General Medical Council* [2006] EWCA Civ 397; [2006] Medical Lloyd's Rep. 345, at [81].

ii) It should at once be added that succinctness is a virtue, not a failing and reasons, provided they are adequate, cannot be criticised for their brevity. Conversely, there is neither a requirement to lengthen reasons unnecessarily nor is there merit in defensive drafting of reasons to guard against a possible challenge.

iii) The adequacy of reasons will be fact specific and the degree of particularity required will vary with the nature of the issues arising for decision. In *South Bucks DC v Porter (No. 2)* [2004] UKHL 33; [2004] 1 WLR 1953, Lord Brown of Eaton-under-Heywood said this, at [36]:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law…. But such adverse inference will not readily be drawn……"

iv) At a minimum, reasons must make clear what has been decided and the parties must be put in a position where they can understand clearly why they have won or lost, as expressed by Wall LJ (as he then was) in *Phipps v GMC (supra),* at [85]:

> "….every Tribunal….needs to ask itself the elementary questions: is what we have decided clear? Have we explained our decision and how we have reached it in such a way that the parties before us can understand clearly why they have won or why they have lost?"

55. Thirdly, as is well-established, the Court approaches decisions of professional and university tribunals dealing with matters of FTP (or professional discipline) with deference, both as to findings of impairment to practise and as to sanction - though a Court can more readily depart from a tribunal's decision in a case where the misconduct in question does not relate to professional performance. The foundation for such deference is that professional and university tribunals are likely to be better attuned to the context than a Court and are, at the least, unlikely to have less insight as to the question/s in issue. Moreover, the professional or university tribunal may well have had the benefit of seeing and hearing from the practitioner or student in question. These propositions emerge clearly from the authorities which follow, taken in chronological order.

56. In *Bolton v Law Society (supra),* Sir Thomas Bingham MR, said this (at p.519):

> "….So far as the difference between striking off and suspension are concerned, I find it difficult to think that the Divisional Court could have expected to bring more insight to bear on that question than a tribunal with a majority of practising solicitors among its members."

57. *Higham v The University of Plymouth* [2005] EWHC 1492 (Admin); [2005] ELR 547 concerned a medical student expelled in the first year of his course. In observations which may be thought especially pertinent to the present case, Stanley Burnton J (as he then was) said this:

> "28. It is obvious that judgments as to whether an individual is fit to enter and to continue in an academic course leading to practise as a doctor are best taken by academics who are responsible for the conduct and teaching of that course, and that the staff who are medically qualified have a special part to play in such decisions. Judges are not, in general, medically qualified, and do not have experience of medical practice or of teaching and training students to become practising doctors……
>
> 29. In deciding whether the [University's] decision should be set aside, the court, which is less qualified to make the decision under challenge than the decision maker, must approach that decision fairly made by those qualified to make it with the respect and deference due in such circumstances. In *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988…. Sedley LJ said, at 1992 E-F…..
>
> 'disputes suitable for adjudication under [a university's] procedures may be unsuitable for adjudication in the courts. This is because there are issues of academic or pastoral judgment which the university is equipped to consider in breadth and in depth, but on which any judgment of the courts would be jejune and inappropriate…..'
>
> I would add to Sedley LJ's list of questions on which the judgment of the court is likely to be inappropriate the question whether a student is fit to continue his medical studies, and whether, if allowed to proceed, he will ultimately be fit to practise as a doctor. The degree of respect and deference appropriate to such a decision is increased by the consideration that the original decision maker, here the committee, had the advantage of seeing and hearing the witnesses and, perhaps most importantly, Mr Higham himself, and were able to form a view of him and his personality that a consideration of the documents by this court cannot approach. "

58. In *Raschid v General Medical Council* [2007] EWCA Civ 46; [2007] 1 WLR 1460, Laws LJ (at [26]) spoke of the "two principles which are especially important in this jurisdiction: the preservation of public confidence in the profession and the need in consequence to give special place to the judgment of the specialist tribunal."

59. *Khan v GPC* [2016] UKSC 64; [2017] 3 All ER 873 concerned a pharmacist who had criminal convictions recorded against him for domestic violence. In the event, the Supreme Court held that removal from the register was disproportionate. Lord Wilson said this (at [36]):

> "An appellate court must approach a challenge to the sanction imposed by a professional disciplinary committee with diffidence. In a case such as the present, the committee's concern is for the damage already done or likely to be done to

> the reputation of the profession and it is best qualified to judge the measures required to address it…… Mr Khan is, however, entitled to point out that:
>
> (a) the exercise of appellate powers to quash a committee's direction or to substitute a different direction is somewhat less inhibited than previously….
>
> (b) on an appeal against the sanction of removal, the question is whether it 'was appropriate and necessary in the public interest or was excessive and disproportionate'….
>
> (c) a court can more readily depart from the committee's assessment of the effect on public confidence of misconduct which does not relate to professional performance than in a case in which the misconduct relates to it….. "

60. Fourthly, the OIA is not a judicial body and is intended to provide, in effect, a speedy and cost effective means of Alternative Dispute Resolution ("ADR") in respect of student complaints against the decisions of university disciplinary or FTP panels. The Court will be slow to interfere with review decisions of the OIA – recognising its distinct status as a non-judicial provider of ADR, not because of any entitlement to "additional" deference over and above that accorded to professional and academic tribunals. Importantly, the OIA's position and its limitations need to be clearly understood, so that its generally useful function does not in some cases produce a procedural trap for the unwary - through unavailing recourse to the OIA (because of its non-judicial nature) resulting in time having expired for the bringing of Judicial Review proceedings against the decisions of university tribunals. It will be convenient below, when addressing the submissions in the present case, to offer some reflections to guard against magnifying the OIA's limitations.

61. In *R (Maxwell) v OIA* [2011] EWCA Civ 1236; [2012] ELR 538, Mummery LJ, building on the decision in *R (Siborurema) v OIA* [2007] EWCA Civ 1365; [2008] ELR 209, enunciated the following "general points" (at [23]):

> "(1) The OIA is amenable to judicial review for the correction of legal errors in its decision-making process.
>
> (2) That process involves conducting, in accordance with a broad discretion, a fair and impartial review of a student's unresolved complaint about the acts or omissions of an HEI and to do so on the basis of the materials before it, also drawing on its own experience of higher education, all with a view to making recommendations.
>
> (3) The function of the OIA is a public one of reviewing a 'qualifying complaint' made against an HEI [i.e., a Higher Educational Institution ("HEI")] and of determining 'the extent to which it was justified'.
>
> ……

> (5) It is not the function of the OIA to determine the legal rights and obligations of the parties involved, or to conduct a full investigation into the underlying facts. Those are matters for judicial processes in the ordinary courts and tribunals. Access to their jurisdiction is not affected by the operations of the OIA.
>
> …..
>
> (7) The courts will be slow to interfere with review decisions and recommendations of the OIA when they are adequately reasoned. They are not required to be elaborately reasoned, the intention being that its operations should be more informal, more expeditious and less costly than legal proceedings in ordinary courts and tribunals."

62. As, with respect, concisely expressed by Hallett LJ in *Burger v OIA* [2013] EWCA Civ 1803, at [50]:

> " The OIA was set up to provide speedy, effective and cost effective resolution of students' complaints. It was not set up as a court or tribunal or other judicial body. Any court asked to review its decisions must, therefore, act with caution….."

63. Very recently, Hickinbottom J (as he then was) considered the position of the OIA in some detail in *R (Zahid) v The University of Manchester* [2017] EWHC 188 (Admin), at [23] – [49] and concluded that it was ADR properly so called. As there set out (at [23]), the OIA came into being as a result of perceived deficiencies in the visitors' jurisdiction. In conducting a fair and impartial review of a student's unresolved complaint about the acts or omissions of a HEI, the OIA (at [40], *inter alia*) draws on its own expertise and experience of higher education. In considering whether the HEI's decision was reasonable in all the circumstances, the OIA is not confined (at [41]) "to the antithesis of legally perverse or *Wednesbury* unreasonable." The function of the OIA is "inherently different from that of the court" (at [43]) and therefore does not provide a "coextensive remedy to a challenge by way of judicial review" (at [44]). Hickinbottom J went on to say this:

> " 45. The OIA scheme and court proceedings thus respectively offer advantages and disadvantages to a student who is dissatisfied with his or her treatment by an HEI. As Parliament specifically intended…..the former offers an attractive alternative to formal legal proceedings; but, although its findings and decision may give pointers to its view on the formal legal position, it does not and cannot determine legal rights and obligations. The latter offers a forum for the resolution of issues in relation to formal legal rights and obligations, but at some considerable cost, not only in terms of money but also publicity and lack of flexibility in terms of both process and remedies….
>
> 46. Because of the advantages of the OIA scheme, most students who have unsatisfied complaints against an HEI at

> which they have been studying refer the matter to the OIA, and do not wish to pursue legal proceedings. The OIA receives about 2,000 complaints per year.
>
> 47. However, some students do wish to pursue a legal claim.…… Such students issue proceedings instead of, or as well as, referring the matter to the OIA; or at least wish to preserve and protect their position on proceeding in the court, dependent upon the result of the OIA reference."

64. For completeness, although Hickinbottom J referred (at [42]) to the need for "especial caution" before a Court interfered with an OIA decision, I am unwilling, with respect, to attach significance to the word "especial". First, there is nothing in Hickinbottom J's judgment suggesting an intention to depart from previous authority (including *Maxwell* and *Burger, supra*) where there is no reference to the need for "especial" caution, as distinct from caution (or being slow to interfere). Secondly, if, which I doubt, Hickinbottom J did attach significance to the word "especial", then I would respectfully part company with him. It suffices to underline the need for caution; degrees or gradations of caution are unhelpful and unnecessary.

DISCUSSION

65. I turn to the three grounds of appeal developed by Mr Newton. All three will be dealt with by reference to the Appeal Panel's conclusions. Thereafter, the position of the OIA will be considered, together with brief mention of the judgment (under appeal). Throughout, I keep well in mind that the mere fact (even if it be the fact) that had we been the primary decision-makers we *might* have reached a different conclusion to that arrived at by the Appeal Panel, is not a proper basis for intervention.

Ground II: Disproportionate Sanction

66. It is convenient to take Ground II first as, in my view, it can be disposed of at once.

67. In reality, the Appellant's case under Ground II invites us to substitute our view for that of the Appeal Panel; if decided in the Appellant's favour, it would effectively rule out expulsion as a sanction and this Court would effectively be replacing it with the sanction of suspension. In the course of argument, McFarlane LJ very helpfully (with respect) deployed the description of a spectrum of behaviour impairing an individual's FTP. While I would not be minded to accept that the Appellant's conduct was so extreme in terms of the spectrum that expulsion was the *only* proper sanction open to the Appeal Panel, I am conversely quite unable to say that the Appellant's conduct was such that expulsion was a disproportionate sanction not open to the Appeal Panel, so that *we* should mandate the substitution of suspension in its place. But nothing less will suffice for Ground II to succeed - having regard to the respect and deference due to the Appeal Panel's decision, reached after seeing and hearing from the Appellant. Accordingly, I would dismiss Ground II.

Ground I: Inadequately Reasoned

68. As earlier foreshadowed, success for the Appellant on Grounds I and/or III (unlike Ground II) does not entail this Court requiring the substitution of a different sanction

for that imposed but would instead lead to remission, most probably to the OIA but with some directions as to the recommendation to be made (by the OIA) to the Appeal Panel. There will of course be no remission unless the Appellant is successful on either of Grounds I or III and it is to the outcome of these Grounds that I next turn.

69. In my judgment, the Appeal Panel's reasoning was clear, if undoubtedly terse. Having regard to the meme and, more especially, the private message, the Appeal Panel concluded that it conveyed to PS a "real and justified" fear that he would be subjected to violence. In two passages (set out above), the Appeal Panel observed, first, that the sending of this message was "completely unacceptable behaviour….such that it renders the sender of it unfit to practise medicine"; secondly, the Appeal Panel expressed itself "under no doubt" that the posting of the Facebook message was "of itself, conduct of a type which should inexorably lead to a finding of unfitness to practise".

70. For my part, I do not think that these observations on the part of the Appeal Panel were conclusory only. To the contrary, the Appeal Panel viewed the Appellant's misconduct as so grave that, of itself, it led inexorably to the conclusion that the Appellant was unfit to practise. In short, the Appellant's misconduct was the reason which gave rise to the conclusion that his studies should be terminated.

71. I am, with respect, wholly unpersuaded that the Appeal Panel did not have in mind lesser sanctions or that it leapt to expulsion without consideration of those lesser sanctions, in particular suspension. To begin with, the Appeal Panel considered and departed from the Panel's reasoning – in a manner favourable to the Appellant, by disregarding the professionalism warnings. However, in doing so, the Appeal Panel could not have overlooked that the Panel had in terms considered and dismissed lesser sanctions than expulsion. Next, the Appeal Panel made express reference to the University's Regulation 11.165, which dealt with its power to impose a lower penalty than that decided upon by the Panel, thus, again, bringing to the fore the Appeal Panel's options in this regard. In any event, the composition of the Appeal Panel, including two senior academics, renders it implausible that the Appeal Panel was not fully cognisant of the availability of lesser sanctions.

72. To my mind, the Panel, as it was entitled to do, took so serious a view of the threat of violence that it implicitly rejected any lesser sanction. In taking such a view, it was acting consistently with para. 70 of the GMC and MSC Guidance, where behaviour may raise a "serious cause for concern" as to FTP – which need not amount to a "persistent cause for concern". So too, "threatening behaviour" is expressly listed in Table 1, following para. 78 of the Guidance as one of the most frequent areas of concern relating to student FTP. Further still and crucially, expulsion may be appropriate when a student's behaviour is "fundamentally incompatible" with being a doctor (para.117 of the Guidance) – language very close to that used by the Appeal Panel.

73. At all events, the questions posed by Wall LJ in *Phipps v GMC (supra)* can readily be answered. The Appeal Panel clearly decided that the Appellant's medical studies should be terminated. The Appellant can clearly understand that he lost because of the seriousness of his own conduct in putting PS in "real and justified" fear of violence, such conduct leading "inexorably" to a finding of unfitness to practise medicine.

74. It follows, in my view, that the Appeal Panel, a lay panel, gave adequate reasons for its decision to uphold the Panel's decision in favour of expulsion. Further, I take the view that the Appeal Panel, in so doing, implicitly rejected the imposition of lesser sanctions. I am unable to conclude that by not going further and dealing expressly with the rejection of suspension that the Appeal Panel fell into error such that its decision can properly be impugned. While it would have been preferable to have said something expressly as to the rejection of suspension (no other alternative sanctions were realistically to be contemplated) – so conforming more literally to the GMC and MSC Guidance at paras. 89, 91 and 102 – in reality, but little would have been added by such an approach in the circumstances of this case. While an appeal panel cannot and should not cut corners, it is to be underlined that a box ticking approach is not required.

75. As the Judge observed (judgment, at [37]), upholding the Appeal Panel's decision on Ground I may appear harsh to some; however, not only is that not the relevant test but there are very powerful considerations telling against this Court interfering:

    i) First, for the reasons so clearly set out by Stanley Burnton J in *Higham*, *supra*, the Appeal Panel was distinctly well qualified to make the judgment on FTP questions in this case. As a university panel, it will have been especially attuned to the context in which student conduct is to be evaluated, in addition to the pastoral issues which arise. Additionally, it saw and heard from the Appellant. Moreover, including amongst its members a hospital Consultant, it was particularly well-placed to rule on whether the Appellant should be permitted to continue his medical studies.

    ii) Secondly, it is to be remembered that different standards of behaviour may be expected from medical students than may be demanded of other students: see, the GMC and MSC Guidance, at paras. 3 and 11 set out above.

    iii) Thirdly, in dealing with an issue of professional discipline or FTP, the reputation of the profession is more important than the fortunes of the individual practitioner or student: *Gupta v GMC*, *supra.* Viewed in this context, this Court should indeed be slow to interfere with the decision of the Appeal Panel.

76. For these reasons, I would dismiss Ground I.

<u>Ground III: Mitigation and Guidance</u>

77. *Mitigation:* The GMC and MSC Guidance unequivocally advises a panel imposing a sanction to take account (*inter alia*) of mitigating factors (at para. 102). The answer, however, to the Appellant's complaint under this heading is straightforward: namely, the Appeal Panel did so.

78. Thus:

    i) The Appeal Panel made express reference to the Appellant's conduct following "provocative behaviour" on the part of PS.

ii) The Appeal Panel treated the Appellant's apology of the 25th April, 2014 to PS as "unreserved" and had it well in mind.

iii) Exceptionally, the Appeal Panel permitted the Appellant to adduce fresh psychiatric evidence, albeit that it did not regard this evidence as providing "strong mitigation" for the Appellant's misconduct.

iv) The Appeal Panel was plainly mindful of the fact that the Appellant's misconduct comprised an isolated incident; indeed, it disregarded the various other matters to which the Panel had had regard, before concluding that the posting of the Facebook message was "of itself" conduct warranting expulsion.

79. *Guidance:* Although the GMC and MSC Guidance is advisory not mandatory, I would expect a university panel in the medical sphere to take such Guidance into account and would be surprised if it appeared that, in substance, it had failed to do so: see para. 7 of the Guidance. For the reasons already given when addressing Ground I, I do not think that was the case here. It would indeed be unlikely that the Appeal Panel did not take the Guidance into account, given that (as Ms Darwin's skeleton argument demonstrated) the University's FTP Regulations were drafted to reflect the guidelines of the relevant professional bodies. It is unnecessary to add here anything further to that already said under the heading of Ground I.

80. For these reasons, I would dismiss Ground III, so that the appeal, insofar as it turns on the decision of the Appeal Panel, falls to be dismissed.

The position of the OIA

81. In the light of my conclusion that the appeal against the decision of the Appeal Panel ought to be dismissed, it follows that the appeal so far as it concerns the decision of the OIA must inevitably fail.

82. Strictly speaking, nothing further need be said about the OIA. However, I confess to some concern as to the nature of the submissions advanced by counsel on behalf of the OIA. On the facts of the present case, with respect to counsel's submissions, I could discern no room for a conclusion that if the Appeal Panel had erred (contrary to my conclusion), the OIA had not. Furthermore, I would not wish to be taken as endorsing counsel's submission defending the reticence of the OIA to intervene simply because a university panel's decision involves professional judgment. That submission appears to overlook the power, contained in rule 6.2 of the OIA Scheme, to consider whether a decision made by a HEI was "reasonable in all the circumstances" – and as observed in *Zahid (supra)*, at [41], when doing so the OIA is not confined "to the antithesis of legally perverse or *Wednesbury* unreasonable". It will be appropriate for the OIA to give great weight to the decision of a university panel involving an assessment based on professional judgment but it should not treat such a decision as completely beyond its power of review. Still further, were that submission well-founded in the terms advanced, the purpose and utility of the OIA might well be undermined – necessitating applications for Judicial Review which could otherwise be avoided. The position of the OIA as a non-judicial body, offering a form of ADR is well understood (as I hope to have shown) but that is not a justification for an unduly self-denying ordinance which would have the unattractive

consequence of pushing parties into litigation or, at the least, preserving time limits for litigation.

The judgment

83. I return, finally, to the judgment. Having already indicated my view that the appeal against the decisions of the Appeal Panel and the OIA underlying the judgment should be dismissed, it follows that I would dismiss the appeal against the judgment. Suffice to say, with respect, that I entirely agree with the observations of the Judge as to sanction, at [34] and following, set out above.

Lord Justice McFarlane:

84. I agree.

Lord Justice Sales:

85. I also agree.