Neutral Citation Number: [2019] EWHC 2129 (Admin)

Case No: CO/5128/2018

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

Manchester Civil Justice Centre
1 Bridge Street,
Manchester M60 9DJ

Date: 05/08/19

Before :

LORD JUSTICE HICKINBOTTOM
and
MR JUSTICE BUTCHER

- -

Between :

THE QUEEN ON THE APPLICATION OF
EVGENIY IGOROVICH KUZMIN

Claimant

- and -

GENERAL MEDICAL COUNCIL

Defendant

- -
- -

Mary O'Rourke QC (instructed by **Gunnercooke LLP**) for the **Claimant**
Eleanor Grey QC (instructed by **GMC Legal**) for the **Defendant**

Hearing date: 23 July 2019

- -

Approved Judgment

Lord Justice Hickinbottom :

Introduction

1. This claim raises the important issue of whether a panel of the Medical Practitioners Tribunal ("the MPT") is entitled to draw an adverse inference from a practitioner's failure to give evidence at a disciplinary tribunal hearing of charges brought against him.

2. The Claimant is a registered medical practitioner. Disciplinary proceedings against him were brought before the MPT by the regulator and responsible disciplinary body for such practitioners, the General Medical Council ("the GMC"), in which an allegation of dishonesty was made. At the close of the GMC's case, following an unsuccessful application to have the case dismissed, the Claimant withdrew his witness statement and indicated that he would not give evidence before the tribunal. The GMC sought a ruling from the tribunal that, as a matter of principle, it (the MPT) had the power to draw an adverse inference from the fact that a doctor against whom charges are made does not give evidence. After hearing submissions on that issue, on 11 October 2018, the tribunal concluded that it had that power. The Claimant now challenges that decision.

3. Before us, Mary O'Rourke QC appeared for the Claimant and Eleanor Grey QC for the GMC. At the outset, I thank them for their helpful submissions.

4. I stress that the challenged decision is one of principle. Leaving aside the facts of the Claimant's own case, Ms O'Rourke submits that, in disciplinary proceedings against a medical practitioner, the practitioner has a right to remain silent; and the MPT cannot in any circumstances draw an adverse inference from him remaining silent. Ms Grey submits that, in appropriate circumstances, it may do so. Having determined that it had the power as a matter of principle, the tribunal itself said that it would not consider whether to draw any inference on the facts of the Claimant's case until it had heard full submissions on the facts: and whether the tribunal should draw such an inference on the facts of this case is not in issue before us.

The Facts

5. The GMC is a body charged by the Medical Act 1983 ("the 1983 Act") with various functions relating to medical practitioners, its over-arching objective being "the protection of the public" (section 1(1A)). Its functions include keeping a register of all those who practise medicine in the United Kingdom (section 2 and Part IV) and investigating allegations that a registered doctor's fitness to practise is impaired (Part V).

6. From 11 June 2011, the GMC established the Medical Practitioners Tribunal Service ("the MPTS") as an adjudication arm. The MPTS arranges and manages panels of the MPT and Interim Orders Tribunals ("IOTs") more or less independently of the GMC, although it does not have a separate legal personality and the GMC funds and is ultimately responsible for the service. Hence, the GMC is the Defendant in this claim.

7. Investigations are conducted under the General Medical Council (Fitness to Practise) Rules Order of Council 2004 (SI 2004 No 2608) ("the Rules"). Under those Rules, where an allegation that a registered medical practitioner's fitness to practise is impaired, having given the practitioner an opportunity to respond to the allegation, case examiners must decide what steps to take which include referring allegations to the MPTS for determination by an MPT (rule 8(2)(d)). If at any stage a case examiner considers that an interim order should be considered, then he is under a duty to refer the matter to the Registrar: and, if he agrees, then he must refer it to the MPTS for it to arrange for the matter to be considered by an IOT (rules 6 and 8(6)).

8. The Claimant graduated from the Bukovian State Medical University, Ukraine in July 1997, and then completed a Certificate in Obstetrics and Gynaecology at the same institution. He was registered with the GMC in February 2006, from when he practised medicine in the United Kingdom primarily in obstetrics and gynaecology, before commencing the GP Vocational Training Scheme in August 2011.

9. As part of this training, he was required to perform a certain amount of out-of-hours work; and, in August 2016, he registered with Hampshire Doctors on Call Service ("Hampshire DOCS"), a GP out-of-hours service. However, concerns were expressed as a result of alleged poor record keeping, use of the EMIS Web primary care clinical system and a missed referral during the earlier part of his training; and charges were brought by the GMC. As a result, from September 2016, he was "deactivated" from Hampshire DOCS pending the resolution of those issues.

10. The GMC opened an investigation into the Claimant ("the 2016 investigation"); and, on 15 November 2016, he appeared before the IOT which placed conditions on his registration. Condition 8(f) included a requirement that he inform any out-of-hours service that his registration was subject to Conditions 1-7. Those conditions were from time-to-time reviewed and maintained, including at a hearing on 5 May 2017 which the Claimant attended.

11. The Claimant did not notify Hampshire DOCS of Conditions 1-7. Indeed, on 7 June 2017, he emailed Hampshire DOCS asking to resume his work for them, making no mention of the conditions. He wrote to them again on 20 and 28 June 2017, on neither occasion mentioning the conditions. Hampshire DOCS found out about the conditions from another source – Dr A – and the Claimant only told Hampshire DOCS about them when prompted to do so by that same doctor. As part of the correspondence, on 4 July 2017 Dr A emailed the Claimant asking him to disclose Conditions 1-7 to Hampshire DOCS; and, on 6 July 2017, the Claimant responded to say that he would do so. It seems to have been common ground before the tribunal that the Claimant did not disclose all seven conditions to Hampshire DOCS, but only those conditions he considered were relevant to them.

12. The 2016 investigation led to a hearing before the MPT in January 2018, at which the tribunal found no misconduct on the Claimant's part. However, the Claimant's failure to inform Hampshire DOCS of Conditions 1-7 in alleged breach of Condition 8(f) attached to his registration by the IOT resulted in further MPT proceedings. In those proceedings, there appear to have been two primary issues, namely:

i) whether the Claimant was registered with Hampshire DOCS at the relevant time, and whether he was obliged by the IOT order to disclose Conditions 1-7 to Hampshire DOCS; and

ii) if so, whether the Claimant's failure to disclose those conditions was dishonest.

13. For those proceedings, the Claimant filed a signed statement. It strenuously denied dishonesty (paragraph 12): indeed, it explained at length how the Claimant said the failure had happened and why it was not dishonest. The Claimant said he did not contact Hampshire DOCS because he was not at that time "active so to speak with [them]" (paragraph 7). In any event, he thought that they had been informed (paragraph 8). He was under immense pressure due to the GMC investigation itself (paragraph 9); and he was also concerned at that time about his mother's health (paragraph 10). It was a "complete oversight" (paragraph 12), in a situation which he considered was "overwhelming" (paragraph 15).

14. The MPT hearing began on 3 July 2018 before a panel comprising a chair and two wing members (none of the three being a legal member), with a legal assessor. The charge was amended so as to read as follows:

> "That being registered under the Medical Act 1983 (as amended):
>
> 1. On 15 November the [IOT] imposed an interim order of conditions ('the interim order') on your registration.
>
> 2. On 5 May 2017 the interim order was reviewed by the IOT, at which you were in attendance.
>
> 3. On or around 7 June 2017, you failed to inform [Hampshire DOCS], the out-of-hours service, with whom you were registered, of conditions 1-7 of the interim order as required by condition 8 of the interim order.
>
> 4. You failed to provide details of the full conditions imposed on your registration by the IOT, in response to email requests made on… 4 July 2017 by Dr A.
>
> 5. Your actions as described above at paragraphs 3 was dishonest."

15. At the conclusion of the GMC's case, which included the examination and cross-examination of the rota manager of Hampshire DOCS, the Claimant through Ms O'Rourke (who also represented him there) made an application of no case to answer, She submitted that there was no evidence or no sufficient evidence upon which the tribunal could properly conclude that the Claimant was (i) registered with Hampshire DOCS on 7 June 2017; (ii) under a duty to inform Hampshire DOCS of Conditions 1-7 on or about 7 June 2017; (iii) under a duty to respond to Dr A's email of 7 July 2017 by disclosing Conditions 1-7; and (iv) dishonest. That application was rejected by the tribunal on 5 July 2018. Notably, the tribunal held that there was evidence upon which dishonesty could be inferred: in particular, the Claimant had attended the IOT

meeting on 3 May 2017, and the conclusion could be drawn that he knew of his obligation to inform Hampshire DOCS of Conditions 1-7 and he deliberately failed to comply with it.

16. That determination having been delivered, the Claimant indicated that he would not call any evidence, and he applied to withdraw his witness statement.

17. The GMC submitted in a skeleton argument that, in those circumstances, the MPT could draw an adverse inference from the Claimant's refusal to give evidence, notably in respect of the alleged dishonesty. It was submitted that the failure of the Claimant to give evidence was capable of giving, and did in fact give, rise to the inference that the Claimant has no innocent explanation for his failure to disclose the conditions or at least no innocent explanation that would withstand the scrutiny of questioning. Ms O'Rourke submitted in a responding skeleton argument there was no right to draw any adverse inference from the Claimant's silence.

18. The hearing resumed on 10 October 2018, with oral submissions on behalf of both parties on that issue. The MPT's legal assessor gave the panel advice of which we have a transcript. He emphasised that the position was very unusual, it being common ground that there was no precedent for the drawing of such an adverse inference in any proceedings before any of the healthcare disciplinary tribunals. He set out the contentions of the parties, and his summary of the relevant case law, statutory provisions in criminal field and GMC guidance in "Good Medical Practice"("GMP") to which I shall return.

19. The MPT handed down its determination the following day (11 October 2018). It concluded that, in the MPT, adverse inferences from silence were permissible (paragraph 50). In coming to that view, the tribunal accepted that there was no definitive precedent on the point, only the discussion in the authorities and approval in principle of the drawing of such inferences (paragraph 45). The tribunal considered that, for the approach of the MPT to change, it was not necessary for the GMC to draw up specific guidance or policy: such an approach could develop from caselaw (paragraph 46). The drawing of adverse inferences had not been regarded in other jurisdictions as reversing the burden of proof (paragraph 47). Having regard to the need to promote and maintain public confidence in the medical profession, the overarching objective of the 1983 Act and the requirement of GMP that doctors cooperate with enquiries, offer all relevant information, be accountable and explain their decisions (paragraphs 48-49), it was in the public interest for doctors to provide a response (including oral evidence) to serious allegations made against them — and adverse inferences from their silence when faced with such allegations were permissible in principle. The tribunal made clear that it was not saying that an adverse inference would be drawn in this case: that was a matter which could only be decided after hearing full submissions.

20. The Claimant sought an adjournment to enable him to challenge that in principle decision by way of judicial review. Permission was refused by Yip J; but granted at an oral renewal hearing by Julian Knowles J.

21. The issue is thus before us.

The Claimant's Core Case

22. Whilst there are twelve grounds of challenge, before us Ms O'Rourke helpfully focused her core case, as follows.

23. In respect of a criminal charge, it is well-recognised that an accused person generally has a privilege against self-incrimination, and thus a "right to silence". As a result, such an individual (e.g.) is under no general duty to assist the police with their inquiries (Rice v Connolly [1966] 2 QB 414) and is not a compellable witness at trial.

24. At common law, this right to silence was supplemented by a further right: no adverse inferences were generally permitted to be drawn from the exercise of the right to silence.

25. Disciplinary proceedings were regarded as quasi-criminal, to which criminal procedures (including the criminal burden and standard of proof) generally applied. Ms O'Rourke submitted that, in disciplinary proceedings, the common law position with regard to the prohibition of adverse inferences being drawn from the exercise of the right to silence was the same as in criminal proceedings.

26. The position in respect of criminal proceedings was substantially changed by section 35 of the Criminal Justice and Public Order Act 1994, which provides that, in determining whether the accused is guilty of the offence charged, the court may draw such inferences as appear proper from his failure to give evidence or his refusal to answer any question, without good cause.

27. However, that provision only applies to criminal proceedings. Ms O'Rourke submitted that it left the position with regard to disciplinary proceedings unaffected: the common law position with regard to the prohibition of inferences from the exercise of the right to silence continued to apply.

28. Ms O'Rourke frankly accepted that it might be in the public interest if such adverse inferences were permitted in disciplinary proceedings; but, she submitted, the common law position could only be altered by the intervention of statute (as it was in the field of criminal proceedings), statutory instrument or at least generally applicable policy or guidance issued by the appropriate regulator after full consultation with (amongst others) the profession. Insofar as the common law might be altered by the courts themselves, although several authorities have indicated that the public might benefit from the availability of such adverse inferences and the relevant regulatory authorities might consider changing their practice so that they are allowed, none of the authorities purports to change the common law position. That position cannot be altered by a single tribunal purporting to take to itself the power which the common law denies and which, in substance or effect, reverses the burden of proof, as the MPT did in this case.

29. Ms O'Rourke submitted that cases such as Wisniewski v Central Manchester Health Authority [1998] PIQR P324 (recently approved in Manzi v King's College Hospital NHS Foundation Trust [2018] EWCA Civ 1882 at [28]), which make clear that a civil court is entitled to draw adverse inferences from the absence or silence of a party who might be expected to have material evidence to give in relation to an action, are of no assistance in relation to disciplinary proceedings which are not simple civil claims. Disciplinary proceedings have charges which a prosecutor brings, and have procedures (such as those relating to bad character evidence) which are akin to

criminal proceedings. They are, in effect, a hybrid of civil and criminal; and, even where (as with proceedings before the MPT) the standard of proof is now civil and not criminal, it cannot be said that they are simple civil proceedings such that the common law rule against adverse inferences from silence can be taken as having been abrogated.

30. Ms O'Rourke prayed in aid rule 16A of the Rules, which provides that, where there is a failure to comply with the Rules or a direction issued by the tribunal or case manager, the MPT may, in respect of that failure, "draw adverse inferences" (see rule 16A(2)(a)). That was inserted with effect from 31 December 2015, by paragraph 1 of Schedule 1 to the General Medical Council (Amendments to Miscellaneous Rules and Regulations) Order of Council 2015 (SI 2015 No 1964). Ms O'Rourke submitted that rule 16A is support for the proposition that the power to draw adverse inferences can only be introduced by some formal means such as a statutory instrument; and that, had it been intended to change the position with regard to such inferences from silence, then that could easily have been done in the 2015 statutory instrument (or one of the other amending instruments that there have been both before and after 2015); or some generally applicable policy or guidance issued by the GMC.

The Claimant's Core Case: Discussion

31. Inferences are simply conclusions deduced by a competent fact-finder by a process of reasoning (including drawing on common experience) from primary facts, i.e. matters which the fact-finder accepts were observed by witnesses and proved by oral or written testimony, or proved by the production of a thing itself such as an original document. As a general rule, a fact-finder such as a disciplinary tribunal may draw such inferences as it considers appropriate from the primary facts: it is a power which is implicit in the wider power to make factual findings from evidence, without the need for any express power. However, of course, inferences may be impermissible in certain circumstances, notably where they give rise to procedural unfairness or an unacceptable risk of such unfairness.

32. Although I accept that the right against self-incrimination (and thus the right to silence) are essential elements of the normative right to a fair criminal trial (see, e.g., Saunders v United Kingdom (European Court of Human Rights ("ECtHR") Case No 19187/1991) (1997) 23 EHRR 313 at [72]), the right to silence at common law was in practice inextricably linked to the common law rule that the accused was not a competent witness at his own trial. Although eroded during the nineteenth century by statutory provisions relating to particular circumstances, that general rule was not abolished until the Criminal Evidence Act 1898, section 1 of which made an accused a competent but not compellable witness, i.e. an accused was able to give evidence on his own behalf, but could choose not to do so and remain silent.

33. Where a person has a case to answer, if he remains silent, then, as a matter of normal processes of reasoning and common sense, it may be reasonable to draw the inference that he is unable to answer that case in whole or in part. However, for criminal cases, the common law attached to the other rights of an accused person (including the right not to self-incriminate), the right not to have adverse inferences drawn from his silence which he had the right to maintain. That was an exception to the general rule that a fact-finder is entitled to draw inferences from facts he finds to be true, including adverse inferences from silence.

34. Disciplinary tribunals are part of the regulatory scheme which governs the relationship between professional associations and individuals who practise that profession and, as a condition of doing so, sign up to that scheme. In form they may have "charges" in the form of alleged breaches of the regulatory scheme under which the individual operates, which are "prosecuted" by the relevant regulatory authority; and, of course, disciplinary tribunals have the power to impose sanctions for breaches which may have very severe consequences for the individual involved. However, as the courts have repeatedly emphasised, disciplinary proceedings are civil and *not* criminal proceedings (see, e.g., Wickramsinghe v United Kingdom (ECHR Commission Case No 31503/96) [1998] EHRLR 338; R v The Securities and Futures Authority ex parte Fleurose [2001] EWHC 292 (Admin) and [2001] EWCA Civ 2015; R (Coke-Wallis) v Institute of Chartered Accountants of England and Wales [2011] UKSC 1; [2011] 2 WLR 103 at [23] per Lord Clarke of Stone-cum-Ebony JSC giving the majority judgment of the court; and R (Panjawani) v Royal Pharmaceutical Society of Great Britain [2002] EWHC 1127 (Admin) at [54] per Sedley LJ).

35. Ms O'Rourke accepted that disciplinary proceedings are not simply criminal in nature; but, she submitted, they are a "hybrid" of criminal and civil proceedings. In support of that proposition, she relied upon authorities which focused on the question as to whether article 6(2) and (3) (as well as article 6(1)) of the European Convention on Human Rights ("the ECHR") applied in disciplinary proceedings.

36. Article 6 of the ECHR provides, under the heading "Right to a fair trial":

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> > (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> >
> > (b) to have adequate time and facilities for the preparation of his defence;
> >
> > (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient

> means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

37. Ms O'Rourke referred us to Albert and Le Compte v Belgium (ECtHR) Case Nos 7299/75 and 7496/76) (1983) 5 EHRR 533 at [30], in which the ECtHR said:

> "In the opinion of the Court, the principles set out in [article 6(2) and (3)(a), (b) and (d)] are applicable, *mutatis mutandis*, to disciplinary proceedings subject to [article 6(1)] in the same way as in the case of a person charged with a criminal offence."

Similarly, in Fleurose, the Court of Appeal, having referred to Albert and Le Compte, said (at [9]) that "disciplinary proceedings against a professional man or woman… may still bring into play some of the requirements of a fair trial spelt out in article 6(2) and (3) including the presumption of innocence…".

38. However, in my view, these authorities do not assist Ms O'Rourke's cause. Each makes clear, beyond any doubt, that, whilst disciplinary proceedings involve the determination of a practitioner's civil rights and obligations where the practitioner's right to practise is affected, they are not criminal proceedings (see the resumé in The Regulation of Healthcare Professionals: Law, Principle and Process: D Gomez: 2nd Edition (2012), at paragraph 19-016, to which we were helpfully referred). It is true that, because they concern important rights and may result in severe consequences for an individual, disciplinary proceedings often demand strong procedural safeguards including some safeguards regarded as essential in criminal proceedings. But that does not mean that disciplinary proceedings are criminal, or even a criminal/civil hybrid as Ms O'Rourke submitted. They are civil proceedings in respect of which procedural fairness sometimes requires particular steps to be taken, including some of those specifically identified in article 6(2) and (3) as vital in criminal proceedings such as the requirement to be properly informed of the nature of the disciplinary charges against him. As the ECtHR put it in Albert and Le Compte (also at [30]), in the context of disciplinary proceedings:

> "… the principles enshrined in articles 6(2) and (3) are, for the present purposes, already contained in the notion of a fair trial as embodied in article 6(1))".

Those safeguards are demanded by the common law, as well as article 6(1) of the ECHR (see, e.g., R (Panjawani) v Royal Pharmaceutical Society of Great Britain [2002] EWHC 1127 (Admin) at [54] per Sedley LJ; and R (Banerjee) v General Medical Council [2015] EWHC 2263 (Admin) at 131] per Walker J). In practice, the scope of common law and article 6 in this area is more or less co-extensive.

39. Whether proceedings are fair can, as ever, only be assessed by looking at the process as a whole. It is true that some propositions are likely to be generally applicable to disciplinary proceedings, in the sense that without certain procedural steps being taken it is likely that the proceedings will not be lawful, e.g. the allegations (or charges) which the individual faces must be made known to him and must be clear, and he does not bear the burden of proof. However, what is required by the common law and/or article 6 as a matter of procedural fairness in a particular case will inevitably be highly dependent upon the facts and circumstances of that case.

40. Ms O'Rourke did not suggest that a prohibition on the drawing of adverse inferences from silence by the MPT is established by statute or statutory instrument or even guidance issued by the GMC. Neither the 1983 Act, nor the Rules, nor GMP nor any other GMC guidance contain any such prohibition. As I have said, Ms O'Rourke contends, instead, that it is an aspect of the common law that in proceedings before disciplinary tribunals like the MPT there is such a prohibition because of their analogy with criminal proceedings. She prays in aid the fact that disciplinary tribunals, including the MPT, have until recently applied the criminal standard of proof; and that, in her submission, indicated the more general applicability of related criminal procedures which included the time-honoured prohibition on adverse inferences.

41. Ms O'Rourke submitted that it thus required a statute to change the standard of proof applied in healthcare disciplinary proceedings. She referred to the General Medical Council (Fitness to Practise) (Amendment in Relation to Standard of Proof) Rules Order of Council 2008 (SI 2008 No 1256) which, she submitted, had been implemented as a result of section 112 of the Health and Social Care Act 2008, which had inserted a new section 60A into the Health Act 1999 requiring all healthcare disciplinary tribunals to adopt the civil standard of proof. The fact of statutory intervention of this sort illustrated, in her submission, the engrained common law rules which had governed disciplinary proceedings, and the fact that these were equivalent to the rules for criminal proceedings at common law (i.e. before the 1994 Act). However, the changes that had been made pursuant to statute had left unaltered the common law position with regard to the prohibition of drawing adverse inferences from silence in disciplinary proceedings.

42. However, two particular points can be made in respect of that submission. First, the 2008 Order was not passed as a result of the 2008 Act: the Order brought in the change of standard of proof for GMC proceedings from 31 May 2008, whereas the amendment inserting section 60A into the 1999 Act was not effective until 3 November 2008. The Explanatory Note to the 2008 Act indicates that, although there were inconsistencies between the nine healthcare regulators, disciplinary proceedings for registered medical practitioners did by that time use the civil standard of proof.

43. Secondly (and much more importantly), Ms O'Rourke did not in any event submit that a change to such matters as the burden of proof before a MPT, or as to whether adverse inferences could be drawn from silence, could only be effected by statute or statutory instrument. She accepted that they could be changed by GMC policy or guidance.

44. This is indeed what happened in relation to procedures of the Solicitors Disciplinary Tribunal ("the SDT") following Iqbal v Solicitors Regulatory Authority [2012]

EWHC 3251 (Admin). In Iqbal, at [25]-[26], Sir John Thomas PQBD referred to "the practice of the Solicitors Tribunal not to take into account the failure to give evidence by a solicitor… which may have been justified by analogy to the law, as it used to be, in the last century" (i.e. before section 35 of the 1994 Act). That language clearly indicates that not drawing adverse inferences from silence was merely a practice of the tribunal, and not a common law rule. Following that case, the SDT issued Practice Direction No 5: Inference to be drawn where Respondent does not give evidence" (4 February 2013), which directed:

> "… for the avoidance of doubt that, in appropriate cases where a Respondent denies some or all of the allegations against him (regardless of whether it is alleged that he has been dishonest), and/or disputes material facts, and does not give evidence or submit himself to cross-examination, the Tribunal shall be entitled to take into account the position that the Respondent has chosen to adopt as regards the giving of evidence when reaching its decision in respect of its findings. This direction applies regardless of the fact that the Respondent may have provided a written signed statement to the Tribunal."

The use of the phrase "for the avoidance of doubt" strongly suggests that the SDT itself considered that its panels always had the power to draw such inferences, and the practice direction merely confirmed as much.

45. Be that as it may, I do not see how a change in policy or guidance by a regulator, which Ms O'Rourke accepts would be sufficient to enable a disciplinary tribunal which in the past had not drawn inferences from silence to do so in the future, could possibly change a common law rule. The common law is established by the courts: it is not open to one party to actual or potential proceedings to change it unilaterally. Ms O'Rourke accepts that regulators are able to endorse or change procedures applying to its disciplinary tribunals (as the SRA did with regard to adverse inferences from silence). In my view, they are able to do so, as Ms Grey submits, because these are simply matters of the tribunal's own procedure, and not matters embedded in the common law.

46. That disciplinary tribunals in the position of the MPT did not generally draw adverse inferences from silence as a matter of practice, rather than as the result of a common law rule, is also reflected in the language used in the authorities. I have already referred to the case of Iqbal. In Kearsey v Nursing and Midwifery Council [2016] EWHC 1603 (Admin) at [20], Ouseley J noted that the panel had decided not to draw adverse inferences from non-attendance at the hearing of the registered nurse who faced charges, which appeared to be a "policy" (I suspect he meant, "practice") of the respondent Council; but the Council might wish to reconsider that which, the judge considered, may not be "required by law in all cases". Neither of those cases – nor any of the other cases to which we were referred – suggested that there was a rule that such inferences were proscribed as a matter of law.

47. Two other cases appear to go further. In Radeke v General Dental Council [2015] EWHC 778 (Admin) at [8], Turner J appears to have assumed that, where a dental practitioner facing disciplinary charges fails to make a statement, an adverse inference might be appropriate in accordance with the principles set out in Wisniewski.

Stronger still is Panjawani at [52]-[54], in which Sedley LJ assumed that the disciplinary tribunal *did* have the power to draw such inferences, the appellant in that case apparently having withdrawn the argument that he did not. As Ms Grey submitted, if Sedley LJ considered the tribunal did not have the power to draw such an inference, one might have expected him to say so, rather than proceed to consider whether an inference should be drawn on the facts of that case.

48. Ms O'Rourke relied upon three other matters with which I should deal.

49. First, she submitted that allowing adverse inferences to be drawn from the silence of the registered medical practitioner who faces disciplinary charges effectively reverses the burden of proof. However, it is well-established that neither article 6 nor the common law forbids the drawing of adverse inferences from silence in appropriate circumstances (see, e.g., Panjawani at [54]), even in criminal cases (see section 35 of the 1994 Act), and the drawing of an adverse inference does not alter the burden or standard of proof. Ms O'Rourke rightly did not suggest that section 35 of the 1994 Act, when used, reversed the burden of proof in criminal cases. It clearly does not.

50. Second, and as I have already indicated (see paragraph 30 above), Ms O'Rourke submitted that the fact that rule 16A of the Rules expressly allowed for adverse inferences to be drawn from procedural defaults supported her contention that adverse inferences could not be drawn from silence without some express provision to that effect. However, I do not consider that that follows. Drawing appropriate adverse inferences from procedural defaults is of a completely different nature from drawing such inferences from evidential silence; and in any event the former appears in rule 16A as part of a battery of sanctions which might be applied where there is a procedural failing – including refusing to admit evidence where the failure relates to the admissibility of that evidence (rule 16A(2)(b)), and making an adverse costs award (rule 16A(2)(c)) – such that to omit it might suggest that such an adverse inference is positively excluded.

51. Third, Ms O'Rourke submitted that it could not be suggested that, where a particular witness was not called by the regulator, an inference could be drawn that the evidence of that witness would be adverse to the charge brought; and, because of the importance of the procedural fairness of a level playing field, that is an indication that adverse inferences from silence cannot be held against a charged person either. However, I do not accept that this "sauce for the goose" argument has force. The circumstances of a regulator and a charged person are entirely different. The former brings the charges and has the burden of proof in respect of them. It is for him to make the case he requires the charged person to answer. If he does not rely on the evidence of a particular witness, that evidence simply does not form part of the case the charged person has to meet. There is no question of there being any need for the tribunal to "draw an adverse inference" that that evidence does not support the charges, or otherwise speculate as to what that evidence might have been. However, in respect of the accused person, where the regulator has established a *prima facie* case against him, leaving aside the professional obligation upon a person to engage with the regulator in respect of the resolution of the allegations against him, it may well be reasonable to expect him to respond to the allegations and may be reasonable to infer that, if he does not, then he has no innocent explanation of the matters alleged that will stand up to examination.

52. I am therefore not persuaded that any of these matters significantly add to the weight of Ms O'Rourke's submissions.

53. Ms Grey raised two further matters in support of the proposition that, as a matter of principle, the MPT has the power to draw an adverse inference from silence.

54. First, although proceedings before the MPT and like tribunals have always been civil and never criminal, she submitted that, over time, there has been a greater appreciation of, and confidence in, their civil nature. The adoption of the civil burden of proof is one example. She also relied on rule 34 of the Rules, which came into effect on 1 November 2004, under which an MPT "may admit any evidence they consider fair and relevant to the case before them, whether or not such evidence would be admissible in a court of law". Whilst accepting that some provisions of the Rules were quasi-criminal in nature, she submitted, with some force, that the width of that provision differs radically from the approach to evidence taken in a criminal trial.

55. Second, in Iqbal, Sir John Thomas said (at [25]) that, where a professional man faced grave allegations, "Ordinarily the public would expect a professional man to give an account of his actions". As I have described, Ms O'Rourke frankly accepted that it may be in the public interest if adverse inferences could be drawn from silence. In Adeogba (at 20]), Sir Brian Leveson PQBD said:

> "… [T]here is a burden on medical practitioners, as there is with all professionals subject to a regulatory regime, to engage with the regulator, both in relation to the investigation and ultimate resolution of allegations made against them. That is part of the responsibility to which they sign up when being admitted to the profession."

In respect of registered medical practitioners, that is supplemented by paragraph 73 of GMP:

> "You must cooperate with formal inquiries and complaints procedures and must offer all relevant information while following the guidance in *Confidentiality*".

Registered medical practitioners are required to comply with GMP (see paragraph 3). See also Ashiq v Bar Standards Board (Visitors to the Inns of Court Case No PC 2010/0185A) (27 March 2013) at [9], in respect of the duty of barristers to respond positively to requests from the Bar Standards Board for comments and information.

56. Ms Grey submitted that all of this supported the proposition that, not only does the MPT have the power to draw adverse inferences from silence, but it is in the public interest that it should have that power. I agree.

The Claimant's Core Case: Conclusion

57. Therefore, in my view, both principle and the authorities point away from Ms O'Rourke's submission: both favour the proposition that disciplinary tribunals have the legal power to draw adverse inferences from the silence of an individual charged with breaches of the regulatory scheme to which he or she is subject, even if in

practice they have not in the past drawn such inferences in individual cases. That self-denying ordinance was, however, a matter of the tribunal's own procedure, and not a matter embedded in common law or otherwise required by law.

58. Of course, even where it has the power to do so, a tribunal cannot draw such an adverse inference if it would be procedurally unfair to the charged individual to do so. I did not understand Ms O'Rourke to submit that drawing an adverse inference from silence in the MPT would in all circumstances be unfair to the charged individual. That must be right: as Ms O'Rourke accepted, the practice of the MPT could properly be changed by statute, statutory instrument or even policy/guidance issued by the GMC. She submitted, however, that it would inevitably now be unfair to the Claimant for the following reasons.

i) If the Claimant had known of the power to draw inferences earlier, that may have influenced whether he would have produced a statement. However, I do not understand this submission: apparently on the understanding that no inferences could be drawn from his silence, the Claimant *did* make a full statement explaining his actions and behaviour. Ms O'Rourke did not suggest any way in which his statement would have been different had he been aware of that power. In any event, he is now aware of the power, and can always apply to the tribunal to adduce further evidence by way of a late statement.

ii) It was unfair to the Claimant to have the prospect of an adverse inference sprung on him, after he had announced that he would not be giving evidence. However, the tribunal made clear that, if the Claimant wished now to give evidence, he would be given an opportunity so to do.

iii) There is no case law or guidance from (e.g.) the MPT as to when an inference from silence will or might be drawn. Without such detailed guidance as is found in section 35 of the 1994 Act and paragraph 26P of the CrimPD VI (Trial) so far as criminal proceedings are concerned, Ms O'Rourke submitted that it would be impossible to advise a client as to whether an adverse inference will be drawn. She referred to the advice of the legal advisor in this case, and submitted that that disclosed the impossibility of giving advice in the current "vacuum". However, an adverse inference can only be drawn if it is not unfair to the individual to do so – which is quintessentially dependent upon the particular circumstances of a specific case. Clearly, it is likely to be unfair if (e.g.) the individual is not given prior notice that an adverse inference may be drawn if he does not give evidence or does not answer a particular question. I am unpersuaded that, even without express guidance from the GMC, advising on the issue of when an inference can and should properly be drawn is of impossible, or in reality of any great, difficulty as Ms O'Rourke suggested. There is short and helpful guidance in such cases as Wisniewski. The SRA appear to have endorsed adverse inferences from silence without any detailed guidance as to when such an inference might be drawn.

iv) Ms O'Rourke submitted that it would be unfair to the Claimant to draw an adverse inference, because he might then feel compelled to give evidence which would make both the disciplinary proceedings and any appeal more difficult for him. However, even if that were the case, that would not be procedurally unfair: it is not procedurally unfair to draw an adverse inference from silence on notice

where it is reasonable to expect an individual to explain why charges in respect of which there is a *prima facie* case are not good.

59. I do not consider that any of these factors make it inevitable that any adverse inference that might be drawn from any continuing silence by the Claimant would be procedurally unfair.

60. For those reasons, I do not consider that Ms O'Rourke's core submission has been made good. In my view, it is open to an MPT to draw adverse inferences from the failure of a charged registered medical practitioner to give evidence, including, in an appropriate case, the inference that he has no innocent explanation for the *prima facie* case against him, subject to such an inference not being procedurally unfair.

61. However, whilst emphasising that whether an adverse inference is drawn will be highly dependent upon the facts of the particular case, it seems to me that, generally, no inference will be drawn unless:

    i) a *prima facie* case to answer has been established;

    ii) the individual has been given appropriate notice and an appropriate warning that, if he does not give evidence, then such an inference may be drawn; and an opportunity to explain why it would not be reasonable for him to give evidence and, if it is found that he has no reasonable explanation, an opportunity to give evidence;

    iii) there is no reasonable explanation for his not giving evidence; and

    iv) there are no other circumstances in the particular case which would make it unfair to draw such an inference.

62. An MPT panel therefore has the power to draw an adverse inference from the failure of a charged person to give evidence at all or in relation to a particular issue/question, without any express sanction by statute, statutory instrument or GMC guidance/policy; and without any express guidance on how that power should be exercised. I am entirely unconvinced by Ms O'Rourke's submission that the power could not be exercised fairly without some express guidance.

63. However, that does not mean that, for the avoidance of doubt, guidance from the GMC (and other regulators of, amongst others, the healthcare professions) confirming the existence of the power and how it might be used would not be useful for disciplinary tribunal panels and the practitioners who might appear before them: such guidance, which might be short, could clearly be of considerable practical assistance. Speaking for myself, I hope that, after any consultation they deem helpful, the regulators will consider publishing such advice as they each consider appropriate.

The Claimant's Grounds of Challenge

64. Having dealt with Ms O'Rourke's core submission, I can deal with the individual grounds on which she relies shortly. As I have indicated, there are twelve. I will deal with Grounds 1-11 more or less in turn. For the following reasons, I do not consider

any is made good. Ground 12 is merely an assertion that, as a result of Grounds 1-11, the tribunal erred in law.

65. Grounds 1 & 2: In reaching its "in principle" decision, the tribunal ignored/rejected the advice of its legal assessor; and it failed to give any/sufficient reasons for departing from that advice.

However, the legal assessor indicated that there was no precedent for drawing an adverse inference on the basis of a charged person's refusal to give evidence, and he clearly urged caution: but he did not advise it would be unlawful. In any event, whether the tribunal had the power to draw such an inference, as a matter of principle, is a question of law. Had the legal assessor given advice that there was no such power, in my view he would have been wrong; and the tribunal would have been right to ignore/reject that advice.

66. Ground 3: The tribunal erred in assuming to itself as an individual MPT charged only with hearing a specific case under the Rules the right to create a precedent or policy and implement it while purporting to exercise its own discretion.

However, I consider that the tribunal would have the power to draw an inference from the failure of the Claimant to give evidence, and its conclusion that that power exists is not a change in the law but only a matter of practice or procedure which it is entitled to adopt. In drawing that conclusion, there is no purported or actual exercise of any discretion on the part of the tribunal.

67. Ground 4: The decision of the MPT was perverse.

I do not understand this ground. The tribunal has properly identified what the relevant law is. There is no question of that decision being legally "perverse".

68. Ground 5: The tribunal reached a decision for which there was no applicable statutory provision either in the 1983 Act or any procedural rules altering the common law position in a jurisdiction that is based on statute only.

This was essentially covered by the Claimant's core submission. The tribunal had the power to draw an adverse inference from silence as a result of its general power to manage its own procedure, which includes the power to draw inferences including inferences from the failure of a charged person to give evidence. There is nothing to prevent the exercise of that power. In particular, the common law does not prevent it.

69. Grounds 6, 7 and 9: The tribunal reached a decision for which there was no power or precedent under the Rules, case law, guidance or otherwise, and in particular no power given the stage of the proceedings then reached.

These to an extent overlap with Ground 5, and it is largely subsumed within the Claimant's core case. I have some sympathy with this ground so far as timing is concerned: in my view, generally, tribunals should not be encouraged to make "in principle" decisions. But the tribunal in this case was asked to do so, and I understand why both parties wished to have an in principle decision which, if necessary, could be challenged in this court. There was clearly no error of law in the tribunal doing so.

70. Ground 8: The tribunal reached a decision as an individual tribunal on an individual case which was contrary to common law and an individual's right to out his "prosecutor" to proof and rely in the right to silence.

This was the Claimant's core case, which I deal with above.

71. Ground 10: The effect of the tribunal's decision would in essence be to reverse the burden of proof.

See paragraph 49 above.

72. Ground 11: The tribunal fell into serious error in finding as a justification or reason for its decision that the request to consider it was made by Counsel in an individual case being instructed by or on behalf of the regulator.

However, the regulator (as a party to proceedings before the tribunal) sought clarification from the tribunal as to the extent of its (the tribunal's) powers; and I consider the tribunal correctly identified that extent. The fact that the application came from the regulator is not to the point, and was clearly not in any way unfair to the Claimant.

Conclusion

73. For those reasons, subject to my Lord, Butcher J, I would dismiss this claim.

Mr Justice Butcher :

74. I agree.