

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
B E T W E E N:

THE QUEEN ON THE APPLICATION OF
MR JOHN SMALLEY

Claimant

-and-

THE UK COUNCIL FOR PSYCHOTHERAPY

Defendant

-and-

[REDACTED]

Interested Party

GROUPS OF JUDICIAL REVIEW

- Numbers in [...] refer to page numbers in the bundle of documents. Numbers in (...) refer to tab numbers in the bundle of authorities.
- Expedition is sought for the reasons given in paragraph 7 below.
- The Pre-Action Protocol has been complied with and the correspondence is attached herewith [45-66].
- Essential reading:
 - R (Gibson) v GMC* [2004] EWHC 2781 (Admin) (Authorities, 7)
 - The Chronology [20-23]
 - The Allegations [35-38]
 - The Decision Subject to Challenge [39-42]

Background

1. C is a Jungian Psychotherapist and a member of the Independent Group of Analytical Psychologists (IGAP), a professional association.
2. In its Memorandum of Association, D states that it has the power to "...create and maintain registers and listing of properly qualified psychotherapeutic practitioners for the benefit of the general public..." and "to publish guidelines for ethics and codes of practice, and to establish processes for the practice of psychotherapy and psychotherapeutic counselling for the protecting of the public..." [165]
3. The Health Professions Council (HPC) which is a state and statutory regulator of 15 health professions formed a Psychotherapy and Counsellors Professional Liaison Group for the purpose of taking forward a proposal that HPC become the state and statutory regulator of psychotherapists. This followed the Government's announcement in 2007 that the Government was planning to introduce statutory regulation for psychotherapists and counsellors. It is understood that it is not currently the Government's intention to proceed with statutory regulation of psychotherapists and counsellors but that the Government will keep the matter under review.
4. It is clear that if D did not provide regulation of the psychotherapy profession, then the Government would fill that gap and provide a statutory regime. In the words of its Memorandum of Association it is required to act "*for the benefit of the general public*" and "*for the protection of the public*" [165]. Registration with D is held out as a mark of proper professional regulation which the public can trust and which if lost is destructive of a professional career. It is clear that D is performing public functions and duties which are governmental in character and scope. In these circumstances D is to be treated as the de

facto public regulator of the psychotherapy profession and thereby amendable to judicial review (*R v Panel of Take-overs and Mergers, ex part Datafin* [1987] QB 815 (Authorities,3), see also Fordham 34.2 (Authorities, 9)).

5. C is registered with D as well being a member of IGAP, which itself is a constituent member of D.
6. [REDACTED] was C's analysand (patient) from February 2006 to November 2007. On 23rd August 2008 [REDACTED] complained about C's professional services during that period to IGAP [72]. IGAP's committees, at first instance and appeal, ultimately dismissed that complaint on 30th January 2009 [135 and 163]. [REDACTED] appealed to D on 1st February 2009 against that dismissal and D's relevant Panel (CFAP) heard that appeal over a year later on 26th March 2010. CFAP required IGAP to refer the complaint to D's own complaints processes (CCP) [Process set out at 169-214], and it took until 2nd June 2011 for the complaint to come before the appropriate FTP Panel and Legal Assessor (Simon Phillips QC) for the hearing of preliminary issues. At that hearing C applied, amongst other things, for a direction that the proceedings be stayed by reason of the delay.
7. After an oral announcement at the end of the hearing that the applications were dismissed, 5 weeks after the hearing the FTP Panel delivered written reasons rejecting both applications [39-42]. The substantive hearing of the allegations is set for December 2011 and therefore C asks for these proceedings to be expedited.
8. C seeks permission to judicially review D's refusal to stay these proceedings.

Prematurity

9. In pre-action correspondence D has asserted that these proceedings are premature. In *R (Gibson) v GMC* [2004] EWHC 2781 (Admin) (Authorities, 7) the Court entertained a judicial

review challenge to the GMC's refusal to stay proceedings by reason of delay after that question had been considered as a preliminary issue and in circumstances where a right of appeal would arise only at the end of the proceedings and not after the hearing of the preliminary issue. So it is the case in these proceedings, C cannot appeal the determination that has been made by D but must await the conclusion of the proceedings [43-44]. The remedy he seeks however is to be relieved from having to face those proceedings because the serious prejudice caused by the delay renders a fair trial impossible.

10. D in pre-action correspondence has referred to the case of *R (Mahfouz) v GMC [2004] EWCA Civ 233* (Authorities, 8). In that case the GMC Panel had refused to adjourn proceedings to permit a judicial review claim to be made mid-hearing to challenge the Committee's refusal to discharge itself on the ground of having been contaminated by media reporting midway through proceedings. Whilst the Court of Appeal accepted that it was generally preferable for proceedings to run their course and to be un-interrupted by applications for judicial review, it did not apply that rule as is shown at paragraphs 42-45 of the judgment of Carnwarth LJ (the judgment of the Court). At paragraph 43 Carnwarth LJ accepted the points made by the claimant as to why it was right that the proceedings should be interrupted by a judicial review: *"The charges go back to events in 2001, and the proceedings had been programmed to take 8 days. Although there is a general need for such issues to be decided as quickly as possible, the need for speed is relative. Furthermore, as Miss O'Rourke says, to leave Dr Mahfouz to his remedy of an appeal following a determination against him disregards the serious prejudice to him, which would be caused in the meantime by a finding of serious misconduct. She also draws attention to the fact that her client is funding the proceedings himself without any prospect of recovering costs even if he wins; if the proceedings are fundamentally flawed, he should not be put at risk of having to pay twice."* So it is in these proceedings –if there were no remedy at this stage C would have to fund his defence of these stale allegations in circumstances of serious

prejudice and with his professional life in the balance. He would then have to exercise his rights of internal appeal before finally coming, far too late, to this Court.

Stay for Delay

11. The following propositions of law were not in dispute before the FTP Panel:

- (a) Both at common law and by virtue of Article 6, C has a right to a hearing within a reasonable time: as Lord Denning said in *Moran v Lloyd's* [1981] 1 Lloyd's Rep 423 (Authorities, 1): *"It is of the utmost importance that disciplinary proceedings should be brought to a conclusion at the earliest practicable moment..."*
- (b) Accordingly D had a duty to stay these proceedings if, *"on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held: in other words that the continuance of the prosecution amounts to a misuse of the process of the court."* (Lord Lane CJ giving the judgment of the court at page 644 B in *Attorney General's Reference* (No 1 of 1990) [1992] 1 QB 630 (Authorities, 4) and cited with approval in the context of disciplinary proceedings by Elias J at para 20, *R (Gibson) v GMC* [2004] EWHC 2781 (Admin) (Authorities, 7).
- (c) Time runs *'from the time when the conduct giving rise to the grounds of complaint arose'* (*Gibson*, para 27) (Authorities, 7).

The Delay

12. A chronology is attached [20-23]. The proposed substantive hearing will convene just under 6 years after the start of [REDACTED]'s therapy with C and around 3 ¼ years since [REDACTED] made [REDACTED] complaint. D took 5 months to decide if it could accept [REDACTED]'s appeal from the IGAP decision and almost 10 months more to bring that appeal on for

hearing. 21 months will have elapsed since the decision that the complaint should proceed to the proposed substantive hearing date in December 2011.

The Prejudice

13. Save for letters written in 2008 (after the complaint) by the parties [67-134], there are no contemporary records relating to the events underlying the complaint. This is a classic case of one person's word against another. The allegations (list attached [35-38]) broadly relates to who did what and who said what in 2006-2007. Those events, based purely on memory recall, are to be examined in December 2011, almost 5-6 years later. Absent a public interest element (not present in this case) UKCP does not admit complaints where the events occurred more than 5 years ago (rule 3.4 CCP) [173]. It is well known that delay has a corrosive effect on justice: "*[w]here there is delay the whole quality of justice deteriorates*": R v Lawrence ([1982] AC 510, at 517-B, per Lord Hailsham of St Marylebone LC (Authorities, 2). The effect of delay on witness testimony is often imperceptible but highly dangerous as noted by McHugh J in Brisbane South Regional Health Authority v Taylor, [1996] HCA 25 (Authorities, 5): "*Sometimes the deterioration in quality is palpable, as in the case where a crucial witness is dead or an important document has been destroyed. But sometimes, perhaps more often than we realise, the deterioration in quality is not recognisable even by the parties. Prejudice may exist without the parties or anybody else realising that it exists. As the United States Supreme Court pointed out in Barker v Wingo (407 US 514 at 532 (1972)), 'what has been forgotten can rarely be shown'. So, it must often happen that important, perhaps decisive, evidence has disappeared without anybody 'knowing' that it ever existed. Similarly, it must often happen that time will diminish the significance of a known fact or circumstance because its relationship to the cause of action is no longer as apparent as it was when the cause of action arose. A verdict may appear well based on the evidence given in the proceedings, but, if the tribunal of fact had all the evidence concerning*

the matter, an opposite result may have ensued. The longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose."

14. D's procedures (in common with many regulators) require D to judge C's fitness to practise, as it is found *at the time of the hearing*, to be impaired or not (see para 3.1 CCP [172]). It cannot possibly be fair to judge C's current fitness by reference to events which took place in 2006-2007. There have been no further allegations in the meantime. It is for this reason that D has a duty to expedite its procedures to bring matters to a hearing without avoidable delay: D must judge fitness to practise based on contemporaneous events, not on historical stale allegations supported by fading memories.

The Public Interest

15. The maintenance of public confidence in the psychotherapy profession creates a public interest in ensuring that a practitioner's fitness to practise, when called into question, is investigated and determined. That public interest is however, to be weighed against the public interest in the administration of justice. D has forfeited the ability for these proceedings to continue fairly. If the public interest in continuing with these proceedings is going to be frustrated it is not going to be because of any failure on the part of C or [REDACTED]. Whilst some delay has been caused by the usual turn of events and the diary commitments of all involved, the significant delays have been those caused by D. The 144 days to consider whether or not it could accept [REDACTED]'s appeal from IGAP was inexcusable. The 274 days taken to then hold a hearing is beyond comprehension and the almost 2 years delay to bring these proceedings to a hearing following the CFAP appeal is simply unacceptable.

16. These delays have prevented [redacted] from bringing [redacted] grievances to fruition and D from obtaining the vindication he desires. Neither of these outcomes can be obtained because the process has become corrupted by the passage of time.

The FTP Panel's Decision:

17. The FTP Panel's decision is short on law and detail:

"Although there have been delays in bringing about the case there has not been such a delay to the extent that the allegations in relation to Mr Smalley's FTP can no longer be fairly heard; the unreliability of memory recall presented in Mr Heppinstall's submission as dismissed because the Panel were of the opinion that there is sufficient written evidence to ensure a fair hearing could take place. The Panel decided that the delay in bringing proceedings to their current stage has not led Mr Smalley to suffer serious prejudice which would preclude a fair trial taking place". [41]

18. The decision is irrational, one to which no reasonable FTP Panel could have come to and/or is supported by insufficient reasons:

- (a) In their reasons, the Panel did not identify what the sufficient written evidence which would ensure a fair hearing was. There is no such written evidence save for letters written after the complaint had been made. The judicial review in *Gibson* failed because Elias J ruled that the case against the Doctor concerned nothing more than *"...the analysis of certain particular cells and tissues and the careful reporting of the results"*. There was no prejudice despite the delay because: *"The relevant slides are available and it is a matter largely of expert evidence whether the Claimant fell so far below that standard as to constitute serious professional misconduct in relation to any or all of these specimens..."* (Authorities, 7, para 42). That is a very different situation to that which

obtains here where the evidence will essentially be the oral testimony of the parties, recollecting historic events. The serious prejudice of permitting proceedings to continue in circumstances where the integrity of the forensic process rests of recollections so long after the event is clear and is the very reason why stale complaints should not proceed and the reason why a fair trial cannot be had in this case.

- (b) The FTP Panel did not properly apply the legal test nor did they properly take into account and/or assess the evidence before them (or absence of it). They did not properly identify and/or assess the prejudice and/or the effect of that prejudice on the ability for C to have a fair trial.
- (c) The FTP Panel had witness statements before them from C and [24-34] which set out the nature of the delay, the effect of the delay on C and his family and the serious prejudice they were suffering. The FTP Panel do not specifically mention this evidence at all in their reasons. They do not appear to have taken it into account.
- (d) The FTP Panel do not mention the balance of interests between the complainant, the defendant and the public interest in the regulation of the profession; they do not appear to have taken this important factor into account.
- (e) The FTP Panel's reasons do not sufficiently set out why the decision was reached and are inadequate (*Needham v NMC* [2003] EWHC 1141 (Authorities, 6)).

19. In all the circumstances C should not be required to face these stale proceedings which are a misuse of D's procedures and which risk C's professional reputation and future being

brought to an end in a miscarriage of justice. D's decision should be quashed and the Court is respectfully requested to order D to direct a stay of these proceedings forthwith.

Henderson Chambers
2 Harcourt Buildings
Temple, London EC4Y 9DB

ADAM HEPPINSTALL
5th October 2011