Neutral Citation Number: [2021] EWHC 3286 (Admin)

Case No: CO/3095/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Double-click to add Judgment date

Before :

THE HONOURABLE MR JUSTICE DOVE

- -

Between:

Dr Samuel White	**Claimant**
- and -	
General Medical Council	**Respondent**

- -
- -

Mr Francis Hoar (instructed by **PJH Law**) for the **Claimant**
Alexis Hearnden (instructed by **Solicitor to the General Medical Council**) for the **Respondent**

Hearing dates: 4th November 2021

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE DOVE

Mr Justice Dove :

Introduction

1. The claimant makes this application pursuant to section 41A(10) of the Medical Act 1983. He seeks a review of the decision of the Interim Orders Tribunal ("the IOT") to impose conditions on his registration following a hearing on 17th August 2021. The controversial conditions at the heart of this application are as follows:

> "4. He must not use social media to put forward or share any views about the Covid-19 pandemic and its associated aspects.
>
> 5. He must seek to remove any social media posts he has been responsible for or has shared relating to his views of the Covid-19 pandemic and its associated aspects."

2. Other conditions were imposed in relation to the provision of information in respect of his employment. The IOT did not impose any conditions preventing the claimant from practising medicine, which he continues to do.

3. As will become apparent in due course, the outcome of this case does not in any way depend upon the merits of the views which the claimant has expressed in relation to the Covid-19 pandemic and the response which has been made to it by the National Health Service or national governments, in terms of public health measures imposed and advised medical treatment. For the reasons which are set out below, the court expresses no view whatever in relation to the issues which the claimant has raised in respect of these matters. For reasons which will become apparent, the determination of this appeal depends upon purely legal issues as to how the decision was arrived at in the present case.

The facts.

4. The claimant is a GP with an unblemished professional career. Following publication of a video on YouTube ("the video"), which will be referred to in greater detail below, the claimant was suspended on 25th June 2021 by NHS England South East. This suspension was revoked on 21st July 2021. The views expressed in the video were specifically disavowed as providing the reasons for the claimant's suspension.

5. The respondent commenced proceedings against the claimant on 15th July 2021, and referred him to the IOT for it to consider restrictions on his medical practice pursuant to regulation 27 of the General Medical Council (Fitness to Practise) Rules 2004. In the Annex to the letter advising of these proceedings, a number of allegations were set out which the respondent was investigating. Some of these allegations were ultimately not pursued and are not further referenced in this judgment. The allegations which were pursued and which formed the basis of the subsequent IOT proceedings were specified as follows:

> "- Through a social media video, Dr White spread misinformation and inaccurate details about the Coronavirus and how it is diagnosed and treated, including saying the vaccine is a form of genetic manipulation which can cause

> serious illness and death and that he advised against wearing masks.
>
> -Dr White has potentially put patients at risk and diminished the public's trust in the medical profession by disseminating misinformation and inaccurate details about the measures taken to tackle the Coronavirus pandemic.
>
> -Dr White signposted viewers of his online video to comments and articles of others on the internet who share the same views as him and this raises concerns as those individuals also promote information which is inaccurate or untrue."

6. A summary was provided of the material in the video which formed the subject matter of these allegations and which was not disputed by the claimant in the proceedings before the IOT. It provides as follows:

> "In his seven-minute Instagram video Dr White looked to explain why he had resigned from his job as a GP. He laid out his experience as a doctor and advised he was leaving conventional medicine to pursue a career in functional medicine. He said he could no longer work in his previous roles '*because of the lies*' surrounding the NHS and government approach to the pandemic which have been '*so vast*' he could no longer '*stomach or tolerate*' them. He claimed doctors and nurses were '*having their hands tied behind their backs*' preventing them from using treatments that had been established as being effective both as prophylaxis from Covid-19 infections and as treatments for it. He named hydroxychloroquine, budesonide inhalers and ivermectin as the drugs he was particularly concerned about. He called them '*safe and proven treatments*' and he raised concerns that he had been prevented from offering these drugs as a form of '*early intervention in the community*'.
>
> Dr White went on to raise concerns about the safety of the Covid-19 vaccine and the need to have it. With no mention of the variety of vaccines available for Covid-19 he claimed the vaccine inserted a code for the spike protein of the vaccine.
>
> He said that 99% of people who contract Covid-19 survive and that most of those who had died had also suffered from multiple medical problems.
>
> He asked his viewers to do their own research online and signposted them to UK and USA websites which record the side effects of the vaccine. He asked the viewers to consider the number of deaths and serious side effects the vaccine was causing.

> Dr White then went on to raise concerns about the method of tracing for Covid-19, PCR. He claimed that once a PCR test multiplied traces of viral code more than 24 times, the false positive rate was greater than 90% and as such he believed the use of the test was a fraud which '*vitiates everything*'.
>
> He then discussed common law and the inability of the authorities to justify the '*civil rules and regulations*' that had been brought into force during the pandemic.
>
> One of his final claims was '*masks do absolutely nothing*'."

7. In response to these allegations, and for the purposes of the IOT hearing, the claimant prepared an extensive witness statement running to 106 paragraphs that addressed, point by point, the allegations contained in the summary of the YouTube video. It is unnecessary to set out any of this material in detail as, for the reasons set out elsewhere in this judgment, it is not germane to the court's decision to adjudicate in any way on the merits of this material. However, by way of example, in his witness statement the claimant stood by his claim that "masks do absolutely nothing", and produced as material exhibited to his witness statement scientific and medical opinion which he contended supported his opinions in relation to wearing non-clinical grade masks or face coverings in a non-clinical setting. In undertaking this point by point refutation of the GMC allegations the claimant produced an extensive volume of literature and other sources to support the position which he had taken in the video.

8. At the hearing of the IOT the respondent made clear that whilst it was submitted that conditions were necessary, no submissions were to be made as to any specific conditions appropriate to the claimant's case. Further, in the course of the respondent's submissions it was stated that the issue would be whether what was indisputably said fell within the bounds of legitimate freedom of speech protected by article 10 of the European Convention on Human Rights ("the ECHR"), or whether it went beyond "legitimate medical comment to conspiracy theories, accusing the government of a campaign of lies and of a hoax" and were therefore matters which departed from "Good Medical Practice", undermining confidence in the profession and raising concerns as to patient safety. In response to these contentions Mr Hoar, who appeared on behalf of the claimant before the IOT, developed extensive submissions in relation to both article 9 and, in particular, article 10 of the ECHR, and the apparent infringement of the right to freedom of expression which was involved in the respondent's submissions to the IOT, as well as rehearsing the content of the responses to the GMC's allegations which were raised in the claimant's witness statement and its supporting material.

9. At the end of the hearing session the Chair of the IOT set out the approach which she and her colleagues were proposing to take to the question of whether or not conditions should be imposed, or more serious measures taken by way of suspension, in the following terms:

> "As I said at the outset, we will have regard to the guidance in the Interim Orders Tribunal Guidance and I think you will have seen that. It explains the test we apply under section 41A and it does go on to say that, in reaching the decision, we should

> consider – and it lists these things. The seriousness of risk to members of the public if the doctor continues to hold unrestricted registration, and, in assessing this risk, the tribunal should consider the seriousness of the allegations, the weight of the information, including information about the likelihood of a further incident or incidents occurring. Secondly, we should consider whether public confidence in the medical profession is likely to be seriously damaged if the doctor continues to hold unrestricted registration during the relevant period. The third one, Mr Barton didn't rely upon, considering the doctor's own interests, so I won't mention that.
>
> Also, of course, we're very aware that we must consider the proportionality of any response that we provide in dealing with the risk to the public, and the public interest and any decisions we make about risk, and any decisions about restrictions, have to be proportionate.
>
> Also we'll proceed in this way. Firstly, we will consider whether there is a risk to the public or the public interest and, if we decide there are those risks, we will firstly consider whether those risks can be addressed by workable and proportionate conditions. Only if we decide that conditions couldn't be framed to meet the risks, would we go on to consider suspension.
>
> There is more in the guidance, of course. As I say, the tribunal is experienced, we are very familiar with that guidance and we will take it into account. Just to say, Mr Hoar, I certainly had read your legal submissions and the case law, etc, before this morning. You have taken us through that, drawing our attention to the particular cases and principles, and the tribunal will, I am sure, as I have, have taken note of that and we will consider those points you have made in our deliberations."

10. In reaching their determination of the application the IOT set out the basis of the allegations made against the claimant, and noted that 18 complaints had been received in relation to the video. The IOT recorded the evidence which it had received and the submissions, including, without comment, the preliminary submission made by Mr Hoar that the IOT would not be fact finding that day in reaching its decision. The IOT recorded its conclusions in the following passages of the decision:

> "19. In reaching its decision, the Tribunal has borne in mind the serious concerns raised about Dr White's conduct. These involve all allegations that Dr White posted misinformation on social media platforms about the Covid-19 virus, vaccinations and PCR testing and that he is alleged to have encouraged people not to wear masks or take the vaccine. The Tribunal has noted Mr Hyland's response to the allegations, on behalf of Dr White, and the documentation provided in support of his rebuttal of the allegations. The Tribunal has also taken account

of Mr Hoar's submissions in relation to Dr White's right to freedom of expression. However, it considers that Dr White's manner of expressing his own views to the general public may have a real impact on patient safety. The Tribunal also considers that any doctor has a responsibility to provide sufficient and balanced information about Covid-19 to allow any potential patients and other members of the public to access the potential risks and benefits of any treatment or preventative measures under consideration and then make an informed choice. It considers that Dr White's alleged means of imparting information in his capacity as a registered doctor, by way of social media platforms, to a wide and possibly uninformed audience does not allow for individual circumstances and does not give the opportunity for a holistic consideration of Covid-19, its implications and possible treatments and potential for reducing risk to health in individual circumstances. Further, the Tribunal considers that the alleged conduct is not likely to be an isolated incident, given the submissions made by Mr Hoar today and the apparent strength of Dr White's expressed views. The Tribunal considers that there is a high likelihood of repetition in the case.

20. In all the circumstances the Tribunal considers that there is information to suggest that Dr White may pose a real risk to public safety if he were permitted to remain in unrestricted clinical practice, given the nature of the concerns raised from a number of separate complainants, and bearing in mind the impact that the alleged behaviour may have on patient safety. Furthermore, the Tribunal considers that public confidence in the profession may be seriously undermined, if no order were made today, in the light of the public nature of the alleged misinformation posted by Dr White, which has the potential to reach a large audience. The Tribunal has noted that the allegations are made against a background of the Covid-19 pandemic and it is concerned that the impact of such alleged conduct may be significant. The Tribunal has noted that comments have been made in relation to Dr White's health and behaviour by work colleagues. However, it is mindful that no health assessments have yet been undertaken and no diagnosis has been made. It has therefore been determined than an order is not in Dr White's own interests.

21. In accordance with Section 41A of the Medical Act 1983, as amended, the Tribunal has determined, based on the information before it today, that it is necessary to impose an interim order on Dr White's registration. It has determined to impose an interim order of conditions for a period of 18 months.

> 22. The Tribunal has determined that, based on the information before it today, there are concerns regarding Dr White's fitness to practise which pose a real risk to members of the public and which may adversely affect the public interest. After balancing Dr White's interests and the interests of the public, the Tribunal has decided that an interim order is necessary to guard against such a risk.
>
> 23. Whilst the Tribunal notes that the order has restricted Dr White's ability to practise medicine it is satisfied that the order imposed is the proportionate response. The Tribunal considers that conditions can be formulated to address the risks identified in this case. It has therefore determined to impose monitoring conditions together with conditions restricting him to not posting or sharing his views on the Covid-19 pandemic and its associated aspects on any social media platforms and requiring previous posts to be removed. The Tribunal considers that these conditions are sufficient as workable, enforceable and measurable means of addressing the risks identified in the case."

11. Subsequent to the IOT hearing, and prior to the hearing of this matter, a transcript of the video was obtained and furnished as part of the material before the court. No point was taken by either side that it did anything other than reflect the allegations which the IOT had considered. Thus, whilst it provided more accurate detail in relation to what was said in the video, it was not suggested by either side that it cast any different light upon the allegations which had been placed before the IOT.

The principles in an application under section 41A(1) of the Medical Act 1983.

12. The relevant provisions of section 41A of the 1983 act are as follows:

> "41A Interim Orders
>
> (1) Where an Interim Orders Tribunal or a Medical Practitioners Tribunal in arrangements made under subsection (A1), or a Medical Practitioners Tribunal on their consideration of a matter, are satisfied that it is necessary for the protection of members of the public or is otherwise in the public interest, or is in the interests of a fully registered person, for the registration of that person to be suspended or to be made subject to conditions, the Tribunal may make an order –
>
> (a) that his registration in the register shall be suspended (that is to say, shall not have effect) during such period not exceeding eighteen months as may be specified in the order (an "interim suspension order"); or
>
> (b) that his registration shall be conditional on his compliance, during such period not exceeding eighteen months as may be

> specified in the order, with such requirements so specified as the Tribunal think fit to impose (an "order for interim conditional registration").
>
> (2) Subject to subsection (9) below, where an Interim Orders Tribunal or a Medical Practitioners Tribunal have made an order under subsection (1) above, an Interim Orders Tribunal or a Medical Practitioners Tribunal –
>
> (a) shall review it within the period of six months beginning on the date on which the order was made, and shall thereafter, for so long as the order continues in force, further review it –
>
> (i) before the end of the period of six months beginning on the date of the decision of the immediately preceding review; or
>
> (ii) if after he end of the period of three months beginning on the date of the decision of the immediately preceding review the person concerned requests an earlier review, as soon as practicable after that request; and
>
> (b) may review it where new evidence relevant to the order has become available after the making of the order.
>
> …
>
> (10) Where an order has effect under any provision of this section, the relevant court may –
>
> (a) in the case of an interim suspension order, terminate the suspension;
>
> (b) in the case of an order for interim conditional registration, revoke or vary any condition imposed by the order;
>
> (c) in either case, substitute for the period specified in the order (or in the order extending it) some other period which could have been specified in the order when it was made (or in the order extending it),
>
> and the decision of the relevant court under any application under this subsection shall be final."

13. The approach to be taken to the jurisdiction of this court in considering an application under section 41A(10) is well settled in a number of authorities: see *R (Madan) v GMC* [2001] EWHC Admin 322; *GMC v Anyuam Osigwe* [2012] EWHC 3884 (Admin); *Houshain v GMC* [2012] EWHC 3458, and, drawing these threads together, *Agoe v GMC* [2020] EWHC 39 (Admin) in particular at paragraphs 17 to 21. In approaching an application the court exercises an original jurisdiction and is not confined to an inquiry in relation to whether or not there were public law errors of the kind which would arise in a judicial review, albeit of course the court will seek to examine whether or not the IOT was properly directed to the appropriate legal

questions when reaching its decision. Although the court exercises an original jurisdiction it will show respect for, and give appropriate weight to, the decision of the IOT as an expert body well acquainted with the requirements of the profession that it is regulating, and the need to uphold public perception and confidence in the profession. The court will interfere with the decision if it is satisfied that the order which was made was wrong: see *GMC v Hiew* [2007] 1 WLR 2007. When considering whether or not the order made was wrong the court will have regard not only to all of those matters and all of the evidence which were before the IOT, but can also have regard to other evidence which has come to light since the IOT reached its decision.

Article 10 of the ECHR.

14. Whilst reference was made by Mr Hoar during the course of his submissions to article 9 of the ECHR, for the purposes of this judgment the focus must be on article 10. Article 10 provides as follows:

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

15. Although reference was made during the course of Mr Hoar's submissions to a contention that the claimant's rights under article 10 were enhanced by the fact that it is suggested that they flow from the philosophical and libertarian beliefs which he holds, it is unnecessary for the purposes of this judgment to determine that issue. Focusing most directly, therefore, on the provisions of article 10, it is clear that article 10 is a qualified right. As pointed out by Ms Hearnden during the course of her written and oral submissions, article 10 is a qualified right and one of the qualifications specifically identified within article 10(2) is the legitimate aim of pursuing public safety and the protection of health. In respect of the views articulated by the claimant the respondent submits that, subject to the limits of proportionality, his observations would fall within the parameters of that qualification and thus as a medical practitioner expressing opinions about medical matters his entitlement to freedom of expression is not absolute.

16. In my judgment it is important to observe two features of the order which was made by the IOT which are obvious, but which have significant legal consequences in relation to the approach to be taken to whether or not the order should be made imposing conditions of the kind in question in this case, in particular on an interim basis. The first is that the order, and in particular the conditions which are attacked by the claimant, are clear and obvious limitations on his right to freedom of expression under article 10. This is undisputed and indisputable. The second is that the effect of the order is to impose those constraints on an interim basis, prior to the issues in respect of compliance with article 10 having been fully heard and resolved at a final hearing.

17. Specific provision exists within the Human Rights Act 1998 in relation to the granting of relief in cases engaging freedom of expression, and section 12 provides as follows:

> "12. Freedom of expression.
>
> (1)This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> (2)If the person against whom the application for relief is made ("the respondent") is neither present not represented, no such relief is to be granted unless the court is satisfied –
>
> (a) that the applicant has taken all practicable steps to notify the respondent; or
>
> (b) that there are compelling reasons why the respondent should not be notified.
>
> (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
>
> (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connect with such material), to –
>
> (a) the extent to which –
>
> (i) the material has, or is about to, become available to the public; or
>
> (ii) it is, or would be, in the public interest for the material to be published;
>
> (b) any relevant privacy code.

> (5) In this section – "court" includes a tribunal; and "relief" includes any remedy or order (other than in criminal proceedings)."

18. It was not disputed at the hearing that section 12 of the 1998 Act was of application to proceedings in the IOT. It was accepted that section 12(5) brought the IOT within the section. As was observed by Warby J (as he then was) in *Birmingham City Council v Afsar* [2019] EWHC 1560, the term "publication" is not limited to commercial publications, and section 12(3) applies to any application for prior restraint of any form of communication that falls within article 10 (see paragraphs 60 and 61 of the judgment, in which the correct test under section 12(3) was again reiterated). As set out above, the IOT was considering the restraint of freedom of expression prior to the trial and final resolution of the issues in the case. The conditions which they imposed upon the claimant's practice restrained his ability to express his views before trial of the question as to whether this restriction of his freedom of expression was legitimate. Section 12(3) of the 1998 was therefore engaged, and such was essentially not disputed by the respondent at the hearing of this matter.

19. The effect of section 12, and the approach which should be taken to interim orders precluding freedom of expression prior to the final determination of the legitimacy of such a constraint, was considered by the Supreme Court in *PJS v News Group Newspapers Limited* [2016] UKSC 26; [2016] 4 All ER 554 at paragraph 9 of the judgment of Lord Mance (with whom the remainder of the Supreme Court agreed on this point). He set out the approach to section 12 of the 1998 Act in paragraph 19 of his judgment as follows:

> "19. There is, as all members of the Supreme Court conclude, a clear error of law in the Court of Appeal's reasoning in relation to s12. For reasons given in para 20, below, it consists in the self-direction that s12 'enhances the weight which art 10 rights carry in the balancing exercise' (para 40). The Court of Appeal's further self-direction, that s12 'raises the hurdle which the claimant must overcome in order to obtain an interim injunction' is unexceptionable, in so far as s12 replaces the general *American Cyanamid* test, focused on the balance of convenience, with a test of whether the appellant is 'likely to establish that publication should not be allowed' at trial. The position was stated more particularly by Lord Nicholls said in *Cream Holdings Ltd v Banerjee* [2004] UKHL 44, [2004] 4 All ER 617, [2005] 1 AC 253 (at 22), in a speech with which the other members of the House agreed;
>
> 'Section 12(3) makes the likelihood of success at the trial an essential element in the court's consideration of whether to make an interim order… There can be no single, rigid standard governing all applications for interim restraint orders. Rather, on its proper construction the effect of s12(3) is that the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular

> circumstances of the case. As to what degree of likelihood makes the prospects of success "sufficiently favourable", the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ("more likely than not") succeed at the trial. In general, that should be the threshold an applicant must not cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on art 10 and any countervailing convention rights. But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite. Circumstances where this may be so include those mentioned above: where the potential adverse consequences of disclosure are particularly grave, or where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal."

20. That the test is whether the party seeking to restrain a person exercising free speech before trial is whether that party is "likely to establish that publication should not be allowed", or normally that success at trial must be shown to be more likely than not, is further reinforced by the judgment of Warby J in *YXB v TNO* [2015] EWHC 826 in paragraph 9.

The issues.

21. The application as pleaded advances as grounds 1 and 2, firstly, the contention that the IOT were wrong to make findings that the claimant had spread misinformation, including under ground 2 the further submission that the reasons provided by the IOT for so concluding were not legally adequate. Ground 3 is the contention that in reaching their conclusion the IOT failed to afford sufficient respect to the claimant's right under article 10 to freedom of expression. Ground 4 is the failure of the IOT to take account of the support for the claimant's views to be found in the bodies of medical and scientific opinion which he had furnished to support the witness statement he lodged in the proceedings. Ground 5 is the contention that the IOT failed to have any, or any adequate, regard to the high test to be satisfied before a member of the medical profession could be subject to restrictions in relation to comments made outside his medical practice in the public interest.

22. In addressing the merits it is in my judgment sensible to commence with the issues that are raised under ground 3 and, perhaps, although the matter is not very clearly pleaded, ground 5. Bearing in mind the nature of the IOT's proceedings and the kind of restrictions which were being contemplated it is important to start with the question of whether or not in this instance the IOT properly directed themselves as to the correct approach to whether or not an interim order of the sort under contemplation should be made. In this regard, it is clear, and was properly conceded, that when contemplating the interim restriction of freedom of expression pending a final determination, the provisions of section 12 of the 1998 Act, and in particular section 12(3), apply. As explained in *PJS*, that required the IOT to ask themselves the question as to whether or not the respondent would probably succeed at any subsequent tribunal hearing in imposing the restrictions which were now sought. The

question or test to be applied is whether it is likely to be established at the final hearing that publication of the claimant's views should not be allowed.

23. Having scrutinised the decision-making process in the present case it is clear that the IOT did not direct themselves to the tests required by section 12(3) and which applied in the particular kind of case which they were considering. Firstly, nowhere in the decision is there any reference to section 12 of the 1998 Act, and Miss Hearnden conceded that the IOT had not been directed in relation to this central statutory provision. Unfortunately, it appears that neither side's representatives drew the attention of the IOT to this statutory material. Secondly, it is clear from both the observations of the chair of the IOT during the course of the hearing, and also the subsequent written determination, that the IOT approached the making of the order in this case on what might be described as a conventional assessment of the balance of risk and proportionality, without appreciating and applying the specific provisions arising if they were proposing to restrict the practitioner's freedom of expression.

24. Again, that is perhaps unsurprising that since there is no reference in the Guidance provided for the IOT to the approach to be taken in cases where the contention is that there is a requirement to the impose conditions preventing a medical practitioner from exercising their right to freedom of expression. Indeed, paragraphs 23 and following of the Guidance couch the test in terms of the assessment of whether there is a real risk, balanced with the interests of the doctor concerned. This is set out against the background of paragraph 22 of the Guidance emphasising that the IOT "does **not** make findings of fact or resolve disputes of fact". The failure to allude to section 12 of the 1998 Act or apply the test which it requires was, in the particular circumstances of this case, in my judgment an error of law and a clear misdirection in the IOT's decision-making process. In this respect, therefore, the decision of the IOT was clearly wrong and cannot stand.

25. Miss Hearnden in the course of her submissions suggested that whilst there had been no reference to section 12 of the 1998 Act, and the record of the decision did not involve any application of the relevant test under section 12(3) of the 1998 Act, nevertheless the IOT's decision was sustainable. She submitted that the assessment of risk and the consideration of necessity was effectively the equivalent of the test under section 12(3) or, alternatively, that the findings that the IOT made in that connection would satisfy the test under section 12(3). I am unable to accept either of these submissions. The questions which the IOT addressed themselves to, as they identified from the Guidance, in relation to risk and necessity are not the same questions as the test indicated by section 12(3). The latter involves a specific enquiry in relation to the merits of the case; the assessment of risk which the IOT undertook is a different assessment and indeed eschewed any evaluation of the merits. Thus the assessment which the IOT undertook cannot be properly understood as a proxy for the test which ought to have been applied under section 12(3).

26. Alternatively, Ms Hearnden submitted that the court might undertake its own assessment. In my view it would be inappropriate for the court to embark upon such an exercise. The application of the test as to whether or not it is likely that the respondent would establish its case at the conclusion of the final hearing of this matter is something which requires expert evaluation. The authorities rightly point out that respect should be afforded to the professional expertise of the IOT, albeit, of course, that judgment must be properly directed to the correct question. In the particular

circumstances of this case it would, in my judgment, be inappropriate for the court to, in effect, entirely remake the decision applying correct legal principles.

27. It follows that on this analysis there was an error of law in the IOT's decision based upon the nature of the conditions which they intended to impose and the impact which they had on article 10. The decision was wrong from a purely procedural perspective. The powers of the court are circumscribed by section 41A(10)(b) to revocation of the conditions imposed. As was observed at the outset of this judgment, that outcome arises purely as a result of a misdirection in the procedure adopted by the IOT, and has no bearing whatever on the substantive merits of the parties' competing positions on the issues.

28. It may be that the respondent will wish the IOT to reconsider this case and, applying the correct test, urge the IOT to conclude that having done so an order is justified. In connection with that possibility it may be of assistance to mention some concerns that I observed during the course of argument in relation to the form of the conditions which were imposed by the IOT. It is notable that the prohibition imposed under condition 4 would preclude the claimant from changing his mind, and expressing himself on social media in support of positions which are adopted by the respondent. Ms Hearnden indicated in response to this point that it would be open to the claimant in those circumstances to instigate a review, which could lead to the revision of the conditions. That submission itself gives rise to concern as to the proportionality of the condition as it was framed in the order. It is unclear from the papers as to whether or not there is any condition of this kind amongst the bank of conditions available to the IOT, and as noted above the respondent specifically did not make submissions as to how a condition could properly be framed. Amongst other matters, any condition proposing to curtail freedom of expression on an interim footing, in order to be proportionate, is likely to need to be specific as to what views or opinions the person subject to the order is precluded from expressing. On the basis that I have concluded that there was an error of law in the approach of the IOT rendering the order wrong for other reasons, I do not propose to say anything further on this issue.

29. For the reasons which have been set out above this application is granted. It should be noted that no substantive consideration is required in relation to grounds 1, 2 and 4, and that grounds 3 and perhaps 5 succeed, but only on the basis which has been described above, and no other basis, it not having been necessary for the court to express any opinion as to the merits of the opinions with which this case is concerned in order to achieve a resolution of the matter.