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| Agenda item: | 8 |
| Report title: | Updating the s.40A decision-making Guidance |
| Report by: | Jim Percival , Principal Legal Adviser and Deputy General Counsel, GMC Legal, Fitness to Practise jim.percival@gmc-uk.org , 0161 923 6583 |
| Action: | To consider |

Executive summary

In line with commitments given both to Council and to the Chair of the Health and Social Care Committee, the Guidance for GMC decision-makers in relation to the exercise of the right of appeal under s40A Medical Act 1983 has been substantially updated both:

- a** to incorporate relevant clarification as to the applicable legal principles provided by the courts of both England and Wales and Scotland in cases which they have decided since the introduction of the right of appeal in December 2015; and
- b** to reflect changes to the decision-making process in response to recommendations from the Williams Review and in line with advice received from Sir Robert Francis QC.

This paper presents, for approval, the revised Decision-making Guidance.

Recommendation

That the revised Decision-making Guidance, at Annex A to this paper, be approved.

Introduction

- 1 In December we put to Council, and Council agreed, a number of recommendations in the light of advice which we had sought from Sir Robert Francis QC on a range of changes to our decision making processes surrounding our right of appeal on MPTS tribunal decisions (s40A appeals). This in turn had followed on from our consideration of Recommendations made by the Williams Review¹ and the discussion which took place before the House of Commons Health and Social Care Committee in October 2018 in relation to the Williams Review and its recommendations.
- 2 Our recommendations, accepted by Council, covered a range of improvements to our guidance and decision making processes in relation to s40A appeals, including changes to increase openness and transparency. On 20 December 2018 the Chief Executive wrote to the Chair of the Health and Social Care Committee² confirming that:
 - a The guidance on appeals decision-making will be updated to reflect the learning from recent judgments and Sir Robert’s advice, particularly the Court of Appeal’s clarification of the thresholds that should be applied when considering whether to appeal and consideration of context and systemic issues.
 - b Decision-making in prospective appeals involving decisions of Medical Practitioners Tribunals will be delegated to a three person Executive Panel comprising: the Chief Executive and Registrar as Chair; the Medical Director and Director of Education and Standards; and the Director of Fitness to Practise (or their nominated Deputies if not available).
 - c We will increase transparency by publishing panel decisions.
 - d We will seek the views of the PSA as part of our consideration of appropriate clinical misconduct or deficient performance cases.”
- 3 This paper presents, for approval, the revised Decision-making Guidance referred to in paragraph 2a above.

The proposed Amendments

- 4 A copy of the proposed revised version of the s40A Decision-making Guidance is attached to this paper at Annex A. A copy of the previous version of the Guidance, marked up to illustrate the amendments being proposed, is attached at Annex B.

¹ [Gross negligence manslaughter in healthcare: The report of a rapid policy review](#) (Williams: June 2018)

² [GMC letter to Sarah Wollaston MP dated 20 December 2018](#)

- 5** In summary, the amendments proposed:
- 5.1** Update the Guidance to reflect the learning, as to such matters as the approach which the court will take to s.40A appeals including the relevant thresholds for intervention by the court with the findings of an MPT;
- 5.2** Make explicit reference to the need for the s.40A Panel, when considering whether or not to exercise the right of appeal in a given case, to have regard, where relevant, to the degree to which the MPT gave or ought to have given due weight to the context of the practitioner’s failings and the impact of any systemic issues on the same.
- 6** The principles which the s40A Panel, the relevant decision-maker since January 2019, apply in reaching decisions on potential s40A appeals and the process which is followed in reviewing and making decisions on potential s40A appeals are now clearly set out in the amended Guidance in line with the latest jurisprudence from the courts.
- 7** Having appropriate regard to all the circumstances of the case, and in particular to:
- the overarching objective (public protection),
 - the role of the MPT,
 - where relevant, to the degree to which the MPT gave or ought to have given due weight to the context of the practitioner’s failings and the impact of any systemic issues on the same and
 - the principles which the relevant court will apply in determining any appeal if issued

the s40A Panel will decide to exercise the power to appeal under s.40A only if they consider that the MPT’s decision was wrong and insufficient to protect the public.

8 – Updating the s.40A decision-making Guidance

8 – Annex A

Appeals pursuant to section 40A of the Medical Act 1983 (“section 40A appeals”) – Guidance for Decision-makers

Introduction

1 Section 40A of the Medical Act 1983 empowers us to appeal a “relevant decision” by a Medical Practitioners Tribunal (MPT) if it considers that the decision is not sufficient (whether as to a finding or a penalty or both) for the protection of the public.

2 “Relevant decisions” are defined at section 40A(1) to include:

Decisions (following the determination of the question of a doctor’s fitness to practice) under section 35D to make:

- a No direction;
- b A direction for the imposition, extension or termination of an order of suspension;
- c A direction for the imposition, extension, variation or revocation of an order for conditional registration.

Decisions (following the determination of an application by an erased doctor) under section 41 to make

- d A direction restoring a doctor’s name to the Register;

Decisions (where doctor has been found to have failed to comply with an order that they undergo an assessment) under Sch.4 para.5A(3D) or 5C(4) to make:

- e A direction for the imposition of an order for suspension;

- f** A direction for the imposition of an order for conditional registration
- 3** The right of appeal under section 40A also extends to cases where a MPT has failed to make a finding of impairment of a doctor's fitness to practise when it should have done¹.
 - 4** Section 40A gives us a discretionary power to appeal such decisions. Accordingly, we must consider in each case:
 - a** whether there are grounds to consider that the decision is not sufficient for the protection of the public; and, if so,
 - b** whether it should exercise its right of appeal in respect of that decision.
 - 5** This document is intended to provide guidance as to how and in what circumstances our power to appeal such decisions should be exercised.

The structure and process for making decisions

- 6** Decision making in prospective appeals involving decisions of Medical Practitioners Tribunals is delegated to an Executive Panel comprising Chief Executive and Registrar as Chair, the Medical Director and Director of Education and Standards and the Director Fitness to Practise (or their nominated Deputies if not available) (“the section 40A Panel”)².
- 7** There is an established, three stage process supporting the section 40A Panel in its decision-making:
 - a** Firstly an assessment is undertaken by senior GMC lawyers (with input from the external counsel who conducted the case at the MPT) of the determinations in all concluded MPT hearings where the tribunal's decision did not meet the GMC submission on sanction. This assessment is to determine whether there are, in principle, any realistic grounds of appeal.
 - b** If this assessment identifies there may be realistic grounds of appeal, external legal advice is then obtained from a different expert counsel as to the legal merits of an appeal. This advice is then incorporated into a submission from the Deputy General Counsel for consideration by the section 40A Panel at a meeting.

¹ Confirmed by the Court of Appeal in *Raychaudhuri v General Medical Council* [2019] 1 WLR 324,

² When the right of appeal was first introduced in December 2015, the GMC Council agreed to delegate decision making to the Registrar (the Chief Executive). This delegation remained in place until January 2019 when GMC Council agreed to delegate decision making to an Executive Panel.

- c** The section 40A Panel will then consider the case at a meeting and make a decision, having regard to the legal advice received and all the circumstances of the case, to determine whether we should exercise our right of appeal.

The decision whether to appeal

- 8** Bringing a section 40A appeal is not a decision we will take lightly.
- 9** This is because:
 - a** We recognise and respect that the MPT is a specialist tribunal with particular experience and expertise. The operational independence of the MPT is an important part of the statutory scheme in which we operate. It would be improper for us to bring an appeal simply to invite the court to substitute the MPT's reasonable view of the merits of the case with its own reasonable view.
 - b** Any decision to exercise the right to appeal under section 40A will undoubtedly place strain upon a doctor, whose case would otherwise have been closed. However, considerations of pressure on the doctor must be a secondary consideration to our overarching objective to protect the public.
- 10** Whilst considering the above factors, we must also have regard to our overarching objective of protecting the public. The right to appeal pursuant to section 40A is an important mechanism by which we can ensure that we meet this objective.
- 11** We have a power to bring a section 40A appeal where we consider that the decision of the MPT in the particular case is not sufficient to protect the public. The purpose of the appeal is not to seek to punish the doctor but rather to protect the public in line with the GMC's over-arching objective³.
- 12** When considering whether a decision is sufficient for the protection of the public the section 40A Panel will need to consider whether the decision is sufficient⁴—
 - a** to protect the health, safety and well-being of the public;
 - b** to maintain public confidence in the medical profession; and/or
 - c** to maintain proper professional standards and conduct for members of that profession.

³ Section 1(1A) of the Medical Act 1983

⁴ Section 40A(4) of the Medical Act 1983

- 13** We are required to act reasonably in the exercise of our statutory powers, including the power to bring a section 40A appeal. We would not be acting reasonably if we were routinely to bring appeals which were likely to fail. Therefore, the section 40A Panel will need to consider the likely merits of any appeal (the prospects for success of any such appeal before the court) before making a decision to bring a section 40A appeal even when, in principle, there may be grounds for us to consider that the decision of the MPT in the particular case is not sufficient for the protection of the public.

Questions which section 40A Panel will need to address in deciding whether or not to bring a section 40A appeal

- 14** When considering whether to bring a section 40A appeal in a particular case, it will be necessary for the section 40A Panel to consider the following questions:

- a** Based on their assessment of all of the information held, and in the particular circumstances of the case including, where relevant, the degree to which the MPT gave or ought to have given due weight to the context of the practitioner’s failings and the impact of any systemic issues on the same, and having regard to the factors set out in paragraph 12 of this Guidance, does the s40A Panel consider that the MPT’s decision is not sufficient to protect the public?

If the answer is yes, they go on to consider:

- b** In all of the circumstances, would exercising the power of appeal further, rather than undermine, the achievement of our overarching objective to protect the public?

If the answer is yes, then we may exercise our power of appeal

- 15** In considering 14b above, it may be that the section 40A Panel will be required to consider and weigh a number of competing factors. This would include their assessment of the likely effect on patient safety of a decision to appeal in the case under consideration, their assessment of the prospects of success of the appeal, and the nature and importance of the issues which would be aired.

The assessment of whether the decision is “not sufficient” for the protection of the public

- 16** Unless we conclude that there are grounds for considering that the decision which has been reached by the MPT is not sufficient for the protection of the public, the power to appeal pursuant to section 40A of the Medical Act will not arise and we will not need to proceed to consider whether we should exercise our power to bring a section 40A appeal.

- 17** Whilst regard will be had to decisions of the MPT relating to other issues and earlier stages in the hearing, the question as to whether the decision of the MPT is not sufficient for the protection of the public will turn in most cases upon the ultimate outcome (if any) in relation to sanction.
- 18** Whilst we may conclude that there are grounds for considering that one or more of the MPT's other decisions (for example as to fact or impairment) has been wrong, it will be the effect (if any) of such decisions on the ultimate outcome in terms of their finding of impairment and, in particular, the determination as to sanction which will in most cases determine whether this threshold for the section 40A appeal is met.
- 19** If the sanction is ultimately considered to be an appropriate sanction, then it is unlikely that we will consider that decision which has been reached by the MPT is not sufficient for the protection of the public.
- 20** When considering whether the decision which has been reached by the MPT is not sufficient for the protection of the public, the section 40A Panel will need to have regard to such factors as whether:
 - a** the MPT has made an error of fact; and/or
 - b** the MPT has made an error in its application of the relevant legal principles; and/or
 - c** the MPT has failed adequately to apply the relevant guidance published by the GMC and the MPTS, whether as to Standards or as to Sanctions, when reaching its decision as to impairment and/or sanction in a given case; and/or
 - d** the MPT has failed adequately to set out the reasons for the decision made.
- 21** When considering the matters referred to at paragraph 20 above, the section 40A Panel will be mindful that the MPT:
 - a** is itself a specialist, quasi-judicial tribunal with particular expertise in relation to the determination of such issues in the exercise of its statutory function under the Medical Act 1983, and
 - b** plays a central role in the statutory scheme under which we fulfil our statutory functions and meet our statutory objectives.

The assessment of prospects and the legal framework governing the determination of section 40A appeals

- 22** When considering whether a proposed appeal may have reasonable prospects of success, the section 40A Panel will need to have regard to the approach which the court will take in determining the appeal in accordance with the provisions of the Medical Act itself, any relevant case law and the relevant Rules of Court.
- 23** This is because, when assessing whether a section 40A appeal has reasonable prospects of success, the section 40A Panel is assessing whether a judge hearing the appeal, acting in accordance with the law, is more likely than not to allow the appeal.
- 24** A section 40A appeal is governed by the same court rules which govern other statutory appeals, including appeals brought by doctors pursuant to section 40 of the Medical Act 1983 ('section 40 appeals') and references to court by the Professional Standards Authority for Health and Social Care (PSA) made pursuant to section 29 of the National Health Service Reform and Health Care Professions Act 2002 ('section 29 references').
- 25** The legal framework in place will vary depending on which jurisdiction the appeal is to be heard in, whether that be Northern Ireland, Scotland, or England and Wales. However, as the following makes clear, the principles which the courts of the respective jurisdictions in the United Kingdom will apply in determining section 40A appeals will be essentially the same in substance.
- 26** Where the relevant court before whom the appeal is brought is the Administrative Court of England and Wales, the appeal will be governed by the provisions of Part 52 of the Civil Procedure Rules (CPR).
- 27** CPR 52. 21(3) provides as follows:
- The appeal court will allow an appeal where the decision of the lower court was —
- a** (a) wrong; or
 - b** (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.
- 28** The Court of Appeal has confirmed the correct approach to appeals under section 40A, setting out that the well settled principles in relation to section 40 appeals can be applied to section 40A appeals⁵. It summarised the following key points:

⁵ General Medical Council v Chandra [2018] WLR(D) 542: full reference of the decision can be found in Annex C para 40.

- Proceedings under section 40A of the 1983 Act are appeals and are governed by CPR Part 52. A court will allow an appeal under CPR Part 52.21(3) if it is 'wrong' or 'unjust because of a serious procedural or other irregularity in the proceedings in the lower court'.
- It is not appropriate to add any qualification to the test in CPR Part 52 that decisions are 'clearly wrong'.
- The court will correct material errors of fact and of law. Any appeal court must however be extremely cautious about upsetting a conclusion of primary fact, particularly where the findings depend upon the assessment of the credibility of the witnesses, who the Tribunal, unlike the appellate court, has had the advantage of seeing and hearing.
- When the question is what inferences are to be drawn from specific facts, an appellate court is under less of a disadvantage. The court may draw any inferences of fact which it considers are justified on the evidence.
- In regulatory proceedings the appellate court will not have the professional expertise of the Tribunal of fact. As a consequence, the appellate court will approach Tribunal determinations about whether conduct is serious misconduct or impairs a person's fitness to practise, and what is necessary to maintain public confidence and proper standards in the profession and sanctions, with diffidence.
- However there may be matters, such as dishonesty or sexual misconduct, where the court is likely to feel that it can assess what is needed to protect the public or maintain the reputation of the profession more easily for itself and thus attach less weight to the expertise of the Tribunal. The appellate court will afford an appropriate measure of respect of the judgment in the committee, but the appellate court will not defer to the committee's judgment more than is warranted by the circumstances.
- Matters of mitigation are likely to be of considerably less significance in regulatory proceedings than to a court imposing retributive justice, because the overarching concern of the professional regulator is the protection of the public.
- A failure to provide adequate reasons may constitute a serious procedural irregularity which renders the Tribunal's decision unjust.

- 29** The Court of Appeal has also given the following reasons why there is limited scope for overturning decisions of the MPT on sanction⁶:
- a** Decisions on sanction are ‘multi-factorial’ decisions, akin to jury questions, which first-instance tribunals are best placed to judge as they turn not just on the explicit findings of fact but also the other evidence which the tribunal heard – i.e. the ‘penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, *la vérité est dans une nuance*), of which time and language do not permit exact expression⁷
 - b** The MPT is the body best equipped to determine the sanction to be imposed. The assessment of the seriousness of the misconduct is essentially a matter for the MPT in the light of its experience. It is the body best qualified to judge what measures are required to maintain the standards and reputation of the profession⁸
- 30** Accordingly;
- a** when an appeal is against a multi-factorial decision, such as the MPT’s view as to what sanction may be required to maintain public confidence in the profession, “the appeal court’s approach will be conditioned by the extent to which the first instance judge had an advantage over the appeal court in reaching his/her decision. If such an advantage exists, then the appeal court will be more reticent in differing from the trial judge’s evaluations and conclusions”;
 - b** that general caution applies with particular force in the case of a specialist adjudicative body, such as the MPT, which (depending on the matter in issue) usually has greater experience in the field in which it operates than the courts;
 - c** an appeal court should only interfere with such an evaluative decision if:
 - there was an error of principle in carrying out the evaluation, or
 - for any other reason, the evaluation was wrong, that is to say it was an evaluative decision which fell outside the bounds of what the adjudicative body could properly and reasonably decide.
- 31** The Court of Session has confirmed that essentially the same legal principles apply to section 40A appeals heard in Scotland⁹.

⁶ In *Bawa-Garba v GMC* [2018] EWCA Civ 1879

⁷ See *Bawa-Garba* at [61]-[66]

⁸ See *Bawa-Garba* at [67] & [94]

⁹ See Annex C para 41 for the relevant extract of the Court of Session’s Opinion.

- 32** It is anticipated that, in relation to section 40A appeals brought in Northern Ireland, the High Court of Justice in Northern Ireland will adopt the principles set out in the above cases, and in particular the English Court of Appeal cases.
- 33** In summary, when assessing whether a proposed appeal has reasonable prospects of success the section 40A Panel will need to consider:
- a** Whether there is a reasonable prospect that the court will conclude that the decision of the MPT was unjust because of a serious procedural or other irregularity in its conduct of the hearing before it. For example:
 - i** that it improperly excluded or otherwise failed to have regard to evidence upon which the GMC sought to rely at the hearing;
 - ii** that the unreasonable exercise, or failure to exercise, Case Management powers by the MPT had the effect of rendering the hearing before it unjust;
 - iii** that it failed to give adequate reasons to explain the decision which it reached;

and/or
 - b** Whether there is a reasonable prospect that the court will be satisfied that the decision of the MPT was wrong, having paid due regard to both:
 - iv** the specialist expertise of the MPT, particularly in relation to multi-factorial evaluative decisions on matters within its specialist area of expertise, and
 - v** the MPT's particular advantages in evaluating the evidence as the Tribunal which has heard the live evidence.
- 34** Having appropriate regard to all the circumstances of the case, and in particular to:
- a** the overarching objective (public protection),
 - b** the role of the MPT,
 - c** where relevant, to the degree to which the MPT gave or ought to have given due weight to the context of the practitioner's failings and the impact of any systemic issues on the same and
 - d** the principles which the relevant court will apply in determining any appeal if issued
- the s40A Panel will therefore decide to exercise the power to appeal under s.40A only if they consider that the MPT's decision was wrong and insufficient to protect the public.

ANNEX A

Appeal under section 40A: The role of the Professional Standards Authority for Health and Social Care (“the PSA”)

- 35** The GMC’s right to appeal exists concurrently with the PSA’s power to refer a case under section 29 of the National Health Service Reform and Health Care Professions Act 2002. Once one party has brought an appeal/referred the case, the other party is precluded from bringing separate, like proceedings.
- 36** Where we decide to exercise the power of appeal, the Registrar must notify the PSA without delay. While the PSA will not be able to take separate proceedings once we have commenced an appeal, it can become a party and make representations in our appeal in cases where it considers that there is insufficient protection of the public. If we withdraw an appeal, the PSA can continue the proceedings.
- 37** If we wish to withdraw the appeal or agree terms of a settlement with the respondent, then we must communicate this to the PSA, whether or not the PSA is a party to the appeal. The PSA may then take over conduct of the appeal, which from that time would be treated as a section 29 reference.

ANNEX B

References under section 29 of the National Health Service Reform and Health Care Professions Act 2002: Our role

- 38** Where the PSA refers a case under section 29 the PSA must notify us without delay.
- 39** Where we are the respondent in a case referred under section 29, and the PSA wishes to withdraw the reference (or has agreed a settlement with the practitioner and wishes for the case to be resolved on those terms) the PSA must notify us. In those circumstances we may take over conduct of the proceedings, which from that time would be treated as a section 40A appeal.
- 40** When determining its view on whether the proceedings should continue, we will review any information held as to why the PSA no longer wishes to proceed with the section 29 reference. It will also be necessary to review why it was we did not bring an appeal following the Tribunal decision (for example, this may be because the PSA referred the case before we brought an appeal and so precluded us from bringing an appeal). We will consider whether the tests set out in paragraph 12 above are met, in light of all of the information held.

Annex C

- 41** As the Court of Appeal confirmed in its judgement in *General Medical Council v Chandra* [2018] WLR(D) 542:

In *General Medical Council v Jagjivan and another* [2017] EWHC 1247, [2017] 1 WLR 4438, Sharp LJ sitting in the Divisional Court considered the correct approach to appeals under section 40A and held as follows:

"39. As a preliminary matter, the GMC invites us to adopt the approach adopted to appeals under section 40 of the 1983 Act, to appeals under section 40A of the 1983 Act, and we consider it is right to do so. It follows that the well-settled principles developed in relation to section 40 appeals (in cases including: *Meadow v General Medical Council* [2006] EWCA Civ 1390; [2007] QB 462; *Fatnani and Raschid v General Medical Council* [2007] EWCA Civ 46; [2007] 1 WLR 1460; and *Southall v General Medical Council* [2010] EWCA Civ 407; [2010] 2 FLR 1550) as appropriately modified, can be applied to section 40A appeals.

40. In summary:

- i) Proceedings under section 40A of the 1983 Act are appeals and are governed by CPR Part 52. A court will allow an appeal under CPR Part 52.21(3) if it is 'wrong' or 'unjust because of a serious procedural or other irregularity in the proceedings in the lower court'.
- ii) It is not appropriate to add any qualification to the test in CPR Part 52 that decisions are 'clearly wrong': see *Fatnani* at paragraph 21 and *Meadow* at paragraphs 125 to 128.
- iii) The court will correct material errors of fact and of law: see *Fatnani* at paragraph 20. Any appeal court must however be extremely cautious about upsetting a conclusion of primary fact, particularly where the findings depend upon the assessment of the credibility of the witnesses, who the Tribunal, unlike the appellate court, has had the advantage of seeing and hearing (see *Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)* [2002] EWCA Civ 1642; [2003] 1 WLR 577, at paragraphs 15 to 17, cited with approval in *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23, [2007] 1 WLR 1325 at paragraph 46, and *Southall* at paragraph 47).
- iv) When the question is what inferences are to be drawn from specific facts, an appellate court is under less of a disadvantage. The court may draw any inferences of fact which it considers are justified on the evidence: see CPR Part 52.11(4).
- v) In regulatory proceedings the appellate court will not have the professional ~~expertise of the Tribunal of fact. As a consequence, the appellate court will~~

approach Tribunal determinations about whether conduct is serious misconduct or impairs a person's fitness to practise, and what is necessary to maintain public confidence and proper standards in the profession and sanctions, with diffidence: see *Fatnani* at paragraph 16; and *Khan v General Pharmaceutical Council* [2016] UKSC 64; [2017] 1 WLR 169, at paragraph 36.

- vi) However there may be matters, such as dishonesty or sexual misconduct, where the court "is likely to feel that it can assess what is needed to protect the public or maintain the reputation of the profession more easily for itself and thus attach less weight to the expertise of the Tribunal ...": see *Council for the Regulation of Healthcare Professionals v GMC and Southall* [2005] EWHC 579 (Admin); [2005] Lloyd's Rep Med 365 at paragraph 11, and *Khan* at paragraph 36(c). As Lord Millett observed in *Ghosh v GMC* [2001] UKPC 29; [2001] 1 WLR 1915 and 1923G, the appellate court "will afford an appropriate measure of respect of the judgment in the committee ... but the [appellate court] will not defer to the committee's judgment more than is warranted by the circumstances".
- vii) Matters of mitigation are likely to be of considerably less significance in regulatory proceedings than to a court imposing retributive justice, because the over-arching concern of the professional regulator is the protection of the public.
- viii) A failure to provide adequate reasons may constitute a serious procedural irregularity which renders the Tribunal's decision unjust (see *Southall* at paragraphs 55 to 56)."

42 In their Opinion in *General Medical Council v a Decision of the Medical Practitioners Tribunal in the case of Dr Milind Mehta* [2018] CSIH 69, the Inner House of the Court of Session cited with approval the decision of the Divisional Court in *GMC v Jagjivan* [2017] 1 WLR 4438 as confirming that the approach to appeals set out by Lord Malcolm in *The Professional Standards Authority For Health And Social Care against a decision of the Conduct and Competence Committee of the Nursing and Midwifery Council* 2017 SC 542 [para 25] governed section 40A appeals, namely:

"There is a well-established body of jurisprudence relating to the proper approach to appeals from regulatory and disciplinary bodies. The general principles can be summarised as follows. In respect of a decision of the present kind, the determination of a specialist tribunal is entitled to respect. The court can interfere if it is clear that there is a serious flaw in the process or the reasoning, for example where a material factor has not been considered. Failing such a flaw, a decision should stand unless the court can say that it is plainly wrong, or, as it is sometimes put, 'manifestly inappropriate'. This is because the tribunal is experienced in the particular area, and has had the benefit of seeing and hearing the witnesses. It is in a better position than the court to determine whether, for

example, a nurse’s fitness to practise is impaired by reason of past misconduct, including whether the public interest requires such a finding. The same would apply in the context of a review of a penalty.”

8 – Updating the s.40A decision-making Guidance

8 – Annex B

Appeals ~~by the GMC~~ pursuant to section 40A of the Medical Act 1983 (“section 40A appeals”) – Guidance for Decision-makers

Introduction

- 1 Section 40A of the Medical Act 1983 (~~as amended by Article 17 of The General Medical Council (Fitness to Practise and Over-arching Objective) and the Professional Standards Authority for Health and Social Care (References to Court) Order 2015~~) empowers ~~the GMCs~~ to appeal a “relevant decision” by a Medical Practitioners Tribunal (“MPT”) if it considers that the decision is not sufficient (whether as to a finding or a penalty or both) for the protection of the public.
- 2 “Relevant decisions” are defined at ~~sections~~ 40A(1) to include:
 - Decisions (following the determination of the question of a doctor’s fitness to practice) under ~~section s~~ 35D to make:
 - a No direction;
 - b A direction for the imposition, extension or termination of an order of suspension;

- c A direction for the imposition, extension, variation or revocation of an order for conditional registration.

Decisions (following the determination of an application by an erased doctor) under section s-41 to make

- d A direction restoring a doctor's name to the Register;

Decisions (where doctor has been found to have failed to comply with an order that ~~he~~ ~~they~~ undergo an assessment) under Sch.4 para.5A(3D) or 5C(4) to make:

- e A direction for the imposition of an order for suspension;
- f A direction for the imposition of an order for conditional registration

3 The right of appeal under section s40A also extends -to cases where a MPT has failed to make a finding of impairment of a doctor's fitness to practise when it should have done¹.

34 Section 40A gives ~~the GMC~~ us a discretionary power to appeal such decisions. Accordingly, ~~the GMC~~ we must consider in each case:

- a whether there are grounds to consider that the decision is not sufficient for the protection of the public; and, if so,
- b whether it should exercise its right of appeal in respect of that decision.

45 This document is intended to provide guidance as to how and in what circumstances ~~the GMC's~~ our power to appeal such decisions should be exercised.

~~—This Guidance is a living document which will be revised periodically.~~

The structure and process for making decisions

6 -Decision making in prospective appeals involving decisions of Medical Practitioners Tribunals is delegated to an Executive Panel comprising Chief Executive and Registrar as Chair, the Medical Director and Director of Education and Standards and the Director Fitness to Practise (or their nominated Deputies if not available) (“the section 40A Panel”)².

¹ Confirmed by the Court of Appeal in *Raychaudhuri v General Medical Council* [2019] 1 WLR 324.

² When the right of appeal was first introduced in December 2015, the GMC Council agreed to delegate decision making to the Registrar (the Chief Executive). This delegation remained in place until January 2019 when GMC Council agreed to delegate decision making to an Executive Panel.

7 There is an established, three stage process supporting the section 40A Panel in its decision-making:

- a Firstly an assessment is undertaken by senior GMC lawyers (with input from the external counsel who conducted the case at the MPT) of the determinations in all concluded MPT hearings where the tribunal's decision did not meet the GMC submission on sanction. This assessment is to determine whether there are, in principle, any realistic grounds of appeal.
- b If this assessment identifies there may be realistic grounds of appeal, external legal advice is then obtained from a different expert counsel as to the legal merits of an appeal. This advice is then incorporated into a submission from the Deputy General Counsel for consideration by the section 40A Panel at a meeting.
- c The section 40A Panel will then consider the case at a meeting and make a decision, having regard to the legal advice received and all the circumstances of the case, to determine whether we should exercise our right of appeal.

The decision whether to appeal

8 Bringing a section 40A appeal ~~and thereby continuing to question a doctor's fitness to practise, either without further restriction or at all, notwithstanding the conclusions of an MPT which has already considered the matter,~~ is not a decision which the GMCwe will take lightly.

59 This is; particularly having regard to the following factors because:

- a ~~The GMCwe recognises and respects that the MPT is a specialist tribunal with particular experience and expertise. The operational independence of the MPT as an institution is an important part of the statutory scheme in which the GMCwe operates. It would be improper improper for us to bring an appeal simply to invite the court to substitute one the MPT's reasonable view of the merits of the case with its own reasonable view for another.~~
- b Any decision to exercise the right to appeal under section s.40A ~~and thereby reopen the question of the doctor's fitness to practice and/or the appropriate sanction~~ will undoubtedly place strain upon a doctor, whose case would otherwise have been closed. ~~(However, it is important to qualify this consideration with the following point: the GMC may only bring an appeal where it is felt necessary to do so in order to protect the public and considerations of pressure on the doctor must necessarily be a secondary consideration to our overarching objective to protect the public protection.)~~

~~6~~10 Whilst considering the above factors, ~~the GMC~~we must also have regard to ~~its~~our over-arching objective of protecting the public. The right to appeal pursuant to ~~section s.40A~~ is an important mechanism by which ~~the GMC~~we can ensure that ~~it~~we meets this objective.

~~7~~11 ~~The GMC~~We ~~has~~have a power to bring a ~~section s.40A~~ appeal where ~~it~~we considers that the decision of the MPT in the particular case is not sufficient ~~for the~~to protection of the public. The ~~proper~~ purpose of the appeal is not to seek to punish the doctor but rather to ~~protect the public in line with the GMC's~~ ~~purpose~~the over-arching objective³, ~~set out in s.1(1A) of the Act (as inserted by Article 21 of the 2015 Rules):~~ ~~the~~ *protection of the public.*

~~8~~12 ~~As s.40A(4) of the Medical Act 1983 makes clear,~~ ~~w~~When considering whether a decision is sufficient for the protection of the public, ~~the GMC~~the section 40A Panel will need to consider whether the decision is sufficient⁴—

- a to protect the health, safety and well-being of the public;
- b to maintain public confidence in the medical profession; and/or
- c to maintain proper professional standards and conduct for members of that profession.

~~9~~ ~~However, as a statutory body, the GMC~~We ~~are~~is required to act reasonably in the exercise of ~~its~~our statutory powers, including the power to bring a ~~section s.40A~~ appeal. ~~It~~We would not be acting reasonably if ~~it~~we were routinely to bring appeals which were likely to fail. Therefore, the section 40A Panel will need to consider

~~10~~13 ~~It will therefore need to consider, as one of the factors in reaching a decision,~~ the likely merits of any appeal (the prospects for success of any such appeal before the court) before making a decision to bring a ~~section s.40A~~ appeal even when, in principle, there may be grounds for ~~the GMC~~us to consider that the decision of the MPT in the particular case is not sufficient for the protection of the public.

~~The~~questions which ~~the GMC~~section 40A Panel ~~will~~ need to address in deciding whether or not to bring a ~~section s.40A~~ appeal

³ Section 1(1A) of the Medical Act 1983

⁴ Section 40A(4) of the Medical Act 1983

~~11~~14 When considering whether to bring a section s-40A appeal in a particular case, it will be necessary for the section 40A Panel to consider the following questions:

- a Based on their~~his~~ assessment of all of the information held, and in the particular circumstances of the case including, where relevant, the degree to which the MPT gave or ought to have given due weight to the context of the practitioner's failings and the impact of any systemic issues on the same, and having regard to the factors set out in paragraph 129 of this Guidance, does the decision-maker s40A Panel consider that the MPT's decision is not sufficient to protect the public?

~~Only if the decision maker action is of the view, on his assessment of all the information held, in the particular circumstances of the case, in the context of paragraph 9, that there are grounds to consider that the MPT's decision is not sufficient, does he answer is yes, they go on to consider.~~

- b In all of the circumstances, would exercising the power of appeal further, rather than undermine, the achievement of the our over-arching objective ~~—namely to the protection of the public?~~

~~If the answer is yes, then the GMCwe may exercise its our power of appeal~~

~~12~~15 In considering 14(b) above, it may be that the decision-maker section 40A Panel will be required to consider and weigh a number of competing factors. This would ~~(including his assessment of the prospects of success of the appeal, their assessment of the likely effect on patient safety of a decision to appeal in the case under consideration, their assessment of the prospects of success of the appeal, and the nature and importance of the issues which would be aired).~~

The assessment of whether the decision is “not sufficient” for the protection of the public

~~13~~16 Unless the GMCwe concludes that there are grounds for considering that the decision which has been reached by the MPT is not sufficient for the protection of the public, the power to appeal pursuant to section -40A of the Medical Act will not arise and the we GMC will not need to proceed to consider whether it we should exercise the our power to bring a s-ection 40A appeal.

~~14~~17 Whilst regard will be had to decisions of the MPT relating to other issues and earlier stages in the hearing, the question as to whether the decision of the MPT is not sufficient for the protection of the public will turn in most cases upon the ultimate outcome (if any) in relation to sanction.

~~15~~18 Whilst the GMCwe may conclude that there are grounds for considering that one or more of the MPT's the other decisions (for example as to fact or impairment) has been wrong, it will be the effect (if any) of such decisions on the ultimate outcome in terms

of their finding of impairment and, in particular, the determination as to sanction which will in most cases determine whether this threshold for the section 40A appeal is met.

~~1619~~ If, ~~notwithstanding errors in the MPT's reasoning and conclusions leading up to their determination on sanction,~~ the sanction is ultimately considered to be an appropriate sanction, then it is unlikely that ~~the GMC~~ will consider that decision which has been reached by the MPT is not sufficient for the protection of the public.

~~1720~~ When considering whether the decision which has been reached by the MPT is not sufficient for the protection of the public, the ~~GMC section 40A Panel~~ will need to have regard to such factors as whether:

- a the MPT has made an error of fact; and/or
- b the MPT has made an error in its application of the relevant legal principles; and/or
- c the MPT has failed adequately to apply the relevant guidance published by the GMC and the MPTS, whether as to Standards or as to Sanctions, when reaching its decision as to impairment and/or sanction in a given case; and/or
- d the MPT has failed adequately to set out the reasons for the decision made.

~~1821~~ When considering the matters referred to at paragraph ~~2018~~ above, the ~~GMC section 40A Panel~~ will be mindful that the MPT:

- a is itself a specialist, quasi-judicial tribunal with particular expertise in relation to the determination of such issues in the exercise of its statutory function under the Medical Act 1983, and
- b plays a central role in the statutory scheme under which ~~the GMC~~ fulfils our statutory functions and meets its statutory objectives.

~~19~~ In line with the decision of the Court of Appeal in the case of *Fatnani and Raschid v General Medical Council* [2007] EWCA Civ 46 (as to which see further below), the GMC accepts that “particular force [should be] given to the need to accord special respect to the judgment of the professional decision-making body”, here the MPT, in view of its acknowledged expertise in determining “the measures necessary to maintain professional standards and provide adequate protection to the public”.

~~20~~ However, this does not mean that the GMC must accept the conclusions of the MPT in this regard in all cases. This is clear from decisions of the High Court in cases subsequent to *Fatnani and Rashid*. In his judgment in the case of *Naheed v GMC* [2011] EWHC 702 (Admin) [20], Parker J sets out a helpful summary of the correct approach:

The principal purpose of the panel in relation to sanction is the preservation and maintenance of public confidence in the profession rather than the dispensing of retributive justice. The court must accord, therefore, a certain degree of respect or deference to the judgment of the professional panel when it comes to the imposition of sanctions: see Raschid v GMC [2007] 1 WLR 1470 at paragraph 19 by Laws LJ. The exercise of professional judgment is especially important when it comes to sanction -- see Cheatle v GMC [2009] EWHC 645 (Admin) at paragraph 15 by Granston J. However, if this court despite paying such respect is satisfied that the sanction is clearly inappropriate, then this court must interfere -- see Salsbury v Law Society [2009] 1 WLR 1286 at paragraph 30 by Jackson LJ.

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The assessment of prospects and the legal framework governing the determination of ~~s-~~[section 40A](#) appeals

~~21~~[22](#) When considering whether a proposed appeal may have reasonable prospects of success, the ~~GMC~~[section 40A Panel](#) will need to have regard to the approach which the court ~~is likely to will~~ take in determining the appeal in accordance with the provisions of the Medical Act itself, any relevant case law and the relevant Rules of Court.

~~22~~[23](#) This is because, when assessing whether a ~~section -~~[section 40A](#) appeal has reasonable prospects of success, the ~~GMC~~[section 40A Panel](#) is assessing whether ~~-~~a judge hearing the appeal, acting in accordance with the law, is more likely than not to allow the appeal.

~~23~~[24](#) A ~~section -~~[section 40A](#) appeal is governed by the same court rules which govern other statutory appeals, including appeals brought by doctors pursuant to ~~section -~~[section 40](#) of the Medical Act 1983 (~~“section -40 appeals”~~) and references to court by the Professional Standards Authority for Health and Social Care (~~“PSA”~~) made pursuant to ~~section -~~[section 29](#) of the National Health Service Reform and Health Care Professions Act 2002 (~~“section -29 references”~~).

[25](#) The legal framework in place will vary depending on which jurisdiction the appeal is to be heard in, whether that be Northern Ireland, Scotland, or England and Wales. [However, as the following makes clear, the principles which the courts of the respective jurisdictions in the United Kingdom will apply in determining \[section 40A\]\(#\) appeals will be essentially the same in substance.](#)

~~24~~[26](#) ~~For example, where~~ [Where](#) the relevant court before whom the appeal is brought is the Administrative Court of England and Wales, the appeal will be governed by the provisions of Part 52 of the Civil Procedure Rules ([CPR](#)).

~~25~~[27](#) [CPR 52. 21\(3\)](#) provides as follows:

The appeal court will allow an appeal where the decision of the lower court was —

- a** (a) wrong; or
- b** (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

~~26~~ [Judgments of the Court of Appeal will be binding only in England and Wales but nonetheless provide useful guidance in all jurisdictions. Of course, the over-arching objective has now changed and as a result the principles distilled in case law dealing with the old objective will need to be reviewed. However, the case law handed down pertaining to general principles, unrelated to the over-arching objective \(such as the nature and status of regulatory bodies and decisions made by them\), still stands.](#)

~~27—In the case of Fatnani and Raschid, the Court of Appeal gave further guidance on the approach which the courts should take in applying the test under CPR Part 52.11(3) when considering appeals against decisions of the MPT. Although this guidance was given in the context of an appeal brought by a doctor pursuant to s.40 of the Medical Act 1983, in view of the points made in paragraph 27 of this Guidance (above), the GMC considers that it should and will apply equally in the case of a s.40A appeal.~~

~~28—These principles were usefully summarised by Mostyn J in his judgment in the recent case of Khan v General Medical Council [2015] EWHC 301 (Admin), when he said the following:~~

~~“Taking the reasoning of [the Court of Appeal in Fatnani and Raschid] in combination with CPR 52.11(3), the governing principles are:~~

- ~~i— I can only overturn the decision of the FTTP if I am satisfied that it was either wrong or unjust because of a serious procedural or other irregularity in its proceedings.~~
- ~~ii— In determining whether the decision was wrong, I must pay close regard to the special expertise of the FTTP to make the required judgment.~~
- ~~iii— Equally, I must have in mind that the exercise is centrally concerned with the reputation and standards of the profession and the protection of the public rather than the punishment of the doctor.~~
- ~~iv— The High Court will correct material errors of fact and of law and it will exercise a judgment, although distinctly and firmly a secondary judgment, as to the application of the principles to the facts of the case.~~
- ~~v— Where the appeal is against a sanction, my decision must not constitute an exercise in resentencing or the substitution of one view of the merits for another.”~~

~~28 As t~~The Court of Appeal has confirmed the correct approach to appeals under section 40A, setting out that the well settled principles in relation to section 40 appeals can be applied to section 40A appeals⁵. It summarised the following key points:

- ~~■ Proceedings under section 40A of the 1983 Act are appeals and are governed by CPR Part 52. A court will allow an appeal under CPR Part 52.21(3) if it is 'wrong' or 'unjust because of a serious procedural or other irregularity in the proceedings in the lower court'.~~

⁵ General Medical Council v Chandra [2018] WLR(D) 542: full reference of the decision can be found in Appendix XX para 40.

- It is not appropriate to add any qualification to the test in CPR Part 52 that decisions are 'clearly wrong'.
- The court will correct material errors of fact and of law. Any appeal court must however be extremely cautious about upsetting a conclusion of primary fact, particularly where the findings depend upon the assessment of the credibility of the witnesses, who the Tribunal, unlike the appellate court, has had the advantage of seeing and hearing.
- When the question is what inferences are to be drawn from specific facts, an appellate court is under less of a disadvantage. The court may draw any inferences of fact which it considers are justified on the evidence.
- In regulatory proceedings the appellate court will not have the professional expertise of the Tribunal of fact. As a consequence, the appellate court will approach Tribunal determinations about whether conduct is serious misconduct or impairs a person's fitness to practise, and what is necessary to maintain public confidence and proper standards in the profession and sanctions, with diffidence.
- However there may be matters, such as dishonesty or sexual misconduct, where the court "is likely to feel that it can assess what is needed to protect the public or maintain the reputation of the profession more easily for itself and thus attach less weight to the expertise of the Tribunal. The appellate court "will afford an appropriate measure of respect of the judgment in the committee, but the fappellate court will not defer to the committee's judgment more than is warranted by the circumstances.
- Matters of mitigation are likely to be of considerably less significance in regulatory proceedings than to a court imposing retributive justice, because the over-arching concern of the professional regulator is the protection of the public.
- A failure to provide adequate reasons may constitute a serious procedural irregularity which renders the Tribunal's decision unjust.

29 The Court of Appeal has also given the following reasons why there is limited scope for overturning decisions of the MPT on sanction⁶:

- a** Decisions on sanction are 'multi-factorial' decisions, akin to jury questions, which first-instance tribunals are best placed to judge as they turn not just on the explicit findings of fact but also the other evidence which the tribunal heard – i.e. the

⁶ In *Bawa-Garba v GMC* [2018] EWCA Civ 1879

'penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, la vérité est dans une nuance), of which time and language do not permit exact expression'⁷

b The MPT is the body best equipped to determine the sanction to be imposed. The assessment of the seriousness of the misconduct is essentially a matter for the MPT in the light of its experience. It is the body best qualified to judge what measures are required to maintain the standards and reputation of the profession⁸

30 Accordingly:

a when an appeal is against a multi-factorial decision, such as the MPT's view as to what sanction may be required to maintain public confidence in the profession, "the appeal court's approach will be conditioned by the extent to which the first instance judge had an advantage over the appeal court in reaching his/her decision. If such an advantage exists, then the appeal court will be more reticent in differing from the trial judge's evaluations and conclusions":

b that general caution applies with particular force in the case of a specialist adjudicative body, such as the MPT, which (depending on the matter in issue) usually has greater experience in the field in which it operates than the courts;

c an appeal court should only interfere with such an evaluative decision if:

- there was an error of principle in carrying out the evaluation, or
- for any other reason, the evaluation was wrong, that is to say it was an evaluative decision which fell outside the bounds of what the adjudicative body could properly and reasonably decide.

31 The Court of Session has confirmed that essentially the same legal principles apply to [section 40A](#) appeals heard in Scotland⁹.

32 It is anticipated that, in relation to [section 40A](#) appeals brought in Northern Ireland, the High Court of Justice in Northern Ireland will adopt the principles set out in the above cases, and in particular the English Court of Appeal cases.

2933 In summary, when assessing whether a proposed appeal has reasonable prospects of success, the [GMC section 40A Panel](#) will therefore need to consider:

⁷ See [Bawa-Garba](#) at [61]-[66]

⁸ See [Bawa-Garba](#) at [67] & [94]

⁹ See [Annex C](#) para 41 for the relevant extract of the Court of Session's Opinion.

- a Whether there is a reasonable prospect that the court will conclude that the decision of the MPT was unjust because of a serious procedural or other irregularity in its conduct of the hearing before it. For example: e.g.
- i that it improperly excluded or otherwise failed to have regard to evidence upon which the GMC sought to rely at the hearing;
 - ii that the unreasonable exercise, or failure to exercise, Case Management powers by the MPT; had the effect of rendering the hearing before it unjust;
 - iii that it failed to give adequate reasons to explain the decision which it reached;
- and/or
- b Whether there is a reasonable prospect that the court will be satisfied that the decision of the MPT was wrong, having paid due regard to both:
- i the specialist expertise of the MPT, particularly on matters of in relation to 'multi-factorial' evaluative decisions on matters within its specialist judgment area of expertise, and particularly in relation to the application of the Sanctions Guidance, and and
 - ii the MPT's particular advantages in evaluating the evidence as the Tribunal which has heard the live evidence.

~~iii~~

~~the court will be satisfied that the decision of the MPT was wrong.~~

~~Errors of Fact~~

~~30 Section 40A gives a power to appeal against the "relevant decision": namely a decision as to sanction.~~

~~31 Due to the fact that the MPT is a specialist body with the advantage of relevant experience and expertise, the court is unlikely to interfere with a finding of fact unless it was manifestly wrong. It is now firmly established¹⁰ that findings of primary fact are "virtually unassailable", particularly where those findings are founded upon an assessment of the credibility of live witnesses. Though the High Court has jurisdiction to reopen questions of fact, it very rarely recalls witnesses and recognises that where a tribunal has had the benefit of live evidence, its decisions on matters relating to that~~

¹⁰ ~~Southall v GMC [2010] EWCA Civ 407 [47]; Dr Luise Schodlok v GMC [2015] EWCA Civ 769 [71].~~

evidence are more likely to be sound than a substitute decision made without the advantage of seeing witnesses.

34 Having appropriate regard to all the circumstances of the case, and in particular to:

c the overarching objective (public protection),

d the role of the MPT,

e where relevant, to the degree to which the MPT gave or ought to have given due weight to the context of the practitioner's failings and the impact of any systemic issues on the same and

f the principles which the relevant court will apply in determining any appeal if issued

the s40A Panel will therefore decide to exercise the power to appeal under s.40A only if they consider that the MPT's decision was wrong and insufficient to protect the public.

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ANNEX A

Appeal under section -40A: The role of the Professional Standards Authority for Health and Social Care (“the PSA”)

3235 The GMC’s right to appeal exists concurrently with the PSA’s power to refer a case under section 29 of the National Health Service Reform and Health Care Professions Act 2002 (~~“s.29”~~). Once one party has brought an appeal/referred the case, the other party is precluded from bringing separate, like proceedings.

3336 Where ~~the GMC we~~ decides to exercise the power of appeal, the Registrar must notify the PSA without delay. While the PSA will not be able to take separate proceedings once ~~the GMC we~~ has~~es~~ commenced an appeal, it can become a party and make representations in ~~a GMCour~~ appeal in cases where it considers that there is insufficient protection of the public. If ~~the GMC we~~ withdraws an appeal, the PSA can continue the proceedings.

37 If ~~the GMC we~~ wishes to withdraw the appeal or agrees terms of a settlement with the respondent, then ~~they we~~ must communicate this to the PSA, whether or not the PSA is a party to the appeal. The PSA may then take over conduct of the appeal, which from that time would be treated as a section -29 reference.

ANNEX B

References under ~~section 29~~ of the National Health Service Reform and Health Care Professions Act 2002 (~~“s.29”~~): ~~Our role~~~~the role of the GMC~~

- 38 Where the PSA refers a case under ~~section 29~~ the PSA must notify ~~the GMC~~ without delay.
- 39 Where ~~the GMC~~ ~~are~~ ~~is~~ the respondent in a case referred under ~~section 29~~, and the PSA wishes to withdraw the reference (or has agreed a settlement with the practitioner and wishes for the case to be resolved on those terms) the PSA must notify ~~the GMC~~. In those circumstances ~~the GMC~~ may take over conduct of the proceedings, which from that time would be treated as a ~~section 40A~~ appeal.
- 40 When determining its view on whether the proceedings should continue, ~~the GMC~~ will review any information held as to why the PSA no longer wishes to proceed with the ~~section 29~~ reference. It will also be necessary to review why it was ~~the GMC~~ did not bring an appeal following the Tribunal decision (for example, this may be because the PSA referred the case before ~~the GMC~~ brought an appeal and so precluded ~~the GMC~~ from bringing an appeal). ~~The GMC~~ will consider whether the tests set out in paragraph 12 above are met, in light of all of the information held.

Annex C

- 41 As the Court of Appeal confirmed in its judgement in General Medical Council v Chandra [2018] WLR(D) 542:

In *General Medical Council v Jagjivan and another* [2017] EWHC 1247, [2017] 1 WLR 4438, Sharp LJ sitting in the Divisional Court considered the correct approach to appeals under section 40A and held as follows:

"39. As a preliminary matter, the GMC invites us to adopt the approach adopted to appeals under section 40 of the 1983 Act, to appeals under section 40A of the 1983 Act, and we consider it is right to do so. It follows that the well-settled principles developed in relation to section 40 appeals (in cases including: *Meadow v General Medical Council* [2006] EWCA Civ 1390; [2007] QB 462; *Fatnani and Raschid v General Medical Council* [2007] EWCA Civ 46; [2007] 1 WLR 1460; and *Southall v General Medical Council* [2010] EWCA Civ 407; [2010] 2 FLR 1550) as appropriately modified, can be applied to section 40A appeals.

40. In summary:

- i) Proceedings under section 40A of the 1983 Act are appeals and are governed by CPR Part 52. A court will allow an appeal under CPR Part 52.21(3) if it is 'wrong' or 'unjust because of a serious procedural or other irregularity in the proceedings in the lower court'.
- ii) It is not appropriate to add any qualification to the test in CPR Part 52 that decisions are 'clearly wrong': see Fatnani at paragraph 21 and Meadow at paragraphs 125 to 128.
- iii) The court will correct material errors of fact and of law: see Fatnani at paragraph 20. Any appeal court must however be extremely cautious about upsetting a conclusion of primary fact, particularly where the findings depend upon the assessment of the credibility of the witnesses, who the Tribunal, unlike the appellate court, has had the advantage of seeing and hearing (see Assicurazioni Generali SpA v Arab Insurance Group (Practice Note) [2002] EWCA Civ 1642; [2003] 1 WLR 577, at paragraphs 15 to 17, cited with approval in Datec Electronics Holdings Ltd v United Parcels Service Ltd [2007] UKHL 23, [2007] 1 WLR 1325 at paragraph 46, and Southall at paragraph 47).
- iv) When the question is what inferences are to be drawn from specific facts, an appellate court is under less of a disadvantage. The court may draw any inferences of fact which it considers are justified on the evidence: see CPR Part 52.11(4).
- v) In regulatory proceedings the appellate court will not have the professional expertise of the Tribunal of fact. As a consequence, the appellate court will approach Tribunal determinations about whether conduct is serious misconduct or impairs a person's fitness to practise, and what is necessary to maintain public confidence and proper standards in the profession and sanctions, with diffidence: see Fatnani at paragraph 16; and Khan v General Pharmaceutical Council [2016] UKSC 64; [2017] 1 WLR 169, at paragraph 36.
- vi) However there may be matters, such as dishonesty or sexual misconduct, where the court "is likely to feel that it can assess what is needed to protect the public or maintain the reputation of the profession more easily for itself and thus attach less weight to the expertise of the Tribunal ...": see Council for the Regulation of Healthcare Professionals v GMC and Southall [2005] EWHC 579 (Admin); [2005] Lloyd's Rep Med 365 at paragraph 11, and Khan at paragraph 36(c). As Lord Millett observed in Ghosh v GMC [2001] UKPC 29; [2001] 1 WLR 1915 and 1923G, the appellate court "will afford an appropriate measure of respect of the judgment in the committee ... but the [appellate court] will not defer to the committee's judgment more than is warranted by the circumstances".

vii) Matters of mitigation are likely to be of considerably less significance in regulatory proceedings than to a court imposing retributive justice, because the over-arching concern of the professional regulator is the protection of the public.

viii) A failure to provide adequate reasons may constitute a serious procedural irregularity which renders the Tribunal's decision unjust (see Southall at paragraphs 55 to 56)."

42 In their Opinion in General Medical Council v a Decision of the Medical Practitioners Tribunal in the case of Dr Milind Mehta [2018] CSIH 69, the Inner House of the Court of Session cited with approval the decision of the Divisional Court in GMC v Jagjivan [2017] 1 WLR 4438 as confirming that the approach to appeals set out by Lord Malcolm in The Professional Standards Authority For Health And Social Care against a decision of the Conduct and Competence Committee of the Nursing and Midwifery Council 2017 SC 542 [para 25] governed section 40A appeals, namely:

"There is a well-established body of jurisprudence relating to the proper approach to appeals from regulatory and disciplinary bodies. The general principles can be summarised as follows. In respect of a decision of the present kind, the determination of a specialist tribunal is entitled to respect. The court can interfere if it is clear that there is a serious flaw in the process or the reasoning, for example where a material factor has not been considered. Failing such a flaw, a decision should stand unless the court can say that it is plainly wrong, or, as it is sometimes put, 'manifestly inappropriate'. This is because the tribunal is experienced in the particular area, and has had the benefit of seeing and hearing the witnesses. It is in a better position than the court to determine whether, for example, a nurse's fitness to practise is impaired by reason of past misconduct, including whether the public interest requires such a finding. The same would apply in the context of a review of a penalty."