Robert Phipps v General Medical Council [2006] APP.L.R. 04/12

CA on appeal from QBD Administrative Court, (The Honourable Mr Justice Newman) before The President of the Family Division; Arden LJ; Wall LJ. 12th April 2006.

JUDGMENT : Lord Justice Wall :

Introduction

2. Mr. Robert Phipps is a surgeon. He qualified as a doctor at the Welsh National School of Medicine in Cardiff in 1978, and in 1983 was elected a Fellow of the Royal College of Surgeons of Edinburgh. In about May 1990 he emigrated to New Zealand, and on 4 October 1990 took up a post as a consultant surgeon at the Dunedin Public Hospital. In 1998, he applied for and obtained a post as a consultant general surgeon with the Bradford Hospitals NHS Trust (the Bradford post). He took up the Bradford post on 14 September 1998.

3. On 8 May 2003, the Professional Conduct Committee (PCC) of the General Medical Council (GMC) began a hearing in which Mr. Phipps was charged with serious professional misconduct. The hearing was protracted, and took place over a total of 35 days (albeit that some days were very much shorter than others). The hearing did not conclude until 28 October 2004. The outcome was that the PCC found Mr. Phipps guilty of serious professional misconduct and suspended him from practice for a period of 12 months.

4. The essence of the charge which the PCC found established against Mr. Phipps was that he had applied for and obtained retrospective accreditation to enable him to qualify as a consultant surgeon in the National Health Service (NHS) by misrepresenting the length and nature of a number of the posts which he had held, thereby obtaining accreditation by illegitimate means. In particular, the PCC found that he had applied for and obtained the Bradford post in reliance on the illegitimately obtained accreditation. Both the PCC and the judge found that his application form and *curriculum vitae* (CV) contained a number of misrepresentations and omissions which were unprofessional and in some respects dishonest.

5. As was his right under section 40 of the Medical Act 1983 (as amended by section 30 of the National Health Service Reform and Health Care Professions Act 2002 and Article 13 of the Medical Act (Amendment) Order 2002 (SI 2002, No. 3135)), Mr. Phipps appealed against the decision of the PCC to the High Court of Justice, where his appeal was heard in the Administrative Court by Newman J. After a hearing lasting a little more than 2 days (20 to 22 June 2005) the judge dismissed Mr. Phipps' appeal in a lengthy reserved judgment handed down on 21 July 2005.

6. Mr. Phipps now seeks this court's permission to appeal against Newman J's decision. On 5 October 2005, Laws LJ considered the application on paper, and adjourned it to an oral hearing on notice to the GMC with appeal to follow if permission to appeal was granted. The application duly came before this court on that basis on 2 March 2006. Both Mr. Phipps and the GMC were represented by counsel, respectively Mr. Ian Pennock and Miss Dinah Rose, each of whom had appeared before the judge.

7. It will be immediately apparent that Mr. Phipps' application for permission to appeal relates to a second appeal, and that section 55(1) of the Access to Justice Act 1999 (AJA 1999) applies. That sub-section reads as follows: -
"Where an appeal is made to …. the High Court in relation to any matter, and on hearing the appeal the court makes a decision in relation to that matter, no appeal may be made to the Court of Appeal from that decision unless the Court of Appeal considers that –
(a) the appeal would raise an important point of principle or practice; or
(b) there is some other compelling reason for the Court of Appeal to hear it."

8. Rule 52.13 of the Civil Procedure Rules 1998 (CPR), which governs second appeals to this court, follows the statutory language and provides that this court will not give permission for a second appeal unless the application falls within the terms of AJA 1999, section 55(1).

9. In my judgment, Mr. Phipps' application passes neither of the tests identified by AJA 1999, section 55(1), and speaking for myself, I would refuse permission to appeal on that basis. However, I recognise that the success or failure of this application is a matter of considerable moment for Mr. Phipps, and I am equally conscious of the fact that on 2 March 2006, when we heard it, we not only allowed Mr. Pennock to develop all the arguments set out in the appellant's notice and his skeleton argument, but also listened to his very late application to amend the former to add two further grounds of appeal.

10. In these circumstances, and whilst remaining of the view that the application fails to satisfy either of the two limbs contained in AJA 1999 section 55(1)(a) or (b), I have come to the conclusion that it is, nonetheless, appropriate also to examine Mr. Phipps' application on its merits, and to take the opportunity to comment, in particular, on the arguments advanced by Mr. Pennock in relation to the alleged failure of the GMC to give adequate reasons for its decision. Before doing so, however, I will set out, quite shortly, my reasons for concluding that this court should apply CPR r. 52.13 and refuse permission to appeal pursuant to that rule.

The case under AJA 1999 section 55(1) and CPR Rule 52.13

11. I have already set out the terms of the Statute and summarised CPR rule 52.13. For a decision on this part of the case, the relevant facts can be stated quite shortly, although I will need to revisit some of them in greater detail when considering the merits of the application.

12. In order to become a consultant surgeon in the NHS, a doctor has to obtain what is known as a Certificate of Higher Surgical Training (CHST). That certificate is usually obtained by the doctor in question obtaining what is known as a career register (CR) number and completing five years' accredited training under a suitably qualified consultant or consultants. In the overwhelming majority of cases, the doctor's entitlement to the CHST is not in doubt. He or she, in accredited posts, will have done the requisite training over the requisite period with the appropriately qualified consultant or consultants in one or more NHS hospitals. It must, I think, be borne in mind throughout, that the need to obtain proper accreditation is an important matter, given the seniority of the posts to which it is the portal, and the need for the authorities regulating the medical profession to ensure that the public is protected by only properly qualified doctors attaining consultant status.

13. The unusual feature of Mr. Phipps' case is that he took an appointment as a consultant in New Zealand (where the rules were different) before he had obtained his CHST. It was thus in November 1992, whilst he was still in New Zealand, that he contacted the Chairman of the Joint Committee on Higher Surgical Training (JCHST) and asked if he could apply for retrospective accreditation.

14. As the judge explained, the detailed provisions relating to accreditation have, from time to time, been laid down by the JCHST, and have appeared, periodically, in reports made by the JCHST. The report governing the content and requirements of the scheme relevant to this application is the Fourth Report of the JCHST dated 1 January 1987. As the judge also explained, implementation of the scheme (and in particular the power to recommend accreditation in individual cases) depended significantly on related committees known as Specialist Advisory Committees (SACs) which, amongst other foundations advised the JCHST in relation to procedures for Higher Surgical Training.

15. From November 1992, there was correspondence between Mr. Phipps and the JCHST (to which I will refer in greater detail when dealing with the merits of the application) about the information which would be required from him in order to achieve retrospective accreditation. In due course, Mr. Phipps provided information on a record card, which listed the training posts he asserted he had held both as a Registrar and as a Senior Registrar. On the basis of this information, the SAC on 28 September 1993 recommended his accreditation to the JCHST, which accepted the recommendation, and shortly afterwards Mr. Phipps was accredited as a specialist with consultant status in the NHS by the Royal College of Surgeons in Edinburgh (RCSE).

16. As I have already related, Mr Phipps applied for the Bradford post in April 1998 and took it up in September of the same year. However, in 2001, the RCSE withdrew his accreditation. That led to Mr. Phipps instituting proceedings for judicial review before the outer house of the Court of Session in Edinburgh, which in turn resulted in two opinions dated respectively 30 March 2005 and 17 June 2005 by Lord Drummond Young, both of which were placed before Newman J. As will be apparent, the issue for the court in what I will call the "Scottish" proceedings was whether the RCSE had acted reasonably in revoking Mr. Phipps' accreditation. On this question, Lord Drummond Young found for Mr. Phipps.

17. In the meantime, as I have already related, proceedings had been commenced against Mr. Phipps in England by the GMC. It will be immediately apparent from the date of the PCC's adjudication (28 October 2004) that its proceedings were concluded long before the delivery of Lord Drummond Young's first opinion in the Scottish proceedings.

18. It will also be immediately perceived, and was so found by the judge, that the Scottish proceedings were addressing a quite different issue to that for which Mr. Phipps was being brought before the GMC. In the Scottish proceedings, the question for Lord Drummond Young was that which I have identified in paragraph 15. The question for the PCC and Newman J was whether or not Mr. Phipps had been guilty of serious professional misconduct by misrepresenting his credentials in order to obtain retrospective accreditation. It was for this reason that Newman J, after a careful examination of Lord Drummond Young's opinions found that they were of no assistance to him in determining Mr. Phipps' appeal.

19. Of particular importance in the GMC's case against Mr. Phipps was his representation that a post he had held at the Royal Marsden Hospital had been a recognised and substantive (as opposed to a locum) senior registrar post duly obtained after advertisement and in open competition. Both the PCC and Newman J found that this post was a locum post and not a recognised and substantive post, and that Mr. Phipps had misrepresented its status (as well as the nature and length of other posts he had held) on the record card. Both found that some of the misrepresentations were more significant than others. As Ms Dinah Rose, for the GMC, put it in paragraphs 6 and 7 of her skeleton argument: -

"Those misrepresentations were found to be in some respects inappropriate and unprofessional, because he had failed to check the facts and to ensure that he gave accurate information to the SAC, and in other respects dishonest, and intended to mislead.

The PCC and the High Court have both found that the SAC's decision to recommend accreditation was influenced by the dishonest and unprofessional misrepresentations made by the Appellant on his record card, and that his accreditation was accordingly obtained illegitimately."

20. Against this background, Miss Rose submitted that we should apply the reasoning of this court as explained in paragraphs 41 to 46 of the judgment of Brooke LJ in ***Tanfern Limited v Cameron-MacDonald and another (Tanfern)*** [2000] 1 WLR 1311, a judgment with which Lord Woolf MR (as he then was) and Peter Gibson LJ agreed. Mr. Phipps had had a long and careful hearing in front of the PCC. He had had a full and careful hearing on appeal by Newman J in the Administrative Court. In these circumstances, she submitted, AJA 1999 section 55(1) applied.

21. For present purposes, the following citations from ***Tanfern*** will suffice:

> *"41. Parliament is responsible for controlling the expenditure of public resources on the administration of justice (whether in relation to the direct costs of the courts, in including the cost of the judiciary, or in relation to expenditure on what used to be called legal aid). It has now made it clear that it is only in an exceptional case that a second appeal may be sanctioned. …. "*

Having set out AJA section 55(1), Brooke LJ continued:

> *"42. This reform introduces a major change to our appeal procedures. It will no longer be possible to pursue a second appeal to the Court of Appeal merely because the appeal is 'properly arguable' or 'because it has a real prospect of success'. The tougher rules introduced by a recent Court of Appeal Practice Direction for 'second tier appeals' related only to cases where a would-be appellant had already lost twice in the courts below ….. The new statutory provision is even tougher—the relevant point of principle or practice must be an important one—and it has effect even if the would-be appellant won in the lower court before losing in the appeal court. The decision of the first appeal court is now to be given primacy unless the Court of Appeal itself considers that the appeal would raise an important point of principle or practice, or that there is some other compelling reason for it to hear this second appeal…… "*

22. In his skeleton argument, Mr. Pennock identified two main areas which he submitted raised important points of principle or practice. The first arose in the context of his first ground of appeal, which I set out in full in paragraph 32 below. It was that the judge's findings were inconsistent with the two opinions of Lord Drummond Young, with the consequence that two different and contradictory approaches to the question of accreditation emerged, one in England, the other in Scotland.

23. The second area in which it was agued that the criteria identified in section 55(1) AJA 1999 applied emerged from Mr. Pennock's submission that the PCC had failed to give any or any sufficient reasons for its decision. Mr. Pennock argued that clarification was needed as to the extent to which the PCC was required to give reasons. This was itself, he submitted, a compelling reason to permit Mr. Phipps a further opportunity to challenge the PCC's determination, because his legal advisers

had been prejudiced in the first appeal by the fact that the attempt to advance it "was made impractical by the lack of reasons".

24. In paragraph 43 of his skeleton argument, Mr. Pennock also attempted to attach the following proposition to the first of these two areas:

"Further, this Honourable Court might not condone the persecution of an otherwise internationally respected Consultant Breast Surgeon who had the integrity to stand up and complain about his employers' serious faults and, in those circumstances, this Honourable Court might consider that a compelling reason to afford the Appellant a further opportunity to reclaim his good name and career."

25. This latter proposition reflects Mr. Phipps' belief that the complaint to the GMC was part of a conspiracy against him by the medical establishment, extending to Australasia and resulting, *inter alia* from Mr. Phipps' whistle-blowing exposure of poor practice by others. This is a point which the PCC addressed in its adjudication, when it said: -

"You have placed great emphasis throughout this hearing on what you consider to be a conspiracy against you both in the United Kingdom and Australasia. Even if such a conspiracy were to exist, it would not affect your responsibility for your own conduct, nor alter the gravity of that conduct, and therefore it is unnecessary to reach any conclusions in that regard in deciding whether you have been guilty of serious professional misconduct. "

26. Mr. Pennock's difficulty in relation both to the proposition advanced in paragraph 43 of his skeleton and to the citation from the PCC's adjudication set out in the preceding paragraph of this judgment is that the correctness of the approach adopted by the PCC in taking no account of the conspiracy allegations was not challenged before the judge. What I may loosely call the "conspiracy" argument thus plays no part either in the judge's judgment or in the appellant's notice in this court. Plainly, therefore, it is simply not open to Mr. Phipps to argue before us that there is a medical conspiracy against him; or that the PCC was wrong not so to find, and as a consequence wrong not to dismiss the complaint against him on the ground that it was tainted and brought in bad faith.

27. In any event, it is self-evidently not for this court to involve itself in medical politics unless a discrete and relevant issue arises which it is necessary for the court to resolve in order to reach its conclusion. That is manifestly not the case here. Any argument, therefore, that the case meets the AJA 1999, section 55(1) criteria because the court needs to address the motivation of the GMC in bringing the charges, or that it is appropriate for the appeal to be used as a platform for Mr. Phipps to reclaim his good name and his career is manifestly untenable.

28. Furthermore, in my judgment, neither the alleged divergence in opinion between Newman J and Lord Drummond Young, nor the "reasons" point brings this application within the criteria identified in AJA 1999, section 55(1). As to the former, Lord Drummond Young and the judge were, as I have already stated and as Newman J found, plainly deciding quite different issues. The judge examines Lord Drummond Young's two opinions with great care, and comes to the conclusion that they were of no assistance to him in deciding the appeal. As the judge put it, most succinctly, in paragraph 91 of his judgment: -

"The court (the Outer House) was not considering the question whether the appellant had made dishonest misrepresentations in his application. The Tribunal's decision (i.e. the Council of the Royal College of Surgeons of Edinburgh) had not involved consideration of that issue. This court is concerned with the GMC proceedings where that issue was resolved."

29. As to the "reasons" point, quite irrespective of any wider argument as to the duty of the GMC to give reasons for its decisions, the reasons for the PCC's decision in the instant case are plain from its adjudication. In other words, the PCC gave reasons for its decision. Mr. Phipps, in my judgment, can be in no doubt at all as to why the PCC found as it did.

30. Furthermore, in a careful judgment amounting to 103 paragraphs, the judge himself gives extensive and clear reasons for dismissing the appeal. Thus although the "reasons" point gives rise to an interesting issue (which I discuss in paragraphs 57 to 87 below) it does so, in my judgment, for reasons unconnected with this appeal.

31. In my judgment, therefore, this is a paradigm case for the application of AJA 1999 section 55(1). There was a long hearing before the GMC. Whilst it is true that Mr. Phipps was not legally represented during the hearing itself, he had the benefit of expert legal advice throughout the period leading up to it. Legal advice and assistance was only withdrawn shortly before it began. There was then a full and careful review of the GMC's decision by a High Court judge on appeal, in which Mr. Phipps was represented by both solicitors and counsel. Plainly, if there had been any ECHR Article 6 / unfairness points arising from the PCC hearing (and I have to say I do not think there were) they were corrected by Newman J's careful adjudication.

32. Whilst, therefore, this application is plainly important to Mr. Phipps, it raises no important point of principle or practice that I can detect. It seems to me to turn essentially on its facts. Furthermore, I can see no other compelling reason for this court to hear the appeal, and I would, accordingly, dismiss the application for permission on the ground that it falls at the AJA 1999 section 55(1) hurdle. That said, however, for the reasons which I gave in paragraph 9 of this judgment, I propose also to deal with the substantive issues raised by the permission application.

The merits: the applicant's first ground of appeal

33. Mr. Pennock advanced four grounds of appeal, and endeavoured to introduce two more by way of late amendment. I propose to deal with each in turn. The first ground of appeal reads as follows: -
"The Learned Judge failed to give sufficient consideration and due weight to the fact that the Respondent's Professional Conduct Committee misdirected themselves as to whether the Appellant had undertaken a course of training sufficient to entitle him to be accredited with the Certificate of Higher Surgical Training: such that their findings were based upon a misunderstanding of an important factual issue and/or they took into account an irrelevant factor."

34. The appellant's notice identifies three alleged instances of this failure. They are: -
"(1.1) the PCC and the learned judge fell into an important error of fact when they erroneously found that the appellant was not entitled to be accredited;
(1.2) that error of fact led them into an error of law by concluding that errors contained within the documents submitted by the appellant were relied upon and so material errors so that the same amount to misrepresentations when they were not;
(1.3) that error of fact also led them into an error of law when they concluded that some of the "misrepresentations" were dishonest rather than innocent because that finding;

(a) was based upon a misunderstanding of an important factual issue in that they thought he obtained accreditation as a result of those misrepresentations when he was not entitled to the same, in other words his motivation was dishonest because he got something he was not entitled to (when he was), and or;

(b) they took into account an irrelevant factor, namely that the appellant was not entitled to be accredited. It being irrelevant because it was wrong and the appellant was entitled to be accredited".

35. In his skeleton argument, Mr. Pennock identified two further propositions within his first ground. They were:

"(i) that any misrepresentations did not influence the SAC in their decision to grant the Appellant accreditation; and

(ii) that the PCC wrongly concluded that the Appellant was not accredited upon the basis of the "concession" and he was, therefore, not entitled to accreditation. This misunderstanding of an important factual issue, in believing the Appellant received a pecuniary advantage he was not entitled to, tainted the PCC's finding that the Appellant made dishonest misrepresentations rather than innocent misrepresentations."

36. Shorn of its repetitions, the first ground of appeal seems to me to come down to an assertion that the PCC was wrong on the facts when it concluded that Mr. Phipps was not entitled to retrospective accreditation, and that this error arose because they wrongly found that Mr. Phipps had not undertaken the requisite training entitling him to his CHST.

37. It is, therefore, necessary to start by examining what exactly the PCC alleged against Mr. Phipps, what it found proved against him, and the material upon which it did so. For this purpose it is, I think sufficient to concentrate on paragraph 2 of the charges against Mr. Phipps, which related to his description of his career between 1986 and 1990. Paragraph 1 of the charges had identified the record card which Mr. Phipps had completed in order to obtain accreditation. Paragraph 2 reads: -

"The submitted record card contained the following misrepresentations: -

(a) That starting in January 1986 for a period of 18 months, you were a research fellow / senior registrar at Queen Alexandra Hospital,

(b) That starting in August 1987 for a period of five months, you held the post of senior registrar at the Queen Alexandra Hospital, Portsmouth, and St. Mary's Hospital, Portsmouth,

(c) That starting in January 1988 for a period of five months, you held the post of senior registrar at St. Helier Hospital, London,

(d) Between May 1988 and May 1990 you held the position of senior registrar at the Royal Marsden Hospital, London, implying that it was a substantive post."

38. The charges went on to allege that the record card influenced the SAC to recommend the grant of retrospective accreditation, and that the actions described in paragraph 2(a) to (d) in the preceding paragraph were inappropriate, intended to mislead, dishonest and unprofessional. The further allegation was that the same misleading and inaccurate information had been used to apply for, and obtain the Bradford post in 1998. Mr. Phipps was accordingly alleged to have presented his career history in a way which was consistent with legitimate entitlement to the Bradford post, when he knew or ought to have known that he was not entitled to accreditation.

39. The PCC found that the submission of the record card was dishonest and done with the intention to mislead. Taking the four alleged misrepresentations on the record card identified in paragraph 36 above in turn; item (a) was found proved on the basis that the post was in fact research fellow/honorary registrar (not senior registrar), and (though of less significance) did not commence until May 1986. Mr. Phipps no longer disputes this finding. Item (b) was found proved on the basis that only a very short time over that period was spent as a senior registrar. Once again, this finding is no longer disputed. Item (c) was found proved on the basis that only 42 days was spent as a senior registrar. Mr. Phipps does not dispute this finding. Finally, item (d) was found proved, on the basis that this was a locum post; that it was not, and could not have been a substantive post; that Mr. Phipps knew it was not a substantive post and that he had not been appointed to it by open competition.

40. Mr. Pennock acknowledged that when Mr. Phipps filled out the record card in 1992 (many years, he argued, after the events recorded) there were errors which amounted to misrepresentations of fact. He submitted, however, that any such misrepresentations did not influence the decision to grant Mr. Phipps accreditation. To the contrary, he argued vigorously that Mr. Phipps was properly accredited because all that he needed to demonstrate was what Mr. Pennock described as "two plus two plus one"; that is to say: training comprising two years as a Registrar; two years as a Senior Registrar and one year in post fellowship clinical practice. That, Mr. Pennock submitted, Mr. Phipps could demonstrate. The judge, accordingly had been wrong in paragraph 55 of his judgment when he had held to the contrary.

41. In order properly to examine this first ground of appeal, it is necessary to look at the correspondence to which the PCC refers, and which was also painstakingly examined by the judge. It begins with a letter dated 6 November 1992 from Mr. Phipps to the Chairman of the JCHST. At this point, of course, Mr. Phipps is in New Zealand and he writes in his capacity as a consultant surgeon at the University of Otago Medical School. In the letter, Mr. Phipps asks to know if he can "apply for accreditation for higher surgical training in retrospect". He states that prior to his appointment as consultant surgeon in Otago, he was "Senior Surgical Registrar for two years at the Royal Marsden Hospital in London". Prior to that, he says he was "Rotating Surgical Registrar on the St. Thomas's surgical rotation, followed by a period of research for which I was granted a thesis by the Welsh National School of Medicine." He expresses the belief that a year on the St. Thomas's rotation, and a research post, could be counted towards higher surgical rotation. He offers to supply his full curriculum vitae and says that "a full and comprehensive audited log book" could be made available.

42. The response, dated 26 November 1992, from Mr. Wilfred Webber, the secretary to the JCHST, identified "the usual procedure", namely the enrolment of the trainee with the appropriate SAC on being appointed to a Senior Registrar Post, thereby enabling the SAC to monitor the trainee's progress during the period of training leading to appointment. Mr. Webber also pointed out that the usual requirement was for three of the four years of higher training to be at Senior Registrar level. Nonetheless, Mr. Webber invited Mr. Phipps to send him his CV, and said that he would ask the Chairman of the SAC if it could consider Mr. Phipps' application at its next meeting.

43. Mr. Phipps (still in New Zealand) replied on 4 June 1993, enclosing his CV. He expressed his belief in the letter that his position as consultant surgeon in Otago over the past two years and eight months would make him eligible for retrospective accreditation, since the regulations for General Surgery Higher Certificate Training set out in the fourth report of the JCHST

stated that three years must be spent as a senior registrar or in a post of equivalent responsibility and training potential. He also stated: -

"The regulations further state that a remaining year can be spent in a post approved at registrar level provided it is held in a post fellowship period. This I believe can be applied to the position of surgical registrar of St Thomas's rotation which I held for two years. ***I was also a senior surgical registrar at Royal Marsden Hospital for a further two years.*** (Emphasis supplied)."

44. Accompanying the letter was a document entitled "Application for Admission to Specialist Medical Register", which included Mr. Phipps' CV and his surgical log book. On page two of the CV under the heading Senior Registrar Appointments, Mr. Phipps listed the following: -

"Locum Senior Registrar, St Helier Hospital, London, January 1988-May 1988.

Senior Registrar, The Royal Marsden Hospital, Fulham Road, London, May 1988 –May 1990. It was during these two years that my interest and experience in early detection of breast cancer was gained. We ran an early diagnostic unit. It was during this time that I learnt the techniques of the immediate and delayed breast construction. The other aspect of surgical oncology involved colorectal disease. As you are aware, the Royal Marsden was a tertiary referral centre."

45. Mr. Webber replied to Mr. Phipps' letter on 14 June 1993. This is an important letter, and I propose to cite it in full:-

"Thank you for your letter of 4 June and for sending me your CV.

I must make it clear that time spent as a Consultant cannot be counted towards accreditation. A Consultant would not be regarded by this Joint Committee as equivalent to a trainee for this purpose. ***You would therefore have to rely on your time in the training grades of Registrar and Senior Registrar.***

I shall therefore ask the Chairman of the (SAC) in General Surgery if your application could in principle be considered on that basis.

However, I must add that Accreditation is not only a matter of completing so many years of training. It has always been the rule that the training must have been completed to the satisfaction of the Consultants with whom the trainee has worked. This means that the SAC would be obliged to seek reports from those with whom you worked as a Senior Registrar. ***The SAC would also wish to be assured that your post at the Royal Marsden Hospital was a recognised and substantive Senior Registrar post obtained after advertisement and in open competition.***

I shall be in touch with you again when I have heard from my Chairman."

(Emphasis supplied in both cases)

46. On the same day, Mr. Webber wrote to the Chairman of the SAC, Professor Johnson, enclosing Mr. Phipps letter of 4 June and stating: -

"He did not apply for enrolment when he was a Senior Registrar at the Royal Marsden Hospital. I would be glad of your advice on whether or not I should now invite him to apply for Accreditation ***if he can confirm that his time there was in a recognised post."*** (Emphasis supplied)

47. Mr. Pennock placed reliance on the fact that Professor Johnson annotated Mr. Webber's letter by writing on it:

"Wilfred, yes, please check the facts. He has two years post fellowship career Registrar. Two years Senior Registrar (if it was a substantive post). Therefore he needs another year. Is the locum SR on the same Rotation @ Marsden or St Helier? Did the breast research post include clinical work and could count as half clinical. When all details available I will make a decision with the help of another SAC member".

48. On 22 June 1993, Mr. Webber wrote once again to Mr. Phipps. This, once again, is an important document, and I propose to set it out in full: -

"In my letter of 14 June, I mentioned that I would be seeking advice from the Chairman of the SAC regarding your request for Accreditation. ***He confirms that the crucial issue will be the standing of the Senior Registrar post you held at the Royal Marsden Hospital . He also points out, as indicated in my letter of 26 November 1992 that three of the four years of higher training need to be at Senior Registrar level.***

If therefore your two years at the Royal Marsden Hospital were in a substantive post, the question will be how to find a third acceptable Senior Registrar year. *The Chairman has suggested that your five months as a locum Senior Registrar at St Helier hospital could be counted if the post you held as a locum formed part of a rotation with the Royal Marsden Hospital It would also be helpful if you could let me know how much, if any, of your time as a Research Fellow (January 1986 – January 1988 was spent in clinical work.*

We therefore need to establish the facts before deciding whether or not we can take the matter further.

I look forward to hearing from you again soon."

(Emphasis supplied)

49. That letter was copied to Professor Johnson. Mr. Phipps replied on 8 July 1993. In his letter, he asserts in terms that "the Senior Registrar position at the Royal Marsden Hospital was a substantive post". He then refers to the question of finding "a third acceptable senior registrar year". The letter then continues:-

"During my research period at Portsmouth I spent a proportion of my time in clinical work.. This consisted of ward rounds with the consultant as well as a regular breast clinic. The then "soft money" for this position ran out at eighteen months and for the remaining six months while writing my thesis I filled in as a locum senior registrar (part of the St Thomas's rotation) both in the Queen Alexandra and St. Mary's Hospital, Portsmouth. I would also point out that during the research position I also filled in for holidays and study leave for the senior registrar which I believe counts for a further two months in all. It is not unusual for research fellows to occupy senior registrar locums. ***Following my research I moved on as locum senior registrar at St Helier's Hospital for five months which is also part of the St Thomas's surgical rotation and then on to the Royal Marsden for a further two years.***

The basis for the scheme of Higher Surgical Training is the evolution and recognition of higher training programmes lasting from three to four years in each of the major surgical specialities after the pre fellowship period with the object of accrediting the completion of surgical training in the speciality for those who will normally be seeking consultant appointments. ***My post fellowship training has been***

1. two years St Thomas's surgical rotation

2. eighteen months research fellowship plus six months senior registrar locums

3. five months senior registrar locum St Helier Hospital (St Thomas's rotation)

4. two years senior registrar at the Royal Marsden."

(Emphases supplied)

50. Mr. Phipps goes on to state that he had been given a "J Pack number" in 1988 after being interviewed by a "J Pack committee"; that he had obtained a consultant's post in New Zealand, and that he was in a difficult position because his time spent as a consultant in New Zealand did not appear to be recognised. The letter concludes: -

"I feel that my years in post fellowship training October 1983 to May 1990 should be sufficient along with the three years spent as a consultant surgeon at a university teaching hospital should satisfy the committee. Bearing in mind that the J Pack committee considered me as suitable for a consultant position."

51. Mr Webber acknowledged receipt of this letter on 15 July 1993 and on the same day wrote to Professor Johnson. That letter reads: -

"I enclose a copy of the latest letter …. from Mr. Phipps. You will have copies of the previous correspondence. He has no more than two years as a substantive Senior Registrar but was appointed to that post in May 1988, having obtained his FRCS in 1983. It may be possible therefore for him to qualify for the concession that would allow him two years of retrospective training.

If you think his case is strong enough, I shall ask him to complete the usual Record Card and seek reports from the Consultants with whom he worked at the Royal Marsden Hospital."

52. On 28 July 1993, Mr Webber advised Mr. Phipps that his application for accreditation would be considered by the SAC on 20 September. He was asked to complete and return a Record Card, which Mr. Webber enclosed. The phrase "Record Card" is, I think, somewhat misleading. It is, in fact, a substantial document running to some four pages of A4, and covers the doctor's entire career. Mr Webber says in the letter: -

"Page 4 of the card should be completed and signed by the Consultants with whom you worked during your time as a Senior Registrar at the Royal Marsden Hospital. To save time I could arrange that from this end, but for this to happen I must ask you to let me have the names of the consultants concerned."

53. Time then became of the essence because the New Zealand regulations were about to change, and Mr. Phipps could only have continued in his post at Otago if he could show that in addition to his fellowship he was (1) on the Specialist Register; and (2) had "training appropriate to the needs". It is plain from the letter Mr. Phipps wrote to Mr. Webber on 3 August 1993, that he regarded the question of accreditation as "a technicality over retrospective accreditation, i.e. on my three years as a consultant surgeon not being regarded for accreditation purposes".

54. The record card which Mr. Phipps returned set out the details of his career, including the assertion that from May 1988 to May 1990 he had been a Senior Registrar at the Royal Marsden Hospital. The two consultants whom Mr. Phipps identified as referees both supplied satisfactory references, and when the JCHST met on 28 September 1993, it accepted the SAC's recommendation that Mr. Phipps, along with a number of others, should be awarded a certificate of completion of training. That recommendation was passed to the Royal College of Surgeons in Edinburgh, which in due course awarded Mr. Phipps his certificate.

55. I have already set out the findings of the PCC in relation to the application for accreditation. The judge undertook a detailed examination of the evidence, and reached a series of very clear conclusions. In summary, these were that: -

(1) Mr. Phipps knew from the correspondence that a locum Senior Registrar's post was not a substantive post, and that the qualification which was required for accreditation was a substantive Senior Registrar's post;
(2) the post occupied by Mr. Phipps at the Royal Marsden was not a substantive post;
(3) the Royal Marsden Senior Registrar numbered post was held by one Mr. Montogmery, who was on secondment to another hospital and that Mr. Phipps was in post as locum in his absence having replaced a previous locum and in response to an advertisement for a locum;
(4) It was obvious that there can be but one incumbent of an SAC approved numbered post, and Mr. Phipps could not have thought otherwise;
(5) Mr. Phipps' statement to the court that:-
"In consequence of being awarded a J PAC number my post as a Senior Registrar at the Royal Marsden was converted to a permanent position,"
was a deliberate piece of obfuscation.

56. In my judgment, those findings are unassailable on the evidence available to the judge and to the PCC. The judge's conclusions on this part of the case are summarised in paragraph 83 of his judgment in the following words: -

"The appellant has from the outset of these proceedings attempted to counter and qualify clear facts stated by him in the record card by mounting a series of arguments to the effect that, despite clear inaccuracies and misstatements on the card, he had nevertheless completed training which met criteria for accreditation laid down by the JCHST. He has demonstrated a high degree of ingenuity and mental agility in shifting the argument to meet the various responses to which his arguments have given rise but, in reality, the statements on the record card are there and speak for themselves. He did not refer to the locum status of his post at the Royal Marsden. He did not refer to the locum status of his posts at the Queen Alexandra and St Helier Hospitals. He misstated the periods in which he had acted as locum senior registrar at each of these hospitals. There is overwhelming evidence to support the conclusion that he knew they were locum posts. Had he wished to claim, at the time, as he had subsequently, that, although locum, they were not to be regarded as such or that, retrospectively, any one of them was made "substantive" it is clear that he spectacularly failed go state that on the record card or in any document qualifying the statements in the card. The essence of the

disciplinary case is that his professional duty required candour and full disclosure and in my judgment as the PCC found, he plainly failed to exercise any, even on his own case."

57. I can only agree. The correspondence (and, in particular, the passages I have highlighted) speak for themselves. The simple fact of the matter is that if the SAC / JCHST had known the true position, it would never have recommended Mr. Phipps' accreditation to RCSE. It did so on the basis of the misrepresentations contained in the record card. The contrary, in my judgment, is unarguable. The first ground of appeal thus fails.

The second ground of appeal: the alleged failure on the part of the PCC to give reasons

(1) The issue in this appeal

58. Ground two of the appellant's notice asserts that: -
"The Learned Judge failed to give any, or sufficient weight to the fact that the PCC did not give any, or sufficient, reasons for their decisions and the extent to which that would prejudice the Appellant in his appeal and make the same impractical."

59. As I indicated in paragraph 29 of this judgment, this ground gives rise to an interesting argument, albeit one which is not immediately germane to the outcome of the appeal. As I have also already indicated, the PCC's reasons are, in my judgment, clear from its adjudication. Thus the simple answer to Mr. Pennock's second ground of appeal, which in my judgment renders it unarguable, is that the PCC did give adequate reasons for its decision.

60. Miss Rose gave us two examples from the PCC's decision which will, I think, suffice for present purposes to demonstrate the clarity of its reasoning process. Firstly, dealing with the critical period between May 1988 and May 1990 when Mr. Phipps held himself out as occupying a substantive post as senior registrar at the Royal Marsden, the PCC explained its findings as follows: -

"….. in the context of the earlier correspondence, you clearly implied that it was a substantive post. You did not, and could not have, filled this post substantively because the numbered post was still held by another doctor. Whilst you had a CR number, this did not entitle you to fill the post substantively and you were not appointed by open competition, following advertisement and interview by a properly constituted committee. Furthermore, the training being given to you was not part of a recognised and supervised programme. We do not accept that any change of contract altered this position, but even if this were the case the duration of the period at the Royal Marsden Hospital after such alteration would have been less than two years."

61. Secondly, in explaining its conclusion that the content of Mr. Phipps' CV, combined with his application form and his responses at interview, presented his career history in a way that was consistent with legitimate entitlement to accreditation, whilst Mr. Phipps knew or ought to have known that this was not the case, the PCC said:

"You stated that you had obtained accreditation for higher surgical training, and the career history as presented was consistent with that statement. However, you were not entitled to accreditation because this had been granted on the basis of wrong information supplied by you. You would not have obtained accreditation if the relevant bodies had known that the information you had supplied was wrong. Some of this information you supplied dishonestly. You must have known of its falsity and must therefore have realised that you had obtained accreditation to which you were not entitled. As to your period at the Royal Marsden, you ought to have ascertained your correct status."

62. Whether one analyses these passages as the expression of findings of fact which emerge clearly from the evidence, or as reasons for the PCC's decision, the consequence, in my judgment, is the same. In the language of this court in paragraph 16 of its decision in ***English v Emery Reimbold*** [2002] 1 WLR 2409, Mr. Phipps could have been left in no doubt at the end of the PCC's decision (of which these two passages are but examples) why and on what factual basis he had been found guilty of serious professional misconduct.

(2) The judge's reference to Gupta v GMC

63. Newman J also took the view that Mr. Phipps could be in no doubt why the PCC had found against him. The judge was, however, critical of several aspects of the way in which the case had been presented against Mr. Phipps. He said that the case had been unnecessarily unwieldy and intractable for a number of reasons. There had been a lack of specificity in some of the allegations. Despite this, the judge was clear that Mr. Phipps had had a fair hearing; indeed, he felt that the lack of specificity had been to Mr. Phipps' advantage in that it had enabled him "to range far and wide in his arguments".

64. However, during the course of his five paragraphs dealing with the related points of reasons and whether or not Mr. Phipps had had a fair hearing before the PCC, the judge said the following: -

> *"99. There is no obligation on the PCC to give reasons for finding the facts in the charges proved (**Gupta v GMC** [2002] 1 WLR 1691 paras 10-14). The narrative form of the charges and the notice to the practitioner informs him or her of the facts in issue in connection with the chargers. But whilst the general rule is well established, this case demonstrates that a lack of specificity in the charges and consequently in the reasons can give rise to difficulty, in particular, in this court on appeal. The court has had to travel through the nine lever arch files to see whether unfairness had occurred."*

65. In her skeleton argument, Miss Rose adopted the first sentence of paragraph 99 of the judge's judgment, albeit as a secondary position. Her primary position, as already stated, was that the PCC had given adequate reasons. Mr. Pennock, on the other hand, took us to, and relied on, this court's exposition of the need for reasons set out in ***English v Emery Reimbold***. He submitted that there was no reason for the PCC of the GMC to be exempted from the general propositions set out in that case.

(3) An analysis of Gupta v GMC

66. In ***Gupta v GMC***, the short facts were that Dr. Gupta and her husband were both general practitioners. He was struck off in 1996, and in 2001, Dr Gupta was charged by the GMC with serious professional misconduct on the ground that following her husband's erasure from the Register, she had been aware of, permitted or failed to prevent him from practising in her surgery. The PCC after hearing conflicting evidence from witnesses called on both sides, simply announced that it found three of the four charges proved, but gave no indication of the reasons for its findings. It then directed that Dr Gupta's name be erased from the Register. Dr. Gupta appealed, inter alia, on the ground that the decision was bad for want of reasons. The Privy Council dismissed her appeal.

67. The Board comprised Lord Steyn, Lord Hobhouse of Woodborough and Lord Rodger of Earlsferry. Its judgment was delivered by the latter, and contains an extensive survey of the relevant case law. The tone is set in paragraph 5 of the judgment: -

"In arguing that the committee's decision was bad for want of reasons, Ms Booth QC readily acknowledged that she was asking the Board to break new ground – or, as she put it, to take the next incremental step in a developing field."

68. Lord Rodger's review of the authorities begins with the decision of the Privy Council in ***Selvanathan v GMC*** [2001] Lloyd's Rep Med 1. In paragraph 6, he summarised the effect of that case in the following way: -

*"The position as to the duty of the Professional Conduct Committee to give reasons, as presently understood, is to be found in **Selvanathan v General Medical Council.** In that case the amended allegation against the practitioner was to the effect that he had knowingly given a false and misleading response to an inquiry by his local health authority in relation to a complaint by a patient. The evidence against the practitioner was all agreed and the committee's decision depended on the inferences drawn from that evidence and from the oral evidence given by the practitioner. After considering the evidence, the committee decided that particular heads of the charge had been proved. The committee gave no reasons for its decision. The practitioner appealed to this Board on the basis that the committee should have given its reasons for finding against the practitioner on the charge that he had known that his response to the health authority had been false and misleading. Giving the decision of the Board, Lord Hope of Craighead first drew attention to the nature and composition of the committee, comprising medical practitioners and lay members, acting with the legal advice of their assessor. The rules required the committee, as a committee, to reach a view on the matters for its determination and there was no provision for expressions of dissent. In these circumstances, said Lord Hope at p 7-*

it is not to be expected of the committee that they should give detailed reasons for their findings of fact. A general explanation of the basis for their determination on the questions of serious professional misconduct and of penalty will be sufficient in most cases. In the present case the complaint is that reasons should have been given to explain the basis upon which the committee found against the appellant on the questions of fact raised by head 2(b). It was plain, however, from the outset that their decision on this point was going to depend upon inferences which it was open to them to make from agreed facts and on the committee's assessment of the appellant's credibility. The issue was a relatively simple one, and all the appellant needed to know in order to decide what to do next was the decision which the committee had reached upon it. There are no grounds for thinking that the appellant has suffered any prejudice due to the absence of reasons directed specifically to this finding. In these circumstances their Lordships do not consider that it was necessary for reasons for this part of the committee's decision to be given.

In that passage their Lordships affirmed the existence of a duty to give a general explanation for the committee's decisions on questions of serious professional misconduct and of penalty. By contrast, they rejected the existence of any such duty to give reasons for the committee's decision on the matters of fact in that case."

69. The Board in Gupta rejected both counsel's attempt to distinguish ***Salvanathan*** on the grounds that it was a very particular kind of case where the factual issue had been extremely simple, and her consequential argument that, except in such very straightforward cases, the PCC should now give reasons – "not of the sophisticated nature that could be demanded of a professional judge, but sufficient to inform the parties in broad terms as to why the PCC had reached its decision". The Privy Council was exercising an appellate, not a supervisory jurisdiction. Put shortly, that meant that it had the power to reconsider findings of fact. Thus in order for it to be able properly to exercise its appellant functions, the decisions of the PCC should now be given in a form that would permit the Privy Council to perform its appellate role. That in turn meant that the PCC would have to give reasons indicating why they had found particular allegations proved. Otherwise, the practitioner could not decide whether there was a proper basis for an appeal.

70. The Privy Council was not persuaded by these arguments, and in paragraphs 10 to 14 of the judgment explains why. Matters of witness credibility were for the tribunal which heard the witnesses. The Privy Council could not accept the submission that the PCC should give reasons explaining what it had done in cases which turned on the credibility or reliability of a witness. The judgment pointed out the detail in which the particulars of the conduct complained about were set out. The findings themselves accordingly gave the practitioner a very good idea what evidence the PCC had accepted. The structured determination of the PCC dealing with the charge would in itself reveal much about its reasons for reaching its decision. The practitioner had the opportunity to study a transcript of the hearing. The Privy Council thus concluded that: -

"To go further and to insist that in virtually all cases raising issues of credibility and reliability the committee should formally indicate which witnesses it accepted and which it rejected would be to require it to perform an essentially sterile exercise. "

71. The Privy Council then adopted paragraph 27 of the judgment of Lord Mustill, giving the decision of the Board in a criminal appeal from Jamaica, ***Wallace v The Queen*** (The Times, 31 December 1996) in which the only issue had been whether the judge had believed one set of witnesses or the other on a *voir dire*. The judge had simply said that he was satisfied the statements made by the accused were given voluntarily. That, the Privy Council held, had been sufficient. The alternative would have been a fully reasoned analysis. There was nothing to recommend such a course, and good reason not to follow it.

72. The Privy Council's conclusion in ***Gupta v GMC*** thus emerges in paragraph 13 in the following terms: -

"….. there is no general duty on the committee to give reasons for its decisions on matters of fact and, more particularly, that there is no duty to do so in a case like the present where, as the appellant's solicitor was at pains to emphasise to the committee, its decision depended essentially on resolving questions of the credibility of the witnesses led before it. The committee's decision on the individual heads of the charge, when considered in the light of the transcript of the evidence, reveals sufficiently clearly the reasons for its decision. Nothing more was required in this case. It so happens, however, that a further indication of the committee's reasons could be found in its indication to the appellant in person that it had found her evidence to be untruthful in many respects. That made the position even clearer."

73. In paragraph 14 of the judgment, however, there is a substantive proviso, which needs to be cited in full:

*"14. Their Lordships would add this. They have rejected the submission that there is a general duty to give reasons in cases where the essential issue is one of the credibility or reliability of the evidence in the case. Nonetheless, while bearing in mind the potential pitfalls highlighted by Lord Mustill, the committee can always give reasons, if it considers it appropriate to do so in a particular case. Their Lordships would go further: there may indeed be cases where the principle of fairness may require the committee to give reasons for their decision even on matters of fact. Nothing in Selvanathan is inconsistent with that approach, while the general reasoning in Wallace supports it. It is also in line with the observations of Lord Steyn giving the judgment of the Board in **Rey v Government of Switzerland** [1999] 1 AC 54, [1998] 3 WLR 1. That case concerned extradition proceedings in the Bahamas in which the magistrate had not given reasons for her decision on certain disputed matters of fact. The Board was not prepared to hold that there is a general implied duty on magistrates to give reasons in respect of all*

disputed issues of fact and law in extradition proceedings. Lord Steyn continued, however ([1999] 1 AC 54 at 66, [1998] 3 WLR 1 at 10):

But their Lordships must enter a cautionary note: it is unnecessary in the present case to consider whether in the great diversity of cases which come before magistrates in extradition proceedings the principle of fairness may in particular circumstances require a magistrate to give reasons.

In the present case Mr Shaw, who appeared for the respondent council, accepted that in certain circumstances – which he said would be exceptional – there could indeed be a duty on the committee to give reasons for its decision on matters of fact. He gave examples of situations in which, he believed, such a duty might arise. He urged the Board to provide guidance to the committee on this matter. Their Lordships are satisfied that no duty to give reasons arose in this case. That being so, they prefer to leave the questions of the existence of any such exceptional duty to give reasons, and of its scope, to be determined in a case where the point is live."

(4) Discussion: the impact of English v Emery Reimbold

74. I have cited so extensively from the decision in ***Gupta v GMC*** for a number of reasons. The first is that the judge's summary of it (set out in paragraph 63 above) seems to me, with respect, too restrictive, although I accept that he was not seeking to give a detailed exposition of the law. Secondly, although counsel for the GMC in ***Gupta*** plainly submitted that it would only be in exceptional circumstances that there could be a duty on the PCC to give reasons for its decision on matters of fact, the common law does not stand still, particularly in the developing area of the need for judges and tribunals to give reasons for their decisions. Thus, it seems to me that what was exceptional in 2001 may well have become commonplace in 2006.

75. Thirdly, in my judgment, decisions such as ***Gupta v GMC*** now fall to be considered in the light of the statutory changes (identified in paragraph 4 of this judgment) which have moved appeals from the GMC away from the Privy Council and into the Administrative Court, with only a second appeal to this court, and the prospect of a further appeal to the House of Lords likely to be unusual in the extreme.

76. For the GMC, Miss Rose acknowledged that due to those jurisdictional changes the Privy Council will now be deprived of the future opportunity to consider the questions of the existence of "any such exceptional duty to give reasons, and of its scope" which it left open in the final sentence of paragraph 14 of its judgment in ***Gupta***. In these circumstances, Miss Rose was minded to accept, I think, that (subject to any further appeal being available with permission to the House of Lords) it would be for this court, in a suitable case, to decide the question as to whether or not there was a duty on the PCC to give reasons for making relevant findings of fact, and if so, the extent of that duty.

77. The question is plainly live in the instant case, since Mr. Pennock specifically raised it as a ground of appeal. At the same time, I have, of course, come to the clear view that Mr. Phipps' application neither passes the AJA 1999 section 55(1) barrier, nor, on the facts, does it pass the permission barrier on its merits so far as the reasons argument is concerned. Accordingly, anything said by this court in this case on the duty to give reasons for factual findings must, inevitably, be obiter.

78. That said, there is, in my judgment, considerable force in Mr. Pennock's submission that there is no reason why doctors sitting in judgment on their peers should be exempt from the general rules which apply to all other tribunals. Plainly, the need to give reasons for findings of fact will vary from case to case, and will depend on the subject matter under consideration. There may be cases where such reasons are unnecessary because they emerge clearly from the court's findings: there may be cases where the expression of such reasons is essential. The test in every case, it seems to me, is the same, and finds its expression in many places in the books, most succinctly in paragraph 16 of this court's judgment in ***English v Emery Reimbold & Strick*** [2002] 1 WLR 2409 at 2417, to which I have already referred, namely:

> *"[16] We would put the matter at its simplest by saying that justice will not be done if it is not apparent to the parties why one has won and the other has lost."*

79. The decision of this court in ***English v Emery Reimbold*** is, of course, primarily addressed to the professional judiciary. However, it both contains a summary of the European jurisprudence, and, in my judgment, reaches conclusions which are applicable to any tribunal charged with the duty to reach a judicial or quasi-judicial conclusion.

80. Two other citations from ***English v Emery Reimbold*** are, therefore, I think. appropriate in the current context, given in particular that appeals from the PCC now go to the Administrative Court. In paragraph 17 of its judgment, ([2002] 1 WLR 2409 at 2417) this court said: -

> ***"[17]*** *As to the adequacy of reasons, as has been said many times, this depends on the nature of the case (see, for example,* ***Flannery's case*** *[2000] 1 All ER 373 at 378, [2000] 1 WLR 377 at 382). In* ***Eagil Trust Co Ltd v Pigott-Brown*** *[1985] 3 All ER 119 at 122, Griffiths LJ stated that there was no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case:*
>
> *When dealing with an application in chambers to strike out for want of prosecution, a judge should give his reasons in sufficient detail to show the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what he says shows the parties, and if need be, the Court of Appeal the basis on which he has acted … (see Sachs LJ in* ***Knight v Clifton*** *[1971] 2 AER 378 at 392–393, [1971] Ch 700 at 721*
>
> *In our judgment, the observations of Griffiths LJ apply to judgments of all descriptions."*

81. Finally, at [2002] 1 WLR 2409 at 2418, this court said: -

> ***"[19]*** *It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one*

manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon."

82. As I have already indicated, the application of the principles set out in ***English v Emery Reimbold*** seems to me universal, and there are many similar statements in the books dealing with the manner in which different Tribunals are required to go about their respective tasks. Perhaps one of the best known expressions of the universal theme is that set out in the judgment of Bingham LJ (as he then was) in ***Meek v Birmingham City Council*** [1987] IRLR 250 paragraph 8: -

"It has on a number of occasions been made plain that the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises; and it is highly desirable that the decision of an Industrial Tribunal should give guidance both to employers and trade unions as to practices which should or should not be adopted."

83. To that analysis, Bingham LJ added the proposition, stated by Donaldson LJ (as he then was) in ***UCATT v Brain*** [1981] IRLR 225 at p.227: *"Industrial Tribunals' reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law ... I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based upon any such analysis. This, to my mind, is to misuse the purpose for which the reasons are given."*

84. The argument that the adjudicating PCC does not have a lawyer amongst its number, and that the Regulations which govern it contain no provision for dissent applies equally to other tribunals, notably to lay magistrates conducting both criminal and family proceedings. Yet in care proceedings under Part IV of the Children Act 1989, for example (which involve issues of great moment for both the parents and the children concerned) justices are required not only to give reasons for their overall decisions, but must both make findings of fact and explain their reasons for doing so when necessary: see Family Proceedings Court (Children Act) Rules 1991, rules 21(5)and (6): ***Rayden & Jackson on Divorce and Family Matters,*** 18th edition, paragraph 51.22 and the case there cited.

85. Most other statutory tribunals are, it is true, chaired by a lawyer, but the rule that they must provide sufficient reasons for their conclusions is universal, albeit expressed in different ways depending on the expertise engaged. Thus, for example, the decision reached by the Special Educational Needs and Disability Tribunal (SENDT) is usually to amend or to refuse to amend a child statement of special educational needs. But the SENDT has to explain why it is either doing so, or refusing to do so.

86. Whilst I fully accept that the instant case is not a proper forum for the promulgation of guidelines, my provisional view is that paragraph 14 of the decision of the Privy Council in ***Gupta v GMC*** identifies an approach which reflects current norms of judicial behaviour. In every case, as it seems to me, every Tribunal (including the PCC of the GMC) needs to ask itself the elementary questions: is what we have decided clear? Have we explained our decision and how we have reached it in such a way that the parties before us can understand clearly why they have won or why they have lost?

87. If, in asking itself those questions the PCC comes to the conclusion that in answering them it needs to explain the reasons for a particular finding or findings of fact that, in my judgment, is what it should do. Very grave outcomes are at stake. Respondents to proceedings before the PCC of the GMC are liable to be found guilty of serious professional misconduct and struck off the Register. They are entitled to know in clear terms why such findings have been made.

88. In the instant case, in my judgment, the PCC's reasons are clear and cogently expressed. I would, accordingly, reject the second ground of appeal.

The appellant's third ground: the absence of a fair trial

89. Mr Pennock articulated this ground in the following way: -
"The Learned Judge in the consideration as to whether the Appellant had received a fair trial gave too much weight to the exceptional circumstances in the case of ***Morris and Steel v The United Kingdom*** *[2005] All ER (D) 207 (Feb) and failed to consider the principles already established by the ECHR."*

To this, by amendment, Mr. Pennock added: -
"The learned judge fell into an error of law when, having distinguished the case of ***Morris and Steel v The United Kingdom*** *he failed to adequately consider the principles of the ECHR already established by the case of* ***P, C and S v The United Kingdom, 16th July 2002, Application No 56547/00."***

90. In my judgment, there is nothing in this point. The judge dealt with it comprehensively in paragraphs 94 to 97 of his judgment. He gives seven reasons why this was not a case within ECHR Article 6(1) requiring Mr. Phipps to be provided with public funding. Furthermore, as Miss Rose pointed out, Mr. Phipps had an appeal by way of re-hearing before the High Court, at which he was assisted by the Legal Services Commission and represented by solicitors and Counsel. I agree with her that in these circumstances, there can be no arguable complaint that he has been denied a fair hearing contrary to Article 6(1), which, as she submitted, requires consideration of the proceedings as a whole, including any appeals: see ***Edwards v UK*** (1992) 15 EHRR 417, paragraphs 34 and 39.

The fourth ground of appeal: the judge's alleged failure to give reasons

91. The fourth ground of appeal asserts: -
"The Appellant repeats his submissions in relation to ground 2 above and, although the Learned Judge saw fit to give guidance to the Respondent with regards to the reasons they ought to have given in their determination he did not give any, or adequate, reasons as to why the same should not result in the upholding of the appeal or the remittal of the matter back to the PCC for additional reasons. "

92. Mr Pennock acknowledged that this ground was, in substance, a re-run of his submissions in relation to ground 2, but with the burden of responsibility shifted onto the judge. Since ground 2 has failed, this ground must, in my judgment, fail also. In fairness to the judge, however, I should record that his judgment, which runs to 103 paragraphs, is fully and clearly reasoned, and in my judgment there is no basis upon which Mr. Pennock's fourth ground is even remotely arguable.

The application to amend the appellant's notice

93. By notice dated 21 February 2006, Mr. Pennock applied for permission to add two news grounds of appeal. These were in the following terms: -
"(1) Heads 1 to 4 of the charge of serious professional misconduct against the Appellant were not referred to the Professional Conduct Committee of the Respondent in accordance with the Statutory Procedure set down by the "General Medical Council Preliminary Proceedings Committee and Professional Conduct Committee (Procedure) Rules Order of Counsel 1988 ("the Procedure Rules"), so that the Professional Conduct Committees determination upon heads of charge 1 to 4 were outwith of their powers.
(2) That the professional conduct committee erred in Law in failing to uphold the Appellants submission relating to the "antiquity of the charges" in relation to the 1993 matters and by failing to consider Rule 6(7) of the Procedure Rules."

94. It is, I think, quite extraordinary that points of this ostensible portentousness should be taken for the first time approximately a week before the hearing of a permission application for a second appeal in this court. That said, as the first purports to go to the ***vires*** of the PCC's decision, we had to deal with it.

95. In the event, Miss Rose was able to despatch both points without undue exertion. It suffices, I think, to say that, speaking for myself, I accept Miss Rose's submission that fresh ground (1) is based on a misunderstanding of the Procedure Rules and of the factual history of the case. I do not propose to burden this already lengthy judgment with a repetition of her careful analysis of what occurred, which fully persuaded me that the rules had been complied with and the correct procedure followed. That conclusion makes it unnecessary for me to have to consider whether the outcome of the hearing before the PCC would have been vitiated by a procedural defect of the kind alleged. In the absence of clear authority, however, I have to say that I consider it highly unlikely.

96. As to fresh ground (2), Miss Rose pointed out that rule 6(7) of the Procedure Rules was inserted only in 2002, and did not come into force until 1 November 2002. The rule itself provides as follows: -
"Subject to paragraph (8), an allegation of misconduct in a case relating to conduct may not be referred to the Preliminary Proceedings Committee (PPC) under this rule if, at the time when the complaint was first made to the Council, more than five years had elapsed since the events giving rise to that allegation."

97. Miss Rose submitted that since Mr. Phipps' case was first considered by the PPC on 7 July 2002, before Rule 6(7) had been implemented, it had no application to his case. In any event, she added, it was not material to the PCC's decision to hear the charges against him, since it applied only to referrals to the PPC.

98. Finally on this point, Miss Rose submitted that even if Rule 6(7) were applicable (which it was not), it was subject to Rule 6(8), which permits a case to be referred to the PPC after more than five years if the medical screener considers that the public interest requires it in the exceptional circumstances of the case. She argued that since the misrepresentations made by the Appellant about his training in order to obtain accreditation in 1993 were not discovered until 2000, it would have been fully open to the GMC in these circumstances to refer the case to the PPC. Indeed, it could be argued that the use of the defective accreditation to obtain the Bradford post in 1998 required an investigation of the circumstances in which retrospective accreditation had been acquired in 1992.

99. I accept Miss Rose's submissions. For these reasons, quite apart from the fact that the application comes impossibly late, I would refuse Mr. Phipps permission to amend his grounds of appeal to include the two additional grounds.

Conclusion

100. I am, accordingly satisfied that none of the grounds of appeal advanced by Mr. Pennock, whether actual or prospective, is arguable. I would therefore refuse permission to appeal both under CPR rule 52.13 and on the merits.

Lady Justice Arden

101. I agree with Lord Justice Wall that this application for permission should be dismissed on the grounds that it fails to meet the statutory criteria for a second appeal. I also agree with Lord Justice Wall that if the conditions for a second appeal had been met the application would have failed on the ground of no real prospect of success.

102. I turn to the adequacy of the GMC's reasons for its findings of fact, which my Lord has discussed in paras. 62 to 87 above. Under the law as stated in ***Gupta v GMC*** [2002] 1 WLR 1691, article 6 does not require the GMC in the usual case to give reasons for its findings of fact. The judge accepted this statement of the law in *Gupta* even though the opinion of the Privy Council is not binding on him. The opinion in ***Gupta*** was handed down on 2 December 2001 and therefore before the decision of this court in ***English v Emery Reimbold Strick*** [2002] 1 WLR 2409. In the latter case, this court considered in detail the question of whether and to what extent reasons needed to be given by a court for its decisions.

103. My Lord expresses the view obiter that the law may have moved on. Indeed, our common law has now become infused in many areas with the jurisprudence that has been developed under the European Convention on Human Rights. That jurisprudence has now become part of the waft and weave of the English common law. It has infused it with new vigour. The Human Rights Act 1998 entitles and requires the courts to question the assumptions on which our earlier law is based. But the Privy Council was in the same position when it decided ***Gupta***, and, although it is parsimonious in its citation of authority, paragraph 12 of its opinion made a highly pertinent reference to the decision of the European Commission on Human Rights in ***Wickramsinghe v UK*** [1998] EHRLR 388.

104. I would in this instance respectfully draw attention to the following matters. First, it was not necessary for Miss Rose to develop any submissions on the points which my Lord makes in the paras. cited, and therefore we have not heard what she would have submitted, no doubt very helpfully, on this point. We do not know what the practical implications are: No-one would want to cause unnecessary delays in the delivery of decisions by the GMC. That would not be in the public interest. By contrast with this court, the Privy Council had enormous experience in dealing with these appeals and we should not lightly cast aside the benefit of that heritage. Indeed I would say that in this particular field the judge was right to treat the decision in ***Gupta*** as binding on him unless it could not stand with a decision of this court or of the House of Lords. If the relevant decision of the Privy Council was inconsistent with a decision of the House of Lords, this court would in turn have to take account of the what was recently decided by the Criminal Division of this court in ***R v James, R v Karimi*** [2006] 1All ER 759.

105. Secondly, the decision in ***English v Emery Reimbold*** does not encourage appeals on the grounds of adequacy of reasons: see for example paras. 30 and 53 to 57 of the judgment of the court. In my judgment the ***English*** case establishes that a decision of a court does not infringe article 6 or the common law on the grounds that the reasons are not spelt out if the reasons can be

deduced from other sources to which reference may properly be made: see the judgment in the ***English*** case at the paras already cited and para. 26. Applying that to this case, to the extent that the issue was for example whether Mr Phipps' explanations for his misstatements were accepted, it seems to me that Mr Phipps can have little doubt that the reason why he lost is that the GMC found his explanations incredible in the light of the evidence and general matters of practice of which both would be aware.

106. For these reasons, I for my part would not wish to join in criticising the judge's very brief summary of the principle summarised in para. 99 of the judge's judgment (see paras. 63 and 73 above). He made no reference to the reservation on the grounds of fairness made in ***Gupta*** (see in para. 72 above), and therefore, as it seems to me, the judge was not in fact there attempting to give an exhaustive statement of the law.

Sir Mark Potter P

107. I agree with the judgment of Lord Justice Wall and, for my part, I would endorse his observations at paragraphs 65 to 87 concerning to the inter-relation of paragraph 14 of the decision of the Privy Council in ***Gupta*** and the principles set out in ***English v Emery Reimbold.*** The latter case made clear that the so-called "duty to give reasons", is essentially a duty which rests upon judicial and quasi-judicial tribunals to state their decisions in a form which is sufficient to make clear to the losing party why it is that he has lost. This requirement will be satisfied if, having regard to the issues as stated and decided and to the nature and content of the evidence in support, the reasons for the decision are plain, whether because they are set out in terms, or because they are implicit i.e. readily to be inferred from the overall form and content of the decision. I do not think that there is any real difference or substantial inconsistency, other than one of emphasis, between that principle and what was stated in ***Gupta***, namely that there is no *general* duty on the PCC of the GMC to give reasons for its decisions on matters of fact, in particular where the essential issue is one of credibility or reliability of the evidence in the case, whilst at the same time recognising that there are cases where the principle of fairness requires reasons to be given "even on matters of fact": see paragraph 14 of ***Gupta.*** It seems to me that such cases are those where, without such reasons, it will not be clear to the losing party why he has lost. It is not a necessary ingredient of the requisite clarity that the reasons should be expressly stated when they are otherwise plain or obvious.

107. Like Lady Justice Arden, I do not criticise the short form statement of the law adopted by the judge in paragraph 99 of his judgment in the context of the issues as they were presented before him. However in the light of the law as stated in ***Gupta*** in paragraphs 13-14, and the secondary position adopted by Miss Rose in this appeal, I consider that the analysis of the law set out by Lord Justice Wall should prove a helpful exposition by way of guidance for the PCC of the GMC in future cases, and it is one with which I concur.

Ian Pennock (instructed by Stachiw Bashir Green - Solicitors) for the Appellant
Dinah Rose (instructed by Field Fisher Waterhouse - Solicitors) for the Respondent