Neutral Citation Number: [2011] EWHC 1585 (Admin)

Case No: CO/11367/2010

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/06/2011

Before :

LORD JUSTICE LAWS

MR JUSTICE STADLEN

- -

Between :

The Queen	**Claimant**
(on the application of Johannes Philip Bonhoeffer)	
- and -	
General Medical Council	**Defendant**

- -
- -

Kieran Coonan QC and **Neil Sheldon** (instructed by **Radcliffes Le Brasseur**) for the **Claimant**
Mark Warby QC and **Kelyn Bacon** (instructed by **Field Fisher Waterhouse LLP**) for the **Defendant**

Hearing date: 8 April 2011

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Approved Judgment

Mr Justice Stadlen :

1. This is an application for judicial review of the decision of the Fitness to Practise Panel ("FTPP") of the General Medical Council ("GMC") announced on Friday 29 October 2010 to admit the hearsay evidence of Witness A in fitness to practise proceedings brought against the Claimant by the GMC. It raises important issues relating to the circumstances in which hearsay evidence may be admitted in disciplinary proceedings.

Background

2. The Claimant is an eminent consultant paediatric cardiologist of international repute. Until last year he was a consultant at The Great Ormond Street Hospital for Children. It is alleged by the GMC that he was guilty of serious sexual misconduct whilst undertaking work in a foreign country. Despite attempts by the GMC and the FTPP to preserve the anonymity of that country it emerged in newspaper reports on the eve of the hearing of this application that it was Kenya. Accordingly Mr Coonan Q.C., who appeared on behalf of the Claimant at the FTPP and in front of us, accepted that there was nothing to be gained by seeking to conceal in these proceedings the fact that it is Kenya. The evidence against the Claimant in respect of the majority of the charges he faces comes from a single source, Witness A, whose identity for reasons which will become apparent has been disguised. The Claimant denies the allegations.

3. Witness A is a young man in his late twenties. He lives in Kenya. He has repeatedly indicated, including shortly before the GMC's application to the FTPP to admit hearsay evidence that he is willing and able to travel to the UK to give evidence in person to the FTPP in support of the allegations he has made against the Claimant. However despite his availability and willingness to give live oral testimony, the GMC decided not to call him as a witness. Instead at the outset of the proceedings it made an application for permission to rely on hearsay evidence from Witness A in the form of (1) transcripts of video-taped interviews of Witness A conducted by the Metropolitan Police ("the MPS"), in Kenya in 2009 (the tapes themselves having been lost by the MPS due, as accepted by the MPS, to incompetence on its part), (2) a transcript of a conversation between Witness A and a third party (Witness Z) which was recorded on Witness Z's mobile phone, (3) hearsay accounts given by Witness Z and another witness as to what they were told by Witness A, and (4) text messages sent to Witness Z by Witness A.

4. The sole ground on which the GMC advanced its application to the FTPP was that if Witness A were to give oral testimony in the FTPP proceedings whether by attending in person or by giving evidence via live video link from Kenya he would be exposed to a significantly increased risk of harm in Kenya. In the light of that alleged risk the GMC made three submissions to the FTPP:

    i) that it was not reasonably practicable for the GMC to call Witness A to give evidence such that his hearsay evidence would be admissible in criminal proceedings pursuant to section 116(2)(c) of the Criminal Justice Act 2003 ("2003 Act").

ii) that it would be "in the interest of justice" for Witness A's hearsay evidence to be admitted such that it would be admissible in criminal proceedings pursuant to section 114(1)(d) of the 2003 Act.

iii) that even if Witness A's hearsay evidence would not be admissible in criminal proceedings, the FTPP's duty to inquire into the allegations against the Claimant made its admission desirable so that its admission was not prohibited by Rule 34(2) of the General Medical Council (Fitness to Practice Rules) 2004 ("the 2004 Rules"), and the FTPP should exercise its discretion under Rule 34(1) to admit it since it would be fair to do so.

5. The alleged risk to Witness A was the only reason advanced by the GMC for not calling him to give evidence. It remained the GMC's position throughout the course of the application to the FTPP that Witness A did face a significant risk of harm were he to give evidence and that that justified its decision not to call him and the admission by the FTPP of hearsay evidence. The application was opposed by the Claimant. In short it was his case that there was no good reason why Witness A should not attend to give evidence and that the admission of his hearsay evidence would be contrary to the interests of justice, and/or in breach of his right to a fair hearing. It would not be admissible in criminal proceedings by virtue of either section 116 2(c) or section 114(1)(d) of the 2003 Act and should not be admitted under Rule 34.

6. In support of its application, the GMC adduced evidence in the form of oral testimony from two police officers, Detective Chief Inspector Grant and Detective Sergeant Crystal, the oral testimony of Witness Z, a number of text messages sent by Witness A to Witness Z and a log kept by DS Crystal of conversations between him and Witness A. DCI Grant was the Senior Investigating Officer and DS Crystal was the Witness Liaison Officer. Witness Z was the person to whom Witness A first made his allegations against the Claimant. In addition at the request of the FTPP, oral testimony was given by Ms Kate Emmerson, a solicitor acting on behalf of the GMC. The FTPP wished to hear from her as to the circumstances in which the decision had been taken not to call Witness A to give evidence in the proceedings. The FTPP declined the GMC's invitation to read, and thus it did not consider the content of, the transcripts of the video-taped interviews of Witness A conducted by the MPS in Kenya in 2009, which constituted the core of the hearsay evidence which it sought to admit against the Claimant. In reaching its decision the FTPP was thus not in a position to and did not make findings as to the probative force or lack thereof of the hearsay evidence sought to be admitted.

7. The alleged risk to Witness A was said by the GMC to derive from two sources. First it was said that he would be at risk of reprisals from homophobic elements in Kenya were he to be identified as having engaged in sexual activity with the Claimant. Second it was said that he would be at risk of harm from those who were loyal to the Claimant and who might wish to prevent or exact revenge for Witness A's participation in proceedings against the Claimant. The FTPP characterised these two risks as "the general threat" and "the specific threat" respectively.

8. The charges against the Claimant were set out by the GMC in a notice of hearing dated 15 September 2010 giving him notice that a Fitness to Practise Panel

hearing would be held on 18 October 2010 with a hearing estimate of 35 days. There were eight separate allegations alleging sexual misconduct and inappropriate sexually motivated conduct on the part of the Claimant on various dates between 1995 and August 2008 and directed variously against Witness A and an unspecified number of identified and un-identified young Kenyan male adults and Kenyan male children. It was alleged that over a number of years the Claimant travelled to Kenya to undertake charitable medical work and that the alleged victims were children and young men to whom he had provided sponsorship by paying for their education and accommodation.

9. In August 2008 Witness A for the first time made allegations to Witness Z that the Claimant had been guilty of sexual misconduct towards him and other spondees of the Claimant. The allegations were reported to the MPS in London who commenced an investigation and following the grant of permission by the Kenyan authorities travelled to Kenya in March 2009 to interview a number of the Claimant's spondees, including Witness A. Of the alleged victims who were interviewed by the MPS only Witness A supported the allegations against the Claimant. The investigation team concluded that the evidence obtained would not permit prosecution of the Claimant in this country for alleged offences against Witness A under the extra-territorial provisions of the Sexual Offences Act 2003 because they occurred before the commencement of that Act and the FTPP was told by Mr Donne Q.C., who appeared for the GMC at the FTPP hearing on its application to adduce Witness A's hearsay statements, that the MPS decided that there could be no sensible prosecution in this country against the Claimant in respect of Witness A's allegations that the Claimant abused the other alleged victims (notwithstanding that, since some of that alleged conduct took place after 2003, the English court would have jurisdiction under the Sexual Offences Act 2003) because they denied that the abuse had happened.

10. There were communications between the MPS and the GMC on the question whether witnesses who gave evidence in prospective fitness to practise proceedings in London would be exposed to the risk of harm.

11. By a letter dated 27 May 2009 the MPS wrote to the GMC emphasising the high degree of risk faced by many of the alleged victims and witnesses. It was recommended that a comprehensive risk assessment and where appropriate child protection strategy should be in place to manage and reduce any potential threats. It was said to be the view of the senior investigating officer that victims might be subject to considerable risk of violence if they were perceived by their community as being homosexual. It was said still to be an offence in Kenyan law to take part in homosexual acts and some sections of Kenyan society were said to be extremely hostile to gay men and could present a real and tangible threat to their safety. The risk identified at that stage was thus the general risk and indeed was not specifically related to Witness A as distinct from any of the other alleged victims. There was no reference to the specific threat from those loyal to the Claimant.

12. By a letter dated 20 April 2010 Naz Saleh an Assistant Director of the MPS declined a request made by the GMC at a meeting on 9 March 2010 for the contact details of all the alleged victims/witnesses in Kenya. She wrote: "The nature of the allegations against Professor Bonhoeffer are such that if any of the

details become more widely known in Kenya the view of the SIO is that the physical safety of those alleged victims/witnesses, (and possibly their families) may be at risk of considerable violence. Homosexuality is unlawful in Kenya and there are extreme homophobic attitudes which could present a real and tangible threat to witness safety. We informed you that we have recently received information that threats had been made against one of the potential witnesses which demonstrates the risks posed to these witnesses are very real and current. Given we are no longer investigating this matter and the key vulnerable witnesses are abroad the police are not in a position to carry out any meaningful or comprehensive risk assessments, nor can the police put any measures in place to mitigate any risk to any of the witnesses or protect them from harm...."

13. On 2 July 2010 Ms Emmerson sent an e-mail to Witness A. She stated that the GMC had been provided with the transcript of his interviews with the MPS conducted in March 2009, the information he provided to Witness Z in August/September 2008 and a number of texts and e-mails he sent to Witness Z and someone else. She attached a copy of the letter from the MPS to her dated 20 April 2010 which she asked him to read and informed him that the GMC had been made aware of concerns expressed by the UK police about the risk of violence to Witness A and/or his family if the GMC contacted him and obtained evidence from him. She said that the GMC took the matter of his safety very seriously which was the principal reason why they had not contacted him until then. However she added "We also take the view that you are well placed to assess any risk. Therefore we ask you to tell us if you consider that you or your immediate family will be put in danger if you assist the GMC and to explain the reasons for any views you have about this matter. You will understand that your evidence is vital to the GMC's investigation and to the potential success of the tribunal case but we are also clear that your health and well-being must not be jeopardised by providing assistance to the GMC." She explained that if he chose to assist the GMC any witness statement he signed, along with other relevant material, would be disclosed to the Claimant and his lawyers and that it was likely that he would be required to attend a hearing to give evidence in the UK in person. She asked Witness A to send an e-mail confirming that he had read the letter dated 20 April 2010 from the MPS to her and addressing any concerns he might have about the safety and well-being of him and/or his family, indicating whether or not he would be prepared to assist the GMC and indicating whether he would be willing to come to London to give evidence to the tribunal about the allegations he had made.

14. In an e-mail dated 19 July 2010 to Ms Emmerson Witness A stated that he was ready to sign what he had said to the police and had disclosed to Witness Z. He also stated that he was ready to sign as a witness and "to be there in person."

15. In a letter dated 26 July 2010 to the Commissioner of the MPS the Chief Executive of the GMC Niall Dickson informed the Commissioner that the GMC had decided that there should be a hearing into whether the Claimant's fitness to practise is impaired. He said that the GMC's legal advice was that they would require at least one Kenya-based witness to give evidence were it to have a reasonable prospect of proving impairment. He invited the Commissioner's view on the level of risk were the GMC to interview Kenyan witnesses and whether

there was any way in which the GMC could mitigate those risks with or without the help of the MPS to such a point where the GMC could exercise its responsibilities to protect children in this country.

16. On 27 August 2010 Mr Philip, the Deputy Chief Executive of the GMC wrote to Commander Gibson, the head of child abuse investigation in the MPS, referring to a meeting held on 4 August to discuss the fitness to practise case relating to the Claimant. He recorded that at that meeting Commander Gibson "confirmed your view, which you had communicated previously, that there remains a very real risk of physical harm to witnesses from Kenya, should the GMC pursue calling them to give evidence at a fitness to practise hearing. This arises, essentially, from the attitudes towards homosexuality in Kenya. The assessment was made after officers from the Metropolitan police had spent some time in Kenya investigating the allegations pursuant to a criminal prosecution..." Mr Philip concluded that the GMC's position was that "We feel that we must continue with our investigation but we accept your assessment of the risk to any witnesses. As such, we intend to continue to pursue this case without calling some of the key witnesses. There is no doubt that this weakens our case evidentially. That said, at our meeting you kindly agreed to the investigating officers giving evidence at the hearing and to the GMC having access to the interview tapes – all of which will go some way to bolstering the evidential base of the charges against the doctor."

17. This is an important letter because in evidence to the FTPP Ms Emmerson confirmed that she was told by a member of the GMC on the 5 August 2010 that the decision by the GMC to proceed with the case against the Claimant but without calling Witness A was made on 4 August essentially for the reasons set out in that letter. Those reasons in turn were described in that letter as being essentially the general risk as distinct from the specific risk. Indeed the risk identified in that letter was general not just in the sense of arising from general country attitudes towards homosexuality but in the sense that it was said to apply not just to Witness A but to all Kenya-based witnesses. The decision was thus not based in whole or in part of any assessment of a specific risk to Witness A whether from the Claimant or from the Claimant's spondees or supporters to which there was no reference in the letter.

18. In a letter dated 25 August 2010 Ms Saleh informed Ms Emmerson that the MPS had recently learnt that Witness A had confirmed that he was now prepared to come to the United Kingdom to give evidence at the GMC fitness to practise hearing regarding the Claimant. She said that the MPS had informed Witness A that the police were not in a position to carry out any meaningful or comprehensive risk assessments nor were they able to put any measures in place to mitigate any risk to him or to protect him from harm particularly in Kenya. Notwithstanding that she said that Witness A was still willing to give evidence against the Claimant. However she stated that it remained the view of the senior investigating officers that there was a very real risk that harm might come to Witness A while he was still in Kenya from individuals acting out of a misplaced loyalty to the Claimant who might seek to prevent Witness A from giving evidence. "Given our concerns surrounding Witness A (as set out above and on a number of previous occasions to you) particularly his vulnerability once the claim [the Claimant] is made aware that Witness A is prepared to give evidence and that

you will be calling him, we would urge some caution as to whether he should be called."

19. It is of note that the MPS were thus confirming that Witness A had himself confirmed that he was willing to give evidence against the Claimant notwithstanding having been told by the MPS that they were unable to put in place measures to protect him and notwithstanding the view of the SIO that there was a very real risk that harm might come to him while he was still in Kenya. It is also of note that the MPS did not in this letter urge the GMC not to call Witness A as a witness by reason of the threat posed from individuals acting out of a misplaced loyalty to the Claimant. Nor was this specific threat said to be the or even a reason for the decision of the GMC taken on 4 August not to call Witness A as a witness.

20. On 17 August 2010 Ms Emmerson wrote to the Claimant's solicitors enclosing copies of the MPS letter dated 20 April 2010 and her correspondence with Witness A. In that letter she said that at the 4 August 2010 meeting between senior management at the GMC and senior police officers the GMC had been informed that following its approach to Witness A he had recently been "visited" by someone in his home village and had communicated to the police that he was now fearful of assisting the GMC investigation. Given that development and the advice already received from the police she said that the GMC had decided that Witness A would not be asked to provide a statement or attend the fitness to practise hearing in person. She said that the GMC would seek the assistance of the police to produce the police interviews with Witness A recorded in March 2009, the transcripts of which had already been disclosed to the Claimant on 9 December 2009. She said that the GMC had made a written request to the police for a copy of all video/audio tape evidence relating to their investigation and that the GMC would provide the Claimant’s solicitors with copies of any material upon which they sought to rely at the hearing.

21. In fact, as was accepted by Mr Donne, the letter dated 17 August contained an error. Unknown to Ms Emmerson when she wrote the letter, the MPS did not inform the GMC at the meeting on 4 August that there had been a recent approach to Witness A and the GMC's decision not to rely on the oral testimony of Witness A was based only on the matters set out in Mr Philip's letter to Commander Gibson dated 27 August 2010 - that is to say the general threat.

22. We were told by Mr Coonan at the hearing in front of us that at the time the GMC took its decision not to rely on the oral testimony of Witness A on 4 August it did not know that the police had lost the video and audio tapes of the MPS interviews with Witness A in March 2009. Thus the decision to rely on his hearsay evidence alone was taken in the belief that the FTPP would have the added advantage of being able to hear and observe the demeanour of Witness A at the time he gave those interviews, an advantage which Mr Philip said in his letter dated 27 August would go some way to bolstering the evidential base of the charges against the Claimant. The loss of the tapes by the MPS, we were told, emerged shortly before the hearing of the GMC's application to rely on Witness A's hearsay evidence, at which point we were told that the GMC confirmed its initial decision notwithstanding that the FTPP would be deprived of that additional benefit.

23. In a letter dated 14 September 2010 the Claimant's solicitors invited the GMC not to issue a press notice in the case which identified him or detailed the allegations against him. Reference was made to the GMC's letter of 27 August to the MPS and the reference in it to the general threat and it was stated that it appeared to the solicitors that the same risk must affect all witnesses from Kenya, whether they are called by the GMC or by the Claimant and that if there were publication of a hearing concerning the Claimant linking him to allegations of sexual abuse and/or Kenya there was a very real risk to those who are known to be associated with him in Kenya, whether or not they give evidence and that that might manifest itself in an unwillingness on the part of witnesses in Kenya to attend the hearing to give oral evidence.

24. The hearing of the GMC's application to admit Witness A's hearsay evidence occupied the FTPP for 10 days including time taken by the FTPP to consider and announce its decision. At that hearing the FTPP heard evidence as to both the general and the specific threat to Witness A.

25. From the point of view of the GMC's case there were a number of unsatisfactory and problematic aspects of that evidence. They are summarised in Appendix 1 to this judgment.

Relevant provisions of the Criminal Justice Act 2003 and the Fitness to Practice Rules 2004

26. Rule 34 of the General Medical Council (Fitness to Practice) Rules Order of Council 2004 provides as follows:

"**Evidence**

(1) Subject to paragraph (2), the Committee or a Panel may admit any evidence they consider fair and relevant to the case before them, whether or not such evidence would be admissible in a court of law.

(2) Where evidence would not be admissible in criminal proceedings in England the Committee or Panel shall not admit such evidence unless, on the advice of the Legal Assessor, they are satisfied that their duty of making due enquiry into the case before them makes its admission desirable….."

Rule 17(2) provides as follows:

"Procedure before a FTPP Panel

(2) The order of proceedings at the hearing shall be as follows:….

(e) Where facts have been admitted, the Chairman of the FTP Panel shall announce that such facts have been found proved;

(f) where facts remain in dispute, the Presenting Officer shall open the case for the General Council and may adduce evidence and call witness in support of it;

(g) the practitioner may make submissions regarding whether sufficient

evidence has been adduced to find the facts proved or to support a finding of impairment, and the FTP Panel shall consider and announce its decision as to whether any such submissions should be upheld;

(h) The Practitioner may open his case and may adduce evidence and call witnesses in support of it;

(i) The FTP Panel shall consider and announce its findings of fact……"

Section 114 of the Criminal Justice Act 2003 provides as follows:

"Admissibility of hearsay evidence

(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if –

(a) any provision of this Chapter or any other statutory provision makes it admissible, ….or

(d) the court is satisfied that it is in the interests of justice for it to be admissible.

(2) In deciding whether a statement not made in oral evidence should be admitted under sub-section (1)(d), the court must have regard to the following factors (and to any others it considers relevant) –

(a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;

(b) what other evidence has been, or can be, given on the matter or evidence mentioned in paragraph (a);

(c) how important the matter or evidence mentioned in paragraph (a) is in the context of the case as a whole;

(d) the circumstances in which the statement was made;

(e) how reliable the maker of the statement appears to be;

(f) how reliable the evidence of the making of the statement appears to be;

(g) whether oral evidence of the matter stated can be given, and, if not, why it cannot;

(h) the amount of difficulty involved in challenging the statement;

(i) the extent to which that difficulty would be likely to prejudice the party facing it."

Section 116 of the 2003 Act provides as follows:

"Cases where a witness is unavailable

(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if –

(a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter,

(b) the person who made the statement (the relevant person) is identified to the court's satisfaction, and

(c) any of the five conditions mentioned in sub-section (2) is satisfied.

(2) The conditions are - …..

(c) that the relevant person is outside the United Kingdom and it is not reasonably practicable to secure his attendance;…..

(e) that through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence."

Section 124 of the 2003 Act provides as follows:

Credibility

(1) This section applies if in criminal proceedings –

(a) a statement not made in oral evidence in the proceedings is admitted as evidence of a matter stated, and

(b) the maker of the statement does not give oral evidence in connection with the subject matter of the statement.

(2) In such case –

(a) …

(b) evidence may with the court's leave be given of any matter which (if he had given such evidence) could have been put to him in cross-examination as relevant to his credibility as a witness but of which evidence could not have been adduced by the cross-examining party;

(c) evidence tending to prove that he made (at whatever time) any other statement inconsistent with the statement admitted as evidence is admissible for the purpose of showing that he contradicted himself.

Section 125 of the 2003 Act provides as follows:

"Stopping the case where evidence is unconvincing

(1) If on a defendant's trial before a judge and jury for an offence the court is satisfied at any time after the close of the case for the prosecution that -

(a) the case against the defendant is based wholly or partly on a statement not made in oral evidence in the proceedings, and

(b) the evidence provided by the statement is so unconvincing that,

considering its importance to the case against the defendant, his conviction of the offence would be unsafe,

the court must either direct the jury to acquit the defendant of the offence or if it considers that there ought to be a re-trial discharge the jury."

The grounds of the GMC application to adduce Witness A's hearsay evidence.

27. The GMC accepted that Witness A's hearsay evidence was the only evidence of most of the allegations made against the Claimant including in particular the allegations relating to his alleged conduct involving the other people who had been interviewed by the MPS none of whom supported his allegations of abuse against the Claimant. The GMC further accepted that Witness A had informed the police that he is willing to give evidence to the FTPP so that Section 116(e) of the 2003 Act would be inapplicable.

28. There is no question of Witness A not giving oral evidence through fear. The GMC's case was that it had decided that it could not place Witness A in potential danger by relying on his oral testimony whether by video link or attending in person. Accordingly it submitted that the hearsay evidence would be admissible under Section 116(c) of the 2003 Act on the basis that the risk to Witness A were he to give oral testimony made it not reasonably practicable to secure his attendance. Alternatively the GMC submitted that the hearsay evidence would be admissible in criminal proceedings under Section 114(1)(d) of the 2003 Act in that it would be in the interests of justice for it to admissible. In relation to the matters identified in sub paragraphs (a) to (c) of Section 114(1) the GMC submitted that the hearsay evidence is the only evidence that could be adduced in relation to the allegations where Witness A was the only witness. As to the matters set out in (d) to (f) they were to be dealt with in evidence by the police officers involved in interviewing Witness A and Witness Z. As to (h) and (g) the GMC submitted that the Claimant could cross-examine witnesses with knowledge of Witness A, demonstrating the consistencies in his evidence, give evidence if he wishes and call evidence to undermine Witness A and/or his evidence.

29. The GMC further submitted that whether or not the evidence would be admissible under Section 114 or 116 in criminal proceedings, the FTPP should admit it in their discretion on the basis that it was fair and relevant to the case against the Claimant. Alternatively, if contrary to their primary submissions, the hearsay evidence would not be admissible in criminal proceedings under the 2003 Act the FTPP retained a discretion to admit it by reason of Rule 34(2) on the basis that they should be satisfied that their duty of making due enquiry into the case before it makes its admission desirable.

The FTPP's Determination

30. On 29 October 2010 the FTPP gave a public determination on the GMC's application to admit the hearsay evidence. The determination declared that the application was allowed. Although it recorded that it had sat in private when dealing with matters relating to safety and anonymity but otherwise in public, it stated that it was satisfied that it was appropriate to announce its decision in public.

At the outset of its Determination t

he FTPP made it clear that:

- Dr Bonhoeffer has never been arrested or interviewed by the police in relation to the complaints made and no criminal prosecution has ever been undertaken;
- There is no intelligence to suggest that Dr Bonhoeffer is involved with or has instigated any campaign of intimidation; and
- The Panel has received no complaint concerning his clinical practice, either in the United Kingdom (UK) or elsewhere.

31. The FTTP recorded that it had been told that Witness A, having been contacted by the GMC's solicitors in July 2010 despite the reservations of the MPS, had subsequently confirmed that he was willing to give evidence in London. It also recorded that following liaison with the MPS the view of the GMC was that calling Witness A was not a safe course of action, and that following the emergence of new evidence in the hearing which the SIO stated diluted his reasoning in relation to the Specific Threat, counsel for the GMC had told the FTPP that the view of the MPS, verified in live evidence, and as a consequence the view of the GMC, was that there remained a genuine risk to Witness A should he give live evidence.

The Panel made the following findings on the evidence:

> "1. The hearsay evidence comprises the only evidence in relation to the majority of the charges outlined in the formal Allegation.
>
> 2. The MPS has, in losing video and audio tapes of Witness A's evidence that were made as part of the criminal investigation, removed an opportunity for assessing Witness A's demeanour.
>
> 3. Whilst the MPS stands by the conclusion that there is a real and credible, if ill-defined, risk to Witness A, it acknowledges that it has not undertaken a meaningful risk assessment.

4. The GMC has relied solely upon the advice of the MPS. It has not taken any further advice on the General Threat. In relation to the Specific Threat, whilst there have been unusual events, which may be open to a sinister interpretation and have caused concerns, there is no evidence before the Panel of any direct threat made to Witness A."

32. The Panel concluded that the hearsay evidence would not be admissible in criminal proceedings under either Section 116(2)(c) or 114(1)(d) of the 2003 Act. The reasons it gave for those conclusions which included a series of factual findings were as follows:

Conclusions in relation to Sections 116 and 114 CJA

The Panel is concerned by the contradictory and incomplete nature of some of the evidence of the threat to Witness A. It is evident that there is a disagreement within the police as to which of the two areas of risk is the more serious. DCI Grant believes that the general threat is more serious, whereas Police Sergeant Chrystal believes the specific threat to have greater weight. These contradictions are reflected in the correspondence between the GMC and the MPS which demonstrate a lack of clarity as to the nature, extent and seriousness of any potential threat.

The letter of 27 August 2010 to the MPS confirming the GMC's decision not to call Witness A indicates that its understanding is that the risk arises essentially from the attitudes towards homosexuality in the Country. In relation to the general threat, reliance was placed on the view, now some two years out of date, formed by an officer with limited experience of the Country. No independent, objective, advice was taken from readily available UK Government sources.

In relation to the specific threat, it is clear that the advice provided to the GMC was not based on all the information now available and relied upon an incomplete and outdated understanding of Witness A's circumstances, for example, ignorance of his living arrangements and of his ongoing socialising with one of the persons who is perceived to be a source of threat.

The Panel appreciates the difficulty with which the GMC was faced in having to decide whether to call a witness against the advice of the MPS received from the highest level. Certainly it could not have been possible to ignore the risk that was portrayed by the MPS. In their letter of 14 September 2010 Dr Bonhoeffer's solicitors, Radcliffes Le Brasseur, also acknowledge that there may be a very real risk to potential witnesses from the Country.

However, the GMC has failed to balance this advice with other information about Witness A's circumstances and to appraise the advice provided by the MPS. It has also disregarded Witness A's own declared wishes, failed to evaluate his circumstances or behaviour, and failed to assess his capacity to judge any perceived threat. Accordingly, the Panel is not satisfied, to the criminal standard, that it is not reasonably practicable to secure Witness A's

attendance. It is, therefore, of the view that the evidence would not be admissible in criminal proceedings under Section 116(2)(c) CJA.

Having determined that the hearsay evidence would not be admissible under Section 116(2)(c) CJA, the Panel then considered the submissions made on Section 114(1)(d) CJA. In considering this section the Panel took into account the relevant case law which prescribes caution and in particular that admission of hearsay evidence under this section should not be used to circumvent Section 116 CJA.

The Panel has considered and formed a judgment on the factors within Section 114(2). The evidence has clear probative value and is important as it is the only evidence in relation to many of the charges. The Panel has heard from Witness Z about the circumstances in which the evidence was made and the apparent reliability of Witness A. The Panel found Witness Z to be an honest and credible witness on this issue. The Panel has again taken full account of the stated reasons why Witness A has not been called. It has also taken account of the means available to the doctor of challenging the evidence, balanced with the difficulties and possible prejudice these present to him.

The Panel acknowledges that many of the factors favour admitting the evidence. However, in weighing these factors, both individually and together, bearing in mind the need for a cautious approach, and taking into account the requirement for the criminal standard of proof when dealing with issues of fact, the Panel considers that the evidence would not be admissible in criminal proceedings under Section 114(1)(d) CJA."

33. The FTPP then proceeded to consider if the admission of the hearsay evidence was desirable pursuant to Rule 34(2) and whether it would be both fair and relevant pursuant to Rule 34(1). It concluded that it was desirable and would be fair and relevant for the following reasons:

"Conclusions in relation to Rules 34(2) and 34(1)

Having concluded that the evidence would not be admissible in criminal proceedings, the Panel then considered whether the admission of hearsay evidence was desirable pursuant to Rule 34(2).

Having considered the advice of the Legal Assessor it has taken into account the allegations as they stand against the doctor. The Panel is in no doubt that their duty of making due inquiry in this case makes it desirable to admit the evidence.

The Panel has then had to consider whether the admission of the evidence would be both fair and relevant pursuant to Rule 34(1). It is the only evidence in respect of many of the allegations. The Panel has not heard any submissions challenging the relevance of the evidence. What remains therefore is whether, in all the circumstances, the admission of the hearsay evidence would be fair.

In considering this issue of fairness the Panel notes not only its obligations to Dr Bonhoeffer but also its duty to the public interest which includes protection of patients, maintenance of public confidence in the profession, and declaring and upholding proper standards of behaviour.

The Panel has considered the means by which Dr Bonhoeffer can challenge the evidence, and the fact that this is a professional Panel able to exercise independent judgment and determine what weight it places on evidence. The Panel is fully aware of the diminished value of, and the prudence needed to be borne in mind when relying on, hearsay evidence. Furthermore, the Panel notes that the GMC has conceded that its case is weakened by the reliance on such evidence and that many of the allegations essentially turn on the evidence of Witness A.

Undoubtedly the admission of hearsay evidence may disadvantage Dr Bonhoeffer. However, in the context of these regulatory proceedings this is not the sole consideration. The question for the Panel is whether it considers it fair in the context of this case.

Determination

It is the professional judgment of this Panel that, in all the circumstances, the admission of the hearsay evidence would be fair.

The issues and alleged misconduct which have led to Professor Bonhoeffer's referral to this Panel include concerns of a most serious nature, particularly in the light of his medical specialty which entails regular access to children. The public interest requires that such allegations are investigated. It is also appropriate and fair that Professor Bonhoeffer be afforded the opportunity to refute the allegations and present his case."

The Claimant's ground of challenge of the FTPP decision to admit the hearsay evidence

33. The Claimant submits that the FTPP was correct to conclude that the hearsay evidence would not be admissible in criminal proceedings either pursuant to Section 116(2)(c) or Section 114(1)(d) of the 2003 Act. However the Claimant submits (1) that the FTPP's decision that it would be "desirable" to admit the hearsay evidence pursuant to Rule 34(2) was irrational, (2) that its decision that it would be "fair" to admit the hearsay evidence pursuant to Rule 34(1) was irrational and (3) that the decision amounted to a breach Article 6(1) of the European Convention on Human Rights (ECHR) in that (a) the Claimant's right to a fair hearing as protected by Article 6(1) requires in the particular circumstances of this case that he be given the opportunity to cross-examine his accuser and (b) that the FTPP acted unlawfully in subordinating the Claimant's rights to a fair hearing, as protected by Article 6(1) to the public interest in "protecting patients, maintaining public confidence in the profession, and declaring and upholding proper standards of behaviour."

Fairness

34. It is convenient to consider first and together the Claimant's second and third grounds. I consider them first because in my judgment they go to the heart of the Claimant's challenge against the decision of the FTPP and, if successful, render academic his first ground. I consider them together because they raise, albeit in the distinct legal boxes of what is required by fairness in Rule 34(1) and the extent of the Claimant's Article 6 rights, broadly similar and overlapping issues.

35. As pointed out by the Claimant there is an imprecision in the drafting of Rule 34(1) in that whereas evidence can properly be said to be either relevant or irrelevant to the subject matter of the case evidence is not of itself fair or unfair. Rather it is the decision as to whether or not the evidence should be admitted that is susceptible to an assessment of fairness. Thus, in my judgment, the discretion conferred on the FTPP by Rule 34(1) is to admit any evidence which they consider to be relevant to the case before them and which they consider it fair to admit. That that is how the FTPP construed Rule 34(1) and approached its task is apparent from its statement that it had to consider "whether the admission of the evidence would be ... fair… pursuant to Rule 34(1). …. What remains therefore is whether, in all the circumstances, the admission of the hearsay evidence would be fair."

36. The FTPP answered that question in the affirmative. It concluded that in its professional judgment in all the circumstances the admission of the hearsay evidence would be fair. It is that conclusion which the Claimant submits that no reasonable FTPP, properly directing itself to the relevant considerations in this case, could have reached.

37. The Claimant submitted that the FTPP's findings amounted to a complete rejection of the factual premise upon which the GMC application was based, namely that there would be a significantly increased risk of harm to Witness A were he to give live evidence. This submitted the Claimant went much further than a conclusion that the facts underlying the GMC's contention that it was not reasonably practicable to secure Witness A's attendance had not been established to the criminal as distinct from the civil standard of proof. Given that the FTPP rejected the factual premise on which the GMC application was based and that that factual premise was advanced by the GMC as the sole reason for its decision not to call Witness A it follows submitted the Claimant that the FTPP found there to be no good reason why Witness A could not give live evidence in the proceedings.

38. The parties' submissions as to fairness are summarised in Appendix 2 to this judgment.

Discussion

39. The question before this Court is whether the decision by the FTPP to admit Witness A's hearsay evidence was irrational. In my judgment the answer to that question is not dictated by any absolute rule whether of common law or under Article 6. Various formulations of such a putative rule were canvassed in argument. There is, in my judgment, no absolute rule whether under Article 6 or

in common law entitling a person facing disciplinary proceedings to cross-examine witnesses on whose evidence the allegations against him are based. Nor does such an entitlement arise automatically by reason of the fact that the evidence of the witness in question is the sole or decisive basis of the evidence against him. Nor, so far as Rule 34 is concerned, does it follow automatically from a conclusion that hearsay evidence would be inadmissible under the gateways of section 114 and/or 116 of the 2003 Act that it would be unfair for the FTPP to admit it under the Rule.

40. However, in my judgment the Claimant's challenge to the decision of the FTPP in this case is not dependent on the assertion of the existence of any such absolute rules. Rather, it is dependent on the application to the particular and very unusual facts of this case of the general obligation of fairness imposed on the FTPP having regard to general common law principles, the Claimant's Article 6 rights and the terms of Rule 34.

41. In my judgment the application of those principles to the peculiar facts of this case required the FTPP to conclude that it would be unfair to admit Witness A's hearsay evidence.

42. In forming that judgment I would reject the GMC's contention that the question which arises on this claim for judicial review is whether the FTPP should be precluded from conducting any inquiry at all into the majority of the serious allegations advanced against the Claimant. It does not follow from the conclusion that it would be unfair to admit Witness A's hearsay evidence that the FTPP should be precluded from conducting any inquiry into the majority of the allegations against the Claimant. The remarkable feature of this case is that Witness A has repeatedly expressed his willingness and ability to attend to give live oral testimony and expressed himself as willing and able to do so right up to the date of the hearing in front of the FTPP to consider the GMC's application to adduce his hearsay evidence. Any decision not to proceed with those allegations which are wholly dependent on the evidence of Witness A by relying on his oral testimony whether in person or by video link was and remains a matter for the GMC. There is nothing as it seems to me in the decision of this Court, which would preclude the GMC from calling Witness A to give oral testimony. To the contrary, the FTPP made no findings of fact to the effect that there would be a significantly greater threat to the safety of Witness A by virtue of his giving oral testimony than would be the case if his hearsay evidence were adduced.

43. Prima facie, the arguments for affording the Claimant the opportunity to cross-examine Witness A are in my view formidable. The Claimant is an extremely eminent consultant paediatric cardiologist of international repute. The allegations against him could hardly be more serious. They involve allegations of sexual misconduct, the abuse of young boys and young men and the abuse of a position of trust. If proved, they would have a potentially devastating effect on his career, reputation and financial position. Not only is the evidence of Witness A the sole evidence against the Claimant in support of most of the allegations against him, but insofar as those allegations involve alleged misconduct towards other victims, those victims were interviewed by the MPS and denied that the allegations were true. Indeed it was for that reason that the FTPP was told by Mr Donne that the MPS decided that there could be no sensible prosecution in this country against

the Claimant in respect of Witness A's allegations that the Claimant abused the other alleged victims, notwithstanding that, since some of that alleged conduct, as distinct from the alleged conduct directed to Witness A, took place after 2003, the English court would have jurisdiction under the Sexual Offences Act 2003. Thus, not only is this a classic case of one person's word against another but because the other alleged victims live in Kenya, neither the Claimant nor the FTPP nor the GMC has any legal power to compel their attendance at the FTPP hearing to give evidence in support of the Claimant. It is hard to imagine circumstances in which the ability to cross-examine the uncorroborated allegations of a single witness would assume a greater importance to a professional man faced with such serious allegations.

44. It is axiomatic that the ability to cross-examine in such circumstances is capable of being a very significant advantage. It enables the accuser to be probed on matters going to credit and his motives to be explored. It is no less axiomatic that in resolving direct conflicts of evidence as to whether misconduct occurred the impression made on the tribunal of fact by the protagonists on either side and by their demeanour when giving oral testimony is often capable of assuming great and sometimes critical importance.

45. In this case the disadvantage to the Claimant of being deprived of the ability to cross-examine his accuser is incapable of being in any way mitigated by the FTPP being able to study the demeanour of Witness A when he was being interviewed by the MPS. The audio and video tapes of the interviews which constitute the centrepiece of the hearsay evidence sought to be adduced by the GMC have been lost as a result of admitted incompetence by the MPS.

46. In relation to those charges that relate to what the Claimant is alleged to have done to Witness A, as distinct from what is alleged to have been done to the other alleged victims, there are no other witnesses to the alleged conduct whom the Claimant could either call or cross-examine as a means of challenging Witness A's account. These difficulties in challenging Witness A's allegations against him are likely to be compounded by the facts that the conduct complained of is alleged to have commenced as long ago as 1995 whereas the allegations were first put to the Claimant as recently as 2009 and that the conduct is all alleged to have occurred in Kenya.

47. Nor in my judgment is the unfairness to the Claimant mitigated by the fact that the GMC's reliance on Witness A's hearsay evidence weakens the case against him or that the case against him may fail. The nature of the unfairness complained of is that the admission of evidence in the form of hearsay statements which could have been but will not be tested in cross-examination may lead to the charges against the Claimant being found by the FTPP to be correct, whereas if it were adduced in the form of oral testimony and tested in cross-examination it might be found to be incorrect or at least not accepted as probably correct. Such a result either is or is not unfair. If it is, it does not cease to be unfair merely because the admission of the hearsay evidence may lead to a different result. The FTPP recorded that it had heard from Witness Z "about the circumstances in which the evidence was made and the apparent reliability of Witness A. The Panel found Witness Z to be an honest and credible witness." It is important to note that the FTPP's reference to apparent reliability in that passage was limited in that it took a decision to decline

the invitation by the GMC at the hearing to read the transcripts of Witness A's interviews with the MPS. It thus was not in a position to reach any even provisional view as to the reliability of the content or substance of the hearsay evidence sought to be adduced. It is thus not clear what was the evidential basis for the finding of the FTPP that Witness A's hearsay evidence "has clear probative value".

48. In giving its reasons for concluding that it would be fair to admit hearsay evidence, the FTPP stated that it had considered the means by which the Claimant could challenge the evidence but did not state what conclusions it drew as to those means or whether it considered that to be a matter arguing for or against admitting the hearsay evidence. It would appear from the context in which that statement appeared that it considered this to be an argument in favour of admitting the evidence, since it appeared in the paragraph in which it identified factors which it is to be inferred it considered mitigated the disadvantage which admission of the hearsay evidence must cause the Claimant. If so, it would appear to be a reference to the GMC's submissions on this point which it recorded as being: "The evidence is challengeable and in the circumstances does not prejudice Dr Bonhoeffer as he will be able to cross-examine the other witnesses, demonstrate inconsistencies in Witness A's evidence, call evidence to undermine Witness A and his evidence and, if he chooses to, give evidence on oath discrediting and denying Witness A's account."

49. Insofar as it is to be inferred that the FTPP accepted that submission, in my judgment it was wrong to do so or at any rate to attach any material weight to it as a factor arguing in favour of admission of the hearsay evidence. Since Witness A is the sole witness in relation to most of the allegations, it is hard to see how the Claimant's ability to cross-examine other witnesses would advance his ability to challenge that part of Witness A's evidence upon which those allegations rest. Any practical advantage to the Claimant in being able to demonstrate inconsistencies in Witness A's evidence would depend, by definition on the content of that evidence and whether and if so what inconsistencies are contained in it. By definition since the FTPP had not read the evidence it was not in a position to form a view on that. As to the ability to call other evidence to undermine Witness A's evidence, that, as already mentioned, is seriously circumscribed by the fact that Witness A was the only witness in relation to the alleged conduct against himself and that the Claimant has no legal power to compel the attendance of the other alleged victims who denied the truthfulness of Witness A's evidence to the MPS insofar as it related to them, all of whom are in Kenya. Since at least some of those victims were alleged to have been consensual participants in the Claimant's alleged conduct, it is to be inferred on the basis of DCI Grant's evidence that any general threat to their safety if they were to attend to give evidence for the Claimant would be greater than to Witness A who alleged that he was a non-consensual participant.

50. The FTPP found that the admission of Witness A's hearsay evidence might undoubtedly disadvantage the Claimant. In concluding that it would nonetheless be fair to admit it, it appears to have considered that that disadvantage would be outweighed by the fact that the Claimant's alleged misconduct raises concerns of the most serious nature, particularly in the light of his medical specialty which

entails regular access to children and its conclusion that the public interest in protecting patients, maintaining public confidence in the profession and declaring and upholding proper standards of behaviour requires that such allegations are investigated.

51. On its face there can be no doubt that in principle the public interest requires that such serious allegations by a consultant paediatric cardiologist should be investigated by his professional body. The question for the FTPP was whether it required and justified an investigation based on hearsay evidence from the main accuser. On that question, the only factor relied on by the GMC was its assertion that if Witness A were to give oral testimony he would be exposed to a threat to his personal safety significantly greater than if the hearing proceeded on the basis of his hearsay evidence.

52. On that crucial point the Determination of the FTPP is silent. In the context of its review of the competing arguments as to fairness under Rule 34(1) the FTPP made no explicit findings as to the existence or extent of either the general or specific threat to which Witness A would be exposed if he gave oral testimony in person or by video link as distinct from if his hearsay statements were admitted. That is in my view a surprising and remarkable omission, not least having regard to the fact that the contested issue of the alleged threat to Witness A was the sole issue in a hearing which occupied 10 days and in the evidence put before the FTPP.

53. In reaching the conclusion that the hearsay statements would not be admissible in criminal proceedings under section 116(2)(c) of the 2003 Act, the FTPP stated that it was not satisfied to the criminal standard that it is not reasonably practicable to secure Witness A's attendance. As mentioned, the GMC submitted that the difference in the standards of proof is one factor that explains why it does not follow from a rejection of the submission that the criminal law gateways under sections 114 and 116 would be satisfied in criminal proceedings that a decision to admit the evidence under Rule 34 is unlawful or irrational. An analysis of facts for the purpose of Rule 34, it was submitted, is not necessarily the exact same exercise as is conducted for the purposes of sections 114 and 116 so that there can therefore be no prior assumption that a factual finding made under section 114 or 116 will be decisive for the purposes of Rule 34.

54. While that may be so in theory, in practice there is nothing in the Determination to suggest that, although the FTPP did not find to the criminal standard that either the general or the specific threat to Witness A was so great as to lead to the conclusion that it is not reasonably practicable to call him to give oral testimony, it did find that to be the case on the balance of probabilities. The mere reference in its conclusion to the fact that it was not satisfied to the criminal standard that it is not reasonably practicable to secure Witness A's attendance does not, in my view, carry with it the implication that it was so satisfied on the balance of probabilities. Indeed had that been the case one would have expected the FTPP to say so.

55. To the contrary, a fair reading of the account given by the FTPP of the evidence of the specific and general threat suggests, at its lowest, a high degree of scepticism on its part and, at its highest, a rejection of the GMC's essential case that there

would be a significantly or even materially greater risk of harm to Witness A if he were to give live testimony as distinct from his hearsay evidence being adduced. Indeed, by way of example the FTPP emphasised that there was no evidence before it of any direct threat made to Witness A, that the GMC acknowledged that it had not undertaken a meaningful risk assessment, that it was concerned by the contradictory and incomplete nature of some of the evidence of the threat to Witness A, that there was a lack of clarity as to the nature, extent and seriousness of any potential threat, that the GMC decision not to call Witness A relied on the view, two years out of date, formed by an officer with limited experience in Kenya, that no independent objective advice was taken from readily available UK Government sources, that the advice provided to the GMC in relation to the specific threat was not based on all of the information now available and relied on an incomplete and outdated understanding of Witness A's circumstances, including ignorance of his living arrangements and ongoing socialising with one of the persons perceived to be a source of threat, that the GMC failed to appraise the MPS advice and balance it with other information about Witness A's circumstances, that it disregarded Witness A's own declared wishes, and that the GMC failed to evaluate his circumstances or behaviour and failed to assess his capacity to judge any perceived threat [although in fact Ms Emmerson had written to him that the MPS took the view that he was well placed to assess any risk].

56. In my judgment this goes to the heart of the issue raised in this claim for judicial review. It has never been suggested by the GMC that, if there were no concerns in relation to Witness A's personal safety, there is any, let alone any good reason, why he should not attend to give oral testimony either in person or by video link. On the contrary, it is clear that it wished to call him to give oral testimony precisely because it recognised how critical he is to the case against the Claimant and that it made considerable efforts to try to secure his attendance.

57. Nor has it ever been argued by the GMC that, in the absence of such concerns, it would be fair to conduct the disciplinary proceedings against the Claimant without calling Witness A or that the admission of the hearsay statements would be fair within the meaning of Rule 34(1). The GMC's arguments as to the limited nature of the Claimant's rights to cross-examine witnesses at common law, under Article 6 and under Rule 34 did not extend to any submission that it would be fair on the facts of this particular case to proceed on the basis of hearsay evidence rather than oral testimony from Witness A if there were no safety considerations involved. That that is not the case is in my judgment plainly right. Indeed the contrary is not in my view seriously arguable, having regard to the applicable legal principles to which I now turn.

58. The Claimant relied on dicta of Lord Edmund-Davies in *Bushell v Secretary of Station for the Environment* [1981] AC 75 as supporting the existence of a well established basic principle that a defendant should have an opportunity of testing the evidence against him unless there are good and cogent reasons why that is either impossible or undesirable. *Bushell* was a case concerned with a public local inquiry into two draft schemes published under the Highways Act 1959. The issue in the case relevant for present purposes was whether the Secretary of State had acted unlawfully in refusing to allow objectors to the scheme to cross-examine the Department's witnesses. By a majority of four to one, Lord Edmund-

Davies dissenting, the House of Lords held that he had not. However, there is nothing in the speeches of the majority which in my view supports the proposition that there may not be circumstances in which fairness requires that a person facing serious charges which amount to criminal offences in disciplinary proceedings should be afforded the opportunity to cross-examine the witness or witnesses upon whose evidence the charges depend.

59. The GMC relied on the following dicta:

> "**What is a fair procedure to be adopted at particular inquiry will depend upon the nature of its subject matter**…the inspector conducting [the inquiry] must have a wide discretion as to the procedure to be followed…it would, in my view, be quite fallacious to suppose that at an inquiry of this kind the only fair way of ascertaining matters of fact and expert opinion is by the oral testimony of witnesses who are subjected to cross-examination on behalf of parties who disagree with what they have said…So refusal by an inspector to allow a party to cross-examine orally at a local inquiry a person who has made statements of facts or has expressed expert opinions is not unfair per se. **Whether fairness requires an inspector to permit a person who has made statements on matters of fact or opinion, whether expert of otherwise, to be cross-examined by a party to the inquiry who wishes to dispute a particular statement must depend on all the circumstances**." (per Lord Diplock, at 95D, 96H, 97B, 2E) (emphasis added)
>
> "If objectors are given a full opportunity of being heard in support of their objections, I find it difficult to see that a complaint of unfairness or an allegation of a denial of natural justice in the conduct of the inquiry can be well-founded…In my opinion the inspector was fully entitled in the exercise of his discretion to refuse to allow that cross-examination and only if one treats proceedings at an inquiry as a trial – which they are not – can any ground be found for saying that in disallowing this cross-examination there was a denial of nature justice or unfairness. In my opinion there was not." (per Viscount Dilhorne at 107E-F,109 B-C)
>
> "The refusal of cross-examination did not ipso facto result in unfairness…the decision not to allow this cross-examination was certainly within the discretion of the inspector and he was right to rule as he did. It was not unfair." (per Lord Lane at 122B-E)

60. In his dissenting speech, Lord Edmund-Davies said:

> "The general law may, I think, be summarised in this way:

> (a) In holding an administrative inquiry (such as that presently being considered) the inspector was performing quasi-judicial duties.
>
> (b) He must therefore discharge them in accordance with the rules of natural justice
>
> (c) Natural justice requires that objectors (no less than departmental representatives) be allowed to cross-examine witnesses called for the other side on all relevant matters, be they matters of fact or matters of expert opinion.
>
> (d) In the exercise of jurisdiction outside the field of criminal law, the only restrictions on cross-examination are those general and well-defined exclusionary rules which govern the admissibility of relevant evidence (as to which reference may conveniently be had to *Cross on Evidence*, 5th ed (1979) p.17); beyond those restrictions there is no discretion on the civil side to exclude cross-examination on relevant matters."

61. In disagreeing with Lord Edmund-Davies it is pertinent to note that Lord Diplock held that in the context of the making of administrative decisions rather than use phrases such as "natural justice" (which was central to Lord Edmund-Davies' analysis) the only requirement as to the procedure to be followed at a local inquiry held pursuant to the Tribunals and Inquiries Act 1971 was that it must be fair to all those who have an interest in the decision that will follow it whether they have been represented at the inquiry or not.

> "That judgment contains the salutary warning against applying to procedures involved in the making of administrative decisions concepts that are appropriate to the conduct of ordinary civil litigation between private parties. So, rather than use such phrases as "natural justice" which may suggest that the prototype is only to be found in procedures followed by English courts of law, I prefer to put it that in the absence of any rules made under the Tribunals and Inquiries Act 1971 the only requirement of the Highways Act 1959 as to the procedure to be followed at a local inquiry held pursuant to Schedule 1, paragraph 9 is that it must be fair to all those who have an interest in the decision that will follow it whether they have been represented at the inquiry or not. What is a fair procedure to be adopted at a particular inquiry will depend upon the nature of its subject matter." (95 B-D)

62. The context in which those general statements were made is far removed from the context of the present case. *Bushell* was concerned with whether fairness required objectors to a proposed road scheme to be allowed to cross-examine the Department's witnesses as to the reliability and statistical validity of the method of traffic prediction disclosed in a Red Book.

63. The remoteness of the context in which the fairness of the refusal of a right to cross-examine in *Bushell* fell to be considered from the context in which the denial of an opportunity to the Claimant in this case to cross-examine Witness A falls to be considered, was underlined by the circumstances identified by Lord Diplock in *Bushell* as being relevant to what fairness required.

> "Whether fairness requires an inspector to permit a person who has made statements on matters of fact or opinion, whether expert or otherwise, to be cross-examined by a party to the inquiry who wishes to dispute a particular statement must depend on all the circumstances. In the instant case, the question arises in connection with expert opinion upon a technical matter. Here the relevant circumstances in considering whether fairness requires that cross-examination should be allowed include the nature of the topic upon which the opinion is expressed, the qualifications of the maker of the statement to deal with that topic, the forensic competence of the proposed cross-examiner, and, most important, the inspector's own views as to whether the likelihood that cross-examination will enable him to make a report which will be more useful to the minister in reaching his decision than it otherwise would be is sufficient to justify any expense and inconvenience to other parties to the inquiry which would be caused by any resulting prolongation of it." (p.97 E-G)

64. In this case nothing turns on the competence of the proposed cross-examiner or the qualifications of Witness A, whose evidence is not an expert opinion upon a technical matter. Nor is it suggested by the GMC that the obvious advantage to the Claimant of cross-examining Witness A would not justify the expense and inconvenience to the GMC which would be caused by any resulting prolongation of the hearing.

65. Insofar as a general principle applicable to the question whether and in what circumstances fairness requires a person facing serious charges amounting to criminal conduct in disciplinary proceedings to be permitted to cross-examine the witness or witnesses on whose evidence the charges are based can be evinced from *Bushell* it is in my view that, in the words of Lord Diplock, whether fairness requires such a person to be afforded the right to cross-examine must depend on all the circumstances including in particular the nature of the subject matter of the proceedings.

66. To similar effect, notwithstanding the reference to natural justice, is the well known dictum of Tucker LJ in *Russell v Duke of Norfolk* cited by the Irish Supreme Court in *Kiely v Minister for Social Welfare* [1977] IR 267 81:

> "Tribunals exercising quasi-judicial functions are frequently allowed to act informally – to receive unsworn evidence, to act on hearsay, to depart from the rules of evidence, to ignore court room procedures, and the like – but they must not act in such a way as to imperil a fair hearing or a fair result. I do not attempt an exposition of what they may not do because, to quote the

> frequently-cited dictum of Tucker LJ in *Russell v Duke of Norfolk*: "There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth."" (Per Henchy J at 281)

67. Henchy J went on to say this:

> "Of one thing I feel certain, that natural justice is not observed if the scales of justice are tilted against one side all through the proceedings. *Audi alteram partem* means that both sides must be fairly heard. That is not done if one party is allowed to send in his evidence in writing free from the truth-eliciting processes of a confrontation which are inherent in an oral hearing, while his opponent is compelled to run the gauntlet of oral examination and cross-examination. The dispensation of justice, in order to achieve its ends, must be even-handed in form as well as in content. Any lawyer of experience could readily recall cases where injustice would certainly have been done if a party or a witness who had committed his evidence to writing had been allowed to stay away from the hearing, and the opposing party had been confined to controverting him simply by adducing his own evidence. In such cases it would be cold comfort to the party who had been thus unjustly vanquished to be told that the tribunal's conduct was beyond review because it had acted on logically probative evidence and had not stooped to the level of spinning a coin or consulting an astrologer. Where essential facts are in controversy, a hearing which is required to be oral and confrontational for one side but is allowed to be based on written and, therefore, effectively unquestionable evidence on the other side, has neither the semblance nor the substance of a fair hearing. It is contrary to natural justice." (ibid)

68. *Kiely* was not concerned with disciplinary proceedings or even an administrative inquiry. It was a statutory claim for death benefit and the failure to allow cross-examination occurred at an appeal hearing against a decision rejecting the claim by a deciding officer. Nonetheless, while the decision is of course not binding on this Court and it did not address the problems which arise when it is difficult or impossible to secure the attendance of the accuser to give oral testimony, it provides a classic statement of why it may be unfair to refuse an opportunity for cross-examination to a person whose own evidence is subject to cross-examination.

69. In *Sebastian Borges v Fitness to Practise Committee of the Medical Council* [2004] IR 103, Keane CJ, with whose judgment the other members of the Irish Supreme Court agreed, approved Henchy J's dictum in *Kiely* that "Where essential facts are in controversy, a hearing which is required to be oral and

confrontational for one side but which is allowed to be based on written and, therefore, effectively unquestionable evidence on the other side has neither the semblance nor the substance of a fair hearing. It is contrary to natural justice." (paragraph 33).

70. *Borges* was a case in which a doctor registered in both the UK and Ireland was struck off the register by the GMC for sexual misconduct following a hearing at which the witnesses against him were called and cross-examined. The Irish Medical Council subsequently commenced fitness to practise proceedings at which it intended to call the same witnesses as had given evidence in the UK proceedings. The UK witnesses were able to attend but unwilling to do so. The Irish Medical Council decided that the transcripts of their evidence in the UK proceedings could be adduced as hearsay evidence.

71. The Irish Supreme Court held that Dr Borges could not be denied the right to cross-examine the witnesses against him. Keane CJ held:

> "The proposition that a tribunal can adjudicate on serious allegations of professional misconduct which may result in a person being struck off the rolls of his profession without hearing the testimony of his accusers being given orally and tested by cross-examination before them, simply because they are unwilling to attend the hearing is, in my view, irreconcilable with the standards of natural justice and fair procedures which are required of such bodies in this jurisdiction having regard to the decisions in *Re Haughey* [1971] IR 217, *Kiely v The Minister for Social Welfare* [1977] IR 267 and *Gallagher v Revenue Commissioners* (No. 2) [1995] 1 IR 55. To the extent that *General Medical Council v Spackman* [1943] AP 627 and *Re A Solicitor* [1992] 2 WLR 552 suggest that a different approach is permissible, I do not think they should be followed." (paragraph 35)

72. However, it should be noted that even in *Borges*, the Irish Supreme Court did not lay down an absolute rule that the requirement of fairness can only be satisfied where a doctor facing serious charges of professional misconduct is afforded a right to cross-examine his accusers. It acknowledged that "The tendency in the more recent jurisprudence has been to admit such out of court statements where the two requirements of necessity and reliability are met." (paragraph 38). The decision appeared to turn on a refusal by the Irish Supreme Court to extend the exceptions to the hearsay rule applicable in that jurisdiction to a case where the maker of the statement was able but unwilling to testify in person:

> "What was effectively an alternative submission was advanced on behalf of the second respondent based on the exceptions which have been developed to the rule against hearsay. Insofar as that submission proceeds on the basis that the principle laid down in *Re Haughey* [1971] IR 217 does not, in every case, preclude a court or tribunal from admitting an out of court statement notwithstanding the rule against hearsay, if the maker of the statement is not available for cross-examination, it is

> undoubtedly correct. To hold otherwise would be to ignore the enormous body of jurisprudence which has been built up in many common law jurisdictions in order to ensure that the rule against hearsay is not so rigidly applied in every case as to result in injustice. It is also correctly pointed out that, apart from evolution of the common law in this area, there has been a statutory recognition of the desirability of making such evidence available, as witness the provisions of section 4 of the Criminal Procedure Act 1967, as inserted by section 9 of the Criminal Justice Act 1990. It is also clear that, as argued on behalf of the second respondent, the tendency in the more recent jurisprudence has been to admit such out of court statements where the two requirements of necessity and reliability are met. I am satisfied, however, that the authorities relied on by the second respondent would not justify the admission of the evidence in the present case…"
>
> "It would seem that in all the Canadian cases, the witnesses concerned could not be called to give evidence because they were either dead or incompetent to give evidence. In the present case, in contrast, the second respondent seeks to adduce the hearsay evidence because the complainants are unwilling to give evidence at the inquiry and cannot be compelled to do so. It is, accordingly, unnecessary to reach any conclusion in this case as to whether the approach adopted in the Canadian authorities should be followed in this jurisdiction. It is sufficient to say that the applicant cannot be deprived of his right to fair procedures which necessitate the giving of evidence by his accusers and their being cross-examined, by the extension of the exceptions to the rule against hearsay to a case in which they are unwilling to testify in person"
>
> "The desire of the second respondent to proceed with an inquiry based on the records of the proceedings in the United Kingdom is perfectly understandable having regard to the important statutory function entrusted to them of investigating any allegations of professional misconduct against doctors registered in this jurisdiction which come to their attention. However, that consideration cannot relieve the High Court or this court of the obligation of ensuring that the right of the doctor concerned to a fair hearing is, so far as practicable, upheld." (paragraphs 38, 43, 44)

73. As pointed out by the GMC it would appear that the applicable exceptions to the hearsay rule to which the Irish Supreme Court referred did not mirror the gateways provided by section 116(2)(c) of the 2003 Act, since the relevant witnesses were outside the jurisdiction and, by reason of their refusal to attend to give evidence, it was not reasonably practicable to secure their attendance. In English criminal proceedings hearsay statements of those witnesses, if they had been abroad, would have been admissible under that gateway. It is also worthy of

mention that there was no discussion by the Irish Supreme Court of whether and if so, what, different principles apply in that jurisdiction as between criminal proceedings and disciplinary proceedings, although the inference from the discussion appeared to be that nothing turned on any such distinction. As with *Kiely* the decision in *Borges* is of course not binding on this Court.

74. In *Ogbonna v NMC* [2010] EWHC 272 Admin, Nicola Davies J allowed an appeal against a decision of the Conduct and Competence Committee of the Nursing and Midwifery Council ("The NMC") to permit the NMC to adduce hearsay evidence by way of the written statement of a key witness who had moved to live abroad in support of misconduct proceedings. The Panel had admitted the statement pursuant to Rule 31(1) of the Nursing and Midwifery Council (Fitness to Practise) Rules 2004 which provides:

> "Upon receiving the advice of the Legal Assessor, and subject only to the requirements of relevance and fairness, a Practice Committee considering an allegation may admit oral, documentary or other evidence, whether or not such evidence would be admissible in civil proceedings (in the appropriate Court in that part of the United Kingdom in which the hearing takes place)."

75. Nicola Davies J held that the witness whose hearsay statement was admitted, being the sole witness of fact in support of one of the charges against the appellant nurse, was a critical witness. Other evidence revealed that there had been a difficult working relationship between the witness and the appellant. The NMC had made no effort to secure the attendance of the witness at the hearing either in person or by way of video link. Nicola Davies J found that the admission of the hearsay statement was unfair. In support of that finding she stated:

> "The evidence of the sole witness of fact was critical. That fact together with the evidence of bad feeling between the two women meant that every effort should have been made to secure Ms Pilgrim's attendance. **Fairness required that the appellant was entitled to test the evidence of Ms Pilgrim by way of cross-examination unless good and cogent reasons could be given for non-attendance."**(p. 154) (emphasis added)

76. The NMC sought leave to appeal against Nicola Davies J's decision on the ground that the statement highlighted purported to lay down a general principle that fairness required that a nurse facing disciplinary proceedings is always entitled to test the evidence of witnesses relied on by the NMC by way of cross-examination unless good and cogent reasons can be given for the non-attendance of the witness.

77. In refusing permission to appeal the Court of Appeal held that Nicola Davies J had not purported to lay down any principle of general application, [2010] EWCA Civ 1216.

> "What the judge did in her judgment was what the CCC failed to do, namely to consider and assess the fairness, **in the particular circumstances she described**, of admitting the witness's statement at all. She concluded, for the reasons she gave, that its admission was unfair. As I interpret her judgment, her reasoning was focused on the particular facts of the case and did not purport to lay down any more general principle than the need for a proper consideration to be given to the criterion of fairness when the question of the admission of a hearsay statement under Rule 31 arises. When refusing permission to appeal on this ground, Sir Richard Buxton said:
>
> "Here the judge laid down no general rule, and certainly not a new rule, but examined the issue of fairness in the context of the particular facts, including the efforts made to secure the attendance of a witness and a particular implication, including the previous ill-feeling between her and the appellant, of her unavailability for cross-examination. Those were essentially matters for the judge, and she did not stray into a more general operation of laying down rules."
>
> I would respectfully agree with that. The resolution of the "fairness" arising under Rule 31(1) will necessarily be fact-sensitive, and all that the judge decided in this case was that the CCC had misdirected itself on that issue. I would respectfully agree with the judge's disposal of that part of the appeal before her." (paras 25,26) (emphasis added)

78. It is apparent from the decision of the Court of Appeal in *Ogbonna* that it did not approve or lay down a general rule that fairness requires that a nurse facing disciplinary proceedings is entitled in every case to test the evidence of her accuser(s) by way of cross-examination unless good and cogent reasons can be given for the non-attendance of the witness. Insofar as the Court of Appeal laid down any general rule, it was that the resolution of what is required by the fairness requirement in Rule 31(1) will necessarily be fact-sensitive.

79. It is on the other hand notable that the Court of Appeal agreed with Nicola Davies J's disposal of that part of the appeal, which I take to mean that the Court of Appeal considered that she was right to conclude that **on the facts of that case**, fairness required that the appellant was entitled to test the evidence of the witness by way of cross-examination unless good and cogent reason could be given for non-attendance and that no such good reasons had been supplied by the NMC. If one asks what were the factors in that case which required cross-examination in the absence of good and cogent reasons for non-attendance of the witness, the answer would appear to be (1) that the witness was the sole and thus critical witness in support of one of the allegations against the appellant, (2) that there was a history of bad blood between them, (3) that there was a conflict of factual evidence between them and (4) that the case against the appellant, in support of which the hearsay statement was sought to be relied on, could and in the event did destroy the appellant's career:

> "The NMC should perhaps be reminded that it was seeking to adduce Ms Pilgrim's statement as the sole evidence supporting the material parts of charge 1 when it knew that evidence was roundly disputed and could not be tested by cross-examination. It was, moreover, seeking so to adduce it in support of a case that it was promoting, whose outcome could be (as in the event it was) the wrecking of Mrs Ogbonna's career as a midwife, a career which had lasted over 20 years. I should have thought it was obvious that, in the circumstances, fairness to Mrs Ogbonna demanded that in principle the statement ought only to be admitted if she had the opportunity of cross-examining Ms Pilgrim upon it." (per Pill LJ, paragraph 23)

80. Factors 1, 3 and (at least potentially) 4 are applicable in the present case

81. Pill LJ went on to say that the NMC should have sought to make arrangements to enable cross-examination to take place either by flying the witness to the UK at its expense or else by setting up a video link. He did, however, add that if despite reasonable efforts the NMC could not have arranged for Ms Pilgrim to be available for cross-examination, then the case for admitting her hearsay statement might well have been strong.

82. It is further of note that Pill LJ rejected the submission of the NMC which he said came close to submitting that it ought to be entitled to have hearsay statements admitted under Rule 31(1) almost as a matter of course on the basis that it will always then be open to the Panel to attach such weight to the statement as it sees fit.

> "That submission appears to me to overlook the point that the criterion of fairness referred to in 31(1) is relevant to whether a statement should be admitted at all: the Rule expressly requires decisions as to the admission or exclusion of a hearsay statement to be governed by considerations, inter alia, of fairness."(paragraph 23)

83. The latter observation in my judgment undermines the GMC's submission that the fairness challenge in this case is premature on the basis that any unfairness, if it should arise, would arise only at the subsequent stage of the FTPP attaching inappropriate weight to the hearsay evidence or declining to exercise its power under Rule 17(g). In this case the damage to the Claimant's reputation which would follow a finding by the FTTP based on Witness A's hearsay statements that the allegations against him are proved would not necessarily be undone by a successful appeal based on a ruling that the Claimant should have had an opportunity to cross examine Witness A.

84. The former observation in my judgment supports the proposition that, in the absence of a problem in the witness giving evidence in person or by video link, or some other exceptional circumstance, fairness requires that in disciplinary proceedings a person facing serious charges, especially if they amount to criminal offences which if proved are likely to have grave adverse effects on his or her reputation and career, should in principle be entitled by cross-examination to test

the evidence of his accuser(s) where that evidence is the sole or decisive evidence relied on against him.

85. In *R (SS) v Knowsley NHS Primary Care Trust* [2006] Lloyds Med Rep 123, Toulson J, as he then was, had to consider Regulation 10(8) of the National Health Service (Performers Lists) Regulations 2004 which required a Primary Care Trust which was considering removal of a general practitioner from its Performer List on grounds of unsuitability to give the practitioner notice of the allegations and an opportunity to make written representations within 28 days and, within the same period "the opportunity to put his case at an oral hearing before it, if he so requests." Toulson J stated:

> "It is no doubt because a decision to remove a doctor from a PCT Performers List is important that a doctor has a statutory right to know the grounds on which the PCT is considering whether to do so and a statutory rights to put his case at an oral hearing. The purpose is so that the doctor concerned should be able properly to address the case made against him. The question whether a fair opportunity of doing this requires the doctor to be able to cross-examine witnesses or to be permitted legal representation or both might reasonably attract different answers in different cases, depending on their nature and complexity." (paragraphs 81,82)

86. In the case of Dr SS the central allegations were that he indecently assaulted four patients. Toulson J held that the core issue was a stark one of credibility. He held that:

> "The Panel would obviously be in a far better position to reach a fair judgment whether the complaints are true if they hear from the complainants and Dr SS, and their stories are tested, than if the Panel's evaluation of the witnesses' credibility is based on their untested statements and Dr Roberts's opinion about their credibility. The complainants might not be willing to give evidence, and the Panel would then have to proceed without them, but that would be from necessity… unless there is some obstacle which I cannot at present see, fairness to the public and to the doctor would appear to me to dictate that the Panel should hear the complainants and permit cross-examination of them (if they are prepared to give evidence) concentrating on what the complainants have to say about their relationship with Dr SS…" (paragraphs 83, 84, 85)

87. While of course Toulson J's decision turned on the particular facts of that case, it is clear that he considered that, in proceedings in which a doctor stood to lose his position if allegations of serious misconduct were proved, and credibility was the core issue, the gravity of the consequences and the importance of credibility to a resolution of the issues in dispute meant that fairness required that the Panel should permit cross-examination of the complainants if they were prepared to give evidence. While not constituting a binding authority or purporting to lay down a principle of general application, it seems to me that Toulson J's approach is

helpful in identifying factors which, if present, are likely to lead to the conclusion that, at least in the absence of exceptional circumstances, fairness requires that a doctor should be permitted to cross-examine his or her accuser(s) provided he/they are available.

88. It is of course necessary in order to identify what is required of the FTPP when approaching the question of what fairness requires under Rule 34(1) to have regard to the provisions of Article 6 of the ECHR. Those provisions and in particular the provisions of Article 6(1) and Article 6(3)(d) have attracted considerable judicial attention both by the ECHR and by the domestic courts in the context both of criminal proceedings and other proceedings such as director disqualification proceedings and disciplinary proceedings.

89. Article 6(1) provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Article 6(3)(d) provides:

> "Everyone charged with a criminal offence has the following minimum rights:…(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

90. On its face, this would suggest (1) that Article 6 confers an absolute right on every defendant in a criminal trial to cross-examine witnesses whose evidence is relied on against him and (2) that the right to a fair hearing conferred on a person the determination of whose civil rights and obligations does not involve the determination of any criminal charge against him does not include a right to cross-examine witnesses upon whose evidence the case against him relies. In fact, the authorities suggest that neither proposition is as clear cut as that.

91. In relation to criminal proceedings it is clear from the review of the authorities by Lord Phillips of Worth Matravers in *R v Horncastle* [2009] UKSC 14, [2010] 2 AC 373, that the ECHR has itself held that hearsay evidence is admissible, notwithstanding the requirement of Article 6(3)(d) where the maker of the statement has died, is ill or cannot be traced. (paragraph 66) Moreover, the Supreme Court in *Horncastle* held that the so-called "sole or decisive" rule introduced into the jurisprudence by the ECHR does not apply in English criminal proceedings so as to render inadmissible hearsay statements which would otherwise be admissible pursuant to the 2003 Act. The sole or decisive rule is that hearsay evidence is inadmissible where it constitutes the sole or decisive evidence against the defendant.

92. In relation to proceedings other than criminal proceedings, both the ECHR and the domestic courts have held that the Article 6(1) right to a fair hearing may in certain circumstances and to varying degrees include a right to cross-examine

witnesses analogous to that conferred by Article 6(3)(d) on persons facing criminal charges.

93. In *Albert & Le Compte v Belgium* 5 EHRR 533, the ECHR held:

> "For its part, the Court does not believe that the two aspects, civil and criminal, of Article 6(1) are necessarily mutually exclusive. Nonetheless the Court does not consider it necessary to decide whether, in the specific circumstances, there was a "criminal charge". In point of fact, paragraph 1 of Article 6, violation of which was alleged by the two applicants, applies in civil matters as well as in the criminal sphere. Dr Albert relied in addition on paragraph 2 and on paragraphs (a), (b) and (d) of paragraph 3, but, in the opinion of the Court, the principles enshrined therein are, for the present purposes, already contained in the notion of a fair trial as embodied in paragraph 1; the Court will therefore take these principles into account in the context of paragraph 1 (see paragraphs 38 to 42 below)…"

> "For its part, the Court considered it unnecessary to give a ruling on the applicability of paragraph 1 of Article 6 under the criminal head, but decided to examine in the context of the interpretation of the notion of "fair trial" in paragraph 1 the substance of the complaints made by the applicant under paragraphs 2 and 3 (see paragraph 30 above). In the opinion of the Court, the principles set out in paragraph 2 and in the provisions of paragraph 3 invoked by Dr Albert (that is to say, only paragraphs (a), (b) and (d)) are applicable, mutatis mutandis, to disciplinary proceedings subject to paragraph 1 in the same way as in the case of a person charged with a criminal offence." (paragraphs 30, 39)

94. *Albert & Le Compte v Belgium* and the correct approach to Article 6(3) in proceedings which are not straightforward criminal proceedings have been considered by the Court of Appeal in a series of cases. In *Official Receiver v Stern* [2000] 1 WLR 2230, the Court of Appeal held that the use in director disqualification proceedings of compelled evidence obtained in interviews pursuant to section 235 of the Insolvency Act 1976 did not necessarily breach the right to a fair trial secured by Article 6(1). Henry LJ, delivering the judgment of the Court, having cited paragraph 30 of the *Albert* judgment stated:

> "So disciplinary proceedings against a professional man or woman, although certainly not classified as criminal, may still bring in play some of the requirements of a fair trial spelt out in Article 6(2) and (3), including the presumption of innocence: see also p.546 paragraph 39" (2254 H)

95. Having held that the Vice Chancellor was plainly right to reject the submission that use in disqualification proceedings of statements obtained under section 235 must necessarily involve a breach of Article 6(1) Henry LJ stated:

> "The issue of fair trial is one that must be considered in the round, having regard to all relevant factors. The relevant factors include, but are not limited to: (i) that disqualification proceedings are not criminal proceedings, and are primarily for the protection of the public, but do nevertheless often involve serious allegations and almost always carry a degree of stigma for anyone who is disqualified; (ii) that there are degrees of coercion involved in different investigative procedures available given corporate insolvency, and these differences may be reflected in different degrees of prejudice involved in the admission, in disqualification proceedings, of statements obtained by such procedures; and (iii) that in this field as in most other fields, it is generally best for issues of fairness or unfairness to be decided by the trial judge, either at a pre-trial review or in the course of the trial." (2258 D to C)

96. In *R v Securities & Futures Authority Ltd ex parte Fleurose* [2002] IRLR 297, the Court of Appeal held unanimously that disciplinary proceedings in which a trader was charged by the SFA with improper conduct as a securities trader which resulted in his suspension for two years and an order for costs against him were not properly to be regarded as involving a criminal charge or offence. He was therefore not entitled to the additional rights conferred by Article 6 on those charged with criminal offences. However the court accepted that the disciplinary tribunal was involved in the determination of the appellants' civil rights for the purposes of Article 6 and held: "Therefore, clearly, the proceedings had to be fair." In a passage of its judgment stating the general approach to be followed when identifying what fairness requires, the Court of Appeal held: "What fairness requires will vary from case to case and manifestly the gravity and complexity of the charges and of the defence will impact on what fairness requires. In this context we have borne in mind, as did the judge, the points made by the Human Rights Court in paragraphs 30 and 39 of *Albert & Le Compte v Belgium* and in paragraphs 32 and 33 of *Dombo Beheer v The Netherlands* [1993] 18 EHRR 213." (para 14).

97. It is instructive to note that, although nothing turned on it in *Fleurose* itself, the Court of Appeal stated that it accepted for present purposes as did the judge that Mr Fleurose was entitled to a proper opportunity to question those witnesses called against him.

98. In the passages of the judgment of the ECHR in *Dombo* referred to by the Court of Appeal in *Fleurose* the court held that although the requirements inherent in the concept of a fair hearing are not necessarily the same in cases concerning the determination of civil rights and obligations as they are in cases concerning the determination of a criminal charge, which is borne out by the absence of detailed provisions such as paragraphs 2 and 3 of Article 6 applying to cases of the former category, nonetheless the latter provisions "have a certain relevance" outside the strict confines of criminal law. However the contracting states have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases. Nonetheless the court held that it is clear that the requirement of "equality of arms" in the sense of a "fair balance"

between the parties applies in principle to such cases as well as to criminal cases. The court agreed that as regards litigation involving "opposing private interests" equality of arms implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponents.

99. In *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] QB 728 Jonathan Parker LJ, having referred to paragraphs 30 and 39 of the judgment in *Albert* stated: "These passages, as I read them, emphasise the importance of giving Article 6 a flexible interpretation, and of not using the process of construction to place concepts of essential fairness in a verbal straightjacket. In my judgment, for the purposes of Article 6 there is no such clear-cut dividing line as Mr Barling submits, but neither can the distinction between civil and criminal proceedings so clearly made in the language of the Article be ignored for all purposes. As I see it, there must be something in the nature of a sliding scale, at the bottom of which are civil wrongs of a relatively trivial nature, and at the top of which are serious crimes meriting substantial punishment. **Broadly speaking, the more serious the allegation or charge, the more astute should the courts be to ensure that the trial process is a fair one.** This is consistent with the court's approach to the standard of proof in civil proceedings: the more serious the allegation, the more cogent the evidence which will be needed to prove it to the requisite standard. **In the case of disciplinary proceedings, as in *Albert & Le Compte*, one can readily see why the distinction between civil and criminal proceedings was not considered to be helpful.**" (paragraph 148) (emphasis added)

100. Simon Brown LJ in that case stated:

> "There is a wealth of Strasbourg case law and a growing body of domestic authority concerning what, for Article 6 purposes, is criminal and what civil – or more particularly what under the autonomous Strasbourg approach must be regarded as criminal despite being categorised as civil under domestic law. Further extensive case law then establishes that the various procedural safeguards expressly or impliedly provided by Article 6 are not ultimately dependent upon such a classification: the protections are sometimes found unnecessary even though the proceedings are criminal; sometimes essential even though the proceedings are civil. Why, therefore, attempt the classification exercise in the first place? **Simpler surely to address the question as to whether the protections are indeed necessary to achieve a fair trial of whatever may be the issue…**In short, the classification of proceedings between criminal and civil is secondary to the more directly relevant question of just what protections are required for a fair trial. I shall, however, address the issue, not least because it covers much of the same ground as must in any event be explored in deciding what protections are required here to achieve a fair trial." (para 33)

101. Finally, Laws LJ stated:

> "Conversely, there are legal regimes which, though not criminal (by the law of the State or by the autonomous Strasbourg standard), nevertheless penalise perceived wickedness. The principal instance of this is to be found in professional disciplinary codes of conduct. It is no exaggeration to say that such codes, or at least some of their content, may be likened to a private or internal criminal law. It is a grave thing for a man to be condemned for misconduct at the bar of his professional peers; graver, often than a criminal conviction. **In these cases, something not far distant from the full rigour of Article 6(2) and (3) will be applied.** A powerful example of this process at work in a discipline case is to be found in the decision of the European Court of Human Rights in *Albert & Le Compte v Belgium* 5EHRR 533. One may compare the decision of this court in *Official Receiver v Stern* [2000] 1 WLR 230, which was concerned with director's disqualification proceedings." (paragraph 93) (emphasis added)

102. In *R (G) v X School Governors* [2010] 1 WLR 2218 the claimant, a music assistant at a primary school, was denied permission by the defendant school governors for his solicitor to represent him at disciplinary proceedings for alleged sexual impropriety. Permission was subsequently refused for his solicitor to represent him at an appeal hearing. His claim for judicial review was allowed on the ground that, although the proceedings were civil not criminal in nature so that the procedural safeguards contained in Article 6(3) did not apply, he was entitled, given the severity of the consequences of an adverse finding, to an enhanced measure of procedural protection under Article 6(1) and was entitled to legal representation at both the disciplinary and appeal committee hearings. Dismissing the defendant's appeal, the Court of Appeal held that since an adverse outcome of the disciplinary proceedings would have a substantial effect on the outcome of barred list procedures which would then be applied to him and since his right to practise his profession was directly at stake in the barred list procedure, it was a civil right for the purposes of Article 6 and might be irretrievably prejudiced at disciplinary proceedings, Article 6 was engaged by the disciplinary proceedings. In the light of what was at stake in the disciplinary proceedings and since an advocate might have a significant effect on the outcome of those proceedings, Article 6 required that the claimant be afforded the opportunity to arrange for legal representation in them should he so choose.

103. Laws LJ, in a judgment with which the other members of the court agreed, reviewed a number of authorities including *Albert*, *Fleurose*, and *International Transport Roth* and the following passage in the judgment of Smith LJ in *Kulkarni v Milton Keynes Hospital NHS Trust* [2010] ICR 101 at paragraph 68:

> "The next question is whether, in the context of civil proceedings, Article 6 implies a right to legal representation. In my view, in circumstances of this kind, it should imply such a right because the doctor is facing what is in effect a criminal charge although it is being dealt with by disciplinary proceedings. The issues are virtually the same and, although

> the consequences of a finding of guilt cannot be the deprivation of liberty, they can be very serious."

104. Laws LJ stated:

> "Although Smith LJ expressly justified the right to representation by reference to the accusations being in the nature of a criminal charge rather than by reason of the possible extinction of the doctor's rights to practise his profession, it is clear from the context both that she was considering the scope of Article 6 "civil" (as opposed to "criminal") and that the possibility of the doctors "effectively [being] barred from employment in the NHS" was uppermost in her mind: see paras 66 and 67 cited above at para 334. Given my view of the effect an advocate might have in the disciplinary proceedings, and in light of the authorities, I would hold in agreement with the deputy judge below that Article 6 "civil" required that the claimant should be afforded the opportunity to arrange for legal representation in those proceedings should he choose." (paragraphs 52 and 53)

105. Although in the result he held that it was not necessary to decide on the claimant's cross-appeal against the judge's finding that the proceedings were civil rather than criminal, Laws LJ made a number of observations which are relevant for present purposes.

> "The claimant does not, as I understand it, press any distinct aspect of Article 6 of which he could only claim the benefit if the case fell on the criminal side of the line. In particular the right of cross-examination, guaranteed by Article 6(3)(d) in a criminal case, is not (as I understood Mr Drabble QC for the claimant) independently insisted upon, though it figured in the proceedings below. That said I find it difficult to see how a rational disciplinary tribunal could refuse to allow a professional advocate, instructed for the accused party, to ask any questions at all of the complainant if the latter gave evidence before them." (paragraph 55)

106. Although in that passage Laws LJ did not address the question whether the accused party could insist on the complainant being tendered for cross-examination as distinct from reliance being placed on his hearsay evidence, his observation underlined the importance attached to the ability of an accused party in disciplinary proceedings to cross-examine his accuser.

107. Laws LJ went on to hold: "The question whether the claimant should be or have been entitled to arrange for legal representation at the disciplinary hearing cannot in my opinion depend on the proceeding's classification as civil or criminal. **The jurisprudence is increasingly to the effect that what matters is the gravity of the issue in the case, rather than the case's classification as civil or criminal. That is the primary driver of the reach of the rights which Article 6 confers**." (paragraph 56) (emphasis added). Laws LJ held that that conclusion was clearly

suggested in the passage of Jonathan Parker LJ's judgment in *Roth* which I have cited above. He further held that his conclusion was supported by the passage from Simon Brown LJ's judgment in *Roth* to which I have referred and the following extract from the speech of Lord Bingham in *Secretary of State for the Home Department v NB* [2008] AC 440: "But in this country also judges have regarded the classification of proceedings as criminal or civil as less important than the question of what protections are required for a fair trial (*International Transport Roth GmbH v Secretary of State for the Home Department*…paras 33, 148) and have held that the gravity and complexity of the charges and of the defence will impact on what fairness requires: *R v Securities & Futures Authority Ltd ex parte Fleurose*…paragraph 14." (paragraph 58).

108. From this review of authorities I derive the following propositions:

i) Even in criminal proceedings the right conferred by Article 6(3)(d) to cross-examine is not absolute. It is subject to exceptions referable to the absence of the witness sought to be cross-examined, whether by reason of death, absence abroad or the impracticability of securing his attendance.

ii) In criminal proceedings there is no "sole or decisive" rule prohibiting in all circumstances the admissibility of hearsay evidence where the evidence sought to be admitted is the sole or decisive evidence relied on against the defendant.

iii) In proceedings other than criminal proceedings there is no absolute entitlement to the right to cross-examine pursuant to Article 6(3)(d).

iv) However disciplinary proceedings against a professional man or woman, although not classified as criminal, may still bring into play some of the requirements of a fair trial spelt out in Article 6(2) and (3) including in particular the right to cross-examine witnesses whose evidence is relied on against them.

v) The issue of what is entailed by the requirement of a fair trial in disciplinary proceedings is one that must be considered in the round having regard to all relevant factors.

vi) Relevant factors to which particular weight should be attached in the ordinary course include the seriousness and nature of the allegations and the gravity of the adverse consequences to the accused party in the event of the allegations being found to be true. The principal driver of the reach of the rights which Article 6 confers is the gravity of the issue in the case rather than the case's classification as civil or criminal.

vii) The ultimate question is what protections are required for a fair trial. Broadly speaking, the more serious the allegation or charge, the more astute should the courts be to ensure that the trial process is a fair one.

viii) In disciplinary proceedings which raise serious charges amounting in effect to criminal offences which, if proved, are likely to have grave adverse effects on the career and reputation of the accused party, if reliance is sought to be placed on the evidence of an accuser between whom and the accused party there is an

> important conflict of evidence as to whether the misconduct alleged took place, there would, if that evidence constituted a critical part of the evidence against the accused party and if there were no problems associated with securing the attendance of the accuser , need to be compelling reasons why the requirement of fairness and the right to a fair hearing did not entitle the accused party to cross-examine the accuser.

109. These propositions do not in my judgment provide an automatic answer to the question raised in this claim for judicial review. The answer to that question involves a consideration of whether and if so what special principles apply where, as in this case, a question arises in disciplinary proceedings as to the availability of the complainant to give oral testimony in person or by video link or the consequences to the complainant in the event of him or her giving such testimony.

110. In criminal proceedings the 2003 Act makes statutory provision for the admission of hearsay statements of complainants (among others) in certain circumstances and subject to certain safeguards. As mentioned above, the Supreme Court in *Horncastle* has held that the 2003 Act represents a crafted code enacted by Parliament which regulates the admission of hearsay evidence at trial in the interests of justice which struck the correct balance between ensuring the fairness of the defendant's trial and protecting the interests of the victim in particular and society in general that a guilty person should not be immune from conviction where a witness who has given critical and apparently reliable evidence in a statement is unavailable through death or some other reason to be called at trial. It further held that so long as the provisions of the 2003 Act were observed there would be no breach of Article 6 and in particular Article 6(3)(d) if a conviction were based solely or to a decisive extent on hearsay evidence. The ECHR had itself recognised the need for exceptions to the strict application of Article 6(3)(d) but in any event the crafted code represented by the 2003 Act contained specific safeguards which did not include a "sole or decisive" rule and rendered such a rule unnecessary. Accordingly, no such rule applies in criminal proceedings to render inadmissible hearsay evidence which constitutes the sole or decisive evidence relied on against a defendant or to render unlawful a conviction consequent upon the admission of such evidence.

111. The issue addressed by the Supreme Court in Horncastle was whether a sole or decisive rule applies to criminal proceedings. The court did not address the question whether such a rule operates in other proceedings such as professional disciplinary proceedings. It did, however, make a number of observations which are in my view of relevance to the issues raised in this case.

112. Lord Phillips of Worth Matravers' summary of conclusions included the following:

> "(i) Long before 1953 when the Convention came into force the common law had, by the hearsay rule, addressed that aspect of a fair trial that Article 6(3)(d) was designed to ensure.
>
> (ii)Parliament has since enacted exceptions to the hearsay rule that are required in the interests of justice. Those exceptions are not subject to the sole or decisive rule. The regime enacted

by Parliament contains safeguards that render the sole or decisive rule unnecessary…

(iv)The Strasbourg Court has recognised that exceptions to Article 6(3)(d) are required in the interests of justice…

(vii) Although English law does not include the sole or decisive rule it would, in almost all cases, have reached the same result in those cases where the Strasbourg Court has invoked the rule.

(viii) The sole or decisive rule would create severe practical difficulties if applied to English criminal procedure…" (paragraph 14)

113. Lord Phillips stated that both in the case of unavailable witnesses and in the case of apparently reliable hearsay, the 2003 Act contains a crafted code intended to ensure that evidence is admitted only when it is fair that it should be. He described the special stipulations contained in sections 124, 125 and 126 of the 2003 Act as designed to further the same end.

"i) Section 124 makes special provision for the admissibility of any material which it is contended challenges the credibility of an absent witness. The opposing party is enabled to put in evidence anything which he could have put in if the witness had been present, but he may also put in material which, if the witness had been present, could only have been asked of him in cross-examination in circumstances where his answers would have been final; this puts the challenger to that extent in a better position than if the witness is present, and is designed to help to counter balance the absence of cross-examination of the witness in person…

ii) By section 125 the judge is required to stop any case depending wholly or partly on hearsay evidence if that evidence is unconvincing to the point where conviction would, in the judge's opinion, be unsafe; this is an important exception to the usual rule of the law of England and Wales that the assessment of the weight of evidence is exclusively for the jury: see *R v Galbraith* [1981] 1 WLR 1039.

iii) Section 126 preserves the general power of the judge (which existed at common law and is enshrined in section 78 of the Police and Criminal Evidence Act 1984) to exclude any evidence relied on by the Crown (but not by a defendant) if its admission would have such an adverse effect on the fairness of the trial that it ought not to be admitted;…"(paragraph 36)

114. Of particular significance in the present context, in my view, is that Lord Phillips identified, as an additional factor designed to further the end of ensuring that hearsay evidence is admitted in criminal trials only when it is fair that it should be, the fact that: "in most cases also, in addition to the statutory rules, a defendant who is faced with hearsay evidence will be entitled to ask the court to call upon the Crown to investigate the credibility of any absent witness and to disclose anything capable of challenging it. That exercise will ordinarily require the Crown to go considerably beyond what would otherwise be the duty simply to disclose which is already in its possession and capable of undermining its case; it will require active investigation of the bona fides, associates and credibility of the witness so as to provide the defendant with, in addition to anything he already knows, everything capable of being found which can be used to test the reliability of the absentee." (paragraph 36)

115. Lord Phillips summarised the principal safeguards designed to protect the defendant against unfair prejudice as a result of the admission of hearsay evidence, seen in the context of the more general safeguards that apply to every jury trial as follows:

> "(i) The trial judge acts as gatekeeper and has a duty to prevent the jury from receiving evidence that will have such an adverse effect on the fairness of the proceedings that it should not be received. (ii) Hearsay evidence is only admissible in strictly defined circumstances. In essence the judge has to be satisfied beyond reasonable doubt that the prosecution is not able to adduce the evidence by calling the witness. (iii) Once the prosecution case is closed, the judge must withdraw the case from the jury if it is based wholly or partly on hearsay evidence and that evidence is so unconvincing that, considering its importance, the defendant's conviction would be unsafe. (iv) The judge has to direct the jury on the dangers of relying on hearsay evidence. (v) The jury has to be satisfied of the defendant's guilt beyond reasonable doubt. (vi) The defendant can apply for permission to appeal against his conviction, which will be granted where reasonable grounds for appeal are demonstrated. A failure to comply with the safeguards outline above, and in particular the admission of hearsay evidence contrary to the rules on its admissibility, will constitute such grounds. Where the Court of Appeal finds that there ahs been such a failure, the appeal will be allowed unless the court is satisfied that, despite the shortcoming, the conviction is "safe"." (paragraph 38)

116. It is self-evident that not all the safeguards referred to by Lord Phillips are present in disciplinary proceedings. Which, if any of them, are present will vary according to the regime under which any particular disciplinary proceedings are conducted. Of relevance in the present case is the fact that the standard of proof in Fitness to Practise hearings was changed in 2008, in response to the Shipman case, from the criminal standard of being satisfied beyond reasonable doubt to the civil standard of the balance of probabilities. Nor is there a requirement that the

FTPP must be satisfied beyond reasonable doubt that the GMC is not able to adduce the evidence by calling the witness. Rule 34(1) gives the FTPP a discretion to admit any evidence it considers fair and relevant whether or not it would be admissible in a court of law and Rule 34(2) by implication gives the FTPP power to admit evidence which would not be admissible in criminal proceedings if satisfied that its duty of making due enquiry into the case before it make its admission desirable. The inference would appear to be that at least in theory evidence could be admitted even if the FTPP were not satisfied beyond reasonable doubt that the GMC was not able to adduce the evidence by calling the witness.

117. Nor is there an express equivalent in the 2004 Rules to section 124 entitling the doctor to adduce evidence as to the credit of the maker of the hearsay statement of a kind which would ordinarily be admissible only if admitted by the witness.

118. It was accepted by the GMC at the FTPP hearing that the 2004 Rules contain no direct equivalent to section 125 of the 2003 Act. The GMC submitted to us that Rule 17(g) is capable of functioning as an equivalent to section 125 in a case where the GMC case rests largely on hearsay evidence. I do not find that submission persuasive. Rule 17(g) appears from its context to be intended to provide for a submission to be made by the practitioner after the conclusion of the GMC's evidence and before he opens his own case. It entitles the practitioner to make submissions "regarding whether sufficient evidence has been adduced to find the facts proved or to support a finding of impairment." I see force in Mr Coonan's submission that in so far as Rule 17(g) is designed to reflect the position in a criminal trial laid down by *R v Galbraith* 73 Cr. App.R.124,CA where the judge is considering an application at the end of the prosecution case that, taken at its highest, it is such that a jury properly directed could not properly convict on it, the protection it affords is potentially less extensive than that afforded by Section 125**.** Section 125 provides that the court must direct an acquittal or discharge the jury if **at any time** after the close of the case for the prosecution it is satisfied that the hearsay evidence "is so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe".

119. Of particular relevance, in my view, is the unavailability to the Claimant in this case of the benefit, clearly regarded by Lord Phillips as an important non-statutory safeguard in the criminal context, of any entitlement to ask the FTPP to call upon the GMC to investigate the credibility of Witness A and to disclose anything capable of challenging it. As mentioned, in a criminal trial that exercise would ordinarily require the Crown to go considerably beyond what would otherwise be the duty simply to disclose what is already in its possession and capable of undermining its case. It would require active investigation of the bona fides, associates and credibility of Witness A so as to provide the Claimant with, in addition to anything he already knows, everything capable of being found out which could be used to test the reliability of the putatively absent Witness A. The FTPP has no power to call on the GMC to make such investigations and even if it did, there is no suggestion that the GMC has the practical means of carrying out such investigations with any realistic prospect of identifying helpful material. The

alleged events took place in Kenya, many of them a very long time ago. The GMC is not a police force and it has no jurisdiction in Kenya.

120. On the other hand the disciplinary proceedings in front of the FTPP are not criminal proceedings and they are not concerned with the determination of a criminal charge against the Claimant. Moreover, although the disciplinary proceedings may bring in play some of the requirements of a fair trial spelt out in Article 6(3) including the right to cross-examine witnesses whose evidence is relied on against him, the ECHR has acknowledged the existence of exceptions to the rights conferred by Article 6(3)(d). In addition to the passage cited above in this context, Lord Phillips in *Horncastle* also cited the following extract from the speech of Lord Bingham in *Grant v The Queen* [2007] 1 AC 1, paragraph 17:

> "…The Strasbourg court has been astute to avoid treating the specific rights set out in Article 6 as laying down rules from which no derogation or deviation is possible in any circumstances. What matters is the fairness of the proceedings as a whole…the Strasbourg court has recognised the need for a fair balance between the general interest of the community and the personal rights of the individual and has described the search for that balance as inherent in the whole Convention…Thus the rights of the individual must be safeguarded, but the interests of the community and the victim of crime must also be respected…While, therefore, the Strasbourg jurisprudence very strongly favours the calling of live witnesses, available for cross-examination by the defence, the focus of its inquiry in any given case is not on whether there has been a deviation from the strict letter of Article 6(3) but on whether any deviation there may have been has operated unfairly to the defendant in the context of the proceedings as a whole. This calls for consideration of the extent to which the legitimate interests of the defendant have been safeguarded." (paragraph 65)

121. Lord Phillips pointed out that one situation where Strasbourg has recognised that there is justification for not calling a witness to give evidence at a trial or for permitting the witness to give evidence anonymously is where the witness is so frightened of the personal consequences if he gives evidence under his own name that he is not prepared to do so.

> "If the defendant is responsible for the fear, then fairness demands that he should not profit from its consequences. Even if he is not, the reality may be that the prosecution are simply not in a position to prevail on the witness to give evidence. In such circumstances, having due regard for the human rights of the witness or the victim, as well as those of the defendant, fairness may well justify reading the statement of the witness or permitting them to testify anonymously. Claims of justification on such grounds have to be rigorously examined:..." (per 68)

122. Lord Phillips continued:

> "Where the [European Court of Human Rights] has found justification for the admission of a statement from a witness not called, or for a witness giving evidence anonymously, the court has been concerned with whether the process as a whole has been such as to involve the danger of a miscarriage of justice. The exercise has been similar to that conducted by the English Court of Appeal when considering whether, notwithstanding the breach of a rule relating to admissibility, the conviction is 'safe'." (paragraph 69)

123. Lord Phillips quoted from the judgment in *Kostofski v The Netherlands* (1989) 12 EHRR 434:

> "In the light of these principles the Court sees its task in the present case as being not to express a view as to whether the statements in question were correctly admitted and assessed but rather to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair…This being the basic issue, and also because the guarantees in Article 6(3) are specific aspects of the right to a fair trial set forth in paragraph (1) the Court will consider the applicant's complaints from the angle of paragraphs (3)(d) and (1) taken together."

Lord Phillips stated that that passage indicates that the fairness of a trial has to be assessed on a case by case basis, viewing each trial as a whole, and that an inability on the part of a defendant to cross-examine the maker of a statement that is admitted in evidence will not necessarily render the trial unfair. (paragraph 74)

124. Lord Phillips later cited a summary of the position following a review of the Strasbourg authorities by Waller LJ in *R v Sellick* [2005] 1WLR 3257:

> "50. What appears from the above authorities are the following propositions. (i) The admissibility of evidence is primarily for the national law. (ii) Evidence must normally be produced at a public hearing and as a general rule Article 6(1) and (3)(d) of the Convention require a defendant to be given a proper and adequate opportunity to challenge and question witnesses. (iii) It is not necessarily incompatible with Article 6(1) and (3)(d) of the Convention for depositions to be read and that can be so even if there has been no opportunity to question the witness at any stage of the proceedings. Article 6(3)(d) is simply an illustration of matters to be taken into account in considering whether a fair trial has been held. The reasons for the Court holding it necessary that statements should be read and the procedures to counter balance any handicap to the defence will all be relevant to the issue, whether, where statements have been read, the trial was fair. (iv) The quality of the evidence and its inherent reliability, plus the degree of caution exercised in relation to reliance on it, will also be relevant to the question whether the trial was fair." (paragraph 79)

Of particular relevance in the present context is Waller LJ's reference to the importance attached by the ECHR when considering fairness to the reasons why the Court held it necessary for hearsay evidence to be admitted.

125. Finally, Lord Phillips referred to the decision of the ECHR in *Al-Khawaja & Tahery v United Kingdom* (2009) 49 EHRR 1 at 37 and commented that the Court appeared to have accepted that the sole or decisive rule does not apply so as to preclude reliance on the statement of a witness who refuses to testify because of fear induced by the defendant. He also pointed out that the Strasbourg court has recognised that anonymity can be justified where a witness is too frightened to be identified even where the defendant has not himself induced the fear. There are he said strong reasons of policy why the evidence of such a witness should be received subject to adequate safeguards and that is recognised by section 116 of the 2003 Act. (paragraphs 103, 104)

126. In my view, notwithstanding the absence in the FTPP proceedings of some of the statutory and non-statutory safeguards which apply to criminal proceedings referred to by Lord Phillips in *Horncastle*, there is no sole or decisive rule applicable to the proceedings of the FTPP which required the FTPP automatically to refuse to admit Witness A's hearsay evidence without considering all the relevant circumstances. Such a conclusion does not in my judgment follow either from the Strasbourg jurisprudence or from the English authorities to which I have referred. I do, however, consider that in deciding whether it would be fair to admit the hearsay evidence, the requirements both of Article 6 and of the common law obliged the FTPP to take into account the absence of all those safeguards to which I have referred. In my view there is no indication that they did take them all into account, in particular the absence of any duty or power on the part of the FTTP to require the GMC to make the kind of enquiries to which Lord Phillips of Worth Matravers referred in *Horncastle.* Although the FTTP did refer to the civil standard of proof applicable in FTTP proceedings, it did not identify that as a factor to be taken into account in considering whether it would be fair to admit the hearsay statements of Witness A. The Claimant in his submissions stated the conclusion of the FTPP as being that admission of the hearsay evidence would not be in the interests of justice. In fact what it found was that it was not satisfied that admission of the evidence positively would be in the interests of justice such as to make it admissible in criminal proceedings under the gateway in section 114(d). That is one reason why I do not consider that it follows automatically as, to be fair, the Claimant did not suggest that it did, from the conclusion that the evidence would not be admissible under the section 114(d) gateway that its admission under Rule 34(1) was impermissible.

127. I do however consider that both the fact of and the reasons for the FTPP's conclusions that the evidence would not be admissible under either the section 114(d) or the section 116 gateway are of great importance. In relation to section 116, they raise the inevitable question: what were the circumstances which rendered fair the admission of hearsay evidence from a witness in respect of whom the FTPP was not satisfied to the criminal standard that it was not reasonably practicable to secure his attendance to give oral testimony, the satisfaction of that requirement being identified by Lord Phillips in *Horncastle* as one of the safeguards designed to render fair the admission of hearsay evidence?

In relation to section 114(d) the FTPP's conclusion raised the question: if it was not satisfied that, even assuming ex hypothesi that it had not been established to the criminal standard that it was reasonably practicable to secure Witness A's attendance, it was nonetheless in the interests of justice to admit his hearsay evidence, what were the circumstances which nonetheless rendered its admission fair under Rule 34(1)?

128. It is not in my judgment necessary to consider what possible answers to those questions might have been capable of rendering fair a decision by the FTPP nonetheless to admit Witness A's hearsay statement. The matters identified by the FTPP as outweighing the factors pointing against admission of the evidence did not include any findings of fact in relation to the critical and indeed sole issue relied on by the GMC, namely whether and if so to what degree any threat, and if so what threat, to Witness A would be greater if he gave oral testimony in person or by video link than if his hearsay evidence were admitted. It certainly made no positive findings that it was satisfied, whether to a civil or criminal standard, that any such threat as might exist would be greater if he gave oral testimony in person or by video link than if his statements were read. Nor did it find that the effect of any such threats was that it was satisfied even on a balance of probabilities that it was not reasonably practicable to secure his attendance. On the contrary, as I have said, the general thrust of the FTPP's analysis of the evidence relied on by the GMC in support of its argument on the threat to Witness A was one of scepticism if not of outright rejection. That analysis was in my view fully justified having regard to the evidence which it heard in relation to the issue of threat to some of which I have referred above.

129. In those circumstances, in my judgment, no reasonable Panel in the position of the FTPP could have reasonably concluded that there were factors outweighing the powerful factors pointing against the admission of the hearsay evidence to which I have referred. The means by which the Claimant can challenge the hearsay evidence are, for the reasons I have set out, not in my judgment capable of outweighing those factors. On the contrary, if anything they point in the opposite direction. Nor, for reasons already given, is the diminished value of the hearsay evidence, to which the FTPP appears to have attached importance. The reality would appear to be that the factor which the FTPP considered decisive in favour of admitting the hearsay evidence was the serious nature of the allegations against the Claimant coupled with the public interest in investigating such allegations and the FTPP's duty to protect the public interest in protecting patients, maintaining public confidence in the profession and declaring and upholding proper standards of behaviour. In oral argument Mr Warby QC on behalf of the FTPP submitted that the gravity of the allegations is a factor arguing in favour of admissibility of the hearsay evidence. In my judgment that submission is misconceived. It is of course self-evidently correct that the greater is the gravity of allegations, the greater is the risk to the public if there is no or no effective investigation by a professional body such as the FTPP into them. However, that factor on its own does not in my view diminish the weight which must be attached to the procedural safeguards to which a person accused of such allegations is entitled both at common law and under Article 6. To the contrary, the authorities to which I have referred suggest the reverse to be the case. The more serious the allegation, the

greater the importance of ensuring that the accused doctor is afforded fair and proper procedural safeguards. There is no public interest in a wrong result.

130. For these reasons in my judgment the FTPP's conclusion that it was fair to admit the hearsay evidence of Witness A and its decision to admit it was irrational and constituted a breach of the Claimant's Article 6(1) right to a fair hearing and cannot stand. The decision must accordingly be quashed

Rule 34(2): the desirability ground

131. It follows from my conclusion in respect of Rule 34(1), that the question whether the FTPP was entitled to conclude that the admission of Witness A's hearsay evidence was desirable, notwithstanding that it would not be admissible in criminal proceedings, does not arise. It would only arise if the FTPP had been entitled to conclude that the evidence was fair and relevant such as to make it admissible under Rule 34(1). There is no power under Rule 34(2) to admit unfair evidence. It would in any event follow automatically that no reasonable FTPP could conclude that it was desirable to admit evidence which was not fair and thus not admissible under Rule 34(1).

APPENDIX 1: SUMMMARY OF THE EVIDENCE AS TO THE THREAT TO WITNESS A

1. First there was contradictory evidence as to the respective roles played in the GMC's decision on 4 August 2010 not to call Witness A by the general threat and the specific threat. As already mentioned, Mr Philips's letter dated 27 August 2010 to Commander Gibson of the MPS recorded that the MPS view, which had been communicated previously to the GMC, that there remained a very real risk of physical harm to witnesses from Kenya should the GMC call them to give evidence arose essentially from the attitude towards homosexuality in Kenya. In oral testimony Ms Emmerson, a senior associate with Field Fisher Waterhouse, LLP, the GMC's solicitors, confirmed that she was told by a member of the GMC the day after the decision was taken on 5 August 2010 that the reasons for the decision were essentially as set out in that letter. That letter made no reference to the specific threat to Witness A.

2. However in a letter dated 17 August 2010 to the Claimant's solicitors, Ms Emmerson stated that at the 4 August 2010 meeting, the GMC had been informed that following the GMC's approach to Witness A in its letter dated 20 April 2010 he had recently been "visited" by someone in his home village and had communicated to the police that he was now fearful of assisting the GMC investigation. She continued: "Given this latest development, and the advice already received from the Police, the GMC has made the decision that Witness A should not be contacted any further and will not be asked to provide a statement or attend the hearing in person." The natural inference from the latter statement is that the GMC decision not call Witness A was based at least in part on what it had been told by the MPS as to the recent visit to Witness A and his recent communication to the MPS that he was now fearful of assisting the GMC.

3. Although Mr Donne conceded, after Ms Emmerson gave evidence, that the MPS had not informed the GMC at the meeting on 4 August that there had been a recent

approach to Witness A, Ms Emmerson was not recalled to clarify what if any part in the GMC's decision had been played by the alleged recent incident of the visit to Witness A's village. As appears below Witness A had informed the MPS that there had been such an incident, albeit many months earlier. When making his concession Mr Donne added that the decision not to rely on the oral testimony of Witness A was based on the matters set out in Mr Philips' letter to Commander Gibson. However there was no evidence from any of the decision takers at the GMC on this important point.

4. The position would thus appear to be that if, as disavowed by Mr Donne, the GMC decision was based in part on a belief that the incident referred to in Ms Emmerson's letter had taken place shortly before the decision was taken, the decision was taken on a factually erroneous basis. It is of course important to bear in mind that the decision under challenge is not the GMC decision not to call Witness A but rather the decision of the FTPP to admit his hearsay evidence. It is also the case that at the same time as conceding the error in Ms Emmerson's letter, Mr Donne informed the FTPP that the GMC had reviewed its decision in the light of the error in her letter, and the letters referred to in Mr Philips' letter as well as the evidence given before the FTPP and that its decision remained the same. Again of course that was a decision not to call Witness A as distinct from the FTPP decision to admit the hearsay evidence.

5. Second, the evidential support for the general risk was limited and in several respects unsatisfactory. The nature of the risk was described by DCI Grant as a general risk that if it were to become known to the community generally that Witness A has been involved in homosexual activities he might be at risk of intimidation or violence. No specific potential aggressors were identified. The risk was said to flow generally from the fact that homosexuality is illegal in Kenya and that there are homophobic attitudes in Kenya.

6. This advice was not based on any comprehensive or indeed any risk assessment carried out by the MPS. No such risk assessment was ever carried out despite the recommendation in the MPS letter to the GMC of 27 May 2009 that a comprehensive risk assessment should be in place to manage and reduce any potential threats. Moreover it was based principally on what DCI Grant had learned in March 2009 and was thus significantly out of date at the time the GMC made its decision on 4 August 2010 and even more out of date by the time DCI Grant gave evidence and the FTPP made its decision in October 2010.

7. Nor was the advice based on any detailed research. It appears to have been based on a combination of a Google search carried out by DCI Grant which could have been carried out by anyone on attitudes to homosexuality in Kenya and general comments made while he was in Kenya in March 2009 by the Kenyan police to the effect that there is a high level of violence, not necessarily homophobic, in Kenya coupled with there being a very anti-homosexual attitude, homosexuality being both against the law and perceived to be un-African. Thus DCI Grant relied on the fact that the week before they visited Kenya in March 2009 he was told that eight police officers had been murdered, although he did not suggest that he had been told that this was linked in any way to homophobia. He said that he had not been informed of any specific incidents relating to homosexuals while he was in Kenya. The only specific incident revealed by his research was a case in February 2010 in a town outside Mombasa where a rumour that two gay men were going to get married led to a riot and the

people involved having to be taken into police protection to prevent them being burned and lynched. He volunteered the general perception based on his researches that the value placed on life in Kenya is cheap compared to this country. DCI Grant accepted that his opinion on the general risk was based on what he described as his limited knowledge of Kenya and things he had read about it. There had been no violent homophobic incidents during DCI Grant's visit in March 2009 and no independent enquiries were made by the GMC, or on its behalf, of any other organisation such as the Foreign Office or the High Commission.

8. It is also worthy of note that, as set out in Ms Emmerson's letter to Witness A dated 2 July 2010, the GMC took the view that he was well placed to assess any risk to himself, and that Witness Z, who gave oral testimony, expressed the view that Witness A is very rational and that "if he thought that he was OK to come, then I think he is OK to come." She said that Witness A was aware that he had to be careful for a number of reasons because of the legal system in Kenya where homosexuality is illegal, and that he seemed to have taken things in his stride. She also said that if Witness A thought that he would be safe while he was in London; she would listen to that and hear what he was saying. Although that was in the context of any danger in London, as distinct as from in Kenya, it was consistent with her view that Witness A was well placed to assess the risks he faced. As to that DS Crystal told the FTPP that in so far as Witness A had concerns they did not relate to the general threat associated with Kenyan cultural views of homosexuality.

9. A further feature of the evidence in relation to the general threat was that according to DS Crystal it would exist irrespective of whether Witness A gave live testimony (either orally or by video link) or the GMC adduced hearsay evidence of what he had told the police in interview. The common feature would be the risk of discovery by people who are ill disposed to homosexuals that any adverse finding against the Claimant was underpinned by Witness A's evidence. He accepted that on his analysis any determination by the FTPP of allegations based on what Witness A had told the MPS would put his life in danger and that that would apply if evidence were called at the substantive hearing of what Witness A had said to the police about the allegations as well as if he gave live testimony. Witness A himself told DS Crystal, as recorded in the telephone log which he kept and as confirmed by DS Crystal in his testimony to the FTPP, that the risk had never gone away or changed since he first spoke to the MPS about his allegations against the Claimant. In short what would trigger the risk of violence would be the entry into the public domain of knowledge of Witness A's involvement in the Claimant's alleged activities should those activities be found to have taken place. The means by which that knowledge entered the public domain, whether by oral testimony or hearsay evidence, was of less importance.

10. A further aspect of the evidence relevant to an assessment of the general risk is that according to DS Crystal the allegations against the Claimant relating to Witness A, as distinct from those relating to other people named in the allegations against the Claimant, were to the effect that Witness A was not a consenting participant. DS Crystal agreed that those who were not involved in a consensual relationship might be at lesser risk from people who are ill disposed to homosexual conduct than those who were.

11. Further, there were inconsistencies between the evidence of DCI Grant DS Crystal, two of which related to the general risk. Whereas DS Crystal said that there were

press reports about killings of homosexuals while they were in Kenya in March 2009, DCI Grant said that he was not aware of any riots or violence associated with someone's sexuality while they were in Kenya. Second, whereas DS Crystal's view was that the specific threat to Witness A was greater than the general threat, DCI Grant's view was that the general threat was greater. DCI Grant was of course the SIO and one of the senior officers on the basis of whose advice it appears that the GMC decision of 4 August was taken.

12. The specific threat was said to be that if it were to become known to those in Kenya who were loyal to the Claimant that Witness A was about to give or had given evidence either orally in London or via video link from Kenya that might place Witness A at a risk of violence, either to prevent him from giving evidence or to exact revenge upon on his return home.

13. The evidence in relation to the specific threat was also problematical.

14. First, it was the GMC's own case, as stated by Mr Donne on the fourth day of the hearing, that the original decision on 4 August 2010 not to call Witness A was based on the matters set out in Mr Philip's letter to Commander Gibson, which did not include any mention of the specific threat. Second, although the specific threat formed part of the MPS advice to the GMC in April 2010, DCI Grant accepted in evidence that at the time he gave that advice he was unaware of important pieces of evidence which emerged at the hearing which he accepted diluted what he described as his argument albeit he would still stand by it. He also said that he considered that the greater risk to Witness A was from the general threat than from the specific threat.

15. Although Mr Donne informed the FTPP that the GMC had reviewed its decision in the light of the evidence given at the hearing, and that its decision remained the same, no witness was tendered to support that assertion or to enable it and the reasons behind the decision remaining the same to be tested in cross-examination or indeed to enable the reasons to be identified. However since the GMC's position was that it was dependent on the MPS for assessing the risk it was DCI Grant's evidence which was critical. There would appear to be no logical basis for the FTPP to have concluded that the reason for the GMC's original decision, which was essentially the general as distinct from the specific risk, had changed by the conclusion of the hearing to the specific risk or a greater concern about the specific risk since DCI Grant, on whose advice the original decision had been taken and who was the Senior Investigating Officer, made it clear both that he originally considered that the specific threat was less than the general threat and that the evidence of which he had been unaware diluted his argument. Since that new evidence related to the specific rather than the general risk the inference is that he considered the specific threat to be less significant than when he gave his original advice.

16. The evidence on which the supposed specific threat rested was contained in police logs which recorded telephone conversations between DS Crystal and Witness A in 2010. Those logs contained a record of all telephone conversations between DS Crystal who was the witness liaison officer and Witness A. The log began in January 2010, which is no doubt why no reference to the specific threat appeared in the initial advice given by the MPS to the GMC in May 2009. The evidence in relation to a specific threat rested on two log entries, one in January 2010 the second in August 2010. The January entry recorded that Witness A told DS Crystal that he had recently

been getting calls from people he did not know asking to meet him in the bush. He felt that that was somebody who might kill him. Why else would they want to meet him in the bush? Witness A said that as a result of the message he left Nairobi and travelled to his mother's house. He was in the countryside with his wife and children when a stranger came to his mother's house asking for him. The stranger said he was a friend of a person referred to as F. The stranger told Witness A's mother he wanted money from Witness A. Witness A told DS Crystal that he felt threatened by this.

17. The August entry recorded Witness A saying that F came passing through his village again. F seemed nervous when around Witness A and kept asking to see Witness A's son.

18. There were references to F in two text messages from Witness A to Witness Z, which form part of the hearsay evidence sought to be admitted by the GMC. In a text message dated 29 November 2009 Witness A wrote: "I know I am the witness and I am worried. I am leaving for home after 4th. God willing. F has bad intention towards my little X..." In a text dated 4 December 2009 Witness A wrote: "Am in Nairobi. Met F. Took lunch together with other friends. Leaving for [a village in the countryside] tomorrow. I disagreed with his opinion and he told me to forgive him."

19. In testimony to the FTPP Witness Z, in the context of expressing the opinion that if Witness A thought he was OK to come to London then she thought he was OK to come, said that F was actually Witness A's friend and although he upset Witness A and scared him and Witness A was wary of him, Witness A still met F for lunch and would still sit and have a coca cola with him. Witness Z said that Witness A was saying that F was a friend of his, and he would still meet with him. Witness A once told her on the telephone that he went to a football match with F. F turned up with an army officer, so she conjectured that F was scared of Witness A in the same way that Witness A was scared of F. "One wonders what his intentions are."

20. Witness Z also told the FTPP that during the year leading up to the hearing Witness A travelled back and forth between his home village in the countryside and Nairobi. There was also adduced in evidence at the hearing a current website for a community project which contained a photograph of Witness A, his name, his position in the organisation, an e-mail address and a mobile phone number.

21. DCI Grant was recalled at the request of the FTPP to enable him to be asked whether evidence which emerged after he gave his first evidence affected his views on the level of threat to Witness A. In addition to the matters referred to above the Panel drew his attention to an attendance note of a telephone conversation between Ms Saleh of the MPS and Ms Emmerson dated 5 August 2010 in which Ms Saleh was recorded as having spoken to Commander Gibson about the GMC request. The attendance note referred to a concern about Witness A and said that he had not been threatened exactly but referred to an "odd contact."

22. When he first gave evidence DCI Grant identified the specific threat as coming potentially from people who had benefited from the Claimant's generosity, through his financial support and sponsorship who might fear that if Witness A gave evidence against him successfully the Claimant's financial support of them might cease and they would be in the same pool as everybody else in Kenya and/or the other young people who had been interviewed by the MPS. He also said that Witness A had taken

steps to protect himself in particular against his identity becoming known by moving out of Nairobi and living with his family is his family area where he was no longer in contact with people and had a big support mechanism around him compared to living in Nairobi.

23. When he was recalled DCI Grant confirmed that he had been unaware that the Claimant had already withdrawn financial support from the people who he had previously said might be a potential source of risk to Witness A if he were to withdrew his financial support from them and also that the fact that the Claimant had already suffered considerable professional and financial consequences as a result of the allegations was known to the persons most closely affected. When he said that he did not think it changed the situation too much partly because it would be a timing thing but also because Witness A had still moved to another location for greater support, it was pointed out to DCI Grant that the FTPP had subsequently heard that Witness A had been travelling back and forth between his home village in the countryside and Nairobi, that he had social contact with at least one of the individuals concerned, mainly F, with whom he had gone to a football match and that Witness A had moved from Nairobi as a result of losing his job rather than as a result of any perceived threat.

24. DCI Grant confirmed that he had been unaware of any of those matters and that it could be absolutely true in the light of that information that Witness A just did not feel under threat. He did not know the answer.

25. It is right to record that in supplemental written submissions the GMC, while accepting that the Claimant did cease sponsorship of the six witnesses interviewed by the MPS who denied Witness A's allegations in respect of alleged conduct by the Claimant involving them, submitted that it appeared from a letter from the Claimant's former solicitors to the GMC dated 18 June 2009 that he renewed his sponsorship of them in or around April 2009 very soon after the MPS investigation had come to an end. That letter was not before the court and when he opened his application to the FTPP Mr Donne stated that the Claimant had ceased financial support for the boys and young men who had been interviewed by the MPS while the investigation was in train. It would appear that neither on that occasion nor when the Chairman of the FTPP informed DCI Grant upon his being recalled that the FTPP had subsequently learned that those individuals had already lost their financial support was any reference made on behalf of the GMC to a suggestion that the financial support had been resumed when the police investigation came to an end. Be that as it may, DCI Grant accepted when he was recalled that the information of which he had been previously unaware which he thought diluted his argument included the evidence about Witness A socialising with F, the evidence of the impact on the other boys in terms of their financial support being withdrawn, Witness A's own willingness to put his information on the internet and the lack of any perceived threat to Witness A since January 2010.

26. For his part DS Crystal accepted that insofar as there was a potential threat to Witness A it would flow from the fact that any adverse determination by the FTPP against the Claimant would be based on the allegations which Witness A had made to the MPS. That risk would therefore exist irrespective of whether the FTPP proceeded on the basis of the hearsay evidence of his police interviews or oral testimony in person or by video link. It was for that reason that Witness A had said that as soon as he

opened his mouth and made the allegations there was a risk over his head. Although DS Crystal was of the view that the risk would probably be greater if Witness A came to give live evidence, that was on the basis that he would be seen as giving evidence in an open forum. However he also expressed the view that even if the hearsay evidence was not adduced there would remain a risk to Witness A by virtue of him having made the allegations in the first place.

27. Thus although he considered that there would be a greater risk from live evidence than from the adducing of hearsay evidence he was not suggesting that the effect of adducing the hearsay evidence would be to eliminate any threat to Witness A. Although later in his evidence he appeared to contradict that by saying that if Witness A's evidence was not put before the Panel at all then he perceived no specific risk to him, he later clarified that if the material in Witness A's interview with the MPS was adduced together with recorded conversations between Witness A and another witness and subsequently the FTPP upheld the allegations against the Claimant, that would potentially put Witness A's life at risk on his analysis. DS Crystal said that everything depended on whether Witness A's identity was revealed so that if his identity was not in the public domain the risk would be different. Since the specific threat was said to come from those who were loyal to the Claimant, including in particular the other alleged victims of the Claimant's conduct who had been interviewed by the MPS in 2009 and who already knew that Witness A had made allegations against the Claimant, this logic was hard to follow.

28. DCI Grant, who considered that the specific threat was less serious than the general threat, also accepted that insofar as there was a specific threat from those loyal to the Claimant it already existed by reason of it being known to the other people interviewed by the MPS that Witness A had made allegations against the Claimant. He also accepted that if the hearsay evidence of Witness A's interviews and text messages were adduced that risk would be increased. In his view there would be a further increase in risk if Witness A gave live testimony or via video link but that was on the somewhat speculative basis that that might be regarded as the "final act of betrayal." He did not suggest that this view was based on any risk assessment and indeed confirmed that no risk assessment had been carried out.

29. A further inconsistency between the evidence of DS Crystal and DCI Grant lay in the fact that whereas the former suggested that any threat would emanate ultimately from the Claimant, the latter made a statement for the purpose of the hearing that: "It must be strongly stated that there is no intelligence to suggest in any way that Professor Bonhoeffer would orchestrate or even consider such action." DCI Grant in testimony said that he absolutely stood by that statement and had no intelligence that would suggest otherwise. Insofar as there was any specific threat DCI Grant considered that it would come from the other people who had been interviewed by the MPS or people benefiting from the Claimant's generosity.

30. Finally both DS Crystal and Witness Z emphasised that Witness A had made it clear to them that he was eager to come to London to give evidence. DS Crystal said that since his return to the UK in March 2009 every time he spoke to Witness A, Witness A stated his eagerness to come over and give evidence. The last time he spoke to him was the Friday before the hearing and he mentioned it again. Witness Z said that throughout the whole period of time since Witness A first made his allegations to her he had kept level-headed and she described him as rational. Apart from some early

vacillation when he was very afraid and wanted support because of perceived threats, he was willing to come to London to give evidence. Ms Emmerson, as already mentioned, said in an e-mail to Witness A dated 2 July 2010 that although the GMC took the matter of his safety very seriously, it also took the view that he was well placed to assess any risk.

APPENDIX 2: THE PARTIES' SUBMISSIONS ON FAIRNESS

1. The Claimant submitted that the starting point for the assessment of fairness in a case such as this is the basic proposition that a defendant should have an opportunity of testing the evidence against him unless there are good and cogent reasons why that is either impossible or undesirable. That was said to be a basic principle well established and of long standing. Reliance was placed on a reference by Lord Edmund Davies in *Bushell v The Secretary of State for the Environment* [1981] AC 75 at 116 to: "a massive body of accepted decisions establishing that natural justice requires that a party be given an opportunity of challenging by cross-examination witnesses called by other parties on relevant issues."

2. Further reliance was placed on dicta of the Irish Supreme Court in *Kiely v The Minister for Social Welfare* [1977] IR 267 at 281:

> "Of one thing I feel certain, that natural justice is not observed if the scales of justice are tilted against one side all through the proceedings. *Audi alteram partem* means both sides must be fairly heard. That is not done if one party is allowed to send in his evidence in writing, free from the truth eliciting processes of a confrontation which are inherent in an oral hearing, whilst his opponent is compelled to run the gauntlet of oral examination and cross-examination. The dispensation of justice must be even handed in form as well as in content."

3. The Claimant accepted that the principle for which he contended is not absolute in its application and that there may be cases in which fairness would permit hearsay evidence to be adduced notwithstanding the lack of opportunity to test that evidence. He submitted however that this cannot be the case where the evidence concerned is the only evidence in support of very serious allegations and where there is no good reason why the witness concerned cannot give live evidence in the proceedings. The right of a defendant to test the evidence against him it was submitted is fundamental and must not be overridden without good reason. That he submitted is precisely the effect of the FTPP's decision in respect of Rule 34(1), since they found correctly that the GMC had failed to establish that there were good grounds for the failure to call Witness A. It will be observed that this is a different formulation of what the FTPP was said to have found, the earlier formulation being that the FTPP positively found that there was no good reason why Witness A could not give live evidence.

4. In support of his irrationality argument reliance was placed by the Claimant on the fact, noted by the FTPP, that Witness A's evidence was the only evidence in respect of very serious charges and on what was characterised by the Claimant as a finding by the FTPP that: "it would be contrary to the interests of justice to admit the evidence for the purposes of Section 114(1)(d) of the 2003 Act."

5. The Claimant submitted that it is clear from the FTPP's determination that it considered that the public interest in investigating the allegations against the Claimant outweighed what it considered to be the disadvantage to the Claimant in admitting the hearsay evidence. It was apparent, submitted the Claimant, that the FTPP's conclusion as to fairness was based on two considerations (i) Its obligation to take account of its obligations to protect the public interest in ensuring that allegations of serious misconduct are thoroughly investigated and (ii) the fact that the poor quality of the hearsay evidence could be taken into account by the FTPP as "a professional panel" when deciding whether the allegations were proved.

6. While conceding that the public interest as articulated by the FTPP is one of the factors to be borne in mind when assessing what fairness would require in a given case the Claimant submitted that its status must not be overstated. It is not a trump card to which all other considerations are subject. As to the poor quality of the hearsay evidence, the Claimant submitted, first that the fact that the FTPP is a professional panel does not of itself establish that its ability properly to weigh the probative value of the hearsay evidence is necessarily superior to that of a properly directed jury and second that in any event the possibility that a defendant might ultimately be acquitted of the allegations against him is not a good reason for admitting evidence in circumstances where it would otherwise be considered unfair to do so.

7. In support of his submission that it would be manifestly unfair to admit Witness A's hearsay evidence in the circumstances of this particular case and that no reasonable FTTP could have concluded otherwise the Claimant prayed in aid the following matters:

   i) The hearsay evidence of Witness A is the only evidence in support of the majority of the allegations faced by the Claimant

   ii) Witness A is available and willing to give evidence before the FTPP.

   iii) It is the GMC, as prosecuting authority, that has decided that Witness A should not give evidence, either in person or by way of video link.

   iv) That decision was taken on an inaccurate and/or incomplete understanding of the nature and extent of the risk to Witness A were he to give live evidence. There is in fact no good reason why he should not give live evidence before the FTPP.

   v) It is reasonably practicable to call Witness A to give evidence in London.

   vi) The effect of the GMC's decision is to deprive the Claimant of one of the most fundamental elements of a fair trial, namely the right to cross-examine his accuser.

   vii) Witness A has made very serious allegations against the Claimant which, if proved, are likely to result not only in the loss of his reputation but also the loss of his livelihood and consequential harm to his patients.

viii) The standard of proof applicable to proceedings before the FTPP is merely the balance of probabilities.

ix) The Claimant does not enjoy any of the further safeguards that protect a defendant in criminal proceedings, including the separation of judge and jury and the power conferred on the judge by section 125 of the 2003 Act.

x) Primary evidence of the demeanour of Witness A when he made his accusations against the Claimant, i.e. the video recordings of his interviews, has been lost by the MPS. [in fact the audio tapes as well as the video tapes have been lost]

xi) It has not (and will never be) possible to explore with Witness A the possible reasons why he has made these allegations against the Claimant.

xii) In relation to those charges that relate to what the Claimant is alleged to have done to Witness A there are no other witnesses to the alleged conduct whom the Claimant can either call or cross-examine as a means of challenging Witness A's account.

8. The proper evaluation of these considerations, undertaken in the light of the FTPP's obligations both to the public and to the defendant practitioner, permit it was submitted of only one reasonable conclusion, namely that it would be plainly unfair to admit the hearsay evidence of Witness A in these proceedings. The GMC's acknowledgement that the hearsay evidence is of "diminished value" and such as to "weaken" its case against the Claimant did nothing to disturb that analysis. The possibility that a defendant might ultimately be acquitted cannot amount to a good reason for exposing him to an unfair hearing.

9. So far as Article 6 is concerned, the Claimant submitted that the decision to admit Witness A's hearsay evidence constituted a breach of his Article 6(1) right to a fair hearing.

10. In support of that submission the Claimant did not submit that the right conferred by Article 6(3)(d) "to examine or have examined witnesses against him" applies automatically to all professional disciplinary proceedings. That right is in terms said to be attached to a person charged with a criminal offence. The Claimant accepted that proceedings before the FTPP are civil in nature for the purposes of Article 6 even if the subject matter of the allegations is conduct which might also be regarded as criminal in nature.

11. However the Claimant submitted that it is well established that the scope of the Article 6(1) protection in civil proceedings may in **an appropriate case** extend so as to include one or more of the specific guarantees contained in Articles 6(2) and 6(3): see *Albert & Le Compte v Belgium* [1983] 5 EHRR 533 at para 39: "In the opinion of the Court, the principles set out in paragraph 2 and in the provisions of paragraph 3 invoked by Doctor Albert (that is to say, only sub-paragraphs (a), (b) and (d)) are applicable *mutatis mutandis*, to disciplinary proceedings subject to paragraph 1."

12. Reliance was placed on the statement by the Court of Appeal in *Official Receiver v Stern* [2000]1WLR 2230 at 2254 H that: "Disciplinary Proceedings against a professional man or woman, although not classified as criminal, may still bring into play some of the requirements of a fair trial spelt out in Article 6(2) and (3) including the presumption of innocence." That statement followed immediately after a recital by the Court of Appeal of an earlier passage in the judgment of the European Court of Human Rights (ECHR) in *Albert* at paragraph 30: "….in the opinion of the court the principles enshrined therein are, for the present purposes, already contained in the notion of a fair trial as embodied in paragraph 1; the court will therefore take these principles into account in the context of paragraph 1.

13. The Claimant submitted that in assessing whether or not one or more of the Article 6(2) and/or 6(3) guarantees fall within the scope of the Article 6(1) protection in a given case, it is necessary to look at the nature and seriousness of the allegations. For that proposition reliance was placed on dicta of Laws LJ in *International Transport GmbH Roth v Secretary of State* [2003] QB728 at 769 and in *R (G) v X School Governors* [2010] 1WLR 2218 at 2243 paragraph 56 to which I refer below. It was submitted that the nature and gravity of the allegations made against the Claimant in this case were such as to bring the Article 6(3)(d) guarantee within the scope of his Article 6(1) right to a fair hearing.

14. The Claimant further submitted that it is clearly established that the right to a fair hearing conferred by Article 6(1) is not a qualified right subject to the public interest. Rather it is an absolute right which cannot be subordinated to the public interest. That principle of law was said to be clearly stated by Lord Hope in *Dyer v Watson* [2004] 1AC 379 at 407: "The overriding right which is guaranteed by Article 6(1) is the right to a fair trial. It has been described by the Strasbourg court as a fundamental principle of the rule of law; Salabiaku v France. I infer from this that it is an absolute right which does not permit the application of any balancing exercise, and that the public interest can never be invoked to deny that right to anybody under any circumstances; see Montgomery v HM Advocates [2003] 1AC 641 and Brown v Stott [2003] 1 AC 681)."

15. The Claimant submitted that the line of authority starting with *Stern* makes it clear that the scope of the protection afforded by Article 6(1) in a given case will be determined by the nature and gravity of the allegation. Neither *Stern* nor *Roth* nor *G* provided any support for the proposition that the question of whether or not the specific guarantees set out in Article 6(2) and 6(3) should apply in a given case depends on the public interest in having the allegations heard. On the contrary, the more serious the allegation the greater the public interest (at least arguably) in investigating; and yet, as the authorities make clear, the more serious the allegation the greater the "rigour" with which Article 6 should be applied.

16. The GMC introduced its supplemental written submissions with the submission that the question is whether, as the Claimant contends, the FTPP should be precluded from conducting any inquiry at all including the majority of the serious allegations advanced against him. The implied premise, namely that there could be no hearing in the absence of Witness A's hearsay evidence or alternatively that if that is the case it is a consequence attributable to a finding that the hearsay evidence should not be admitted, is one which, for reasons given in the main body of the judgment, I do not accept..

17. The GMC characterised the Claimant's argument as amounting to the proposition that the FTPP's decision will inexorably lead to an infringement of the Claimant's rights to a fair hearing at common law and/or under Article 6(1) regardless of how the inquiry proceeds and its outcome. That proposition was said to rest on (a) the assertion of a principle of law to the effect that in civil proceedings it will always be unfair to rely, in support of serious allegations, on hearsay evidence, if the witness could reasonably be brought before the tribunal and (b) an assertion of fact that the substance of the FTPP's findings in respect of Witness A was that there was no good reason why he should not be called.

18. As to (a), the GMC submitted that there is no such rule of law and that the fairness of the process is not to be judged in advance by reference to such absolutes, but rather by how the hearsay evidence is treated in the context of the proceedings as a whole. A challenge at this stage was inappropriate since it was not inevitable that proceedings would be unfair whether as a matter of domestic law or by virtue of Article 6(1). The remedy, if there were in the event unfairness, would lie in statutory appeal. The Claimant's challenge was a pre-emptive strike against a potential unfairness that was as yet entirely speculative.

19. Although that argument was directed principally to the question whether permission to pursue a claim for judicial review should be granted, the GMC maintained the submission before this Court at the substantive hearing of the Claimant's claim for judicial review. It was submitted that a challenge would prove entirely unnecessary if the FTPP finds in favour of the Claimant. Reliance was placed on the GMC's concession that its case was weakened by its reliance on Witness A's hearsay evidence and the FTPP's recognition in its Determination that it was "fully aware of the diminished value of, and the prudence needed to be borne in mind when relying on, hearsay evidence".

20. Reliance was also placed on what was said to be the endorsement by the Court of Appeal in *R (Mahfouz) v General Medical Council* [2004] EWCA Civ 233 at paragraph 44 of the general principle that it is preferable for proceedings to take their course and for a challenge to validity to be taken by way of appeal at the end. Although in that case the Court of Appeal considered that it was right that the proceedings of the GMC's professional conduct committee should have been adjourned to allow the Claimant's judicial review application, brought on grounds of apparent bias, the GMC submitted that only two of the factors relied on by the Court of Appeal in that case as justifying a departure from the general course were relevant to these proceedings, namely the importance of the issue and the alleged damage to the Claimant's reputation. As to the former the GMC submitted that the Claimant did not rely on that as a basis for bringing the application now and that it is not in itself a sufficient basis for the matter to be determined now rather than (if at all) at the

conclusion of the proceedings. As to the latter the GMC submitted that there can be no general rule that a risk to reputation justifies a stay of proceedings pending challenges to procedural decisions.

21. In any event the GMC submitted that the Claimant's contention presupposed that any damage to his reputation would be caused during the proceedings, which was to prejudge the question of what orders the FTPP might make as to privacy or publicity for the evidence and allegations. In addition the GMC submitted that the assertion that any damage to the Claimant's reputation caused in the meantime would be irremediable went too far. If the FTPP dismissed the allegations that would serve to vindicate the claim. If the FTPP upheld the allegations, a statutory appeal if successful would achieve the same end.

22. As to (b) the GMC submitted that the Claimant overstated the true effect of the FTPP's findings of fact. In particular the GMC submitted that the Claimant was wrong to submit that the FTTP found as a matter of fact that there was "no good reason why Witness A could not give live evidence to the FTPP". Moreover the Claimant ignored the fact that the FTPP recorded that the MPS "stands by the conclusion that there is a real and credible, if ill-defined, risk to Witness A" and made a finding on the evidence that in relation to the specific threat "there have been unusual events, which may be open to a sinister interpretation and have caused concern."

23. The GMC submitted that if, contrary to the Claimant's case, serious allegations **can** as a matter of law fairly be advanced in civil proceedings such as these on the basis of hearsay evidence even if the witness could reasonably be brought before the tribunal, then the present claim must fail.

24. Next the GMC submitted that there were two reasons why it did not follow from a rejection of the GMC's submission that the criminal law gateways under sections 114 and 116 of the 2003 Act would be satisfied in criminal proceedings that a decision to admit the evidence under Rule 34 was unlawful or irrational. The first was that, as the FTPP were advised by its Legal Assessor, the exercise conducted in considering the criminal gateways is not necessarily the same as the exercise in considering fairness under Rule 34(1). The former has to be considered in the context of criminal proceedings, the latter in the context of a regulatory function of a Fitness to Practise hearing which includes the protection of patients, the setting and upholding of professional standards, and maintaining public confidence in the profession. The second related to the different standards of proof applicable to any findings of fact made for the distinct purposes of performing a judgment as to whether the case falls within either of the gateways in section 114 or 116 and forming a judgment as to whether it would be fair to admit the hearsay evidence under Rule 34(1) and desirable under Rule 34(2). The former is the criminal standard of proof, the latter the civil standard of proof. Thus it was submitted that an analysis of facts for the purpose of Rule 34 is not necessarily the same exercise as is conducted for the purposes of sections 114 and 116 of the 2003 Act so that there can be no prior assumption that a factual finding made under section 114 or 116 will be decisive for the purposes of Rule 34.

25. The GMC accepted that the 2004 Rules do not contain any direct equivalent of section 125 of the 2003 Act. The Claimant submitted that if the hearsay evidence were to be

admitted the process would therefore lack the safeguard available in criminal proceedings where hearsay evidence is admitted whereby pursuant to section 125 the judge is required to direct an acquittal or discharge the jury if satisfied at any time after the close of the prosecution case that the prosecution hearsay evidence is so unconvincing that a conviction would be unsafe.

26. However, the GMC submitted that not only is the FTPP master of its own process but Rule 17(g) specifically allows it to stop the case at the end of the prosecution evidence and before the defence opens its case and adduces evidence if it finds the prosecution evidence insufficient to prove the facts or amount to impairment. The GMC submitted that Rule 17(g) is capable of functioning as an equivalent to section 125 in a case where the GMC's case rests largely on hearsay evidence. In any event the GMC did not accept that the absence of safeguards equivalent to those that exist in criminal proceedings would render the prospective Fitness to Practice hearing unfair. That is because in civil proceedings heard without a jury a judge should rarely, if ever, entertain a submission of a case to answer without putting the defendant to his election whether or not to call evidence and if such a submission is made the court is entitled to draw adverse inferences if a defendant, having material evidence to give, does not adduce such evidence.

27. In this case if the hearing proceeds on the basis of the hearsay evidence neither the way the proceedings will develop nor the outcome are by any means predetermined. The Claimant might persuade the FTPP that the hearsay evidence is not of sufficient cogency to support findings against him. He might persuade the FTPP to apply Rule 17(g) and stop proceedings at "half time". He might give evidence which the FTPP finds outweighs the cogency of the hearsay evidence against him. Alternatively the hearsay evidence may be assessed as having real weight and if the Claimant gives evidence which is found wanting or fails to give evidence the FTPP may reach conclusions adverse to him on some or all of the charges.

28. Next the GMC submitted that fairness in professional conduct proceedings for the purposes of Rule 34 does not necessarily mean exactly the same thing as fairness in criminal proceedings for the purpose of the "interests of justice" gateway in section 114(1)(d). The law envisages that the requirements of fairness may differ in a criminal and a non-criminal context. That, it was submitted, is apparent from the terms of Article 6 itself, as confirmed by the European Court of Human Rights in *Dombo Beheer v The Netherlands* (1994) 18 EHRR 213 at paragraph 32:

> "The requirements inherent in the concept of 'fair hearing' are not necessarily the same in cases concerning the determination of civil rights and obligations as they are in cases concerning determination of a criminal charge. This is borne out by the absence of detailed provisions such as paragraphs 2 and 3 of Article 6 applying to cases of the former category. Thus, although these provisions have a certain relevance outside the strict confines of criminal law, the Contracting States have greater latitude in dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases."

29. Reliance was also placed on the statement by the Court of Appeal in *Stern* that the issue of fair trial is one that must be considered in the round having regard to all

relevant factors including, in that case, the fact that disqualification proceedings are not criminal proceedings and are primarily for the protection of the public (at 2258 B). The GMC defended the rationality of the FTPP's decision that it would be fair to admit the hearsay evidence on the basis that it balanced the Claimant's submissions against a number of considerations weighing in favour of admitting the evidence. Those factors were the FTPP's duty to the public interest, the means by which the Claimant could challenge the evidence, the fact that it was a professional Panel able to determine the weight placed on the evidence, the diminished value of the evidence (as accepted by the GMC) and the regulatory nature of the proceedings.

30. In addition the GMC submitted that the following matters support the rationality of the FTPP's decision on fairness. First the FTTP referred to the evidence of Witness Z about the circumstances in which the hearsay evidence was made and the apparent reliability of Witness A and found Witness Z to be an honest and credible witness on that issue. Second the Claimant has not yet advanced any reason why the evidence of Witness A is or even might be inherently unreliable by reason, for example, of his characteristics or the relationship between him and the Claimant. Nor has any improper motive ever been attributed to Witness A. That was said to render somewhat hollow the Claimant's protestations that it has not been and will not be possible to explore with Witness A the possible reasons why he has made the allegations against the Claimant. Third if there is anything to suggest that Witness A's hearsay evidence is for some reason unreliable that can be put before the FTPP during a substantive hearing alongside any other evidence advanced by the Claimant.

31. The GMC submitted that there is no general rule to the effect that hearsay evidence cannot be fairly admitted where the evidence is the only evidence in support of serious allegations and where there is no good reason why the witness cannot give live evidence. The GMC relied on two decisions in the Court of Appeal and a decision of Toulson J, as he then was, as authority for the proposition that the English courts have rejected a general presumption of unfairness in certain types of case or a general pre-emptive rule as to the standards required for a hearing to be fair. See *NMC v Ogbonna* [2010] EWCA Civ 1216 at paragraph 25, *Fleurose v SFA* [2001] EWCA Civ 2015 at paragraph 14 and *R (SS) v Knowsley NHS Primary Care Trust* [2006] Lloyds Med Rep 123 at paragraph 82. I comment those authorities in the main body of the judgment. As to *Bushell*, the GMC pointed out that Lord Edmund-Davies from whose speech the Claimant relied on the extract referred to above, dissented from the view followed by the other four members of the House of Lords. He took the view that failure to allow cross-examination of a witness at a planning inquiry was unfair on the basis that natural justice required that the objectors at the inquiry "be allowed to cross-examine witnesses called for the other side on all relevant matters". All the other Law Lords rejected that view.

32. As to the Irish authorities relied on by the Claimant, the GMC submitted that they are of no assistance since insofar as they purport to set out statements of principle which are contradicted by the approach adopted in the English case law they are not even persuasive. Thus, it was said, in *Borges v Fitness to Practise Committee of the Medical Council* [2004] 1IR 103, the Irish Supreme Court acknowledged that the conclusions it reached on the importance of oral evidence were contradicted by the approach taken in the English courts. The hearsay evidence, the admission of which was held by the Irish Supreme Court to be unlawful, was evidence which would on

the face of it have been admissible in criminal proceedings in this jurisdiction pursuant to section 116(2)(c) of the 2003 Act on the basis of there being a witness outside the jurisdiction whose attendance it was not reasonably practicable to secure.

33. As to Article 6, the GMC repeated its submission that intervention by the court at this interlocutory stage is premature. The existence of a statutory right of appeal meant both that fairness had to be looked at, not at the interlocutory stage in isolation but having regard to the Claimant's right of appeal in the event of an adverse substantive finding by the FTPP and also that any question of unfairness did not arise and could not be assessed until the exhaustion of the Claimant's rights under the proceedings including appeal. As to the content of Article 6(1) the GMC submitted the Claimant had not identified a single case where any court has found that Article 6(1) was contravened by the admission of hearsay evidence in disciplinary proceedings. In *Stern* and *DC, HS, AD v UK* [2000] BCC 710, the closest comparable cases, the courts rejected the suggestion that the relevant evidence was unfair. In the latter case, the ECHR indicated that it could not see any unfairness in the use of relevant hearsay evidence in director disqualification proceedings in the cases before it.

34. Reliance was placed on the decision of the Supreme Court in *R v Horncastle* [2009] UKSC 14; [2010] 2 AC 373 at paragraphs 106-107 which rejected the submission that Article 6(3)(d) would be breached in a criminal case if a conviction were based solely or to a decisive extent on hearsay evidence. The House of Lords also concluded in *R (McCann) v Crown Court of Manchester* [2002] UKHL 39; [2003] 1 AC 787 that the admission of hearsay in ASBO cases is compatible with the fair balance that Article 6(1) requires the State to strike. There are sufficient safeguards, it was submitted, inherent in the FTPP process such that the proposition that Article 6(1) precludes the FTPP from considering whether to find serious charges made out against a practitioner on the sole or decisive basis of hearsay evidence should be rejected.

Lord Justice Laws:

I agree.