Neutral Citation Number: [2021] EWHC 1692 (Admin)

Case No: CO/4878/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 June 2021

Before :

MR JUSTICE JOHNSON

- -

Between :

THE PROFESSIONAL STANDARDS AUTHORITY FOR HEALTH AND SOCIAL CARE	**Appellant**
- and -	
(1) THE GENERAL PHARMACEUTICAL COUNCIL **(2) MR NAZIM ALI**	**Respondents**

- -
- -

Fenella Morris QC (instructed by Browne Jacobson LLP) for the Appellant
Helen Fleck (in house counsel) for the First Respondent
David Gottlieb (instructed by Arani Solicitors) for the Second Respondent

Hearing date: 9 June 2021

- -

Approved Judgment

Mr Justice Johnson:

1. Mr Nazim Ali is a pharmacist registered with the General Pharmaceutical Council ("the Council"). Disciplinary proceedings were brought against him, alleging that he had used antisemitic and offensive words during a public speech. A Fitness to Practise Committee ("the FPC") found that the words he had used had not been antisemitic, but that they had been offensive, that this amounted to misconduct, that Mr Ali's fitness to practise was impaired, and that he should be given a warning.

2. The Professional Standards Authority for Health and Social Care ("PSA") appeals against this decision and argues that the FPC took the wrong approach when deciding whether the words were antisemitic. Instead of considering the objective meaning of the words in their context, it took account of (a) Mr Ali's subjective intention, and (b) Mr Ali's good character as being factors relevant to an assessment of the meaning of the words. Moreover, it considered individual phrases in isolation without taking account of their cumulative impact. The PSA contends that if it had taken the correct approach the FPC might well have decided that the words were antisemitic and this might have resulted in a more stringent sanction. The PSA argues that the Court should allow the appeal and remit the case back to the FPC for re-determination.

3. The Council agrees that the FPC erred in its approach to deciding whether or not the comments made by Mr Ali were antisemitic, in that it took into account both his stated intention and his character, rather than taking a purely objective approach.

4. Mr Ali resists the appeal. He contends that the FPC was entitled to take account of Mr Ali's intent in order to determine the "'objective' true meaning" of the words he used. In any event, even if the words had been antisemitic, the sanction that was imposed was appropriate in all the circumstances, so there would be no purpose in remitting the case back to the FPC.

The facts

5. Mr Ali is the managing partner of Chelsea Pharmacy in London.

6. On 18 June 2017 Mr Ali attended the Al Quds Day rally, an event which is held to demonstrate support for Palestinian rights. Mr Ali led the rally and used a loudhailer. In the course of a long speech during the rally, he made the following 4 separate comments (with lettering added):

> "a. It's in their genes. The Zionists are here to occupy Regent Street. It's in their genes, it's in their genetic code.
>
> b. European alleged Jews. Remember brothers and sisters, Zionists are not Jews.
>
> c. Any Zionist, any Jew coming into your centre supporting Israel, any Jew coming into your centre who is a Zionist. Any Jew coming in to your centre who is a member for the Board of Deputies, is not a Rabbi, he's an imposter.

> d. They are responsible for the murder of the people in Grenfell. The Zionist supporters of the Tory party."

7. An allegation was made against Mr Ali that he had thereby said things that were antisemitic (charge 2a) and offensive (charge 2b). The matter was referred to the FPC. Mr Ali admitted using the words, and admitted that they were offensive. He contended that he did not have any antisemitic intent and the comments were not antisemitic. A hearing took place from 26 October 2020 to 30 October 2020. The FPC made its determination on 3-5 November 2020. It found that the comments made by Mr Ali were not antisemitic and so dismissed charge 2a. Nevertheless, it concluded that Mr Ali's use of the words, which he admitted were grossly offensive, amounted to serious misconduct and that his fitness to practise was thereby impaired. It issued Mr Ali with a warning.

The FPC's decision that the words were not antisemitic

8. The FPC took account of a dictionary definition of "antisemitic": "hostile to or prejudiced against Jewish people." It also took account of the working definition of antisemitism provided by the International Holocaust Remembrance Alliance:

> "Antisemitism is a certain perception of Jews, which may be expressed as hatred towards Jews. Rhetorical and physical manifestations of antisemitism are directed towards Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities."

9. It also made reference to examples provided by the International Holocaust Remembrance Alliance ("IHRA"):

> "Manifestations might include the targeting of the state of Israel, conceived as a Jewish collectivity. However, criticism of Israel similar to that levelled against any other country cannot be regarded as anti-Semitic. Antisemitism frequently charges Jews with conspiring to harm humanity, and it is often used to blame Jews for "why things go wrong". It is expressed in speech, writing, visual forms and action, and employs sinister stereotypes and negative character traits. Contemporary examples of antisemitism … taking into account the overall context, include, but are not limited to:
> • …
> • Making mendacious, dehumanizing, or stereotypical allegations about Jews as such or the power of Jews as collective – such as, especially but not exclusively, the myth about a world Jewish conspiracy or of Jews controlling the media, economy, government or other societal institutions.
>
> • Accusing Jews as a people of being responsible for real or imagined wrongdoing committed by a single Jewish person or group, or even for acts committed by non-Jews.
> • …

> • Holding Jews collectively responsible for the actions of the state of Israel."

10. The FPC accepted the following advice which was provided by its legal advisor:

> " … the Committee was advised to consider the Registrant's comments in the context in which they were said, having regard to all the relevant circumstances … The Committee was advised to take into account all the oral and documentary evidence, the two video footages viewed, and the character references submitted on behalf of the Registrant. It was for the Committee to decide what weight to attach to these references, taking into account everything it had heard about the Registrant and his evidence. The Committee was reminded of the Registrant's good character and that it was relevant at this stage of the proceedings."

11. The test applied by the FPC was whether a reasonable person with all the relevant information would consider the words to be antisemitic:

> "The "reasonable person" in the Committee's mind therefore is someone who is in possession of all the facts and knows the context; someone with no particular characteristics … This reasonable person therefore would know what a Zionist is and how that is defined; would know the IHRA definition of anti-Semitism and its associated guidance; would know the dictionary definition of "anti-Semitic" etc. This reasonable person would have no strong views on the Israel/Palestinian question; would not otherwise be unduly sensitive; would be open-minded, balancing what they had heard and seen before reaching a conclusion. … "

12. The FPC said:

> "222. The Committee noted the context of the Al Quds day rally: it was a pro-Palestine, anti-Zionist rally, at which there was a counterdemonstration by supporters of the State of Israel. The Committee concluded that most reasonable people knowing this would not be surprised to hear the term 'Zionists' used that day by the Registrant. It would only be thought anti-Semitic by most reasonable people if they believed additionally that when using this term what actually was meant was 'Jews'. However the evidence was that the Registrant had repeatedly during the rally used words to the effect that 'Zionists' and 'Jews' must not be conflated …
>
> 223. The Committee then looked at the use of 'Zionist' in the context of the other comments …, particularly the use of the words 'genes' and 'genetic code' … <u>The Registrant stated that when using the expressions 'genes' and 'genetic code' these</u>

were figures of speech, in the same way that … people say that scoring goals is in a striker's blood.

224. The Committee concluded that most reasonable people would consider the use of those words highly ill-advised, and certainly readily capable of being misinterpreted. However, the Committee, bearing in mind his good character, believed the Registrant's explanation … Therefore the Committee concluded that most reasonable people having heard and seen the Registrant's evidence would not think it more likely than not that that comment … was anti-Semitic, in context of an anti-Zionist rally…

226. … the Registrant had not been able to explain what the phrase "European alleged Jews" connoted … The Committee concluded that most reasonable people would not find anti-Semitic a part of a comment they could not understand when it appeared to make no sense …

227. The Committee considered that this phrase was open to two possible interpretations. Either it was a statement de facto denying Jewry to anyone who was a Zionist, i.e. if you are a Zionist you cannot be a Jew. The Registrant himself had accepted that denying Jewry to someone of the Jewish faith who was a Zionist would be anti-Semitic …

228. However, it could equally be a statement to the effect that Zionists and Jews should not be conflated. Given that the Registrant had made other statements on the rally emphasising the distinction between Zionists and Jews the Committee concluded that most reasonable people would not think that was an anti-Semitic phrase in this context. …

230. … The Registrant's explanation of this comment was that he was talking about who should be allowed into mosques and Islamic centres as legitimate representatives of the Jewish faith as part of interfaith community dialogue: Jews who were Zionists were not welcome in that regard. …

232. … whilst many reasonable people could indeed find the use of the term "imposter" to describe a Rabbi as straightforwardly anti-Semitic, nevertheless in the context of the day and the explanation provided by the Registrant, it concluded that most reasonable people would not conclude that it was anti-Semitic. …

234. … the Registrant was referencing the Grenfell Tower tragedy …

235. The GPhC position was that the Registrant was here playing on or deploying anti-Semitic tropes … …

> 240. These instances [the Grenfell remarks] of the use of the word "Zionist" are consistent with the definition which distinguishes it from Jews …
>
> 241. … the Committee concluded that most reasonable people would not find the comment to be anti-Semitic."
> [Emphasis added]

Statutory framework

13. Section 60 of the Health Act 1999 provides for the making of an Order in Council for the regulation of pharmacists. Article 51 of the Pharmacy Order 2010, made under that power, makes provision in respect of the impairment of fitness to practise:

> "**51 Impairment of fitness to practise**
>
> (1) A person's fitness to practise is to be regarded as "impaired" for the purposes of this Order only by reason of—
>
> (a)misconduct;
> …
> (2) The demonstration towards a patient or customer, or a prospective patient or customer, by a pharmacist or pharmacy technician of attitudes or behaviour from which that person can reasonably expect to be protected may be treated as misconduct for the purposes of paragraph (1)(a).
> …
> (4) A person's fitness to practise may be regarded as impaired because of matters arising—
>
> (a)outside Great Britain; and
>
> (b)at any time.
> …"

14. Article 52 makes provision for allegations of impairment to be referred to the FPC, which is then, by article 54, required to determine if the person's fitness to practise is impaired.

15. The PSA has a right to refer to the court a final decision of the FPC not to take any disciplinary measure under article 54 if it considers that the decision is not sufficient for the protection of the public – see section 29 National Health Service Reform and Health Care Professions Act 2002:

> "**29 Reference of disciplinary cases by Authority to court**
>
> (1) This section applies to—
>
> (a) a direction of the Fitness to Practise Committee of the General Pharmaceutical Council under article 54 of the Pharmacy Order 2010 (consideration by the Fitness to Practise

Committee) or under section 80 of the Medicines Act 1968 (power to disqualify and direct removal from register),

…

(2) This section also applies to—

(a) a final decision of the relevant committee not to take any disciplinary measure under the provision referred to in whichever of paragraphs (a) to (h) of subsection (1) applies,

…

(3) The things to which this section applies are referred to below as "relevant decisions" .

(4) Where a relevant decision is made, the Authority may refer the case to the relevant court if it considers that the decision is not sufficient (whether as to a finding or a penalty or both) for the protection of the public.

(4A) Consideration of whether a decision is sufficient for the protection of the public involves consideration of whether it is sufficient—

(a) to protect the health, safety and well-being of the public;

(b) to maintain public confidence in the profession concerned; and

(c) to maintain proper professional standards and conduct for members of that profession.

(5) In subsection (4)…, the "relevant court"–

…

(c) in the case of any other person, means the High Court of Justice in England and Wales.

…

(7) If the Authority does so refer a case—

(a) the case is to be treated by the court to which it has been referred as an appeal by the Authority against the relevant decision (even though the Authority was not a party to the proceedings resulting in the relevant decision), and

(b) the body which made the relevant decision (as well as the person to whom the decision relates) is to be a respondent.

(7A) In a case where the relevant decision is taken by a committee, the reference in subsection (7)(b) to the

body which made the decision is to be read as a reference to the body of which it is a committee.

(8) The court may—

(a) dismiss the appeal,

(b) allow the appeal and quash the relevant decision,

(c) substitute for the relevant decision any other decision which could have been made by the committee or other person concerned, or

(d) remit the case to the committee or other person concerned to dispose of the case in accordance with the directions of the court…

…"

16. An appeal under section 29 is governed by CPR part 52. CPR 52.21(3) states:

> "The appeal court will allow an appeal where the decision of the lower court was—
>
> (a) wrong; or
>
> (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court."

17. The jurisdiction afforded by section 29 of the 2002 Act was considered by the Court of Appeal in *Ruscillo v Council for the Regulation of Health Care Professionals* [2014] EWCA Civ 1356. Lord Phillips MR set out the approach that should be taken by the court when a case is referred under section 29 – see at [69]-[73]:

> "69. We have concluded that the concerns of the Council which can entitle it to refer a case to the High Court are (i) that the decision in relation to the imposition of a penalty is unduly lenient and (ii) that it is desirable in the interests of the public to take action under the section. Where a reference is made, what is the task of the Court when considering the reference? The Act does not deal with this, save for the important provision that the reference is to be treated as an appeal by the Council against the relevant decision. Thus the Court is concerned with the decision as to the penalty.
>
> 70. If the Court decides that the decision as to the penalty was correct it must dismiss the appeal, even if it concludes that some of the findings that led to the imposition of the penalty were inadequate. No doubt any comments made by the Court about those findings will receive due consideration by the disciplinary tribunal if, at a later stage, it has occasion to review the standing of the practitioner.

> 71. If the Court decides that the decision as to penalty was 'wrong', it must allow the appeal and quash the relevant decision, in accordance with CPR 52.11(3)(a) and section 29(8)(b) of the Act. It can then substitute its own decision under section 29(8)(c) or remit the case under section 29(8)(d).
>
> 72. It may be that the Court will find that there has been a serious procedural or other irregularity in the proceedings before the disciplinary tribunal. In those circumstances it may be unable to decide whether the decision as to penalty was appropriate or not. In such circumstances the Court can allow the appeal and remit the case to the disciplinary tribunal with directions as to how to proceed, pursuant to CPR 52.11(3)(b) and section 29(8)(d) of the Act.
>
> 73. What are the criteria to be applied by the Court when deciding whether a relevant decision was 'wrong'? The task of the disciplinary tribunal is to consider whether the relevant facts demonstrate that the practitioner has been guilty of the defined professional misconduct that gives rise to the right or duty to impose a penalty and, where they do, to impose the penalty that is appropriate, having regard to the safety of the public and the reputation of the profession. The role of the Court when a case is referred is to consider whether the disciplinary tribunal has properly performed that task so as to reach a correct decision as to the imposition of a penalty. Is that any different from the role of the Council in considering whether a relevant decision has been 'unduly lenient'? We do not consider that it is. The test of undue leniency in this context must, we think, involve considering whether, having regard to the material facts, the decision reached has due regard for the safety of the public and the reputation of the profession."

Discussion

18. The allegation made against Mr Ali is that he used the specified words, and that those words are offensive and antisemitic. It was for the FPC to consider that allegation and make findings of fact – see rule 31(10) of the General Pharmaceutical Council (Fitness to Practise and disqualification etc) Rules 2010.

19. The underlying facts (ie the language that was used by Mr Ali) could have given rise to a slightly different form of allegation. It could, for example, have been alleged that Mr Ali had been intentionally offensive. Or it could have been alleged that he had intended to cause offence. Or it could have been alleged that he had been intentionally antisemitic. Or it could have been alleged that he had intended his words to have been interpreted as being antisemitic. Any of these allegations would have required an assessment of Mr Ali's intention.

20. The allegation was, however, simply that the words used by Mr Ali were offensive and antisemitic. In order to find whether this allegation was established it was necessary for the FPC to consider the meaning of the words so as to determine

whether they were offensive, and whether they were antisemitic. This does not appear to be in dispute.

21. There are different legal contexts in which it is necessary to determine the meaning of words. These include contractual interpretation (see eg *Rainy Sky v Kookmin Bank* [2011] UKSC 50 [2011] UKSC 50 *per* Lord Clarke at [21]), and claims for defamation (see eg *Koutsogiannis v Random House Group Ltd* [2019] EWHC 48 (QB) [2020] 4 WLR 25 *per* Nicklin J at [11]-[12]). The precise canons of interpretation, and their application, differ according to the context. An underlying and consistent theme is that the assessment of meaning is an objective test that does not depend on the intention of the author or speaker. The intention of the author or speaker is logically distinct from the meaning of the words. The two may align, or they may not. Humpty Dumpty's approach ("When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less" – Lewis Carroll's Through the Looking Glass (1872)) is not how the courts assess meaning – see *Liversidge v Anderson* [1942] AC 206 *per* Lord Atkin (dissenting) at 245. Thus, in *Loveless v Earl* [1999] EMLR 530 CA Hirst LJ said at 538 (in the context of defamation):

> "Meaning is an objective test, entirely independent of the defendant's state of mind or intention. Malice is a subjective test, entirely dependent on the defendant's state of mind and intention."

22. Here, the FPC sought to apply an objective test. That is the advice it had been given (see paragraph 10 above, omitting the last sentence of the quotation) and the test that it articulated (see paragraph 11 above) is an objective test. It is not suggested by any of the parties that this was wrong.

23. I agree, however, with Ms Morris QC for the Appellant, and Ms Fleck for the Council, that in seeking to apply an objective test it erred by taking account of what it considered to be Mr Ali's intention (see the underlined words in paragraphs 223, 224 and 232 of its determination as set out at paragraph 12 above).

24. Mr Gottlieb argued that because there is no authoritative legal test for the approach that should be taken by a regulatory body when seeking to determine the meaning of allegedly offensive language used by a registrant, it was open to it to adopt its own approach and to take account of what the registrant intended. I respectfully disagree. The obligation of the FPC was to make findings of fact as to the allegation that had been made against Mr Ali. The allegation was that the comments were antisemitic. The allegation required a focus on the comments themselves, not on Mr Ali's intent.

25. Mr Gottlieb further argued that the consequence of taking a purely objective approach is that it would be more difficult to bring cases of antisemitism against those who positively intend to use antisemitic language but who speak in a sufficiently ambiguous or coded way such that the language is not objectively antisemitic. Again, I disagree. Leaving aside that an objective interpretation of language may accommodate the possibility that coded language has been used (particularly where the code is pretty transparent), in such a case an allegation could be put before the FPC that a person has used language which they had intended to be antisemitic. If that allegation is advanced then the focus of the FPC will be on the speaker's intent rather

than the objective meaning of the language. That is not, however, the allegation that was put before the FPC in this case.

26. Mr Gottlieb also argued that, on this approach, words used by a professional person could be labelled objectively antisemitic even if it is shown beyond doubt that the person had not intended to be antisemitic. I agree that is the consequence, but I see no difficulty with it. If the words used are antisemitic then there is nothing objectionable in them being labelled antisemitic. If the person had not intended that meaning then that might be relevant to other issues, including any required remediation or sanction.

27. Mr Ali points out that he performs as a stand-up comedian. He says "[t]his may be relevant because it shows any previous experience of making unguarded comments that may be perceived as offensive (or even racist) would have been before a supportive audience that had come to be entertained rather than in a political context." Evidence that other audiences, in other contexts, have found Mr Ali's comments entertaining is not, however, relevant to the assessment of the meaning of the language he used.

28. The FPC therefore erred in the approach it took to assessing the allegation made against Mr Ali.

29. For similar reasons, it erred in taking account of Mr Ali's character. His character was relevant insofar as it was necessary to assess Mr Ali's evidence. The FPC was entitled to take account of his good character when assessing the credibility of his evidence. Although his evidence as to his intent was not relevant to the meaning of the words, his evidence as to the general context of the rally was relevant. As a matter of generality, it is permissible to take account of a person's character when deciding whether it has been proved that they have engaged in misconduct. Here, however, the critical issue was the meaning of the words that Mr Ali admitted using. The fact that Mr Ali has no previous convictions or misconduct findings recorded against him is not relevant to an assessment of the objective meaning of the words he used.

30. The FPC also erred in not taking account of the cumulative impact of the language used by Mr Ali. It (rightly) took account of the overall context and nature of Mr Ali's speech when seeking to interpret each of the four specific comments in isolation. It did not, however, separately take account of the meaning of those comments when they are considered as a whole. It should have done so. This requires consideration of how one or more of the individual comments might inform the meaning to be attached to the others.

31. In some respects the case against Mr Ali is that his language was straightforwardly and clearly antisemitic ("Any Jew coming in to your centre who is a member for the Board of Deputies, is not a Rabbi, he's an imposter."). In other respects, the allegation was that the word "Zionist" was, in context, to be taken as a synonym for "Jew", and, on that basis, the language was antisemitic. In order for the FPC to test this, it was relevant to take account of the totality of the comments made by Mr Ali. The FPC did take account of his speech as a whole (and, in particular, the fact that he had said that Zionists were not to be conflated with Jews). It did not, however, separately take into account the cumulative effect of the four remarks that were here under consideration. They included remarks that use the word "Zionist" in a context that does not appear to have anything to do with the state of Israel (and so in a context where the word does

not make a great deal of sense if it is taken literally). That is relevant when assessing whether the Council had made out its allegation that the remarks, taken as a whole, were antisemitic.

32. I therefore agree that the FPC erred in each of the respects suggested in the grounds of appeal. It wrongly took account of Mr Ali's intention when assessing whether his language was objectively antisemitic. It wrongly took account of his character when assessing whether his language was objectively antisemitic. And it erroneously failed to assess whether the remarks, considered cumulatively, were objectively antisemitic, as opposed to whether each remark in isolation was antisemitic.

33. This does not mean that Mr Ali's intention and character are entirely irrelevant to other questions that the FPC had to consider. Those matters are relevant to the question of misconduct and impairment and sanction. However, each of those matters only arises for consideration once the FPC has made findings of fact on the underlying allegation.

34. The wrong approach taken to the question of whether the allegation against Mr Ali was established (and to what extent it was established) amounts, in my judgment, to a "serious procedural or other irregularity in the proceedings in the lower court" within the meaning of CPR 52.21(3)(b) (see paragraph 16 above).

35. The underlying allegation against Mr Ali dates back four years and relates to events when he was not acting as a pharmacist. He recognises that his language was, at least, offensive, and he has expressed remorse. There is no suggestion that he has repeated these types of comment since. I am, in principle, sympathetic to the suggestion that, if it could be shown that the ultimate sanction would not be different if the case were remitted back to the FPC I should, instead, simply dismiss the appeal – see *Ruscillo* at [70].

36. Mr Ali argues that even if his language is found to be antisemitic a warning would be appropriate. He points to the fact that that was the sanction suggested by the Council in its opening submissions in the event that it was accepted that Mr Ali had used antisemitic language but had shown appropriate insight.

37. This case does, however, engage significant questions of public confidence. It is vitally important that all sections of the community are able to place trust and confidence in pharmacists. As Ms Morris QC observed, that is vividly illustrated by the current pandemic, and the need that all communities are able to have confidence in advice given by pharmacists and other professionals about the risks and benefits of vaccination. Public confidence is an important consideration when considering sanction (see section 29(4A)(b) of the 2002 Act). I accept the submission advanced by Ms Morris QC that the FPC is far better placed than the court to make an assessment as to the appropriate sanction to be imposed.

38. I therefore remit the case to the FPC for reconsideration. In determining whether the Council has established that the remarks are antisemitic, the FPC should assess the objective meaning of the remarks applying the test that it previously identified (as set out at paragraphs 10 and 11 above, but omitting the last sentence of the quote at paragraph 10). In assessing the meaning of the words it should take account of their meaning taken as a whole, and it should not take account of:

(1) Mr Ali's subjective intention;

(2) Mr Ali's good character;

(3) The reaction of other audiences in other contexts.

Outcome

39. The appeal is allowed. The order of the FPC that charge 2(a) was not proved is quashed, as are its consequential findings relating to misconduct, impairment and sanction. Charge 2(a) is remitted to the FPC to determine afresh.