Neutral Citation Number: [2019] EWCA Civ 1127

Case No: C1/2017/3073

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**
**Rowena Collins Rice (Sitting as a Deputy High Court Judge)**
**Insert Lower Court NC Number Here**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/07/2019

**Before:**

**LORD JUSTICE IRWIN**
**LORD JUSTICE HADDON-CAVE**
and
**SIR JACK BEATSON**

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**Between:**

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| **THE QUEEN (on the application of NGOLE)** | **Appellant** |
| **- and -** | |
| **THE UNIVERSITY OF SHEFFIELD** | **Respondent** |

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**Paul Diamond** (instructed by **Direct Access**) for the **Appellant**
**Sarah Hannett** (instructed by **Pinsent Masons LLP**) for the **Respondent**

Hearing dates: 12-13 March 2019

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# Approved Judgment

## Introduction

1. This case concerns the expression of religious views, on a public social media platform, disapproving of homosexual acts, by a student, enrolled on a two-year MA Social Work course at the University of Sheffield ("the University").

2. The social work profession is regulated by the Health and Care Professions Council ("HCPC"), a statutory body established by the Health and Social Work Professions Order 2001 SI 2002 No. 254 ("HSWPO") to regulate a range of professional services provided in the health and social work sectors. The regulatory framework extends to students like the Appellant, who are on accredited courses which are not purely academic courses but ones which, on successful completion, lead to registration and professional practice as social workers. The HCPC's Code of Conduct applies to practitioners, providers of accredited courses and students, and includes guidance as to the use of social media. The regulatory framework is set out in detail below.

3. Upon being notified of the postings upon social media, the University, the Appellant's course provider, embarked upon disciplinary proceedings and took the decision to remove the Appellant from his course, on fitness to practise grounds. The Appellant sought judicial review of this decision on the basis that (i) it was an unlawful interference with his rights under Articles 9 and 10 of the European Convention on Human Rights ("ECHR"), as given effect by the Human Rights Act 1998, and (ii) the decision was arbitrary and unfair. Ms Rowena Collins Rice, sitting as Deputy High Court Judge, promulgated a judgment on 27 October 2017, which dismissed the Appellant's judicial review challenge. The Appellant appeals her decision.

4. This is the judgment of the Court, to which we have all contributed.

## Summary of conclusions

5. We disagree with the judge's decision and allow the appeal. The University's disciplinary proceedings were flawed in a number of respects:

   (1) The University adopted a position from the outset of the disciplinary proceedings which was untenable: namely, that <u>any</u> expression of disapproval of same-sex relations (however mildly expressed) on a public social media or other platform which could be traced back to the person making it, was a breach of the professional guidelines. The University's stance was not, however, in accordance with the relevant HCPC professional code and guidelines.

   (2) The HCPC professional code and guidelines did not prohibit the use of social media to share personal views and opinions, but simply said that the University might have to take action "if the comments posted were offensive, for example if they were racist or sexually explicit".

   (3) The Appellant immediately reacted (to what he saw as an unwarranted blanket ban by the University on him expressing his religious views in any public forum) by himself adopting a position which was equally untenable: namely, that the University had no business in interfering with his freedom of

expression and it was his right to express his religious views and he would continue to do so just as before, whatever the disciplinary consequences. The Appellant's reaction, whilst perhaps understandable, was also not in accordance with the relevant HCPC professional code and guidelines.

(4) The right to freedom of expression is not an unqualified right: professional bodies and organisations are entitled to place reasonable and proportionate restrictions on those subject to their professional codes; and, just because a belief is said to be a religious belief, does not give a person subject to professional regulation the right to express such beliefs in any way he or she sees fit.

(5) It will be apparent, therefore, that both sides adopted extreme and polarised positions from the outset, which meant that the disciplinary proceedings got off on the wrong track.

(6) At no stage, did the University make it clear to the Appellant that it was the manner and language in which he had expressed his views that was the real problem, and in particular that his use of Biblical terms such as 'wicked' and 'abomination' was liable to be understood by many users of social services as extreme and offensive. Further, at no stage did the University discuss or give the Appellant any guidance as to how he might more appropriately express his religious views in a public forum, or make it clear that his theological views about homosexuality were no bar to his practising as a social worker, provided those views did not affect his work or mean he would or could discriminate.

(7) The University quickly formed the view that the Appellant had become "extremely entrenched" and that he lacked "insight" into the effect that his actions in posting his views on social media would have. This led the University rapidly to conclude that a mere warning was insufficient and that the Appellant's fitness to practice was irredeemably impaired and, therefore, only the extreme sanction of suspension from his course was appropriate.

(8) The University failed to appreciate two matters. First, failing to appreciate that the Appellant's apparent intransigence was an understandable reaction by a student to being told something that he found incomprehensible, namely that he could never express his deeply held religious views in any manner on any public forum. Second, failing to appreciate that a blanket ban on the expression of views was not in accordance with the relevant HCPC professional code or guidance. In these senses, it was the University and its processes which could be said to lack insight.

(9) It was, in fact, the University itself which became entrenched. First, by failing even to explore the possibility of finding middle ground, despite this being suggested by Pastor Omooba, who accompanied the Appellant at the disciplinary proceedings. Second, by unfairly putting the onus entirely upon the Appellant to demonstrate that he did have "insight" and could mend his ways.

(10) The University wrongly confused the expression of religious views with the notion of discrimination. The mere expression of views on theological

grounds (*e.g.* that 'homosexuality is a sin') does not necessarily connote that the person expressing such views will discriminate on such grounds. In the present case, there was positive evidence to suggest that the Appellant had never discriminated on such grounds in the past and was not likely to do so in the future (because, as he explained, the Bible prohibited him from discriminating against anybody).

(11) The University gave different and confusing reasons for suspending the Appellant. Initially, it was said (by the Fitness to Practice Committee) that he lacked "insight" into how his NBC postings might affect his ability to carry out "his role as a social worker"; and subsequently it was said (by the Appeals Committee) that he lacked "insight" into how his NBC postings "may negatively affect the public's view of the social work profession". Further, at no stage during the process or the hearings did the University properly put either concern as to perception to the Appellant during the hearings.

(12) The University's approach to sanction was, in any event, disproportionate: instead of exploring and imposing a lesser penalty, such as a warning, the University imposed the extreme penalty of dismissing the Appellant from his course, which was inappropriate in all the circumstances.

6. For the reasons given in para 5 the disciplinary proceedings were flawed and unfair to the Appellant.

**The Facts**

7. The Appellant is a devout Christian for whom the Bible is the authoritative word of God. On 22 September 2014, he enrolled as a mature student on the MA Social Work course at the University. As explained above, successful completion of this course would have led to registration and practice as a qualified social worker. As part of his course, the Appellant had already completed one practice placement, which brought him into direct contact with service users. He was due to undertake his second placement in the second year of the course.

8. Upon enrolment on the course in September 2014, the Appellant signed a 20-point Student Entry Agreement confirming that he had accessed and read the HCPC's student guidance on standards of conduct and ethics; would strive to conform to the HCPC's expectations as set out there; at all times ensure that his behaviour does not compromise the public trust in the profession or in the University of Sheffield; not allow his views about a person's lifestyle, culture, beliefs, race, ethnicity, colour, gender, sexuality, age, social status or perceived economic status to prejudice his interaction with service users, university and practice teaching staff or colleagues; and that his conduct will reflect the standards expected of him, both as a student of the University of Sheffield and a prospective member of the social work profession. By signing the agreement, the Claimant also agreed:

> "14. My conduct will reflect the standards expected of me, both as a student at the University of Sheffield and a prospective member of the social work profession and I will be mindful of the fact that my conduct outside the programme of study may compromise my entitlement to complete the programme or to register with the HCPC."

9. It is not in dispute that the Appellant had ready access to all of the relevant HCPC and University guidance material relating to his course, to professional standards, and to fitness to practise (as to which see further below).

*The Appellant's NBC postings*

10. In September 2015, the Appellant posted a series of comments on his Facebook account about a prominent news story on MSNBC, an American news website. The story related to the imprisonment of an American registrar, Kim Davis, for contempt of the order of a US Federal District Court which resulted from her refusal to issue marriage licences to same-sex couples because of her Christian religious beliefs about same-sex marriage. The Appellant contributed around twenty posts to the MSNBC Facebook website ("the NBC postings") in response to comments by others. The Appellant's comments included statements and observations expressing views on same sex marriage and homosexuality:

> "… [S]ame sex marriage is a sin whether we accept it or not"
>
> "…Homosexuality is a sin, no matter how you want to dress it up"
>
> "…[Homosexuality] is a wicked act and God hates the act"
>
> "…God hates sin and not man"
>
> "…[O]ne day God will do away with all diseases and all suffering. He will also get rid of the devil who is the author of all wickedness. That day will surely come. But remember that He will also Judge all those who indulged in all forms of wicked acts such as homosexuality".

11. He also included a number of Biblical quotations, some of which contained strong language:

> "…If a man lies with a male as with a woman both of them have committed an abomination. Leviticus 18:22"
>
> "…Just as Sodom and Gomorrah and the surrounding cities which likewise indulged in sexual immorality and p[u]rsued sexual desire, serve as an example by undergoing a punishment of eternal fire. Jude 1."
>
> "…For this reason God gave them to dishonourable passions. For their women exchanged natural relations for those that are contrary to nature; and the men likewise gave up natural relations with women and were consumed with passion for one another; men committing shameless acts with men and receiving in themselves the due penalty for their error: Romans 1:26-28."

12. The NBC posts were brought anonymously to the attention of the University by another student. The Department of Sociological studies initiated an investigation. It

is necessary to set out the various stages of the disciplinary proceedings in some detail.

*Initial interview on 11 November 2015*

13. On 11 November 2015, the University held an interview with the Appellant. He was accompanied by a friend. The interview was conducted by David Bosworth (Chair Investigator) and Jane Laing (Investigator). There was a note taker, Kerry Milner.

14. Ms Laing advised the Appellant that she had been contacted by "a third party" regarding the NBC postings allegedly made by the Appellant. She explained that they were easily searchable on Google. The Appellant admitted that he made the posts, sought to explain their religious and theological meaning and said that he never discriminated against anybody. He said that his placement reports demonstrated that he was supportive and non-discriminatory when working with people in same sex relationships. He said if he couldn't conform to the University regulations he would rather be kicked out than not follow the Bible. He said if he was asked his views, he would have to tell people his opinion and the Bible says homosexuality is a sin.

15. Mr Bosworth said:

> "The issue is working in a Professional Practice. There may be a family who are gay and see your social media posting, they could be problematic for you. I am not saying not to hold your beliefs, but this is about regulations to behave in a certain way. The comments are incongruous with values of the Social Work profession. This is about personal conduct. I appreciate you are a devout Christian. Professional conduct on social media website[s] is a different situation."

16. When the Appellant said he would never shift from his Christian values, Mr Bosworth replied:

> "I'm not asking for this to happen. But according to the comments that you have made you are in breach of the HCPC regulations as they pertain to social media and the HCPC code of conduct as they pertain to professional and personal conduct. HCPC through The University mean that this has to be looked into formally, to ascertain whether or not there has been a breach of regulations."

17. Later in the interview, when the Appellant re-iterated that he would never discriminate, Mr Bosworth said:

> "We have to look at the conduct guidance within the HCPC. You have not tried to hide anything and thank you for your honesty and integrity. I don't think you would behave in a discriminatory way, however, you could inadvertently discriminate. The person on the receiving end of your comments could be discriminated [sic]. This is very complicated. I wish to give you every opportunity to stay on

> this course. I need to think about this and speak to [Jane Laing], to seek higher authority on the matter."

18. A "Departmental Form for Recording Fitness to Practise Case" was drawn up which stated as follows:

| | |
|---|---|
| Details of concerns (eg placement/ social media/ pattern of lack of professional behaviour/ health condition etc.) | Social media postings that indicate views of a discriminatory nature. These views are in breach of the HCPC Code of Conduct and the HCPC regulations as they apply to social media |

(The notes to the form stated that it should be placed in a prominent position in in the student's file and that it could be used as "…as the starting point for an initial meeting with a student where there are concerns about Fitness to Practice".)

*Referral to the FTP Committee*

19. On 10 December 2015, the Faculty Support Manager of the Taught Programmes Office of the University wrote to the Appellant informing him that the Head of the Department of Sociological Studies had reported "areas of concern" under the Fitness to Practice Regulations ("FTP Regulations") and his case had been referred to the Fitness to Practise Committee ("FTP Committee") which would hold a meeting to consider the concerns raised which he had a right to attend and present written or verbal evidence.

20. The Appellant replied by email on 15 December in forthright terms. It is helpful in understanding his approach to quote his response to the concerns, as follows:

> "Unfortunately I respectfully decline to attend the meeting. I would, however, appreciate if you could consider the following during the meeting:
>
> 1. That I was invited on the Facebook page to share my views on what the Bible says about homosexuality.
>
> 2. That every single word I used was from the Bible and 'not just my views' on the issue as it had been suggested.
>
> 3. That when called upon to give my views on an issue, I should be truthful at all times especially as a student social worker. It would be unethical to do otherwise.
>
> 4. That I never advocated any hate directly or indirectly towards people who are in same sex relationships. The Bible doesn't allow me to do so.
>
> 5. I never stated that people in same sex relationships should be treated differently or that they should be treated different from anyone else. The Bible never allows me to do so.
>
> 6. The only assumption made by the chair and investigating officer is that people from same sex relationship will not feel

> comfortable to approach me because of my views on homosexuality. However, I merely stated what the Bible says in the topic after I was asked to do so.
>
> 7. It was decided during the meeting that the third evidence [regarding a separate discussion on topics other than homosexuality] sent to me be ignored. I haven't received an apology for the stress I was put under. I believe this is grossly unfair. To me it highlights the issue of power and how those who are less powerful are treated in our profession and society.
>
> 8. The meeting should consider my rights as a Christian, especially my rights to be able to share my Christian views when called upon to do so, without any fear of recrimination or reprisals.
>
> 9. Also consider the impact your decision will have on religious freedom.
>
> 10. The fact that the only person who was offended about my response is a student social worker who was my friend on Facebook.
>
> 11. I currently work with young people who have family members in same sex relationships. I have always been very supportive towards them at all times. Although this also includes truthfully representing the views of God whenever I am called upon to do so.
>
> I thank you for your time and I strongly believe that God will be glorified in any decision you take on the day of the hearing. I know He will be always be my advocate in this matter."

21. On 21 December 2016, the Appellant was informed of the proposed membership of the FTP Committee panel that would hear his case, namely, Chair, Professor Jackie Marsh (Faculty Director of Learning and Teaching, School of Education), Dr Angela Fairclough (School of Clinical Dentistry), and Ms B Murphy (Department of Sociological Studies). The Appellant objected to Ms B Murphy on the basis that she was his dissertation supervisor and he was concerned as to the "impact the hearing will have on her judgement when marking my work". The University accepted his objection and Ms Murphy was replaced by Professor Kate Morris (Department of Sociological Studies). The Appellant subsequently also expressed concern that Professor J Marsh remained in the chair but this objection was not upheld.

*FTP Committee hearing on 26 January 2016*

22. The FTP Committee conducted a hearing on 26 January 2016. Present were Professor Marsh (as Chair), Dr Fairclough, and Professor Morris, Mr Bosworth (as Departmental Representative) and two members of the Secretariat of the Faculty FTP Committee, Mrs Marie Boam and Miss Karen Shippam. The Appellant attended and

was accompanied by an advisor and friend, Pastor Ade Omooba, a director at the National Church Leaders Forum, Connections Trust and Christian Concern.

23. Surprisingly and regrettably, there is no contemporaneous note of the hearing available. The only record appears to be a formal minute prepared by Mrs Boam comprising a brief description of the nature of the proceedings, the stages of procedure followed and the outcome. The hearing itself lasted from 10.05 to 10.55 am during which the case was outlined by Mr Bosworth, questions were put and the Appellant then presented his case and clarifications were sought.

24. At 10.55, the Chair asked everyone except the Secretariat to leave so that the Committee could come to its decision. The proceedings were concluded at 11.30. The decision was recorded as follows:

> "The Committee has decided: to exclude the student from further study on a programme leading to a professional qualification but permit registration for an alternative programme."

*FTP Committee decision letter*

25. The FTP Committee issued its decision letter on 8 February 2016. The reasons given for the FPT Committee's decision can be summarised as follows: (i) The Appellant's insufficient "insight" into the effect of publicly posting his views would have on his ability to carry out a role as a Social Worker. (ii) The Appellant's "extremely poor judgement" in posting comments which transgressed boundaries which "may have caused offence" to some individuals. (iii) The Appellant's admitted familiarity with social media and the HCPC guidance. (iv) The fact that Appellant had "given no evidence that he would refrain" from presenting his views in the same way in the future.

26. The FTP Committee found that the Appellant was in breach of two professional requirements: (a) to keep high standards of professional conduct and (b) to make sure that his behaviour does not damage public confidence in the profession.

27. In her subsequent witness statement of 24 May 2017, Professor Marsh explained:

> "35. The FFTPC noted the fact that Mr Ngole was familiar with posting views to public web spaces, such as Facebook, and understood the implications of sharing information via Facebook which could be perceived as expressing views which, albeit based on his religious beliefs, were discriminatory toward single sex couples.
>
> 36. In balancing its decision the FFTPC also took account of the fact that Mr Ngole was in his 2nd year of his MA, and had not previously been subject of any cause for concern. It also took account of the fact that Mr Ngole's comments were an expression of his religious beliefs and his assurance that (despite his clear statement of his right to continue to express his beliefs) he had not and would not discriminate against

> service users on the basis of sexual preference or relationship status.
>
> 37. However, after careful deliberation the panel felt that Mr Ngole's poor judgment in posting comments regarding his beliefs about homosexuality and single sex marriage, whilst an expression of his beliefs, called into question Mr Ngole's ability to meet two requirements of the HCPC guidelines: (i) You should keep high standards of personal conduct and (ii) You should make sure that your behaviour does not damage public confidence in your profession."

*Appeal to University Senate*

28. The Appellant appealed to the Appeals Committee of the University Senate ("the Appeals Committee").

29. It is again helpful to set out the terms in which the Appellant lodged his appeal on 23 February 2017 in order to capture its tone and content:

> "In particular, I have been excluded for the expression of my Christian views in a discussion about homosexuality on Facebook.
>
> This penalty of ending my professional career is *manifestly unreasonable*, I could have been issued with a warning about the use of Facebook or informed which Christian viewpoints the University approves of.
>
> On the contrary, it is me who has been discriminated against because I am a Christian.
>
> …
>
> 1. The complaint against me was made in bad faith, by a person who is known to have hostility to Christian views; and the University are acting upon her discriminatory intent. Shame on you. You have adopted her prejudice against me; and are also preventing me from asking her questions to find out her motives. She should defend her position; and I formally seek permission to question her. Furthermore, I have never been provided with a copy of her complaint.
>
> 2. I have been removed from the course for the expression of the Orthodox Christian viewpoint on sexual ethics and the fact that homosexuality is a sin in the Bible. This is a direct violation of my rights of freedom of speech and of freedom of religion: both are protected under the European Convention on Human Rights.
>
> 3. The expression of my free speech on a subject of public controversy is lawful; expressing my views cannot result in

such a punishment: otherwise there is no free speech, except what the University approves of (acting on the malice of a complaining student). My comments on Facebook are a social forum in my personal and private sphere.

4. At the University many students have extremely left wing and right wing views; and have many views on personal sexual morality. What are your monitoring processes with such students?

5. I have not discriminated against anyone (the evidence is to the contrary – but you have chosen to disregard this) so I am being punished for my views, despite the fact that they have no impact on my work and professional abilities.

6. As Mr David Bosworth (Investigator) said on 11th November: "I don't think you behave in a discriminatory way, however you could inadvertently discriminate". So anyone with the wrong attitude could inadvertently discriminate: the whole world could.

7. The decision is partly based on a hypothetical situation. There has been no discrimination against homosexual people and the position that "this (my views) *may* have caused offence to *some* individuals" (my emphasis added) (letter of 3rd February) is untested and unproved.

8. I am a hard working student, honest, kind, decent who does not believe in discrimination, now facing a life-changing detriment due to my Christian views.

9. I informed the faculty that Jesus is against discrimination and that I would not discriminate against homosexual people. This is a direct attack on freedom of religion and I believe it is animus to Christianity solely by University staff.

10. This application of correct views as complying with the HCPC Requirements means that 'no Christian' can do the course, or if they do, they cannot express freely their religious views on sexual sin (or must renounce them).

11. I have a religious right to express my views on sexual ethics; and it is wrong to threaten me to surrender my beliefs as a condition of staying on the course. This is like the Soviet Union or Nazi Germany."

I require you to express the University's position on whether a Muslim Student who believes in Shari'a law (in relation to the status of women and attitudes to homosexuality) is fit to qualify in Social Work <u>when the student expresses his/her views in</u>

> moderate terms in a religious discussion on the internet." (emphasis added)

30. It is noteworthy that in the last paragraph, the Appellant asked the University to state its position regarding the expression by Muslims of religious views "in moderate terms", suggesting that he was drawing a parallel in the sense that he regarded his own NCB postings as similarly being in moderate terms. As we explain below, it appears that at no stage did either the FTP Committee or the Appeals Committee of the University discuss with the Appellant that expressing views on homosexuality using Biblical language or *tropes* might not be regarded as "moderate", particularly by those unfamiliar with Biblical language.

*Appeals Committee hearing on 28 March 2016*

31. The Appeals Committee conducted a hearing on 28 March 2016. The appeal hearing was chaired by Professor Andrew Callaghan (Director of the Centre for Professional Legal Education at the University) who sat with Professor Glenn Waller and Professor Jonathan Perraton. Mr Bosworth attended as the Department Representative. Professor Marsh was also present throughout the appeal hearing, despite not being a member of the Appeals Committee. The Appellant attended together with Pastor Omooba. No objections were taken to those present.

32. The appeal hearing lasted from 10:00 to 10:50 am. On this occasion, a contemporaneous note of the hearing was made by the Secretary to the Appeals Committee, Stephanie Betts, which provides a reasonable record of the proceedings. The Chair, Professor Callaghan, opened the proceedings by confirming that the grounds of appeal were that the decision of the FTP Committee was "manifestly unreasonable" but explaining that it was not enough for the Appeals Committee to determine simply that it might have made a different decision. The Appellant referred the Appeals Committee to his appeal statement. Professor Callaghan asked Mr Bosworth or Professor Marsh if they had any "questions for clarification". The note records as follows:

> "[David Bosworth] states that every option was given in the dept for the matter to be resolved at dept level and allow [Felix Ngole] to continue with his studies but [Felix Ngole]'s position became entrenched very quickly. [David Bosworth] felt unable to simply issue [Felix Ngole] with a warning…
>
> [Professor Callaghan] steps in, questions for clarification only at this stage please."

33. Subsequently, Mr Boswoth stated:

> "[David Bosworth] wanted to issue a warning and allow for a period of reflection but felt no choice but to refer to [FTP Committee], because [Felix Ngole] not addressing professional behaviour concerns, HCPC guidance dictates this approach."

34. Pastor Omooba is recorded as having made the following important intervention during the hearing regarding the importance of "caution and diplomacy" when posting:

> "[Pastor Omooba] - refers to guidance which also protects religious beliefs etc but knows that caution and diplomacy is needed in what is posted and it is fair to ask people to act in this way but not to denounce their religious faith."

35. Later during the hearing, Pastor Omooba returned to the same theme and the following exchange is recorded:

> "[Pastor Omooba] – states about caution and diplomacy – important.
>
> [Felix Ngole] agrees and feels this was not offered to him – i.e. he believes he was told not to post on Facebook – this he feels is wrong
>
> ([Stephanie Betts] note – it is wrong to be told not to post on Facebook).
>
> [[Pastor Omooba] – are you suggesting that the postings are homophobic – but they are just quotes from the scriptures."

36. Professor Marsh then responded that the FTP Committee did not want to stop people posting "but they needed to be mindful of what they post". When Pastor Omooba pointed out that the NBC postings were just quotes from the scriptures, Professor Marsh and Mr Bosworth agreed but said that they contained more comment and there was the wider impact to be considered. The following exchange then took place:

> "[David Bosworth] HCPC expect their values to be upheld, service users may read posts without context, service users may be vulnerable. Hoped that FN would want to reflect on postings. Important to pay attention to what you post.
>
> [Felix Ngole] felt he had been put in a position where he needed to choose between his religious beliefs and programmes. Felt approach was wrong and oppressive."

37. The Appeals Committee commenced its deliberations at 10:50 am. The note recording the Appeals Committee discussion and decision stated:

> "Committee Discussion/ Decision
> Confirm postings public not private
> Notes escalated very quickly, first offence, no previous problems.
> Notes HCPC guidance on social media vague and that it is not overly helpful.
> Largely quotes from the Bible, though not exclusively, interpreting what the Bible says and 'this is what I think'.
> Demonstrates lack of insight and poor judgment, e.g. 'not his views but what it says in the Bible' – this is not correct based on some of the posts.

> Needs to be aware of the impact of what he says – he is not and does not appear to want to reflect and engage with the idea (appears completely opposed).
> Postings and views – effect public and client confidence in social work.
> Failing to reflect on actions or any willingness to want to reflect.
> …"

38. The note recorded the Appeals Committee then proceeding to consider the question of whether the FTP Committee should have imposed a lesser penalty. The Appeals Committee concluded that the FTP's concerns had been "made out" and that since the Appellant was "not willing to engage/ reflect with HCPC guidance or accept relevance", lesser penalties were not relevant or of any use and the FTP Committee's decision to exclude the Appellant from his course would be upheld.

39. The formal minute of the hearing prepared by Ms Betts recorded the Appeals Committee's decision as follows:

> "The Committee decided that the decision of the Faculty of Social Sciences FTP Committee was not manifestly unreasonable and therefore the decision that the student be excluded from further study on a programme leading to a professional qualification but permitted to register for an alternative programme should stand."

The Appeals Committee therefore upheld the FTP Committee, both on its concerns in relation to the Appellant's NBC postings, as well as the need for the serious sanction of exclusion.

40. According to the statement of Professor Callaghan, Professor Marsh addressed the hearing as follows:

> "24. Professor Marsh gave details of the decision of the FFTPC. Professor Marsh went on to explain that during the initial hearing the FFTPC had wanted reassurance from Mr Ngole that he understood and would reflect on why the fitness to practise concerns had been raised. In particular, the FFTPC was seeking an indication from Mr Ngole that he had shown insight and reflection about his use of social media in this case and would be more mindful of the potential impact of any posts on public confidence in his profession in the future, however Mr Ngole had instead presented an extremely entrenched position and gave the FFTPC serious concerns that his fitness to practise was impaired.
>
> 25. Professor Marsh explained that the issue for the FFTPC was not questioning Mr Ngole's holding of his religious beliefs or his right to express his beliefs but his failure to reflect on how the postings could be considered in the context of the HCPC Guidance on Conduct and his failure to show insight into how his conduct could impact on service users and their confidence

> in the social work profession. The FFTPC were concerned that Mr Ngole had not and did not appear able to reflect on how his use of social media could affect the confidence of vulnerable service users who were in single sex relationships or the wider public in the social work profession."

*Appeals Committee's decision letter*

41. The Appeals Committee's decision was notified to the Appellant in a 'Completion of Procedures Letter' dated 31st March 2016. The reasons given for the Appeals Committee's dismissal of the Appellant's appeal can be summarised as follows: (i) The Appellant's NBC posts were "inappropriate" in the context of the HCPC's code of conduct and the fact that the professional qualification involves dealing with members of the public. (ii) The Appellant failed to offer "any insight or reflection" on how his public postings "may negatively affect the public's view of the social work profession". (iii) The Appellant's failure "to acknowledge or respect the relevance of the HCPC's code of conduct".

42. The Appeals Committee's conclusion that the Appellant had failed to show "any insight or reflection" as to the impact his public postings might have was, however, in contrast to the account of Pastor Omooba, part of whose witness statement reads:

> "14. I also made a point that it was wrong and unhelpful for the panel to require Felix to denounce his Christian beliefs; it would be much better to try and find a mutually acceptable solution. If the University simply wanted Felix to be more discreet in his social media postings, he would be happy to comply with any such guidelines (however none were offered).
>
> 15. …The University was insisting that Felix cannot express his Christian beliefs on homosexuality in any forum except a private setting. In my view Felix was not '*entrenched*'; and was seeking to respond to the concerns of the University without compromising his faith. Unfortunately, all our efforts to find some middle ground with the University fell on deaf ears."

*Complaint to Office of Independent Adjudicator*

43. The Appellant made a separate complaint to the Office of the Independent Adjudicator for Higher Education ("the OIA"). Following a review of the matter, the OIA found that both the FTP Panel and the Appeals Committee had followed their procedures and there was no evidence of bias or a reasonable perception of bias. The issues were found to be a matter of professional judgement for the University. The OIA criticised the FTP Panel for a lack of reasoning for its decision, but found this defect to have been rectified by the Appeals Committee's reasoning.

44. The OIA report concluded as follows:

> 31. …We are satisfied, however, that it was not Mr Ngole's religious beliefs or even the general expression of those beliefs

> that was at issue. Rather, it was the manner in which he had expressed his beliefs on a publicly-accessible social media site**,** and his level of insight into the consequences of doing so on public trust in the profession, which was of concern to the University. We are satisfied that it was reasonable for the University to say that the posts amounted not just to Mr Ngole quoting passages from the Bible, but also to him expressing his own personal views, for instance saying that "homosexuality is a sin, no matter how you want to dress it up**…**
>
> 32. Although Mr Ngole maintains otherwise, we are satisfied that the University had made clear in its communications to him that it was not his beliefs concerning homosexuality, but the manner in which he had posted his views on Facebook which gave rise to concerns about his fitness to practise. …
>
> 35. … In our view, the wording used by the [FTP Committee] did not accurately reflect the test it was applying, namely whether the posts were likely to affect the public's view of, or confidence in, the social work profession. We are satisfied, however, that this was rectified by the Appeals Committee…
>
> 37. We are satisfied that the University gave sufficient explanation to Mr Ngole as to its concerns [about how the posts were likely to undermine the trust of a reasonable member of the public]. …[T]he University had highlighted to Mr Ngole that service users might read the posts without understanding the context or might be vulnerable and be affected by the comments that Mr Ngole had made – which related to public confidence and trust in the profession.
>
> 42. … Given Mr Ngole's statements about putting forward his views in the same way in the future, and given the Committee's conclusions about the level of insight he had demonstrated, we are satisfied that it was reasonable for the Committee not to have imposed a lesser sanction."

**The Regulatory Framework**

*Health and Social Work Professions Order 2001 ("HSWPO")*

45. As explained above, the HCPC was established by HSWPO to regulate a range of professional service provision in the health and social work sectors. The HSPO provides *inter alia* as follows:

> "3(2) The principal function of the Council shall be to establish from time to time standards of education, training, conduct and performance from members of the relevant professions and to ensure the maintenance of those standards."

> "3(4) The over-arching objective of the [HCPC] in exercising its functions is the protection of the public."
>
> "3(4A) The pursuit by the Council of its over-arching objectives involves the pursuit of the following objectives –
>
> (a) to protect, promote and maintain the health, safety and well-being of the public;
> (b) to promote and maintain public confidence in the professions regulated under this Order; and
> (c) to promote and maintain proper professional standards and conduct for members of those professions."
>
> "3(5) In exercising the functions, the Council shall-
>
> (a) have proper regard for-
>
> (i) the interests of persons using or needing the service of registrants in the United Kingdom, and
>
> (ii) any differing interests of different categories of registrants;"

46. The HCPC maintains a register of members, and regulates members and membership of the social work profession. Its functions as regards fitness to practice and ethics are set out in article 21:

> "21(1) The Council shall-
>
> (a) establish and keep under review the standards of conduct, performance and ethics expected of registrants and prospective registrants… and give them such guidance on these matters as it sees fit; and
>
> (b) establish and keep under review effective arrangements to protect the public from persons whose fitness is impaired.
>
> (2) The Council may also from time to time give guidance to registrants, employers and such other persons as it thinks appropriate in respect of standards for the education and training, supervision and performance of persons who provide services in connection with those provided by registrants."

*HCPC Standards of Conduct, Performance and Ethics*

47. The HCPC maintains a register of members, and regulates members and membership, of the social work profession. It has published Standards of Conduct, Performance and Ethics setting out the duties of registrants (registered practitioners).

48. The HCPC does not directly regulate student or trainee social workers. Instead, with prospective registration in mind, the HCPC's Education and Training Committee is required by article 5(2) HSWPO from time to time to –

(1) Establish the standards of proficiency necessary to be admitted to the different parts of the register being the standards it considers necessary for safe and effective practice under that part of the register; and

(2) Prescribe the requirements to be met as to the evidence of good health and good character in order to satisfy the Education and Training Committee that an applicant is capable of safe and effective practice under that part of the register.

49. Article 9 HSWPO requires applicants for registration to satisfy the Education and Training Committee that they hold an approved qualification. Article 12 provides that an approved qualification is one approved by the HCPC as attesting to the necessary standards of proficiency. Part IV of HSWPO makes further provision for the setting of standards of education and training and for approving courses, institutions, tests and qualifications which will enable students in due course to apply for registration.

*HCPC's Guidance for Providers on Standards of Education (SET guidance)*

50. The HCPC accordingly operates a system of approval or accreditation of certain social work courses as capable of leading to registration on successful completion. The HCPC envisages the role played by providers of courses as that of gatekeepers providing a safeguard against students who are not fit to practise being admitted to the register. It has published Standards of Education and Training ("SET") Guidance which is directed at providers of such courses to help them ensure the relevant standards are maintained.

51. SET 3.16 provides for there to be a process in place throughout the programme for dealing with concerns about students' profession-related conduct. The Guidance provides that the purpose of this is

> "…to make sure that education providers play a role in identifying students who may not be fit to practise and help them to address any concerns about their conduct in relation to their profession. The process should focus on identifying and helping to address concerns, but should also allow an appropriate range of outcomes, including providing for an award which does not provide eligibility to apply to the Register."

52. SET 4.5 of the Guidance provides that the curriculum must make sure that students understand the implications of the HCPC's standards of conduct, performance and ethics, and that those standards must be taught and met throughout the programme or course.

53. SET 4.6 requires the delivery of the programme to support and develop autonomous and reflective thinking, encouraging students to reflect on their learning, and consider their approach to their own practice and its responsibilities.

*HCPC's Guidance for Students*

54. The relevant code of conduct is the HCPC's "Guidance on Conduct and Ethics for Students" ("the Guidance") which applies to a very broad range of health care professions including arts therapists, paramedics, radiographers, dieticians, hearing aid dispensers, physiotherapists (to name but a few), as well as social workers in England. The Guidance sets out specific guidelines for students on conduct and ethics, in terms equivalent to the professional standards for registrants, with allowance being made for the difference in the student regulatory context. It explains that fitness to practise means that someone has the skills, knowledge, character and health to practise safely and effectively.

55. The Guidance also provides the following advice to students:

> "**Conduct Outside Your Programme**
>
> On your programme you have the opportunity to develop the skills and knowledge you need to become a professional in an environment which protects the public. You also have the opportunity to learn about the behaviour that the public expects from a registrant.
>
> As a student studying to become a professional in a regulated profession, you have certain responsibilities. On your programme you will be expected to meet high standards of conduct and ethics.
>
> You should be aware that in very serious circumstances, your conduct may affect your ability to:
>
> – complete your programme;
> – gain the final qualification;
> or – register with us. …
>
> When you apply to join our Register, we ask for information as part of a declaration that you have a 'good character'. …"
>
> **Guidance on conduct and ethics**
> 1. **You should always act in the best interests of your service users.**
> …
> - You should treat everyone equally.
> …
> 3. **You should keep high standards of personal conduct**
> - You should be aware that conduct outside of your programme may affect whether or not you are allowed to complete your programme or register with us.
> …
> 13. **You should make sure that your behaviour does not damage public confidence in your profession**
> - You should be aware that your behaviour may affect the trust that the public has in your profession.

> - You should not do anything which might affect the trust that the public has in your profession."

56. The HCPC explains that the student guidance is intended as an introduction to, or educative elaboration upon, the Standards, in the form of explanatory notes, to aid students in becoming familiar with the Standards. It does not in any sense replace the professional standards or suggest a different set of standards for students, but simply recognises that students are in the process of preparation to take on the level of autonomous personal responsibility for regulatory compliance which full registrant status will demand.

*HCPC social media guidance*

57. The HCPC has also, separately, published guidance for registrants, as well as students, about use of social media, designed to explain how to use social media in a way which meets HCPC standards. It reminds registrants as to the importance of ensuring that use of social networking sites is consistent with appropriate professional standards. It states:

> "**Focus on standards – social networking sites**
>
> More and more people are using social networking sites or blogs to communicate with friends and family. Registrants, educators and individuals studying to join the professions we regulate sometimes contact us to ask our views on the use of these sites. We recognise that these sites are a useful way of communicating and sharing information with friends and colleagues. Information placed on social networking sites is in the public domain and can therefore be viewed by other people.
>
> You may use social networking sites to share your views and opinions. Again, this is not something that we would normally be concerned about. However, we might need to take action if the comments posted were offensive, for example if they were racist or sexually explicit.
>
> You should make sure that when you use these sites, your usage is consistent with the standards that we set. The relevant standards from the standards of conduct, performance and ethos are as follows.
>
> - You must act in the best interests of service users.
>
> - You must respect the confidentiality of service users.
>
> - You must keep high standards of personal conduct.
>
> - You must behave with honesty and integrity and make sure that your behaviour does not damage the public confidence in you or your profession. …
>
> You may use social networking sites to share your views and opinions. Again, this is not something that we would normally

> be concerned about. However, we might need to take action if the comments posted were offensive, for example if they were racists or sexually explicit.
>
> Social networking sites are a part of many registrants' and students' everyday life. We do not have any concerns about you using these sites, so long as you do so within the standards that we set. …"

58. It guides registrants to try to be polite and respectful, and avoid using language that others might reasonably consider to be inappropriate or offensive. It reminds registrants of relevant professional standards, including:

> "You must make sure that your conduct justifies the public's trust and confidence in you and your profession. This means you need to think about who can see what you share. … Even on a completely personal account, your employer, colleagues or service users may be able to see your posts or personal information. It is best to assume that anything you post online will be visible to everyone."

It points out that social media activity which is unprofessional may put registration at risk.

*University's Handbook*

59. The University's course meets the HCPC Education and Training Committee's requirements both as to curriculum and assessment, and also in relation to the University's procedures for dealing with concerns about any student's fitness to practise.

60. In this regard, the University's MA Social Work Student Handbook, and other materials explaining the course to students, make clear the HCPC's wider regulatory oversight role and the statutory context within which it has been designed. The Handbook draws express attention to the need to avoid any kind of discriminatory or oppressive language/behaviour and states:

> "As a student social worker, you need to be aware that the MA Social Work is a programme of professional training and that you are expected to behave in a professional manner in the University, on placement and in your personal life (including use of social media).
>
> PLEASE NOTE: comments made by students on social networking sites have in the past been the subject of disciplinary proceedings: comments would be judged against the University conduct expectations, Fitness to Practise regulations and relevant professional practice standards."

## The Judge's Findings

*The Article 10 issue [42-69]*

61. The judge began her full and meticulous judgment by considering whether the Appellant's Article 9 ECHR rights were engaged. She considered a number of authorities but did not find them to be directly applicable to the issue in this case. The postings were found to have been a religiously motivated contribution to a political debate; it was not a protected manifestation of religion. In such a context, it was accepted that the University's decision was not an interference with the Appellant's Article 9 rights. The case was then considered on the basis of interference with the right to freedom of expression under Article 10 ECHR. The judge accepted that there had been a prima facie interference with those rights in this case, and proceeded to consider the lawfulness of that interference. It was noted however, that the religious dimension of this case remained legally relevant and would have a bearing on the lawfulness of the interference with Convention rights to freedom of expression. We find this to be the correct approach in this case.

*Prescribed by law [70]-[93]*

62. The judge then turned to consider whether the interference with the Appellant's Article 10 rights was prescribed by law. On this issue, Mr Diamond, for the Appellant, submitted that the standards materials were too imprecise to guide the Appellant's conduct, or create enough foreseeability of the consequences the University would attach to his conduct. In the alternative, it was argued that, properly construed, the standards materials were not applicable to the Appellant's conduct which was outside the sphere of his professional studies. There was no apparent connection between the Appellant's postings and the social work profession.

63. Drawing together the findings in *R (Pitt) v General Pharmaceutical Council* [2017] EWHC 809 (Admin) and *R (Core Issues Trust) v Transport for London* [2013] EWHC 651, the judge outlined the importance of interpreting standards fairly as a whole and in a practical manner. The flexibility in such standards is reflective of a degree of self-regulation that is expected of professionals rather than an approach of strict conformity. The standards materials in relation to the social work profession were found to be "familiar regulatory territory… [which was] good enough to comply with the 'prescribed by law' test" [82].

64. The judge found that the Appellant had been put squarely on notice with regards to his conduct outside the programme and whilst using social media. He had access to the standards materials and to support in interpreting them. It was clear from the standards materials that they could apply to personal postings. Social work was held to be an environment in which constant personal vigilance is necessarily encouraged. The public nature of the postings meant that while they made no reference to the social work context, they could be readily accessed from a social work context.

65. The judge found that the religious context of the postings must be considered from the perspective of public readership. From this standpoint she noted (at [91]) that "[l]ooked at objectively, the NBC postings are entirely capable of being read in a way which would make a fair-minded, even a sympathetic, reader at least wonder how the poster would behave in the world of social work". Potential service users are people

who particularly need to be able to trust members of the profession and who may be entirely unable to discern the theological gloss in "religious speech" on words such as 'abomination' and 'wicked'.

*Legitimate aim [94]-[111]*

66. In relation to the legitimacy of the aim pursued by the University, Ms Hannett, for the University, outlined that the overarching aim of the regulatory regime is the protection of the public. The judge noted that "[t]he social work profession is a front-line provider of public services intimately affecting the private lives and social and economic wellbeing of service users" and this is the concern of the standards which regulate the profession. The Appellant did not appear to dispute the legitimacy of an obligation to promote public confidence in the social work profession and to ensure that service users were, and perceived that they would be, treated with dignity and without discrimination.

67. Focusing on the importance of perception of service users, the judge found that the issue turned on impact rather than the intention of the professional in question. She outlined that it was important in the social work context to understand the vulnerability of service users as well as their diversity of background and need. This importance of sensitivity to social divisions, such as sexual orientation, was a key feature of the training on the University's MA Social Work course.

68. Turning to the authorities, the judge outlined that precedent indicated that interference with an individual's Convention rights could be justified as a legitimate aim where the objective of a profession was concerned. In reaching this conclusion, she analysed the four cases considered in *Eweida v United Kingdom* (2013) 57 EHRR 8. In each, the importance of providing a public service without discrimination was highlighted. Though the facts in each case were considerably different to the present, the four cases were found to be helpful in establishing that in the provision of public service, the diversity of sexual orientation is treated 'with dignity and without intrusion of the personal views of service providers which do not support those objectives' [104].

69. The judge noted that the University was not claiming there was a risk of future intentional discrimination by the Appellant, nor was it relying on controlling offensiveness as a legitimate aim. Rather, in an important point, the University accepted that the Appellant had not acted in a discriminatory manner, and that he would not intentionally discriminate. The concern expressed was that, in the light of the content and tone of the postings, the general reader, the University, and actual and potential service users might legitimately wonder whether he might discriminate. The future risk of the Appellant expressing his religious views, in the way that he had done, remained. He had been clear that if in the future course of his service delivery, he was asked about his views on same-sex sexuality he would give an unambiguous response. It was the impact that those views could have on the trust in the profession which concerned the University. The judge concluded that the University's aims, in the context of statutory regulation and service delivery, were legitimate.

*Proportionality [112]-[119]*

70. The judge approached this assessment in accordance with the four stages summarised by Lord Sumption JSC in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700. That

the objective of the University's decision is sufficiently important to justify the limitation of a fundamental right was not in dispute.

71. The next stage required a determination of whether the measure taken by the University was rationally connected to its objective of maintaining fitness to practise standards in its gatekeeper role. The judge saw force in the submissions that it is unlikely that a service user would have come across the postings in question, that a 'generous allowance' could be made for the fact the Appellant was an unqualified student who was participating in a lively discussion, and that there is a danger in regarding any misconduct as particularly affecting the reputation of the office rather than the man. The judge also noted that there was no evidence of any actual effect of the posts. However, she was persuaded that the Appellant was 'proximate' to service users. He would be in contact with users on placement and would be seen as a representative of the profession. He was aware of the professional standards he was expected to comply with, and had "chosen publicly to express his views on a sensitive matter of direct relevance to social work practice … in 'religious speech" [125]. Therefore, the rational connection between the postings and the University's inquiries was established.

72. The University's decision to remove the Appellant from the social work course was then considered at the third stage of the proportionality assessment: consideration of the intrusiveness of the measure undertaken. The judge noted that the University did not seek to argue the posting alone would have justified the Appellant's removal. She accepted that this would indeed have been disproportionate. Instead, the University said that it was the Appellant's reaction to the process, in particular his lack of insight and reflection that called his fitness to practise into question.

73. The judge accepted that there was some uncertainty about what actually happened at the FTP hearing but, based on the witness statement of its chair, the subsequent decisions of the Appeals Committee and the University's submissions to the OIA, she accepted that the lack of insight is what motivated the decision and not a focus on the NBC postings or an animus against the Appellant's faith. The judge gave weight to the FTP's decision-making process and recognised that the court should not substitute its own decision. She also reminded herself that the sanction imposed on the Appellant was a severe one: it was career ending. However, she found that "[t]o substitute for the judgment of professionals on a question of risk to social work service users, and to the effective delivery of a difficult and demanding public service, is to make a decision for the consequences of which a court is not properly accountable to the public" [161]. She concluded that there was no good reason or basis for her to disagree with the assessment of the FTP Committee and find that a less severe measure could be imposed: "A court cannot with any confidence conclude, in the absence of good reason, that a student conscientiously assessed as unteachable is, in fact, teachable" [162]. The Appellant had not shown any willingness to engage constructively with the concerns raised.

74. As a final check on her reasoning before reaching a decision, the judge considered the overall fairness of the decision. She noted the following:

> "If a chain of events, starting with a student posting Bible verses on a news website and ending with him being removed

> from his course, is one for which the law does not provide him with a remedy, it is important to test hard why not." [163]

75. The judge emphasised that universities have a wide range of responsibilities to their students. Equally, she outlined that freedom of expression is an important right and that it includes freedom of religious discourse, especially in a university. For courses leading to professional registration, universities also have an additional set of responsibilities. They have to be rigorous in protecting the public from people whose professionalism is uncertain. This has to be balanced with being fair and supportive to the students on those courses.

76. The judge took the view that what troubled the University was not the religious motivation/content of the student's posting but:

> "how they could be accessed and read by people, service users included, who would perceive them as judgmental, incompatible with service ethos, or suggestive of discriminatory intent. … It was reasonable to be concerned about that perception. The language used was strong and the endorsement of the poster was clear. There was nothing on the face of the postings themselves to allay the concern." [169]

77. What troubled the university even more was:

> "the apparent refusal of the student to take an active interest in that concern about perception. He seemed either to deny the possibility of such a perception or to deny that it should be taken seriously. He also seemed to think that the fact that he was exercising his personal freedoms on a matter of religious speech meant that his behaviour was in effect none of the University's business." [170]

78. This had led to rapid escalation between the parties as they were effectively talking past each other. The judge considered that there was no obvious incompatibility between deeply held religious views and social work, nor was there an irreconcilable conflict between Convention rights and professional standards. This is a rare case where the reconciliation failed.

79. Testing the fairness of the outcome required looking not just at the choices the University had but also the choices the student had. The Appellant had professional responsibilities, including outside work. There are choices available in the use of religious speech, and professional discipline can guide those choices.

> "Religious speech like the NBC postings can, as Mr Diamond said, "confuse the secular mind". That is something with which professional practitioners working with secular minds have a responsibility to deal… Perhaps there could have been ways to express public support for Kim Davis, complete with Biblical authorities, while leaving the audience in no doubt about the poster's caring professionalism." [176-177]

80. The judge noted the Appellant's complaint that no-one told him what sort of religious speech is allowed. However, she found that:

> "Trainee professionals might be expected to show they could think that through for themselves; to work out the impression that might be given in the wider world; to take personal responsibility for it; to work through to a professional solution; and if in doubt to take a balanced and consultative approach.
>
> …
>
> As Mr Diamond said, religious speech has "multiple meanings": it is multi-layered. Its theological layer is not necessarily widely understood. Its moral layer is not always warmly received. Its cultural layer may provoke active hostility. Where it touches on issues of same-sex sexuality, it may be radically rejected or cause hurt and harm, even if that is the last thing intended. Social workers have to deal with how people will actually react to it in real life, and express themselves accordingly. That is not about a "blanket ban", or about stifling religious speech or about denouncing faith; it is about seeing the world as others see it, and making the connection between what you say and the provision of public services in sensitive and diverse circumstances. Trainee social workers have to satisfy their supervisors that they understand this, and are if necessary working hard at it. That requires a reflective and proactive response to concerns being raised (the development of "autonomous and reflective thinking" is an HCPC SET expectation for courses of this sort). A reactive and defensive response is likely only to amplify those concerns. It was reasonable to expect a student whose career was at stake to have gone further to show that he understood the questions and had some reassuring answers." [177-178]

81. Therefore, in those terms the judge found that the Appellant was not placed in a position where he had to choose between his faith and being a social worker:

> "He was in a position where he himself had to show he could, in his own way, reconcile the two. That is to a degree a personal matter. He could not simply expect others to do it for him. And if he could not in the end work out a solution that he could put into practice to everyone's satisfaction, including his own, then the result that came about was the right one." [180]

82. For those reasons the Judge held that a fair balance was struck and she declined to interfere with decision impugned.

**The Submissions on Appeal**

83. It will be apparent that we have decided this case on grounds materially different from those argued by Mr Diamond. We did not find Mr Diamond's submissions grappled

with the essential elements of this case, but we nevertheless set his submissions out below for completeness, together with Ms Hannett's response on behalf of the University.

*Prescribed by law*

84. Before us, Mr Diamond argues that the regulatory material fails to comply with the second test set out in *Purdy v DPP* [2009] UKHL 45 in that it is not sufficiently precise to enable the Appellant to understand its application to Facebook posts so that he is able to regulate his conduct without breaking the law. The interpretation of the regulatory framework by the Judge gives the HCPC and the University 'an unfettered power' to determine whether an expression undermines public confidence in the profession and renders an individual unfit to practice. Any limitations on the freedom of speech by the HCPC *Guidance on Conduct and Ethics for Students* must be construed strictly. The scope and manner of any discretion the University can exercise on the issue was not clearly outlined in relation to its application to his Facebook posts. Nothing in the regulatory framework prohibits polite expression of a Biblical view on same-sex marriage by a student.

85. It was submitted that the judge erred in setting aside the relevance of *Smith v Trafford Housing Trust* [2013] IRLR 86 on the ground that it was a private employment law dispute rather than one dealing with Convention rights. If anything, the requirement of 'prescribed by law' is more stringent than in ordinary contractual interpretation. An individual subjected to codes and policies must be able to ascertain exactly what he can and cannot do, and the extent to which those obligations extend beyond the workplace. In *Smith*, the broad policies dealing with the issue of bringing the employer into disrepute in this case were found not to extend to a personal Facebook post, made outside of working hours. The same reasoning must apply here.

86. Mr Diamond submitted that, following *Livingstone v The Adjudication Panel for England* [2006] EWHC 2533 (Admin), the University faced a high hurdle of showing that the actions of the Appellant objectively undermined public confidence in the social work profession and the interference was justified. The judge erred in failing to apply the principle adequately here.

87. Ms Hannett accepted that, for a rule to have the force of law, it must be formulated with sufficient precision so that a citizen is able to foresee, to a reasonable degree, the consequence which a given action may entail: see *Sunday Times v UK* (1979) 2 EHRR 245. Absolute certainty is unattainable. Laws that confer discretion are not inconsistent with the principle of legal certainty, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity. In the context of professional discipline, it is necessary for standards to protect the public reputation of a profession, to retain flexibility and yet be sufficiently certain.

88. Ms Hannett contended that the judge was correct to conclude that the standards applied to the Appellant's case by the University were prescribed by law. The regulatory material required a measure of personal responsibility to be taken for conformity to the ethos of the profession and an understanding that personal conduct in public can have an impact on the profession. The Appellant was on notice that these standards applied to the personal use of social media and applied to religiously motivated speech "where that could have professional consequences on its impact on

others, as may usually be the case where it is in the public domain". Had the Appellant been in any doubt about standards applicable, he could have sought guidance.

89. Finally, she maintained that the judge was right to hold that she was not assisted by reference to the different regulatory and factual contexts in *Smith* and *Livingstone*, neither of which concerned the fitness to practise of a professional. There was no concern that the comments made by Mr Smith would represent the position of the Housing Association. *Livingstone* dealt with a regulatory framework in relation to elected officials, distinguishable from the social work context in this case.

*Legitimate aim*

90. Mr Diamond contended that while service users have the right to access social workers' services without being discriminated against, they do not have a right to choose a social worker of a particular political or religious persuasion. In the cases of *Ladele v LBC Islington* [2009] EWCA Civ 1357 (and see *Eweida v United Kingdom*), *McFarlane v Relate Avon Ltd* [2010] IRLR 872, and *R (Johns) v Derby City Council* [2011] 1 FLR 2094, the interference with the applicants' Article 9 rights was justified by the need to prevent actual discrimination against those in same-sex relationships. In this case, the justification is based on perception, and indeed an unreasonable perception of a risk of discrimination.

91. Mr Diamond argued that for a regulator to censor the expression of a professional's legitimate beliefs to ensure "compatibility, in perception terms, of the views expressed with the ethos of the service", is wrong in law. Maintaining public confidence in a profession does not justify preventing a particular viewpoint being held, or expressed, by members of that profession. Any limitation of social and religious advocacy by professionals must be clearly defined and sufficiently justified. In *Vogt v Germany* (1996) 21 EHRR 2015 and *Wille v Liechtenstein* (2000) 30 EHRR 558, the ECtHR found that the interference with the Article 10 rights of the applicants was not justified, where there was no evidence that it affected the work of the professional.

92. He maintained that the judge should have followed the reasoning in *Vijnai v Hungary* (2010) 50 EHRR 44, and found that the public perception of a risk of discrimination cannot justify a restriction on the Appellant's freedom of expression. To suppress the expression of Biblical criticism of sexual practices would amount to a heckler's veto. The law offers ample protection to any victims of discrimination. Here there is no evidence of actual or intended discriminatory conduct by the Appellant, or of any dissatisfaction from any service user or teaching professional.

93. Ms Hannett argued that the body considering a professional person's fitness to practise is concerned with the reputation of the profession, rather than the punishment of the professional. Conduct outside of professional practice is capable of constituting professional misconduct. The judge rightly found that the University, as a gatekeeper for the HCPC, pursued legitimate aims in ensuring that public confidence in the social work profession was promoted and maintained and that service users were treated, and perceived they would be treated, with dignity and without discrimination. The Appellant had conflated the different questions of

proportionality of an aim, and the proportionality of the measure taken in pursuit of a legitimate aim.

94. On the issue of whether this decision was taken to avoid service users being offended by the Appellant's comments, Ms Hannett highlighted that the judge noted in her decision that this is not a case about general public offensiveness but instead about the regulation of the relationship between service provider and user, in which the balance of power and vulnerability is very unequal.

95. Ms Hannett argued that the perception of a risk, that a social worker may discriminate on grounds of sexual orientation, is a legitimate concern for the University. The judge was entitled to conclude that a reasonable service user, reading the Appellant's postings, might perceive that they would not be treated with dignity or respect. That undermines public confidence in the profession.

*Proportionality*

96. Mr Diamond argued that the judge erred in her assessment of proportionality. The effect of the judgment would be to permit professional regulators to treat the legitimate expression of unpopular beliefs on a political, social, religious or philosophical issue as a breach of the professional code of conduct, and a professional's unwillingness to be silenced in their expression of legitimate views as a lack of insight, aggravating that breach. The judge should have recognised that the Appellant's comments were made in a social as opposed to a professional context, his beliefs were a genuine contribution to an important public debate, and were in response to direct questions. Latitude must be given to the context of public debate (*Gunduz v Turkey* (2005) 41 EHRR 59).

97. Mr Diamond contended that the judge erred in deferring to the Regulator to the extent that she did. The fitness to practise process interfered with his freedom of expression in an unjustified manner.

98. Ms Hannett emphasised that the test for this Court is whether 'the judge erred in principle or was wrong in reaching the conclusion which [she] did' and it is not enough that the appellate court might have arrived at a different conclusion (*R (AR) v Chief Constable of Greater Manchester Police* [2018] 1 WLR 4079). She argued that the judge rightly gave weight to the decision reached by the University bodies. It is well established that a Court must approach the decisions of professional tribunals with some deference, attaching special weight to the judgement or assessment of a decision maker with 'special institutional competence', particularly where these judgements involve a predictive element (*R (Lord Carlile of Berriew QC) v SSHD* [2015] AC 495).

99. The Appellant was aware of the standards he was required to comply with as he had ready access to the regulatory material applicable to his profession. The Appellant did not simply quote from the Bible but also espoused his own views against homosexuality. When asked how he would respond to a question on his views on same-sex sexual relationships, the Appellant stated that he would tell people his opinion.

100. It was accepted that the Appellant currently worked with young people with family members in same-sex relationships and that he was always supportive of them, whilst truthfully representing his views if called on to do so.

101. The University argued that the judge was entitled to conclude that a fair balance between the Appellant's rights and those of the wider community had been struck by the University. The University had an overriding duty to protect the public and to ensure public confidence in the social work profession. The Appellant's submissions amounted to a disagreement with the judge's findings. He had failed to identify an error in principle or show that the judge was wrong in reaching the conclusion that she did. Proportionality requires a fact-sensitive analysis and, none of the cases cited by the Appellant therefore show that the Judge erred in her proportionality assessment. Of the cases cited by the Appellant, the only one dealing with regulation of a profession is *Vogt v Germany*. However, Ms Hannett submitted that that case too is distinguishable. The case concerned the dismissal of a teacher as a result of her active membership of the Communist party. However, the defendant did not allege that these views were, or could have been known by Ms Vogt's pupils, or that they had any repercussions for her teaching.

**Analysis and Conclusions**

102. This is a not a straightforward case. Although we disagree with the conclusions of the judge below, we begin by acknowledging the care and erudition with which the judge approached her judgment.

*Clarity of Regulations and Guidance*

103. We reject the Appellant's proposition that the HCPC Regulations and Guidance were insufficiently clear or precise, so that they failed the requirements of law as laid down in *Purdy v DPP*. In our view, Ms Hannett is correct in her submission, based on *Sunday Times v UK*, that the citizen (or the student professional) must be able to foresee to a reasonable degree, the meaning of a rule and the consequences which may arise from default. But absolute certainty is not achievable. That must particularly be so where, as here, Regulations and attendant Guidance address students training for a wide range of professions. It must have been clear that offensive language and the expression of discriminatory views would be unacceptable. The necessary breadth of the Regulations and Guidance, in our view, do not carry these Regulations beyond what can properly be enforced by law, but they do call for flexibility and proportionality in enforcement.

*Legitimate aim*

104. Turning to the question of the legitimate aim of the professional regulations applicable here, we agree with the judge that the maintenance of confidence in the relevant profession falls within the legitimate aim of professional regulation, and must be supported in law. Indeed, every set of professional regulations is likely to encompass this aim, if in no other sense than to incorporate a duty not to bring the relevant profession into disrepute. However, a moment's consideration will lead to the conclusion that the maintenance of confidence will carry very different requirements in different professions, and in different factual contexts. Thus, public

expression of firm, political views will be perfectly proper for a lawyer in private practice, but are quite improper for a judge.

105. It must equally be the case that the obligation to maintain confidence cannot extend to prohibiting any statement that could be thought controversial or even to have political or moral overtones. No social worker could be sanctioned for arguing in public that social work was under-funded. The expression of such views in offensive language, however, might well damage confidence. The prevention of the latter would fall within the legitimate aim of the system of professional regulation, prevention of the former would not. The existence of a broad legitimate aim is a mere threshold to the key decision in this case, as in almost all cases it must be. Such a legitimate aim must have limits. It cannot extend too far. In our view it cannot extend to preclude legitimate expression of views simply because many might disagree with those views: that would indeed legitimise what in the United States has been described as a "heckler's veto".

106. On the other hand, the legitimate aim of such regulation must extend so far as to seek to ensure that reasonable service users, of all kinds, perceive they will be treated with dignity and without discrimination. Social work service users cannot usually choose their social worker. The use of aggressive or offensive language in condemnation of homosexuality, or homosexual acts, would certainly be capable of undermining confidence and bringing the profession of social work into disrepute. As the Guidance makes clear, the Appellant had an obligation not to allow his views about a person's lifestyle to prejudice his interactions with service users by creating the impression that he would discriminate against them.

*Proportionality*

107. We turn to the major question of proportionality, with the four stages of consideration applied by Lord Sumption and Lord Reed in *Bank Mellat* in mind. The first stage is hardly distinguishable from the question of the legitimate aim of regulation, at least in this case. The objective of regulation was proportionate. The extent of interference must be proportionate. We accept that consideration of interference with the Article 10 right of the Appellant is rationally connected to the objective. The real questions are the degree of intrusion into the Article 10 right, and whether a less intrusive alternative to removal from the course and a bar from professional life would have sufficed.

108. The judge, in considering the proportionality question, accepted from the University the proposition that it was not the statements of the Appellant which were the heart of the matter. As we have indicated, the judge noted that the postings alone would not have provided a proportionate basis for removal from the course. It was said to be the reaction of the Appellant when taxed about the postings, and his perceived lack of insight into the problems, which was the real cause for concern.

*Lack of 'insight' and entrenched positions*

109. At the heart of the University's decision to remove the Appellant from his course was the finding that the Appellant lacked "insight" and had become "entrenched". The

FTP Committee found at an early stage that the Appellant had shown insufficient "insight" into the effect publicly posting his views would have on his ability to carry out a role as a Social Worker (and had failed to demonstrate that he would refrain from similar postings in the future). The Appeals Committee found that the Appellant had failed to offer "any insight or reflection" on how his public postings may negatively affect the public's view of the social work profession (see above).

110. In our view, the University's failure to appreciate two matters mean that it can be described as itself lacking insight. The University failed to appreciate that the Appellant's apparent intransigence was an understandable reaction to what he was being told by those in charge of the disciplinary process, namely that he could never express his religious views on topics such as sexual morals in any public forum, *i.e.* that there was a blanket ban. The University failed to appreciate that it had taken a stance which did not accord with the HCPC guidance or common sense. The HCPC guidance - which the Appeal Committee itself referred to as "vague and not particularly helpful" - did not prohibit the use of social media. It made it clear that the use of social media to share personal views and opinions was permitted but simply said that the University might have to take action "if the comments posted were offensive, for example if they were racist or sexually explicit" (see above).

111. Crucially, at no stage did those in charge of the disciplinary process make the University make it clear that it was the *manner and language* in which the Appellant had expressed his views which was the problem or discuss or offer him guidance as to how he might more appropriately and moderately express his views on homosexuality in a public forum and in a way in which it would be clear that he would never discriminate on such grounds or allow his views to interfere with his work as a professional social worker.

112. In our view, the University quickly became entrenched: the University never shifted from its initial view that the Appellant lacked "insight" or asked itself why the Appellant had reacted in the intransigent way he did. If it had reflected, the University would or should have realised that fault lay with it for the unfortunate course which the disciplinary proceedings took (as explained further below).

*Initial interview*

113. The problem can be traced back to the earliest stages of the disciplinary process. At the initial interview on 11 November 2015, the Appellant was told by Mr Bosworth that his NBC posts were "incongruous" with the values of the Social Work profession and "you are in breach" of the HCPC social media guidance and code (see above). Unfortunately, there appears to have been no discussion or no guidance given to the Appellant during the interview about how he might more appropriately express his religious views in a public forum. Mr Bosworth subsequently said that the Appellant's position "became entrenched very quickly" and he felt unable simply to issue a warning.

114. The Appellant's reaction to the referral following the initial interview is telling: he declined to attend any further meetings since he thought his religious freedom was on trial (see his letter of 15 December 2016). It will be apparent, therefore, that positions had become polarised even at this early stage and the proceedings unfortunately never got back on track.

115. The situation was not helped by the terse - and arguably inaccurate - terms in which the complaint against the Appellant was initially recorded, namely him posting "views of a *discriminatory* nature" in breach of the HCPC Code and regulations (see the "Departmental Form for Recording Fitness to Practise Case"). The mere expression of religious views about sin does not necessarily connote discrimination.

*FTP Committee hearing*

116. It appears that the Departmental Form provided the starting point and *leitmotiv* for the hearing before the FTP Committee hearing took place on 26 February 2017. Pastor Omooba recalls Professor Marsh kept the Departmental Form in front of her during the hearing and repeatedly cited the words from it referring to the Appellant's social media postings indicating views of a "discriminatory nature" in breach of the HCPC Code and regulations (paragraph 11 of his witness statement). In her own witness statement, Professor Marsh refers to the Appellant's posts as giving rise to the perception of "views… of a discriminatory nature". She explains the gravamen of the FTP Committee's concern as to the "the level of insight and reflection" shown by the Appellant and repeats the refrain that the Appellant had from a very early stage in the process "adopted an extremely entrenched position" (paragraphs 40 and 41 of her witness statement). Again, there appears to have been no discussion or no guidance given to the Appellant during the hearing by the panel about how he might more appropriately express his religious views in a public forum.

117. The stance which the FTP Committee appears to have adopted during the hearing in fact amounted to a *blanket* prohibition against the Appellant voicing his religious views on sexual ethics and homosexuality *at all* in a public forum. This is what the Appellant understood he was being told. His reaction was equally uncompromising: he complained in his appeal from the FTP Committee decision that "I have a religious right to express my views on sexual ethics and it is wrong to threaten me to surrender my beliefs" (paragraph 11 of his appeal filed on 23 February 2017). Positions during the FTP Committee hearing remained polarised throughout.

*Appeals Committee hearing*

118. The same pattern features in the Appeals Committee hearing on 28 March 2017. Mr Bosworth repeated to the Appeals Committee what he had said to the FTP Committee below, namely that (i) the Appellant's position "very quickly became entrenched", (ii) the Appellant's actions "were contrary to the HCPC's code of practice", (iii) the Appellant was "not addressing professional behaviour concerns" and so, although he wanted to issue a warning and allow a period of reflection, he felt he had no choice but to refer the matter. Professor Marsh explains that the Appellant's lack of "insight and reflection" was a major feature of the Appeals Committee's decision-making.

119. Again, the stance which the Appeals Committee appears to have adopted during the hearing appears to have been a *blanket* prohibition against the Appellant voicing his religious views on sexual ethics and homosexuality *at all* in a public forum. Pastor Omooba had described the University's position in his witness statement: "… the University was insisting that Felix cannot express his Christian beliefs on homosexuality in any form except a private setting" (see above).

120. The panel appears not to have offered any guidance or advice to the Appellant about how he might more appropriately express his religious views in a public forum. This was, however, in stark contrast to Pastor Omooba who on a couple of occasions during the hearing had the good sense to raise and emphasise the importance of "caution and diplomacy" in the context of posting views on the web. The Appellant's reaction was striking and telling: he is recorded as agreeing with Pastor Omooba and saying that he felt "this was not offered to him" and that he believed "he was told not to post on Facebook [and] this he feels is wrong". The Secretary to the Appeals Committee, Stephanie Betts (who was also the note-taker) then records herself as commenting (correctly) "…it is wrong to be told not to post on Facebook".

121. At one stage, Mr Bosworth is recorded as commenting that service users who may be vulnerable read posts "without context" and saying to the Appellant it was "important to pay attention to what you post". The Appellant's reaction was striking: he said he "felt he had been put in a position where he needed to choose between his religious beliefs and programmes". It is clear that positions during the Appeals Committee hearing remained polarised throughout. It is unfortunate that at no stage did the University grasp the olive branch proffered by Pastor Omooba.

122. We disagree with the OIA's finding that the University adequately explained its concerns to the Appellant during the disciplinary proceedings. The University expressed general concerns about the Appellant's condemnation of homosexuality on a public forum from which people, including social work service users, could identify him. However, as is apparent from the above extracts from the notes of the interview, the precise basis upon which the University's concerns were being put to the Appellant was never made clear. In particular, it was not clear whether the concern about his posting his "incongruous" views on social media was (a) the perception which this could lead to, or (b) the possibility that he might in fact discriminate.

*The University's clarification*

123. Ms Hannett represented the University with real ability and great clarity. In the course of her exchanges with the Court during argument before us, the University's position was tested fully. In an important exchange, Ms Hannett helpfully clarified the University's position as regards what we consider to be a fundamental point: she made it clear that <u>any</u> expression of disapproval of same-sex relations – however mildly expressed – which could be traced back to the person making it, would be a breach of the professional guidelines for social workers as far as the University was concerned. This point does not appear to have been articulated in these precise terms before the judge below, and there appears to us to be considerable tension with what had previously been expressed to be the University's concern.

124. Ms Hannett's clarification is helpful because it confirms what is apparent from the records of the disciplinary proceedings: namely, that the University told the Claimant that whilst he was entitled to hold his views about homosexuality being a sin, he was never entitled to express such views on social media or in any public forum.

125. As the argument developed before us, it became clear how wide Ms Hannett's submission must be taken. Aside from expressing views on-line or in social media, or such old-fashioned modes of expression such as writing in a local newspaper or speaking or preaching on a street corner: even expressing these views in a church, at

least in a community small enough for these views to be known and associated with the speaker, would, it is said, be sufficient to cross the line.

126. The breadth of the proposition became clear in another way, conveniently referenced from the ambit of the HCPC regulations in question here. If social workers and social work students must not express such views, then what of art therapists, occupational therapists, paramedics, psychologists, radiographers, speech and language therapists: all professions whose students and practitioners work under the rubric of the same general regulations? What of teachers and student teachers, not covered by the HCPC regulations, but by a similar regulatory regime? For present purposes it is not easy to see a rational distinction between these groups. All are usually engaged with service users who often have no opportunity to select the individual professional concerned. Very many of these professions deal on a day-to-day basis with personal problems of a particular nature, where the social, family and sexual relationships of the client or service user are relevant, sometimes central.

127. In our view the implication of the University's submission is that such religious views as these, held by Christians in professional occupations, who hold to the literal truth of the Bible, can never be expressed in circumstances where they might be traced back to the professional concerned. In practice, this would seem to mean expressed other than in the privacy of the home. And if that proposition holds true for Christians with traditional beliefs about the literal truth of the Bible, it must arise also in respect of many Muslims, Hindus, Buddhists and members of other faiths with similar teachings. In practice, if such were a proper interpretation of professional regulation supported by law, no such believing Christian would be secure in such a profession, unless they resolved never to express their views on this issue other than in private. Even then, what if a private expression of views was overheard and reported? The postings in question here were found following a positive internet search by the anonymous complainant. What if such statements had been revealed by a person who had attended a church service or Bible class?

128. It will immediately be clear that an absolute prohibition of the expression of such religious views is some way distant from the rather elevated debate about the use of religious language - and the Appellant's obligations to grasp and act on the potential misunderstanding of religious language and how and when to deploy it - which held the stage below. The more nuanced way in which the University's case was put below is likely to have coloured the Judge's findings and conclusions. However, the blanket prohibition espoused by the University from the outset of the disciplinary hearings is clear from a detailed and careful analysis of the records of the hearings such as we have carried out above.

129. In our view, such a blanket ban on the freedom of expression of those who may be called "traditional believers" cannot be proportionate. In any event, the HCPC guidance does not go so far. The specific guidance prohibits "comments … [which] were offensive, for example if they were racist or sexually explicit": see paragraph 27 above. No doubt if the Appellant's comments were abusive, used inflammatory language of his own, or were condemnatory of any individual, they would fall to be regarded in the same way as would racist views, or inappropriate sexually explicit language. But in our judgment, there is no equation here demonstrated between what is rightly condemned by the guidance, and the fundamental position now advanced on behalf of the University. What is here formulated represents a much greater incursion

into the Article 10 rights of the Appellant, and by obvious implication, those of many others, than has hitherto been clear. In our judgment this is not the law.

130. The previous cases on a restriction of employee's or professional's freedom of speech have turned on the need to prevent actual discrimination. As Ms Hannett readily conceded, what is sought here is an extension of interference, based on a perceived risk of discrimination, and in a case where it is accepted the Appellant will not in fact act in a discriminatory way. In our view, this is analogous to the position in *Vogt v Germany* and *Wille v Liechtenstein*. Whether one characterises this as being outside the legitimate aim of protecting the reputation of the profession, or as a disproportionate exercise in pursuit of a legitimate aim, may be of limited importance.

*Proportionality of sanction imposed*

131. We turn finally to consider the proportionality of the sanction imposed by the University, on the assumed basis that it was, in truth, the reaction of the Appellant which determined the outcome of the Panel and Appeal proceedings. Here too, with great respect to the judge, we differ from her conclusions.

132. We entirely accept the need to exercise caution before interfering with the findings and conclusions of a judge at first instance. However, the great majority if not all of the material before us was in the same (written) form as before the judge, and the relevant questions concern the application of law to facts recorded in writing.

133. We also accept the importance of the special knowledge and expertise of professionals, here social workers and senior academics, in making judgements on professional and disciplinary matters. The judge expressed that consideration very well below, and we do not disagree with any part of her observations, in principle. However, it is worth pointing out that the principal issue here involves a question of law, not merely fact and professional expertise.

134. After considerable reflection, we cannot conclude that the approach of the University can be shown to be proportionate.

135. These were the Appellant's religious and moral views, based on the Bible. Where he used his own expressions of belief, rather than Biblical quotations, they mirrored Biblical text. Indeed, as we have observed, the strongest term used in respect of homosexual acts was in direct quotation from Leviticus. The Appellant had never been shown actually to have acted in a discriminatory fashion. He denied having done so and stated he would never do so. That was accepted by the University. It was not said that he would discriminate in the future. He stated, without contradiction, that he had dealt with those in homosexual relationships in the past, and done so properly. There was no evidence any actual or potential service user had read the postings. There was no evidence of any actual damage to the regulation of the profession. Although, the Panel, and then the Appeals Committee, concluded that the Appellant and Pastor Omooba were intransigent and defiant, we find it hard to see how the University made sufficient efforts to engage them. We recognise of course the difficulty that any appeal court faces, that these events were not before us.

136. Moreover, it seems apparent to us that the position as to the condemnation of <u>any</u> expression of such views as those held by the Appellant must have been present in the

minds of key players within the University at the time. That was clearly Pastor Omooba's understanding. Secondly, in our view, that underlying attitude may almost certainly have led to a too-rapid and disproportionate conclusion that removal from the course was necessary, rather than the institution of a calm, continuing process of guidance of the Appellant, spelling out what he could and could not properly say, and the circumstances in which he could say it. It should be borne in mind that the Guidance (SET 3.16) stipulates that the "process should focus on identifying, and helping to address concerns …".

137. The swift conclusion that the Appellant was 'unteachable', that it was for him to construe the Regulations and Guidance, for him to understand the impact of religious language on others unfamiliar with it, and that his failure to do so meant he must be removed immediately, do not seem to us to have been shown to be the least intrusive approach which could have been taken. It appears to us that this approach was disproportionate on the part of the University.

138. We recognise that a more prolonged exploration of a resolution here might well have proved unpopular with some. However, University authorities have an obligation, as do all regulators, to exercise care and restraint, and to take unpopular decisions, if such represent the just and proportionate result.

*Bias*

139. Before the judge Mr Diamond sought permission to appeal on an additional ground, namely the apparent bias of the chair of the panel due to her support for LGBT causes. Permission was earlier refused on the ground of delay and because the ground was not arguable. The judge held that a fair-minded observer would not have concluded that there is a real possibility that Professor Marsh might have been biased.

140. Mr Diamond argued that a fair-minded and informed observer would consider that in a case of this nature there was a real risk of bias on the part of a Chair of the FTP Committee who was openly in a civil partnership, had shown a great deal of activism on LGBT issues, and failed to disclose any of these matters before judging whether the Appellant was 'fit to practise' in this case.

141. Ms Hannett submitted that the judge was correct in finding that no objection against Professor Marsh could be maintained on her sexual orientation alone, and that something more would be required. Professor Marsh was one of three judges on the panel and the decision was unanimous. In these circumstances, the Appellant would be required to show that she exerted an undue influence on the other panel members. There is no such evidence here and the FTP Panel's decision was upheld by the Appeals Committee.

142. Ms Hannett noted that the Appellant's arguments to support this ground essentially suggest that an LGBT judge, who had taken part in LGBT events, would be required to bring these matters to the attention of the parties in any case relating to sexual orientation discrimination. She questions whether the same would be required of heterosexual, BME or disabled judge in relation to cases addressing these characteristics. The Appellant's arguments are contended to be themselves discriminatory.

143. We have some concern about the procedure adopted, on one point. It appears to us rather unusual, and open to misinterpretation, that the Chair of the FTP Panel should attend the Appeals Committee, in effect to argue in favour of the decision below.

144. However, that aside, it appears to us the Appellant's arguments are ill-founded. There is no well-founded basis for actual or apparent bias in the appointment of an LGBT person in these circumstances. To erect a requirement of some kind of declaration would indeed be to discriminate. It would also imply an actual or potential bias, for which there is no basis. We would reject Mr Diamond's argument on this point and dismiss this ground of appeal.

## Conclusion

145. For all the reasons given above, we would allow the appeal on the first ground. The judge's judgment was premised on an incorrect finding that the University was not suggesting a blanket ban of the sort now in question. The disciplinary proceedings were flawed and unfair to the Appellant. The fundamental fault for the unfortunate course which the disciplinary proceedings took lay with the University.

146. This Court cannot finally determine whether the Appellant would have resisted the possibility of tempering the expression of his views or would have refused to accept guidance which would resolve the problem. This requires new findings of fact. This case should, therefore, be remitted for a new hearing before a differently constituted FTP Committee.