

First-tier Tribunal Primary Health Lists

The Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care) Rules 2008

IN THE MATTER OF THE NATIONAL HEALTH SERVICE (PERFORMERS LISTS) (ENGLAND) REGULATIONS 2013

[2020] 4093.PHL VKINLY

Heard by Video Link on 22 December 2020

BEFORE
Mr H Khan (Tribunal Judge)
Mr D Styles (Professional Member)
Ms Pat McLoughlin (Specialist Member)

BETWEEN:

Mrs Daroun Baban

Appellant

-v-

NHS England

Respondent

DECISION

The Appeal

1. This is an appeal by Mrs Daroun Baban (“the Appellant”), made pursuant to Regulation 17 of the National Health Service (Performers Lists) (England) Regulations 2013 (“the 2013 Regulations”), against a decision made by the Performers List Decision Panel (“PLDP”) on 25 June 2020 (confirmed in a decision letter dated 30 June 2020) to refuse her application to join the NHS England Ophthalmic Performers List.

The Hearing

2. The hearing took place on 22 December 2020. This was a remote hearing which has not been objected to by the parties. The form of remote hearing

was by video. A face to face hearing was not held because it was not practicable, and no-one requested the same and we considered that all issues could be determined in a remote hearing. The documents that we were referred to are in the electronic hearing bundle (478 pages) provided for the hearing.

3. The Tribunal took account of the Appellant being unrepresented and made adjustments to enable the Appellant to fully participate in the proceedings such as providing additional breaks and ensuring that the Appellant was aware that she could raise any difficulties at any time during the hearing. For example, we explained to the Appellant that if she had any issues with regards to her hearing any of the proceedings, these should be raised at any time.
4. In dealing with procedural issues and in giving directions on the management and conduct of the final hearing the Tribunal at all times took account of the Tribunal's overriding objective to deal with the case fairly and justly.
5. The Appellant dialled into the hearing by video link so that she could see what was happening in the hearing room but dialled in by telephone as well in order to hear the audio. The Appellant explained that she could follow and see what was going on and was content to proceed on this basis.
6. We acknowledge that due to email quota limits, the hearing bundle was emailed to the Appellant and to the Tribunal in small bundles. The Appellant confirmed at the hearing that she had read the bundle but was also provided with additional time at the hearing (through a short adjournment) in order to be able to download the various parts of the bundle. At the conclusion of the hearing, the Appellant confirmed that she had had "no difficulties" with the video hearing.

Attendance

7. The Appellant represented herself at the hearing and gave oral evidence. The Appellant did not call any witnesses to give oral evidence on her behalf.
8. The Respondent was represented by Ms Sophie Mortimer (Counsel). The Respondent called Ms Susanne Hassleman (Chair, Performers List Decision Panel), Ms Sandra England (Professional Standards Officer) and Ms Manda Copage (Head of Professional Standards and National Performers Lists).
9. Linden Rakestrow, Professional Standards Manager, attended as an observer but played no part in the proceedings.

Background

10. According to the documentation, the Appellant is an Ophthalmic Optician

who qualified in Optometry in the Netherlands in August 2014. The Appellant obtained a licence from the General Optical Council (GOC) in December 2015. The Appellant has been working privately in the UK since January 2016. However, the Appellant confirmed that she had not been working at all in the two weeks prior to this hearing.

11. The Appellant applied previously to join the Ophthalmic Performers List in 2016. The Appellant declared that she was advised at a face-to-face meeting in London on 5 February 2016 that the International English Language Testing System (“IELTS”) was not required.
12. The Appellant submitted a full application and supporting documents to join the Ophthalmic National Performers List via the Primary Care Support England (PCSE) online portal on 07 April 2020.
13. The application was received by the Respondent on 22 May 2020. The full application pack was presented to the Performers List Decision Panel (the Panel), when they reached their decision on 25 June 2020.
14. The PLDP decided on 25 June 2020 (confirmed in a decision letter dated 30 June 2020) to refuse her application to join the NHS England Ophthalmic Performers List. This was based on her failure to provide evidence of successfully achieving the minimum scoring requirement of 7.5 overall in her IELTS.

The Agreed Issues for the Tribunal

15. The issue for the Tribunal was whether the refusal to the Performer’s List was justified pursuant to Regulation 7 (4) (b) of the NHS (Performers List) (England) Regulations 2013, as amended on mandatory grounds.

The Respondent’s position

16. The Respondent’s position was that the decision to refuse the Appellant’s application was based on her failure to provide evidence of successfully achieving the minimum scoring requirement of 7.5 overall in her IELTS.
17. The Appellant had submitted evidence of four IELTS results certificates with the following scores:

IELTS Date	Listening	Reading	Writing	Speaking	Overall
19/11/2016	6.5	5.5	5.5	7.5	6.0
11/02/2017	6.5	5.0	6.0	7.0	6.0
07/09/2019	5.5	5.5	6.0	7.0	6.0
23/11/2019	6.0	6.0	7.0	7.0	6.5

18. The Respondent recognised that the Appellant has been working in the UK since January 2016 and it had the option of considering a reference and the outcome of a face-to-face assessment. However, it considered that the

Appellant had recently completed two recent IELTS tests and not achieved the minimum required score of 7.5 for Optometrists.

19. The Respondent recognised the importance for patient safety of ensuring that practitioners providing NHS primary services had a good grasp of the English Language and this is particularly important when practitioners, such as Optometrists, are treating patients on a one-to-one basis.

The Appellant's position

20. The Applicant's case was that she accepted that she had not achieved the minimum scoring requirement of 7.5 overall in her IELTS but asked for an exception to be made for her taking into account her references.

The Regulatory Framework

21. In order to work as an Optometrist within the NHS England, an Optometrist must be on the "NHS Ophthalmic Performers List" maintained by NHS England.
22. The 2013 Regulations provide a self-contained, statutory regime for maintaining the Performers Lists for NHS medical, dental and ophthalmic practitioners in England. The Regulations govern the eligibility to apply, application by practitioners for inclusion on the list and the removal of practitioners from the list.
23. This is a decision concerning a refusal to include. Under Regulation 7, decisions and grounds for refusal, it states:

(1) The Board

(a) may refuse to include a Practitioner in a performers list on the grounds set out in paragraph (2);

(b) must refuse to do so on the grounds set out in paragraph (4).

24. Regulation 7(4) states:

The grounds on which the Board must refuse to include a Practitioner in a performers list are, in addition to any prescribed in the relevant Part, that-

(b) it is not satisfied that the Practitioner has sufficient knowledge of the English language necessary for the work which those included in that performers list perform

...

25. Regulation 7 also sets out the practical steps that need to be taken in the event of a decision

7(6) Where the Board has made a decision on a Practitioner's application for inclusion in a performers list, it must notify the Practitioner within 7 days of-

(a) its decision; and

b) if it has decided not to include the Practitioner, the reasons for that decision (including any facts relied upon) and the Practitioner's right of appeal under regulation 17.

- 7 (7) Where the Board notifies a Practitioner under paragraph (6)(b), it must
- (a) notify the Practitioner that the right of appeal must be exercised within the period of 28 days beginning with the date on which it notified the Practitioner of its decision; and
 - (b) tell the Practitioner how to exercise that right.

26. The appeal is governed by Regulation 17 of the 2013 Regulations and procedurally by the Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care) Rules 2008 (“the 2008 Rules”).

27. Regulation 17(4) provides that on appeal the First-tier Tribunal may make any decision which the Board could have made. It is common ground that the First-tier Tribunal is not required to review the decision and reasons of the PLDP. It is required to make a fresh decision in light of all the information before it, which includes new information not available to the PLDP. The standard of proof is the balance of probabilities.

Evidence

28. We received an indexed bundle from both parties. We do not rehearse their contents as these are a matter of record. We have summarised the evidence insofar as it relates to the issues we determined.

29. Ms Hasselmann explained that she was the chair of the PLDP. She summarised how the PLDP had taken into account the Appellant’s circumstances in reaching its decision. This included taking into account the Appellants consistently low scores overall of between 6.0 and 6.5 this despite attempting several times to get the required grades. Ms Hasselmann explained that the panel was not satisfied that the Appellant had the ability to engage with all nationalities.

30. Ms England set out that the Appellant previously applied to join the Ophthalmic Performers List (OPL) in 2016, however, on checking with them, she was advised by PCSE that they did not hold a copy of this application although they subsequently provided a copy of the application dated 27 January 2016.

31. Ms England accepted that there was a reported issue with the PCSE online portal which incorrectly stated the overall score for IELTS required is 7, however, the accompanying application guidance correctly states it was 7.5.

32. Ms England stated that the accompanying guidance for completing the National Performers Lists Application Form – English Language Testing states; *“If applicants have not studied or trained in the UK or Irish Republic, they must provide: Ophthalmic practitioners - a certificate indicating a pass obtained within the last two years at the required level of IELTS 7.5”*.

33. Ms England also accepted that she had recorded the “International English Language Testing System” (IELTS) requirement at 7.0 instead of 7.5. However, having realised this error before attending the PLDP, she clarified this verbally at the PLDP meeting on 25 June 2020.

34. Ms England made it clear that whilst she clarified this verbally at the PLDP, she did not take any part in the decision-making process.
35. Ms Copage explained that the language requirement was required in order to ensure that the Appellant could engage with patients from different background and ages. This was important as an Optometrist did not work with any other professions such as a nurse. Therefore, the onus was on the Optometrist to record accurately the patient's history, explain the examination, manage any onward referrals as well as managing the patients themselves. It also included maintaining patient records accurately.
36. The current policy with regards to the required pass mark of 7.5 was consistent with the GOC. The required pass mark which was applied was in force at the time of entry. This requirement had been reached after consultation with various stakeholders including the GOC.
37. The Appellant set out that she was an Optometrist with 10 year's experience in the Optic Industry. The Appellant felt that the decision to refuse the application by the Respondent had caused a high level of stress and anxiety. This also prevented her from working.
38. She accepted the need for "*rules and regulations.*" She had completed an application form, but the order of the questions had changed. She thought that this may have impacted on the outcome before the PLDP. There was also some suggestion that information was missing before the PLDP in the bundle but the Appellant did not elaborate on this.
39. She acknowledged that her most recent attempt at the IELTS was 6.5. However, she had been employed by Specsavers Opticians in the UK for two years and sought to rely on the written reference from her employer Helen Brooke and Mr Kam Gohil regarding her English language capabilities.
40. She believed that believe that a difference of between 0.5 and 1.0 mark in the IELTS requirement would not cause anyone any harm. No patients had ever complained about her English language capabilities.
41. The Appellant had also experienced some personal challenges. She had undergone an examination of the ear which reveal scarring and hearing loss in her left ear. She had a long-standing minor issue with her ears and was routinely examined but it had since deteriorated and progressed into a more severe hearing loss. She considered that she had got frustrated and stressed by the listening session due to a hearing loss. She was therefore not able to concentrate properly as a volume of the speaker created an echo sound ringing in her ears.
42. The Appellant explained that since March 2019, she has been employed by Specsavers. She was made redundant at the start of lockdown on 20 March 2020. However, her employer then cancelled the redundancy after the government announced the furlough scheme although she had now left

that employment.

43. The Appellant explained that her personal circumstances were difficult. Her husband was studying and was not able to work full-time. She has a 2-year-old daughter and her family relied on her income.
44. The Appellant wanted the Tribunal to “*help her out*”. She would be an asset to the NHS. She considered that she could pass the IELTS if she was able to study full-time for a month or two. However, she had a young child to look after and preparing for the IELTS caused anxiety as there was no guarantee that she would pass.

The Tribunals Conclusions with Reasons

45. We took into account all the evidence that was included in the hearing bundle and presented at the hearing.
46. We wish to place on record our thanks to Ms Mortimer and Mrs Baban for their assistance at the hearing. We would also like to thank the witnesses who dialled into the hearing and gave evidence.
47. We reminded ourselves that the Tribunal is considering the appeal at the date of the hearing and makes its decision on the basis of all of the evidence available to it, including any oral evidence at the hearing and is not restricted to matters available to the PLDP.
48. We concluded that based on the totality of the evidence, we were not satisfied that the Appellant has sufficient knowledge of the English language necessary for the work which those included in that performers list perform. Our reasons for doing so are set out below.
49. We acknowledge that the Appellant is passionate about Optometry and acknowledge her oral evidence about her journey to qualification and of her desire to contribute to the work of the National Health Service. We also acknowledge that there have been no clinical concerns raised during this appeal about her work. We found the Appellant to be honest about her position in relation to the IELTS and she accepted the results as set out above. Her case was based on her submission to the Tribunal to “*help her out*” and that that a difference of between 0.5 and 1.0 mark in the IELTS requirement would not cause anyone any harm.
50. We found the Respondent’s witnesses to be credible and whose evidence was consistent with the documentary evidence. Although, we acknowledge that the Appellant was representing herself, the evidence of the Respondent’s witnesses was not challenged. This is not surprising given that the central part of the Respondent’s case was accepted in that the Appellant had not met the minimum scoring requirement of 7.5 overall in her IELTS. In our view, we did not see any evidence which would suggest that the Appellant was treated unfairly by the Respondent or its witnesses in any way.

51. The Appellant raised the suggestion that there was information missing from her application form that had not gone before the PLDP. However, on closer scrutiny this was not the case. The email dated 11 September 2020 from Tony Grime summarised the position succinctly. It stated the following;

“...there were some technical changes made to the online application form by PCSE to amend this section. When these changes took place, these also made the changes to any applications that were currently in progress, changing the view that the applicant sees on screen. What this did not do was change the information that had been entered by the applicants, including yourself, which continued to form part of the application, despite not being displayed to the applicant. On submission of the form, the full information was provided to NHSEI and able to be downloaded by them, including the information no longer presented and made viewable to the applicant, in order that this could be considered as part of the decision-making process”

52. During the hearing, the Appellant did not refer us to any missing information from the application form (a copy of which was in the hearing bundle). The Appellant appeared to think that the change in the order of the questions affected the outcome of the PLDP proceedings when clearly, this was not the case. In short, all the answers that the Appellant had submitted had been before the PLDP and were also before this Tribunal.

53. There is no dispute between the parties that the Appellant had not achieved the minimum scoring requirement of 7.5 overall in her IELTS. We noted that the Appellant had made 4 attempts to pass the IELTS. She had only achieved 7.5 in speaking in November 2016 and whilst we acknowledge that she had made some progress in November 2019, her overall score in November 2019 was still 6.5 and below the required mark of 7.5 overall.

54. In addition, although she had not achieved the overall score of 7.5, she had not received a mark of 7.5 for either Listening, Reading and Writing. We acknowledge what the Appellant stated with regards to issues she had with her hearing at the examination in November 2019, however, this was not raised with IELTS at either of the various tests. In any event, we were persuaded by the Respondent's submission that IELTS scoring is consistently below in other components than just listening, i.e. writing, reading, speaking.

55. We acknowledge that Appellant was correct and that the Respondent accepted that there had been an error on the website which specified that the pass mark required was an overall 7.0 rather than 7.5. However, we note that the Appellant accepted that she was aware in 2016 that the pass mark required was 7.5 and the accompanying guidance document made reference to the correct pass mark of 7.5. In any event, we note this is a moot point as the Appellant has never achieved an overall mark of above 6.5.

56. We also acknowledge the Appellant's submission that she has a young

family and preparing for IELTS exams can be stressful and the process can cause anxiety without any guarantee of success. However, the language requirement is an essential part of the application process. Although the Appellant submitted that she respected the “*rules and regulations*”, she failed to consider the reasons for such standards in relation to the patients and patient safety. As Ms Copage set out, the pass mark reflects the type of work that Optometrists perform including the fact that they work on their own without a colleague. They have to deal with patients of all ages and from all backgrounds. They have to take the history from patients, carry out examinations and make accurate onward referrals where appropriate. Effective communication is therefore essential in order to do so.

57. We considered the evidence of Ms Helen Brooke from Specsavers. We attached limited weight to this evidence. The reference dated 8 July 2020 is short, it does not set out the data on which underpins the reference. Although, Ms Brooke concludes that she “*can say with confidence that her spoken and written English is more than adequate for inclusion in the performers list*” it does not set out how that conclusion was reached nor how it was measured. As Ms Mortimer submits, Ms Brooke does not suggest that she is a language assessor. Furthermore, even if we had been persuaded to attach greater weight to this, it did not address her listening and reading skills.
58. We also considered the evidence of Mr Gohill dated 30 June 2016, this also fails to explain the basis upon which he has reached his conclusion that her English is good enough. We noted that this reference was provided before she undertook any of the IELTS assessments. Since then she has undertaken four assessments and has not met the required standard in any of them.
59. For the avoidance of any doubt, we have considered all the issues raised by the Appellant even if they have not been expressly set out in our decision. We were not persuaded as to their merits.
60. We consider that the decision to refuse the Appellant’s application to join the NHS England Ophthalmic Performers List was both necessary and proportionate taking into account the circumstances of the case.
61. The 2013 regulations are clear in that if we are not satisfied that the Appellant has sufficient knowledge of the English language necessary for the work which those included in that performers list perform then we must refuse to include the Appellant on the performers list.
62. We acknowledge that the Appellant will be disappointed with our decision. The Appellant is keen to pursue her career in the UK. We note that the Appellant was confident that, notwithstanding her personal arrangements, she could pass the exam the IELTS, if she focused on it for a month or two.
63. The Respondent made it clear that it would welcome a new application to join the English Ophthalmic Performers List at a time when she has

achieved the required standard and fully satisfied the requirements of the application process in accordance with the NHS (Performers Lists)(England) Regulations 2013 (as amended). We reminded ourselves that any new decision would also carry with it a right of appeal.

Decision

64. We concluded, therefore, that the Appellant's appeal shall be dismissed and the decision to refuse her application to join the NHS England Ophthalmic Performers List made on 25 June 2020 (and as set out in the letter dated 30 June 2020) is confirmed.

Judge H Khan

Lead Judge

First-tier Tribunal (Health Education and Social Care Chamber)

Date Issued: 06 January 2021