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] 4059.PHL (VKinly)

Heard via video on 6 and 7 October 2020

BEFORE
Mr C Dow (Tribunal Judge)
Dr E Walsh-Heggie (Specialist Member)
Mrs P McLoughlin (Specialist Member)

BETWEEN:

Dr Nihal Elapatha

Applicant

-v-

NHS Commissioning Board (NHS England)

Respondent

DECISION AND REASONS

The Appeal

1. This is an appeal by Dr Nihal Elapatha ("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 15 April 2020 not to admit him to the NHS medical Performers List.

Attendance

2. Dr Elapatha attended and gave evidence on his own behalf. He was

represented by Mr Alan Jenkins of Counsel.

3. The Respondent was represented by Miss Sophie Mortimer, in-house Counsel. The Respondent called two witnesses:

   a. Mr Jesse Lebby, Senior Project Manager, Professional Standards Medical Directorate, NHS England; and
   b. Mrs Hazel Hole, Lay Chair of the Performers List Decision Panel for NHS England in the East of England.

Background and Proceedings

4. Dr Elapatha qualified as a medical doctor in Sri-Lanka in 1981. He undertook training as a General Practitioner (GP) in the UK, which he completed in 1998. From 2003 Dr Elapatha worked as a single-handed GP at Rochester Community Health Living Centre.

5. Between 2003 and 2009, Kent and Medway Primary Care Trust ("the PCT") identified various concerns about clinical care, practice management, record keeping and 'Quality and Outcomes Framework' scores. Breach of contract notices were issued in 2009 relating to staffing and record keeping. These led to a record-keeping audit and an assessment by the National Clinical Assessment Service (NCAS).

6. From November 2011 Dr Elapatha worked reduced hours due to self-reported ill-health.

7. In 2012 the PCT informed Dr Elapatha that they were considering removing him from its Performers List. Dr Elapatha did not attend the oral hearing and he was removed under Regulation 10(3) and 10(4)(a) of the 2004 Regulations. Dr Elapatha appealed this decision to the First-tier Tribunal (FTT).

8. In September 2013 the FTT upheld Dr Elapatha's appeal to the extent that they directed he be reinstated on the Performers List with conditions.

9. In October 2013 the GMC carried out an interim performance assessment They found unacceptable performance in the areas of:

   a. Assessment of patient conditions;
   b. Providing or arranging investigations;
   c. Providing or arranging treatment;
   d. Record keeping;
   e. Other good clinical care – efficacy and use of resources; and
   f. Working with colleagues.

   Dr Elapatha was not present during the assessment.

10. Following this assessment, on 24 March 2014 Dr Elapatha's GMC registration was suspended by the GMC Interim Orders Panel (IOP). In January 2015 the Medical Practitioners Tribunal Service (MPTS) Fitness to

Practice Panel suspended Dr Elapatha's GMC registration for 12 months because his fitness to practice was impaired by reason of his deficient professional performance.

11. On 5 January 2015, NHS England terminated Dr Elapatha's General Medical Services Contract due to serious concerns about his management of the contract. On 11 February 2015 Dr Elapatha was removed from the National Performers List (NPL - which had replaced the Medical Performers List in 2013). The removal was made under Regulation 28(1)(b) which was a mandatory removal resulting from Dr Elapatha's suspension by the GMC.

12. The GMC MPTS reviewed Dr Elapatha's case in February 2016. The MPTS decided that the steps he had taken to remediate his poor performance were insufficient to meet their concerns. The suspension was maintained for a further 12 months.

13. In February 2017 the MPTS reviewed Dr Elapatha's suspension again. Since the previous review Dr Elapatha had undergone a full GMC performance assessment. The Panel concluded that Dr Elapatha's performance was still deficient in some areas but that he was fit to practice on a limited basis under direct supervision. His registration was reinstated with conditions including for direct supervision and to notify particular bodies, including any organisation whose Performers List he applied to join, of the conditions of his GMC registration.

14. On 11 April 2017, Dr Elapatha applied to join the National Performers List. That application was ultimately not progressed because his GMC conditions rendered him ineligible for NHS England funding for the compulsory Induction and Refresher (I&R) Scheme which Performers are required to take.

15. Dr Elapatha undertook the I&R scheme at his own expense and completed the compulsory assessments.

16. In February 2019 the MPTS again reviewed Dr Elapatha's conditions. As a result of his re-training and education, the MPTS decided to relax its supervision condition to 'close supervision'. Other conditions, including the requirement to notify, remained in place

17. In March 2019 Dr Elapatha made a further application to be included on the NPL. Further information was requested of him and his application was considered complete on 27 September 2019. Inclusion on the NPL would enable Dr Elapatha to complete a supervised placement in order to progress his training against the I&R requirements.

18. On 1 April 2020 the East of England PLDP considered Dr Elapatha's application. On 15 April 2020 NHS England wrote to Dr Elapatha informing him that his application had been refused on grounds of suitability.

19. It is the decision published on 15 April 2020 which forms the basis of this

appeal.

The Regulatory Framework

20. In order to work as a General Practitioner within the NHS England a Medical Practitioner must be on the relevant National Performers List maintained by NHS England.

21. 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 medical performers for inclusion on the list and the removal of the medical performers from the list.

22. This is a 'suitability' case. In brief, Regulation 7 makes provision for grounds for refusing an application to join the NPL. The grounds include circumstances where the applicant is considered to be unsuitable and cross-refers to other provisions within the Regulations.

23. 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"). 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.

24. The burden of proof lies on the Respondent and the standard of proof is the balance of probabilities.

The Documents and Evidence

25. The Tribunal was provided with a Bundle indexed and paginated to Tab F, page F17. The 928 page bundle comprised all the filed material on which both parties sought to rely. Prior to the hearing the parties filed a number of further documents including skeleton arguments and further evidence. It is not necessary to itemise those documents here, except to note that Dr Elapatha had requested the admission of several items of late evidence, including email correspondence and a proposed witness statement from Mrs Elapatha which were not admitted by the case-managing Judge. Leave was given for Dr Elapatha to renew his request at the final hearing. Although Dr Elapatha did begin to make such a request, Mr Jenkins suggested that consideration whether to admit these documents could be left until it became clear whether they were relevant to the issues. The Tribunal agreed with that approach. No application was made.

26. However, during the hearing Mr Jenkins did request permission to admit another document as late evidence, which was the current guidance for completing the NPL application form (NPL1). There was no objection to the

admission of that document. Applying Rule 15 of the Tribunal's Procedure Rules, the Tribunal decided that document was relevant and helpful and admitted it. Since this was a remote hearing, the participants each directed themselves to the relevant URL: https://pcse.england.nhs.uk/media/1842/200102-performers-list-applicant-guide-_v1.pdf

The Hearing

27. Although the hearing was held remotely, it was a public hearing and members of the public did attend. There was no requirement for any part of the hearing to be held in private.

28. The Tribunal heard oral evidence for the Respondent from Mr Lebby and Mrs Hole; and Dr Elapatha on his own behalf.

The Agreed Issues for the Tribunal

29. The central issue for the Tribunal was whether refusal to include Dr Elapatha on the Performers List was justified on suitability grounds. As such, the Tribunal was invited to consider:

    a. Whether Dr Elapatha's 2019 application form, judged as a whole, was misleading;

    b. If it was misleading, was Dr Elapatha's motivation dishonest;

    c. The extent to which Dr Elapatha showed insight into:

        (i) the nature of the Performers List regulatory scheme;
        (ii) the reasons for and the seriousness of the actions taken against him by the GMC, Kent and Medway PCT and NHS England;
        (iii) The seriousness of any lack of disclosure of regulatory action taken by the GMC or Kent and Medway PCT or (full) disclosure of the conditions of his GMC registration;
        (iv) the risk of repetition of non-disclosure; and
        (v) the implications of a dishonest or misleading approach to his Performers List application for patient safety and governance.

The Respondent's Opening Submissions and evidence on behalf of the Respondent.

30. Miss Mortimer summarised the background and issues as set out above and relied on her skeleton argument (A51) in setting out the Respondent's position. In response to Dr Elapatha raising procedural unfairness by not being invited to attend or be represented at the PLDP meeting which determined his application, Miss Mortimer said the Respondent did not accept that it was usual to invite an applicant to a PLDP meeting and it was not necessary in this case.

31. The Respondent relied on the statements and oral evidence of Mr Lebby

and Mrs Hole.

32. **Mr Jesse Lebby** is Senior Project Manager, Professional Standards Medical Directorate (PSMD) for NHS England (East of England Region). He adopted his witness statement dated 1 September 2020 (C1) as his evidence in chief.

33. Mr Lebby explained that Dr Elapatha's removal from the NLP in 2015 was an automatic result of his suspension by the GMC.

34. He confirmed it was his role to prepare the bundle of documents to be seen by the PLDP. He had also provided support and guidance to Dr Elapatha in gathering the required documentation to accompany his application and alerting him to the opportunity to make written representations, which Dr Elapatha had done.

35. Mr Lebby said it would not be usual for a GP applicant to be invited to a PLDP meeting. He said that Performers were only invited to attend (accompanied by a legal or other representative if they wished) when the PLDP was considering imposing condition or removal from the NPL. Mr Lebby could not say whether this arrangement was provided for in the Regulations or some other guidance or policy.

36. At Dr Elapatha's request, Dr Raja observed the PLDP which discussed the application, but he took no part in the discussion.

37. Considering Dr Elapatha's applications in 2017 and 2019, Mr Lebby agreed that the application would have been made online with boxes that expanded for applicants to insert the relevant information. He could not say whether there was a facility at that time to upload documents with the application.

38. Mr Lebby said that in preparing materials for the PLDP he had referred to Dr Elapatha's 2017 application only because it appeared to contain similar discrepancies and inconsistencies to his 2019 application. He believed the similarity was relevant.

39. Mr Lebby agreed that in the 2017 application Dr Elapatha had answered correctly questions 35 and 36 which relate to whether he has ever been investigated, suspended by the GMC or removed from the NPL. He also accepted that Dr Elapatha had given accurate dates in respect of his GMC suspension. Mr Lebby also accepted that in a letter dated 11 April 2017 (B384), Dr Elapatha had mentioned his GMC suspension and the letter said he had attached documents. Mr Lebby could not say what documents were attached to the letter or what had become of them because he was not in post at that time. Mr Lebby did not accept that either his preparation of the PLDP Bundle or Julia Sim's analysis which was included in the PLDP Bundle created a false impression of Dr Elapatha's 2017 application.

40. In respect of the 2019 application, Mr Lebby said he understood that because Dr Elapatha remained subject to GMC conditions and a complaint

was not yet resolved, Dr Elapatha should have answered 'yes' to the question about whether he is currently the subject of investigation. Mr Lebby said that he had been balanced about this issue, writing in his advice to the PLDP that Dr Elapatha may not think that having GMC conditions amounts to being under investigation.

41. Mr Lebby accepted that questions which were only to be answered by company directors were not relevant and did not need to be answered by an applicant in Dr Elapatha's circumstances. Mr Lebby accepted that the corresponding pages of the application form were missing from the PLDP bundle but he could not say who had removed them or why. Mr Lebby said he had included all the information sent to him by Dr Lipp. The missing pages were not referred to or queried at the PLDP meeting.

42. Mr Lebby accepted that the PLDP was not specifically referred to an email in May 2019 which supplied answers to declarations he had failed to complete on the original application, although references to that email were contained within Julia Sim's analysis. Mr Lebby could not say what documents Dr Elapatha had handed over when he attended an interview to discuss his application in May 2019.

43. Mr Lebby said that so far as he was concerned, all the relevant material was in the bundle prepared for the PLDP. He denied that the criticisms of both the bundle preparation and analysis put to him had amounted to a distortion or misrepresentation of Dr Elapatha's probity at the PLDP.

44. **Mrs Hazel Hole** is Independent Lay Chair of the PLDP for NHS England & NHS Improvement (East of England). She adopted her witness statement dated 1 September 2020 (C7) as her evidence in chief.

45. Mrs Hole said that the bundle for Dr Elapatha's case was substantially greater than for most applications, and certainly far greater than any other application considered at the same meeting. She had allowed 4-5 hours to read the bundle about a week before the PLDP meeting. She accepted that was not a lot of time to absorb all the information and that she was heavily reliant on the information within it, as well as the questions and comments of her panel colleagues.

46. She did not notice discrepancies or omission of some pages of the application. No issue of unfairness or misrepresentation in the preparation of the bundle was raised at the meeting. The PLDP had considered the application thoroughly and the discussion was wide-ranging and detailed.

47. Mrs Hole said that Performers are invited to attend PLDP only where the Panel was considering removing them or imposing conditions. She said it would not have been appropriate or helpful for Dr Elapatha to have been invited to the PLDP meeting to discuss his application. The panel had his written representations and there was recourse for him to have an oral hearing and re-determination of his application before the FTT if necessary. She did not believe that the criteria for Performers or applicants attending

the PLDP was a matter of regulation.

48. Mrs Hole said the PLDP's decision had turned on the answers he had given in his application, which did not stand up to scrutiny and reflected either misconceptions or misunderstandings of the process he was going through. The PLDP had considered that an apparent lack of acceptance of the behaviours he had previously exhibited was not appropriate for an NHS performer. Mrs Hole referred to Dr Elapatha's statement that he was suspended because he 'could not find a supervisor' and stated that Dr Elapatha's letter to his MP, asking him to intervene and expedite the application process, had been worryingly economical with the facts as the PLDP understood them.

49. When asked to reflect on Dr Elapatha's assertion that all the information, including the full conditions on his GMC registration had either been disclosed with his 2017 application, supplied in the course of his 2019 application or were otherwise publicly available, Mrs Hole said she maintained the view that the application itself was economical to the point of being misleading and it would not have made any difference to her view if she had known that Dr Elapatha had provided these documents at some point during the application process.

The Appellant's Opening Statement

50. Mr Jenkins made a brief opening statement. The Appellant's case is that the PLDP were presented with incomplete and misleading information about his probity. As a result, the Appellant says, NHS England's decision not to admit him to the Performers List was flawed. The Appellant asserts he is suitable to be admitted to the Performers List and should be admitted.

51. **Dr Elapatha** gave evidence on his own behalf. He adopted his witness statement (D1) as his evidence in chief. He added that attached to his letter applying to be included in the Performers List on 11 April 2017 were his 2016 Performance Assessment and the MPTS' 2016 determination of sanctions, which included the full conditions imposed on him at that time. Dr Elapatha said he was led to believe that the application had been lost and at the request of Mr Cutting, he had attached a further copy of his application form in an email dated 28 September 2017 (D81).

52. In relation to his 2019 application, Dr Elapatha said that the mismatch between the electronic and handwritten dates arose because he downloaded the form on 24 February but completed and submitted it on 26 March.

53. Dr Elapatha said that the condition of 'close supervision', which was imposed in place of the previous 'direct supervision' condition in 2019 is still in place because it cannot be relaxed unless he can obtain an employer's report. Dr Elapatha said he can only obtain an employer's report by being re-admitted to the Performers List so that he can undertake a supervised placement.

54. Dr Elapatha said that he could not attach documents with his application in March 2019. He knew that he would be called to attend an interview. He intended to, and did, take with him to the interview the MPTS review determination dated February 2019, which set out his conditions in full.

55. Dr Elapatha said that the document was not included with the bundle sent to Dr Lipp, so he had sent it separately by recorded delivery. Other missing documents were sent electronically to the PSMD.

56. Dr Elapatha was asked to consider his letter to Dr Lipp (B411), in which Dr Elapatha attributed his removal from the Performers List in 2015 to being unable to secure an appraisal and attributed his GMC suspension to ill health. Dr Elapatha said that he had set out his understanding of the situation at the time. It had been Mr Lebby who later explained that his removal from the Performers List had been an automatic consequence of the suspension of his GMC registration. Dr Elapatha denied receiving a letter from NHS England in 2015 explaining why he was being removed from the Performers List. He denied any attempt to mislead or deceive Dr Lipp about the real reason he had been removed from the Performers List or had his registration suspended by the GMC.

57. Dr Elapatha was challenged about various statements he had made suggesting he had retired in 2015 for reasons of ill health. Dr Elapatha said that the suspension of his GMC registration, the cancelling of his services contract and removal from the Performers List had everything to do with ill-health. Dr Elapatha said that, for example, he had been too ill to travel to the MPTS hearing which resulted in his suspension.

58. Dr Elapatha said that he accepted that his GMC suspension had been due to deficient professional performance to a large extent but then said his difficulties were ultimately about him lacking the capacity to manage a busy practice single-handed, relying on locum doctors and nurse practice managers.

59. In relation to the letter covering his 2017 application, Dr Elapatha accepted that he had referred only to his retirement in 2015 due to ill health and did not refer to the suspension of his GMC registration or the stated reasons for it. Dr Elapatha said that the full information was included in his application form and the documentation attached to the letter. Dr Elapatha said that he was not trying to mislead anyone by saying he had retired. Retirement, he said, referred to the fact that he had applied for and begun to draw, his NHS pension.

60. Dr Elapatha said he understood there was a duty on him to be honest, open and fulsome in his application. In relation to his 2017 application he said that his answers to questions about being suspended from the Performers List had been accurate but not comprehensive. Dr Elapatha accepted that he probably should have included more information but he was summarising the position as he saw it. He denied trying to gloss over the reasons for his

suspension. He maintained that the underlying reason for his suspension was because he could not comply with the GMC's requirement that he be closely supervised.

61. Dr Elapatha stated that he had complied with the condition that he inform NHS England of the full conditions of his registration by supplying the full conditions along with his 2017 application form. He did not accept that the conditions should have been set out in full on the face of his application form. He considered his narrative explanation in the form (B402) was a summary.

62. In relation to his 2019 application form, Dr Elapatha said that his answer to question 35 (B446), which asked him about previous refusals, conditions or suspensions had been a mistake. Dr Elapatha said that was clear from the fact that he had gone on to provide a short narrative answer. Dr Elapatha accepted his narrative answer was very short, did not mention the reasons why he had been removed from the list and that he should have added more.

63. Dr Elapatha said that he had answered question 36 (about whether he had ever been subject to sanctions, conditions or suspensions by his regulatory body) accurately. He accepted he had not referred to the conditions but said he had given accurate dates for his suspension and he intended to provide the relevant documents at interview.

64. When challenged about his failure to give more information, Dr Elapatha said that the 2019 application was meant to be a continuation of the application he had made in 2017. He had not filled out the form as comprehensively as he should have done. He said that he had clicked a button prematurely, he was probably tired when he completed the form and there had been computer problems. He would have done a much better job with help. Nevertheless, Dr Elapatha said, he would have typed more in the narrative box (B451) if there had been more space. He believed that he was accurately summarising the situation and did refer to the fact he was subject to conditions on his GMC registration.

65. In relation to his email providing additional information at the request of the MPSD (B462), Dr Elapatha accepted that he had written that he had been suspended by the GMC for health reasons and that he had not mentioned deficient professional performance. Dr Elapatha said that he did not mean to mislead anyone by this statement and it was true that his ill health had persisted until 2016. Dr Elapatha said he accepted there had been performance issues but he did not need to include that in his reply because the MPSD had the full documentation and anyway the reasons for his suspension were all in the public domain.

66. Dr Elapatha said his letter to Tom Tugendhat MP had been written out of frustration with the time it was taking to process his NPL application. His intention was to see whether his MP could expedite the process. Dr Elapatha accepted that he had described a career break due to ill-health, which he asserted was true. Dr Elapatha said that he wasn't going to write

all the detail in a short letter to his MP for a limited purpose and which wasn't a legal document or application.

67. Reviewing his written representations to the PLDP, Dr Elapatha said it had been accurate to state that the GMC probity investigation had resulted in 'no action'. He said the allegation made against him by Dr Lipp was unfounded. Dr Elapatha accepted that the GMC investigation had found he had breached Condition 9 of his conditions and that the letter made clear further investigations into other concerns about his probity would be considered separately. Dr Elapatha said nothing had been proved against him.

68. Referred to his witness statement which set out his GMC performance assessment scores, Dr Elapatha accepted that his score in the knowledge test had been 61% against a standard score of 64.91%. He said that his witness statement was correct to describe these assessments as not 'pass/fail' and it was not misleading, even though he had fallen below the expected standard. In any event, he said, the standard score was not representative of his cohort. The standard score included young Doctors who had just come from medical school.

69. Asked to describe in his own words why he had been suspended by the GMC, Dr Elapatha said he was ill at the time his single-handed practice was inspected in 2013. When he returned, he was told he required supervision and secured the supervision of Dr Da Silva. Dr Da Silva had given him a good report and concluded that he did not require supervision. However, the GMC had escalated the requirement to close supervision, which was a condition he could not comply with as a single-handed GP. As a result, he was suspended.

70. Asked why the GMC had investigated his practice, Dr Elapatha said it was because of his appeal to the FTT in 2013. Dr Elapatha said he wasn't against the investigation but it needed to be understood that he was providing a good service in a tough area.

71. Asked why NHS England had closed his surgery, Dr Elapatha said that as a result of his own interim suspension, he could not provide clinical services. Nor could he afford to employ locums. Dr Elapatha said he had told NHS England he could not go on and they had come to a decision to terminate his contract.

72. Dr Elapatha said his ill health had started around 2011 or 2012, characterised by weight loss and other symptoms. No firm diagnosis had been made and he had regained weight by mid-2016, when he was able to undertake the GMC performance assessment. Dr Elapatha said he had last examined a patient in March 2014. He has not practised since then.

73. Dr Elapatha accepted that his performance had been deficient around the time of his suspension in March 2014. Asked whether he accepted there had still been performance concerns in 2016, Dr Elapatha said these were due to de-skilling, which was reflected in the performance assessment and

discussed with his educational supervisor.

74. It was put to Dr Elapatha that the MPTS Panel in 2015 had accepted evidence that Dr Elapatha's *"deficient professional performance was at the high end on the scale of seriousness"* and he "*has not responded positively to the concerns expressed by the assessment team and that he has not taken any steps to remediate the deficiencies found"* (B218). Dr Elapatha said he accepted that account and that it did not refer to his ill health. He said that whether it was mentioned or not, he had been ill and that was why there were performance issues. Dr Elapatha did not accept that his performance was deficient before he became ill. He acknowledged there had been concerns expressed, but he had to prove them wrong. It was his word against theirs.

Respondent's Closing Submissions

75. Miss Mortimer again relied on her skeleton argument. She said that an application to be included on the Performers List must be complete and not misleading. She submitted that the application form has the space to include the necessary detail.

76. Miss Mortimer submitted that even on his own evidence, Dr Elapatha's application in 2019 had been incomplete and misleading. Miss Mortimer said it was not enough for Dr Elapatha to say now that he should have included more information on the form or to rely on the assertion that the necessary detail was available in other documents. The necessary information, including the reasons for his GMC suspension, cancellation of his services contract and removal from the Performers List should have been clear on the face of the form, along with the current conditions of his GMC registration.

77. Miss Mortimer rehearsed Dr Elapatha's evidence about his completion of important questions on the application form. Miss Mortimer said that both his answers to the questions and his evidence to the Tribunal was deliberately misleading because it 'glossed over' the nature of the concerns about his deficient professional performance, the extent of his involvement with the regulatory process and the extent of his current conditions.

78. Miss Mortimer said that Dr Elapatha had shown very little insight into his professional deficiencies. Miss Mortimer said that Dr Elapatha's continued insistence that his deficient professional performance was attributable to ill health or other factors beyond his control was unacceptable and wrong. Equally, examples such as Dr Elapatha's letter to his MP citing retirement through ill health and his attempt to describe the outcome of the GMC's probity investigation as either complete or as having exonerated him was deliberately misleading.

79. Miss Mortimer said that the concerns over Dr Elapatha's suitability arising from his lack of probity or insight could not be overcome by imposing conditions on his inclusion in the Performers List.

Appellant's Closing Submissions

80. Mr Jenkins again relied on his skeleton argument. The picture presented to the PLDP had been selectively distorted. Dr Elapatha had in both 2017 and 2019 provided documents to accompany or support his application which set out the circumstances of the suspension of his GMC registration and the conditions in place at the time of the application. He had never been credited for providing that information, which formed part of the distorted analysis which was put before the PLDP. It was unfortunate that Dr Lipp's email was included with the bundle (at B472) which incorrectly stated that an email from Dr Elapatha in October 2019 was his only reference to his GMC conditions.

81. In relation to both 2017 and 2019 applications, The PLDP had been invited to draw adverse inferences from Dr Elapatha's answers to questions that he was not required to answer, and where the relevant part of the application was never put before the PLDP. In addition, the PLDP had been invited to draw adverse conclusions from Dr Elapatha's answer that he is not currently subject to investigation. Mr Jenkins said that Dr Elapatha is not subject to investigation.

82. So far as the detail included on Dr Elapatha's applications in 2017 and 2019, Mr Jenkins said that Dr Elapatha is not a good typist and although his application included only the 'bare bones', the applications had included such information as Dr Elapatha felt was necessary to fulfil his duty. It was not unreasonable that he had relied on the documents he had attached in his 2017 covering letter or the documents he had given over at his interview in 2019 to fill in the picture. Anyone reading his application could not have missed that he had GMC conditions. Dr Elapatha had accepted at the very start of his written representations to the PLDP that he had been suspended by the GMC. Dr Elapatha's answer to question 35 had been a clear mistake, which was reflected in his narrative comments underneath the tick box.

83. Addressing the issue of Dr Elapatha's insight into his previous deficient performance, Mr Jenkins said that Dr Elapatha had thought he was suffering from cancer in 2013 and 2014. He did have health problems and it was not surprising that he did not telegraph these problems and concerns to the GMC. Although Dr Elapatha had not accepted the Tribunal's invitation to admit his failings, that was undoubtedly because it was painful to do so. For the same reason, it was not surprising that he would not include the exact circumstances of his suspension in his letter to his MP and it was reasonable for him to summarise his situation by reference to health problems.

84. Dr Elapatha's addendum to his witness statement showed both his insight into his previous failings and that the trials of the past few years have been a salutary lesson.

85. Mr Jenkins summarised the findings of the MPTS at its recent reviews and concluded by submitting that Dr Elapatha is suitable to be included on the

Performers List with his current conditions, except that Condition 7 (notification) should be removed.

The Tribunals Conclusions with Reasons

86. The Tribunal took into account all the evidence that was included in the hearing bundle, the oral evidence presented at the hearing and the submissions of both parties. In coming to its decision, the Tribunal has considered the evidence as a whole.

87. There are a number of primary facts relating to the history of Dr Elapatha's suspension by the GMC, his reinstatement to the GMC Register with conditions, the cancellation of his NHS services contract and his removal from the Performers List. None of these facts are disputed, they are summarised earlier in this decision and they need not be repeated here. The Tribunal's further findings of fact are set out, as necessary, below as part of the Tribunal's overall assessment and decision.

Procedural Unfairness

88. A key plank of Dr Elapatha's case was that the process leading to the PLDP's determination of his application was flawed and unfair, as well as wrong. The Tribunal does not make a global finding about whether the process followed by NHS England was unfair because its role is to make a fresh determination on the merits of Dr Elapatha's application including any new evidence which was not before the PDLP. Any procedural flaws are, in effect, corrected by that *de novo* approach. However, acknowledging that the Tribunal has, in effect, been invited by NHS England to rely on the same material that was put before the PLDP, the assessment below makes clear where the Tribunal found that the PLDP bundle was incomplete or deficient and explains how that impacts on the Tribunal's own evaluation.

89. As accepted by Miss Mortimer in her closing submissions, there was a significant anomaly in the bundle prepared by Mr Lebby. The application forms for both 2017 and 2019 had been edited to remove irrelevant questions and answers which applied only to those applicants who are also company directors. Those questions did not apply to Dr Elapatha. Although Mr Lebby could not offer any explanation as to who had edited the application forms or why, the obvious explanation is that they were removed because they were not relevant. The omission of that part of the application did not, of itself, alter the quality of the Bundle.

90. Nevertheless, Dr Elapatha had answered some of those irrelevant questions, and the answers had been commented on somewhat unfavourably in the briefing materials, including Julia Sim's analysis (B474-B483). The Tribunal accepted that referring to those answers in relation to a pattern of inaccuracy or misrepresentation was a material error. The Tribunal discounted these questions and answers in making its own determination about whether the application form was inaccurate or misleading.

91. The Tribunal also accepts two other significant criticisms raised by Mr Jenkins. First, the PLDP bundle could be read as inviting criticism of Dr Elapatha's negative answer to declaration (h) *'are you currently the subject of any investigation by any regulatory or other body?'*. The Tribunal accepted Mr Jenkins' submission that Dr Elapatha was not 'under investigation' because the regulatory action against him was a matter of record and decision, albeit the conditions remained. Apart from a lack of care, the Tribunal found no fault with Dr Elapatha's omission in answering question (h) or (i) on the application or in his narrative answers to those questions (B462) when his failure to complete the relevant tick boxes was queried.

92. Second, nowhere in the bundle was Dr Elapatha credited for having attached documents to a letter covering his 2017 application or for having provided documents at his NPL interview in 2019. The significance of that omission is addressed in the assessment below.

93. To the extent that Dr Elapatha complains the PLDP should have invited him to attend or to be represented at its meeting which determined his NPL application, that criticism (if it is merited) is corrected by his being able to give oral evidence before the Tribunal.

94. The remainder of this assessment is grouped under headings which reflect the list of issues identified by the parties.

Was the Appellant's 2019 application misleading?

95. The Tribunal's focus, as the parties agreed, in their skeleton arguments and submissions, should rest with Dr Elapatha's 2019 application to be included in the Performers List. The Tribunal acknowledges that Dr Elapatha's application in 2017 was never progressed to the PLDP because he was ineligible for funding to undertake the I&R scheme. Therefore, the relevance of the 2017 application was limited to:

    a. Whether Dr Elapatha's answers or any supporting documents he provided in 2017 were meant to be read together with those in 2019, such that any deficiencies in the 2019 application were mitigated; and
    b. Whether or not Dr Elapatha's answers to specific questions in both application forms reflected a pattern of inaccuracy or misdirection in particular matters.

96. In relation to a. above, the Tribunal rejects the proposition (which was never made with any force) that the 2017 and 2019 applications were mutually supporting. Although Dr Elapatha said in evidence that he believed the 2019 application was a continuation of his 2017 application, the Tribunal was not persuaded that belief relieved Dr Elapatha in any way of his duty to complete his 2019 application fully and accurately.

97. Question 35 of the NPL1 form asks:

'*Have you ever been refused admission, conditionally included in, suspended from, removed or contingently removed from any primary care list or equivalent list?'*

Dr Elapatha answered *'no'*. Dr Elapatha said that this had been a genuine error on his part. He had meant to answer *'yes'*. Although that error did not reflect the care expected an applicant might be expected to take with the application, the Tribunal accepted this was a genuine error. In the box inviting an explanation for the answer, Dr Elapatha wrote *'My surgery was closed down on 5/1/2015 and I took my retirement.'* In his 2017 application Dr Elapatha had answered *'ye*s' to this question and had given a marginally more comprehensive narrative answer: *'I was ill and was suspended by the GMC on 23/3/2014. My surgery was closed down on 5/1/2015. With the surgery at Rochester Health Centre getting closed down, I lost my place on the Performers List.'*

98. Question 36 asks:

'Have you at any time during your career been subject to sanctions, conditions or suspensions imposed by your regulatory body, employer or other NHS body?'

In both 2017 and 2019 applications, Dr Elapatha answered *'yes'*. In response to the prompt for details and a supporting explanation, in 2019 Dr Elapatha wrote *'Suspended by the GMC on 23/3/2014. Reinstated to the GMC Register in March 2017.'* His answer in 2017 had again been marginally more comprehensive. He had written, *'I was suspended by the GMC on 23/3/2014. My suspension was lifted and I am now entitled to hold a license to practice with supervision conditions.'*

99. Section 6 of the NPL1 form gives the applicant the opportunity to provide additional information. It is not necessary to reproduce Dr Elapatha's entry in its entirety. It is sufficient to note that in his 2019 application, the only reference to either his suspension or conditions is limited to the following statement: *'I have supervision conditions from the GMC'*.

100. As Dr Elapatha stated in his own oral evidence, his answers to these questions in his 2019 application lacked detail. The Tribunal's finding goes much further: the answers are wholly inadequate. Each of the answers to the questions set out above was lacking in critical detail about the reasons for his suspension and removal from the Performers List. Even if the space to add detail in response to individual questions was lacking (which the Tribunal cannot be sure about because the online form has been amended since Dr Elapatha completed it), there was clearly sufficient space for Dr Elapatha to provide a much more comprehensive account in the free-text box in Section 6. In the Tribunal's finding, it was not remotely sufficient for Dr Elapatha to refer to his GMC conditions in passing with the bare comment *'I have supervision conditions from the GMC'*. The conditions could and should have been set out in full on the face of the application. At the very

least, Dr Elapatha should have set out where the full conditions could be found. Compliance with the requirement stated on the NPL application form to provide 'detail and a supporting explanation' would have required much more than Dr Elapatha included either in 2017 or 2019, The detail should have included, as a minimum an accurate summary of the reasons given by the MPTS for its suspension of Dr Elapatha's registration and a clear admission that its determination that his fitness to practice remains impaired by reason of serious professional deficiencies.

101. The result of these omissions was to create an impression on the face of the application that Dr Elapatha's regulatory difficulties, and particularly the suspension of his GMC registration, were a result of factors outside of his control, specifically ill health or the impracticability or unreasonable expectation that he would comply with GMC conditions. That was, in the Tribunal's finding both wrong and wholly misleading, because the clear, obvious and unavoidable conclusion from any reasonable reading of the MPTS determination and reviews is that the suspension of his GMC registration was a sanction for serious professional deficiencies over an extended period.

What was the relevance of documents provided separately to the application?

102. The parties agree, and the Tribunal acknowledges, that in March 2017 and in April 2019, there was no facility for Performers List applicants to upload documents to the online application portal.

103. However, to the extent that Dr Elapatha conceded his 2019 application had lacked detail, he said that deficiency was mitigated either by the documents he had provided in a letter attached to his 2017 application, by the documents he had handed over for copying at his NPL interview in May 2019 or by the documents he had specifically sent to Dr Lipp at Dr Lipp's request.

104. For the reasons set out above, the Tribunal attaches little weight or credit to any documents Dr Elapatha provided in 2017. It was not correct (or reasonable for Dr Elapatha to assume) that his 2017 and 2019 applications were mutually supporting and would be read together. The obligation was on him to provide complete information to support his fresh application in 2019.

105. Although he was responsible for collating materials for the PLDP Mr Lebby could not help us in any way with what documents Dr Elapatha had handed over at his NPL interview in May 2019. In that respect, Mr Lebby's evidence was somewhat unsatisfactory.

106. As a result, the Respondent neither accepted nor denied that Dr Elapatha had provided the determination of the MPTS review panel, including the full (amended) conditions of his registration. It follows that the Tribunal must accept Dr Elapatha's evidence that he did provide that document.

107. However, providing that document was not sufficient to allay the Tribunal's concerns about the lack of detail and misdirection resulting from the answers on the face of Dr Elapatha's 2019 application. Contrary to Dr Elapatha's belief, which he maintained during his oral evidence, the Tribunal rejects as unreasonable any assumption that his application would automatically be read and determined alongside the full decision(s) of the MPTS. As Mrs Hole readily accepted in her oral evidence, the PLDP's time in both preparation for and discussion of Dr Elapatha's case was limited. For that reason, among others, the duty lay squarely with Dr Elapatha to explain on the face of his application fully, frankly and without reservation (i) why his GMC registration had been suspended; (ii) why he had been removed from the Performers List and (iii) the exact nature of the conditions on his GMC registration.

108. In his addendum witness statement and in his oral evidence, Dr Elapatha accepted that duty lay with him. In the Tribunal's finding, Dr Elapatha failed to meet that duty by a substantial margin.

Was the application dishonest, or otherwise deliberately misleading?

109. In the Tribunal's finding, Dr Elapatha was not dishonest in the sense that he lied in either his 2017 or 2019 application forms. The Tribunal accepted that his negative answer to Question 35 in his 2019 application had been a genuine mistake, albeit the narrative part of the answer was insufficient to fully mitigate for that mistake.

110. In accepting that Dr Elapatha had provided documentation to support his applications which contained the full conditions of his registration and a summary at least of his involvement in regulatory proceedings, the Tribunal also finds that there was no deliberate attempt on his part to wholly conceal what had happened. As Dr Elapatha put it in his own evidence, it would have been foolish to attempt such a deceit and doomed to fail.

111. Nevertheless, there was an element of calculation in his selective and partial narrative answers to questions 35, 36 and in his perfunctory reference to GMC conditions in Section 6. Taking the application as a whole, the Tribunal finds that Dr Elapatha's intention was to present the circumstances in such a way that explained his regulatory difficulties wholly as a result of ill health, or other factors beyond his control. His intention was to minimise or deflect attention from the real reason for his suspension and the continued imposition of conditions, which was his impaired fitness to practice because of serious professional deficiencies.

112. In the Tribunal's finding, that calculated approach was also reflected in:

    a. Dr Elapatha's covering letter to his 2017 NPL application (B384) where he writes in connection with his regulatory difficulties *"I took my retirement in 2015. The GMC suspended my registration. The GMC has allowed me to work from 3/2/2017"*. The Tribunal was not satisfied that this misleading explanation was corrected by then adding *"Please see*

attached GMC documents";

b. Dr Elapatha's letter to Dr Lipp (B411) where his account of the relevant circumstances fails to mention specifically any deficient performance, states that the GMC 'advised' him to secure a close supervisor and that his registration was suspended until such time as he completed a performance assessment which he was at that time too ill to undertake.
c. Dr Elapatha's answer to Mr Cutting when asked to account for the gap in his CV where he answered *"registration was suspended in 2014 to early 2017 due to health reasons. No misconduct or malpractice."* (B462);
d. Dr Elapatha's letter to Tom Tugendhat MP (B501) where he writes: *"I had to take a career break due to ill-health and when my single-handed practice was closed down in 2015.*";
e. Dr Elapatha's representations to the PLDP, in particular where he writes at various points:

   i. *"I was suspended because I could not physically find a close supervisor to a single-handed practice";*
   ii. *"It is unfair to say that [my] NPL removal in 2015 happened due to performance issues."*; and
   iii. *"If I had any serious issues a British Judge would not have reinstated me on the Performers List."*

113. Whether Dr Elapatha genuinely believes that his professional deficiencies are in turn to be attributed to ill health or some other factor is a question addressed below. However, the Tribunal was persuaded that by 'summarising' (as Dr Elapatha put it) in each of these communications the reasons for the suspension of his registration and his removal from the Performers List, Dr Elapatha deliberately set out to present a narrative to the PLDP which minimised his personal responsibility for the serious professional deficiencies which were the stated reason why his registration was suspended as a matter of sanction in 2015 and which he was under a duty to make clear in his application and associated communications.

114. Since Dr Elapatha had been selective in these communications about his explanation why he had been suspended and why he was currently subject to conditions, the Tribunal was very concerned that he had offered a similarly selective and misleading account when approaching referees. The Tribunal's confidence in those references, brief and factual though they are, was therefore seriously eroded.

115. The Tribunal was also very concerned about the reference in Dr Elapatha's witness statement to the probity issue investigated by the GMC following Dr Lipp's complaint where he writes that the allegation *"was decided by the GMC as a trivial matter with a decision of 'Decided to take no action" on 4th March 2020."* In his oral evidence to the Tribunal Dr Elapatha stood by this summary, despite acknowledging that the material part of the GMC determination was that he had breached Condition 9 of the conditions on his current registration. In the Tribunal's finding, Dr Elapatha's account of these proceedings and the determination was also misleading and reflects

a further, deliberate attempt by Dr Elapatha to minimise the appearance of personal fault in regulatory matters, even where such fault was clearly set out in the relevant decision.

116. In the Tribunal's finding, the collective impact of this misrepresentation amounts to a lack of probity which, given the implications for patient safety explained elsewhere in this decision, was of a degree serious enough to justify refusal to include Dr Elapatha on the Performers List.

Has Dr Elapatha demonstrated insight into the purpose of the regulatory regime, his responsibilities to be open and honest or the seriousness of his professional deficiencies?

117. As well as a lack of probity in itself, Dr Elapatha's approach to the application process reflected a serious lack of insight into the purpose of the regulatory regime and the serious consequences which any lack of candour in the application process has on the question of his suitability to be included on a Performers List. In the Tribunal's finding, it is reasonable that the regulatory regime and the application process itself demands the same standard of personal responsibility and unflinching self-appraisal required of those senior professionals who provide primary healthcare to NHS patients. Any serious failure to be frank and open in the application process will necessarily bring into question whether the applicant can be trusted to be open and frank in the future, whether about regulatory issues or in instances where their clinical judgment is legitimately scrutinised.

118. Nevertheless, the Tribunal reminds itself that its role is to make a decision based on the information available to it now. With the opportunity to reflect on the PLDP's reasons for refusing him, the Tribunal was concerned to give Dr Elapatha the opportunity to show whether or not he now understood the seriousness of the omissions in his application, and whether or not he is able to reflect frankly and with insight on the serious professional deficiencies which led to the suspension of his GMC registration and, by automatic consequence, removal from the Performers List.

119. In our finding, Dr Elapatha's written and oral evidence reflects a very limited understanding of the regulatory regime and the seriousness of the matters for which his GMC registration was suspended and his NHS services contract was terminated.

120. Despite the more reflective nature of his addendum witness statement and the careful answers he gave in his oral evidence, the Tribunal was left in grave doubt whether Dr Elapatha really accepted that the cause of his regulatory difficulties were professional deficiencies within his own control. Although Dr Elapatha did specifically state that he accepted there had been professional deficiencies, at every opportunity in his oral evidence he sought to explain regulatory action as the result either of misunderstanding, unreasonableness or bad faith by the regulatory authorities, or other circumstances beyond his immediate control such as locum doctors or practice managers, or ill health.

121. The Tribunal rejected the proposition that either the GMC, Kent and Medway PCT or NHS England had acted unreasonably. So far as the circumstances of his practice were concerned, the Tribunal accepted Dr Elapatha's evidence that his had been a difficult practice to manage single-handed in a deprived area. However, he did not explain nor justify why he allowed such serious concerns about record keeping, practice management and patient safety to go unaddressed for so long. Nor did the Tribunal accept any suggestion that either his reinstatement to the Performers List in 2013 or the lifting of his GMC suspension in 2017 were any form of vindication or acceptance that Dr Elapatha's professional deficiencies were beyond his control.

122. While the Tribunal acknowledges Dr Elapatha had suffered some ill health in the period 2011-2016, we were far from persuaded that was the operating cause of his regulatory difficulties, not least because the concerns of the GMC and the Kent and Medway PCT (as it then was) clearly pre-dated any evidence of ill health, even on Dr Elapatha's own account.

123. In the Tribunal's finding, this self-justifying component of Dr Elapatha's thinking is deeply concerning. At the very least, it is doubtful whether, in circumstances which threaten to overwhelm Dr Elapatha's capacity to cope, such as pressure of work, he would seek help or assistance from colleagues or refer himself to his regulatory bodies for support and direction. That concern alone leads to an unacceptable risk to patient safety. Far more critical is our concern that he cannot be relied on to have the insight to recognise his professional limitations. In the event that Dr Elapatha's competency is exceeded (which is a real risk given his relatively low scores in recent professional skills assessments) the Tribunal holds little confidence either that he would recognise his limitations, seek the help of his supervisor or recognise when his performance has been deficient and either engage in self-reflection or self-refer when he has made a mistake.

124. These concerns support the conclusion that Dr Elapatha is unsuitable to be included on the Performers List.

Conditions

125. The Tribunal is mindful that the GMC has determined that while Dr Elapatha's fitness to practice remains impaired by reason of professional deficiency, he is allowed to practice under conditions including close supervision.

126. The Tribunal is mindful that the GMC operates under different rules and procedures and for a different purpose than the statutory regulation for NHS performers. Equally, the Tribunal is not bound by the GMC's determination, and must not fetter its discretion by failing to consider an application on its own merits.

127. Most importantly, the Tribunal is well aware that this is a suitability case and

not an efficiency case. The factors to be taken into account are different. Nevertheless, the Tribunal carefully considered whether its concerns about Dr Elapatha's suitability could be mitigated by the imposition of conditions which are the same as, similar to or different from those which are attached to Dr Elapatha's GMC registration.

128. The Tribunal considered whether direct or close supervision would mitigate our concerns, or at least allow for a period of monitoring in which our concerns could be confirmed or assuaged. Applying its specialist expertise, the Tribunal concluded that a close supervision condition would be insufficient to meet its concerns, while a direct supervision condition would be impracticable because it would impose an unacceptable burden on other NHS performers, particularly during the ongoing pandemic, without promise of any short or mid-term benefit to primary healthcare services. No other conditions would mitigate our concerns.

129. In summary, the Tribunal's concerns about Dr Elapatha's suitability could not be mitigated by the imposition of conditions, even if they were stricter than those already attached to his GMC registration.

Proportionality

130. The Tribunal carefully considered the impact of our decision not to include Dr Elapatha on the Performers List. The Tribunal took into account that Dr Elapatha is now 70 years old and its decision may effectively end his prospects of returning to the Performers List, after what the Tribunal acknowledges has been his substantial investment of time and money in undertaking those elements of the I&R scheme that he has so far completed. The Tribunal took into account that the financial impact of this decision is likely to be very substantial for him and his dependent family. Nevertheless, these factors do not outweigh our serious concerns as set out in the reasons. There is no other practicable course of action than to refuse his application.

Conclusion

131. Given the reasons set out above, the Tribunal finds that Dr Elapatha is not suitable to be included on the medical Performers List.

132. Dr Elapatha has a long history of regulatory involvement, including GMC suspension for two years, cancellation of his NHS services contract and removal from the Performers List, as a result of which he has not treated a patient since 2014 and he still remains subject to very strict supervision conditions on his GMC registration. While Dr Elapatha has demonstrated commendable commitment to remediating his skills with the aim of resuming his practice as a GP, both his NPL application and his written and oral evidence to this Tribunal indicate that he lacks sufficient probity or insight into the reasons for his previously deficient professional performance to be found suitable for inclusion on the medical Performers List.

133. In weighing all the matters placed before it, the Tribunal finds that a decision not to include Dr Elapatha is reasonable and proportionate and that the concerns about Dr Elapatha's suitability cannot be addressed by the imposition of conditions or any other mitigating action.

Decision

Dr Elapatha's application for admission to the Medical Performers List is refused.

The appeal is dismissed.

Judge C S DOW

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

Date Issued: 26 October 2020