

## **Primary Health Lists**

### **The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008**

Heard at Brighton Tribunal Hearing Centre on 22 March 2019

[2018] 3514.PHL

**BEFORE**  
**Tribunal Judge J Atkinson**  
**Specialist Member Dr N Castle**  
**Specialist Member Mr M Cann**

**BETWEEN:**

**Dr Violeta Barakzai**

**Applicant**

**v**

**NHS Commissioning Board**  
**(known as NHS England)**

**Respondent**

#### **Representation:**

For the Appellant: Not represented  
For the Respondent: Mr G Thomas of Counsel

### **DECISION AND REASONS**

#### **The Appeal**

1. This is an appeal against the decision of the Respondent, issued on 24 October 2018, to remove Dr Barakzai, the Appellant, from the dental performers list because she had failed to comply with a condition imposed on her under the National Health Service (Performers Lists) (England) Regulations 2013 ('the 2013 Regulations').

#### **Summary Background and chronology**

2. The Appellant is a citizen of Romania. In 2006 she obtained her dental qualifications there.
3. In 2007 the Appellant came to the United Kingdom in order to work. Thereafter the Appellant worked variously as a dental nurse, administrator

and logistics executive. The Appellant also obtained a NVQ level 3 in health and social care.

4. In 2012 the Appellant registered with the General Dental Council (GDC).
5. Between 2012 and 2015 the Appellant worked variously as a locum dentist, a dental hygienist and undertook private dental work.
6. On 24 November 2015 the Appellant made an application for inclusion on the dental performers list.
7. On 9 March 2017 the Appellant was included on the dental performers list subject to the imposition of nine conditions, including a condition that
  - she achieve the acceptable international English Language tests (IELTS) standard test result of 6.5 in all modules within 6 months of being included on the list
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8. The Appellant subsequently made five attempts to achieve the relevant IELTS standard but failed to do so.
9. On 25 January 2018 the Respondent acknowledged that the Appellant had met 8 of the conditions previously imposed but had failed to achieve the IELTS test standard as previously imposed. The Respondent imposed the following condition on the Appellant's inclusion on the list
  - that she must provide evidence of English language competence either through attainment of an IELTS test result of 6.5 in all modules or by post graduate training within the past two years from recognized dental school taught and examined in English within 6 months
10. The Appellant made two further attempts to achieve the required IELTS standards but failed to achieve the required scores.
11. On 19 October 2018, following an oral hearing, the Respondent decided to remove the Appellant because she had failed to comply with the condition imposed as to her language requirements.

### **The Law**

12. The law is to be found in National Health Service (Performers Lists) (England) Regulations 2013. The relevant provisions are set out in the bundle and it is not necessary to set them out in full here.
13. In brief, regulation 10 makes provision for the imposition of conditions; and regulation 11 makes provision for removal for failure to comply with conditions. Regulations 10 and 11 also refer to other matters within the

regulations. Regulation 7(4) provides that an application for inclusion on the performers list must be refused if the Respondent is not satisfied that the practitioner has sufficient knowledge of the English language necessary for the work which those on the list perform. Further reference to the detail of the regulations is made, where necessary, below.

14. It is convenient to note here that appeal proceeded by way of redetermination of the issues and that the hearing was held in public.

### **Preliminary and procedural matters**

15. In dealing with procedural issues and in giving directions on the management and conduct of the hearing the tribunal at all times took account of the tribunal's overriding objective to deal with the case fairly and justly. The tribunal took account of the Appellant being unrepresented and made adjustments to enable the Appellant to fully participate in the proceedings. The tribunal dealt with all the issues in a flexible manner and by avoiding undue formality.

### **The documents and evidence**

16. The tribunal was provided with a bundle of several hundred pages, indexed to tab F ending at page 9 and included an updated index. It comprised all the filed material on which both parties sought to rely together with other background materials.

17. In addition, at the hearing Mr Thomas, on behalf of the Respondent, provided copies of the ECJ cases of **Hocsman C-238/98** and **Haim C-424/97** together with a printout of an information sheet issued by IELTS on how to calculate IELTS scores and the meaning of the banding levels.

18. The tribunal heard oral evidence for the Respondent from Deborah Ward, Programme Manager for professional performance for the Respondent; and oral evidence and submissions from the Appellant.

### **Submissions and grounds of appeal**

19. Mr Thomas, on behalf of the Respondent, relied on his skeleton argument, case summary and made further submissions. They need not be set out in detail here and may be summarized as follows.

20. The issues to be determined are first, whether or not the Appellant should be required to pass the IELTS test with a score of 6.5 in all modules or undertake postgraduate training from a recognized dental school; and second should the Appellant be removed from the list for failing to comply with the condition imposed on her.

21. The regulations relating to inclusion on the list include the provision at regulation 7(4) that a practitioner have sufficient knowledge of the English language necessary for the work which those included on the list perform.

It was accepted that the Respondent technically should not have included the Appellant on the list in the first place but had done so despite the provisions of the regulations.

22. The required level of English to be achieved is determined by reference to the Respondent's standard operating procedures. By virtue of section 6.1 of the standard operating procedures applicants who have not studied or trained in the UK or Irish republic must provide an IELTS certificate indicating a pass at an overall level of 7 and no less than 6.5 in each of the modules. The condition imposed by the Respondent as set out in a notice dated 6 February 2018 was to the effect that the Appellant was required to attain 6.5 in all modules.
23. The standard operating procedures also provided for a discretion where the Appellant cannot demonstrate evidence of their English language proficiency though the IELTS test to the extent that consideration will be given on a case by case basis whether the Appellant has sufficient command of English to allow inclusion. In practice the exercise of such a discretion required identification of a specific reason as to why someone cannot obtain the relevant scores, for example because of having a special educational need, although the discretion itself was drafted in broad terms. In the present case no such specific reason is put forward by the Appellant.

**The oral evidence adduced by the Respondent  
Deborah Ward**

24. The Respondent relied on the oral evidence of Deborah Ward. Deborah Ward was appointed as the Programme Manager for professional performance for the Respondent with effect from 16 July 2018. She adopted her witness statement dated 17 January 2019 as evidence in chief and was questioned. It is not necessary to rehearse the full extent of her oral evidence. It may be summarized as follows.
25. The Appellant had first applied for inclusion on the list in 2014 but the application was closed in 2015 because the Appellant had failed to provide the required documentation to support her application, including the failure to provide IELTS test scores.
26. The Appellant made a further application in November 2015. The Respondent informed the Appellant of the IELTS requirements. There followed extensive correspondence between the Appellant and a number of officers.
27. During that period the Appellant undertook IELTS examinations on 5 occasions achieving an overall score of either 6.5 or 7.0 but without scoring 6.5 or more across all modules on any one occasion. Scores in individual modules varied between 5.5 to 7.0 for listening and 5.5 to 6.5 for writing.

28. On 3 March 2017 the application was referred to the Respondent's relevant committee (the performers list decision panel). The committee decided to include the Appellant on the list subject to 9 conditions including the requirement to obtain an IELTS test with a score of 6.5 across all modules within 6 months. The Appellant signed a letter agreeing to the conditions.
29. On 25 January 2018 the Appellant's inclusion on the list was reviewed by the Respondent. The Appellant had undertaken a further IELTS test achieving an overall score of 7.0 but had scored only 5.5 in writing. The Respondent varied the condition imposed on the Appellant with the effect that she was allowed a further 6 months to achieve the required standard.
30. The Respondent also made arrangements for a clinical advisor to contact the Appellant to discuss matters and to provide additional support, including following up the suggestions from the January 2018 committee that the Appellant seek an opinion from an educational psychologist to explore whether there were any underlying medical reasons for the low scores in reading and writing.
31. The Appellant undertook further IELTS tests on 21 July 2018 and 18 August 2018. She achieved an overall score of 6.5 in both tests but with scores of 5.5 in reading and 5.5 in listening.
32. The Respondent made arrangements for the Appellant's case to be put before the relevant committee. On 19 October 2018 the Respondent, following an oral hearing, removed the Appellant from the list for failure to comply with the condition imposed on her inclusion on the list.
33. The Respondent had not applied the discretion to exempt the Appellant from the requirements of IELTS testing because in practice it was applied to cases where there was a specific reason to do so involving, for example, dyslexia.
34. In this case there was no such reason. It was not appropriate to rely instead on references in assessing the Appellant's competence in English because references are subjective and referees would not have expertise in assessing English. The IELTS tests systematically cover 4 domains: speaking, listening, reading and writing. The domains of reading and writing were particularly related to issues of safety and efficiency as a performer on the list in the context of using and keeping clinical records.
35. It was not appropriate for the Appellant to simply undertake a further oral test outside the IELTS system. Such a test would be only a single item showing satisfactory language skills and would not cover all the domains. The requirements imposed on the Appellant were minimum standards
36. Nor was it appropriate to rely on the opinion of Dr Fallowfield about the Appellant's clinical notes. That is because he had reviewed the notes but

had not seen how the data was entered which might have been undertaken with a high degree of support or entered by others.

37. It was accepted that in the present case there was no suggestion that the Appellant had for example taken out the wrong tooth of a patient or that there had been any incidents showing inefficiency in the provision of services. Nor had the Appellant's mentor Dr Seath and Dr Fallowfield from the deanery raised any performance issues. It was also accepted that the Appellant had successfully met the other conditions imposed on her inclusion in the list and that those too, related to issues of standards. However, such conditions had been met on a practical level with a degree of support and not on the basis of independent ability.
38. It was accepted that the royal college of dental surgeons might apply a different standard from that as required by the NHS, but that was because they had different considerations. The matters that fell for consideration under the performance regulations in the context of NHS services may take time to emerge. Any divergence between the standards was a policy issue which Ms Ward could not address.
39. It was accepted that the Appellant's inclusion in the list in the first instance was an anomaly; and the Appellant's application should not have proceeded for lack of documentation. The Appellant had worked in private practice but the language standards for those on the performers list required applicants to be able to deal with the bureaucracy of the NHS and required understanding of the forms, referral routes, pathways to care and protocols.
40. It was accepted that the wording of the standard operating procedures should be more nuanced when setting out the extent of the discretionary power relating to the language requirements. The discretion, to Ms Ward's knowledge, had not been applied in circumstances beyond those cases where a specific reason had been identified.

#### **The Appellant's grounds of appeal**

41. The Appellant's grounds of appeal had been drafted without the benefit of legal advice. The Appellant's case may be summarized as follows.
42. The Appellant had been previously advised in 2015 by the Kent Primary Care agency, and subsequently by others, that it was not necessary for her to take an IELTS test as she had been registered by the GDC, had been working in the United Kingdom and had a level 3 NVQ.
43. The imposition of the test amounted to unlawful discrimination under European law.
44. The Respondent has failed to properly exercise the discretion provided by the standard operating procedures which in effect allowed exemption from IELTS on a case by case basis.

45. The evidence brought forward by the Appellant showed that she had sufficient command of English. The Appellant had achieved an overall IELTS score of 7.0; her clinical notes had been considered by Dr Fallowfield from the Deanery who was of the view that they were satisfactory; there were a number of references from professionals attesting to her competence; feedback from patients showed that she was rated highly; and there had been no complaints about her practice.
46. Further the royal college of surgeons applied a standard that did not require IELTS examination where a practitioner had been in the United Kingdom for one year, had been included on the dental list during that time and had received no complaints about their English.

### **The Oral evidence of the Appellant**

47. The Appellant did not produce a formal witness statement for the hearing but had produced a number of documents as set out in the bundle and on which she relied.
48. The tribunal explained that all the documents she had submitted had been read and that she would be asked questions by the tribunal to enable her to put forward her case more fully. The Appellant's evidence may be summarised as follows.
49. The Appellant is now a British citizen.
50. The Appellant had been allowed to work within the NHS because of the shortage of dentists. The Appellant has references from the deanery.
51. The Appellant has been involved in running an NHS practice and in the last year has seen about ten thousand patients; maybe forty thousand patients in total.
52. The Appellant's clinical work has been subject to audit by Dr Fallowfield as part of her vocational training and as evidenced by the e-mail at page D3 of the bundle. The audit was undertaken on notice to the Appellant and lasted approximately 2 hours, of which about 30 minutes involved Dr Fallowfield looking at clinical records chosen at random. Approximately 5 to 10 sets of records considered had been selected from the whole range of patients that the Appellant had treated. The cases chosen included complex treatments. No formal report was produced as a result of the audit.
53. The Appellant was of the view that the IELTS results showed that she had scored overall 7.0 but the Respondent had changed the level to 6.5. It was accepted that the Appellant had scored only 5.5 in writing on the last occasion, however in previous tests she had scored 6.0. The issue for the Appellant was the difficulty with managing the timing of giving her answers under test conditions.

54. The Appellant had accessed courses on line with a view to improving her test scores. However, the IELTS tests did not provide enough time for her to give answers. The Appellant accepted that she did not have dyslexia or any other problems with either words or numbers.
55. The Appellant had not had any face to face lessons with a view to improving her reading and writing. The Appellant had bought an IELTS publication with exercises. The Appellant at the time had had to cope with the upset surrounding the death of her mother.
56. The Appellant accepted that English was not her mother tongue and that her e-mail communications such as that at B32 of the bundle reflected that. It was accepted that the e-mail contained grammatical errors; however, the e-mail could be understood and made sense to her. In her experience there were many dentists who do not speak English very well.
57. The Appellant had been struggling for 4 years to obtain her performers list number and had been losing jobs because of the condition imposed.

#### **Closing Submissions on behalf of the Respondent**

58. Mr Thomas confined the extent of his closing submissions in the light of his opening submissions and his submissions on matters arising in the course of the hearing. His closing submissions may be summarized as follows.
59. The legal framework applicable in the present case provided for considerations of both safety and efficiency of the provision of services within the NHS. That framework differed from the considerations applied by the GDC.
60. The cases of **Haim** and **Hocsman** showed that in terms of European law it was acceptable to impose language requirements subject to considerations of proportionality. It had also been accepted within the present jurisdiction, as shown by the case of Fernandes, that such requirements could be legitimately imposed.
61. In the present case the Appellant, in error by the Respondent, had originally been included on the list and given 6 months to obtain the minimum standard of 6.5 test scores, with such period having been extended and which ultimately now stood at two years. The Appellant had failed to achieve the required IELTS score across all domains.
62. The Appellant's claim of sufficient competency in English is at odds with her test scores; and there was no particular explanation such as dyslexia for her scores. It would be wrong to apply different criteria to this Appellant by exempting her from achieving the IELTS minimum scores. The fact that the Appellant had no complaints recorded against her should attract limited weight.

#### **Closing Submissions of the Appellant**



63. The Appellant made a number of submissions that may be summarised as follows.
64. In 2012 the GDC on registering the Appellant had not required her to undergo IELTS testing. The GDC standards should be regarded as a sufficient basis on which to allow the Appellant to remain on the list.
65. The Appellant had an IELTS score of 7.0 overall which meets the required standard. The Appellant had achieved a score of 8 in speaking and 7 in listening. The scores in the other domains were a reflection of the timing difficulties and pressure of performing under exam conditions.
66. The references as set out in the bundle were reliable and formed a suitable basis for showing that the Appellant was competent in English.
67. The Respondent's local area team were playing with the rules and had taken against the Appellant.
68. The Appellant was not subject to any complaints and, as such, should not be regarded as a risk to patient safety.

#### **Findings of fact and reasons**

69. The tribunal considered all the evidence and the submissions. In coming to its decision the tribunal has looked at the evidence as a whole.
70. The material primary facts in the present case are, in essence, not in issue.
71. It is not disputed that the Appellant was ultimately included on the performers list with a condition imposed following a notice dated 6 February 2018
- *that she must provide evidence of English language competence either through attainment of an IELTS test result of 6.5 in all modules or by post graduate training within the past two years from recognized dental school taught and examined in English within 6 months*
  -
72. Nor is it disputed that the Appellant achieved the following scores when undertaking the various IELTS tests

Test date	Overall	Listening	Reading	Writing	Speaking
25.7.15	6.5	5.5	6.0	6.5	7.0
7.11.15	6.5	6.5	6.0	5.5	7.0
21.1.17	7.0	7.0	6.0	5.5	8.5
2.3.17	7.0	7.5	6.0	5.5	8.5
19.8.17	6.5	5.5	6.0	5.5	7.0
21.7.18	6.5	6.0	5.5	6.0	7.5
18.8.18	6.5	5.5	5.5	6.5	8.0

73. The tribunal therefore finds that the Appellant failed to comply with the condition imposed by notice dated 6 February 2018 by failing to achieve a minimum score of 6.5 across all domains. The tribunal finds that the results suggest that the Appellant has demonstrated particular weakness in respect of scores for writing, albeit that on testing on 18.8.18 the Appellant achieved 6.5 but only 5.5 for listening; and has never achieved the minimum score of 6.5 in reading.

74. The tribunal also finds that the banding descriptions as set out in the documentation issued by IELTS are not disputed and are set out below.

75. A score at band 5 indicates that the candidate's skill level can be described as modest, meaning that they have partial command of English and cope with the overall meaning in most situations; is likely to make many mistakes; and should be able to handle basic communication in their own field.

76. A score at band 6 indicates that the candidate's skill level can be described as competent, meaning that generally they have an effective command of English despite some inaccuracies, inappropriate usage and misunderstandings; and can use and understand fairly complex language in familiar situations.

77. A score at band 7 indicates that the candidate's skill level can be described as good, meaning that they have operational command with occasional inaccuracies, inappropriate usage and misunderstanding; and can handle complex language and detailed reasoning.

78. The tribunal makes further findings of fact as necessary below in the course of its exercise of judgement as to whether or not the Appellant should be removed as a result of such failure to comply.

### **Consideration of the legal framework**

79. Before turning to its exercise of judgement the tribunal first reminds itself of the correct legal framework that is to be applied in this appeal.

80. The present appeal concerns removal from the performers list under regulation 11(1)(c). This regulation provides for a discretion for removal on

failure to comply with a condition and necessarily imports a proportionality assessment.

81. The tribunal notes the various submissions put forward on behalf of the Respondent which suggested otherwise. At various times it appears to have been suggested that, amongst other things, there was no such discretion or that the Respondent's standard operating procedures was the relevant test to apply.
82. The tribunal rejects those submissions because the regulations themselves are clear. Regulation 11 provides that a practitioner **may** be removed from the list for failure to comply. Further, the standard operating procedures themselves are not part of the regulations but simply the means whereby, in practice, the Respondent seeks to implement the regulations.
83. In the tribunal's view it is therefore the regulations themselves that set out the relevant test and not the standard operating procedures. The tribunal accepts that in exercising its own judgement the standard operating procedures is a relevant factor
84. In addition, the tribunal also notes that there are several aspects of the regulations which are also relevant factors. The tribunal notes in particular regulation 7(4).
85. Regulation 7(4) relates to applications for inclusion and provides that an application must be refused if the relevant authority is not satisfied that the practitioner has sufficient knowledge of the English language necessary for the work which those included in the performers list perform.
86. The tribunal is of the view that sufficiency of knowledge of English is the core issue in this case and that sufficiency may be demonstrated in this particular case by assessment of all the evidence and not simply on the evidence relating to the IELTS scores.
87. The tribunal notes here that the Respondent accepts that due regard was not paid to this provision when including the Appellant on the list.
88. The tribunal finds that that may be so; nevertheless, the tribunal's assessment can only proceed on the facts as found and in light of all the totality of the evidence.
89. It is appropriate to note here that the regulatory framework must also be considered within the context of the duties under the Equality Act 2010 prohibiting indirect discrimination in relation to a protected characteristic unless such measures are a proportionate means of achieving a legitimate aim; and in the context of EU law so far as it relates to freedom of movement and freedom of establishment. Those matters are considered below in the tribunal's overall proportionality exercise.

## **The Tribunal's assessment of removal**

90. The tribunal turns next to its own assessment of whether or not the Appellant should be removed from the list for failure to comply with the condition imposed within the framework noted above.
91. Given what is said above, the tribunal is of the view that the Appellant's IELTS scores form only part of the evidential base in determining whether or not the Appellant has sufficient command of English to perform services based on inclusion on the list.
92. The tribunal finds, in the absence of evidence to the contrary, that a minimum score 6.5 across all modules, together with an overall score 7.0, is a reasonable marker of sufficiency of English.
93. In this context the tribunal rejects the submissions of the Appellant to the effect that the standards applicable for the purposes of the performers list should be lowered and re-aligned with those that are said to be applied by the general dental council and the royal college of surgeons. The tribunal rejects that submission because those bodies are applying standards that have been determined without specific regard to the matters that arise as a practitioner on the performers list and therefore are directed to a purpose in the context of professional self-regulation, which differs from the objective involved in statutory regulation under the performers list system.
94. The banding information relating to these scores show that someone performing at level 5 has only partial command of English and is likely to make many mistakes. The tribunal finds that a practitioner functioning at this level is likely to present an unacceptable risk to patient safety and to be prejudicial to the efficiency of the provision of services.
95. The Appellant has scored at this level on a number of occasions.
96. More typically the Appellant has scored at level 6. The banding information shows someone functioning at this level is able to use fairly complex language but nevertheless there will be inaccuracies, inappropriate usage and misunderstandings. The tribunal is of the view that a practitioner functioning at this level would not have the sufficiency of language to perform services due to safety and efficiency issues; though clearly the risks are less than those represented by a person at level 5.
97. The Appellant on a number of occasions has scored 7. A banding of 7 shows operational command and the ability to use complex language and detailed reasoning. In the tribunal's view such an overall level is a fair marker of sufficiency in English.
98. In the present case, the tribunal attaches considerable weight to the fact that the Appellant has failed to achieve the minimum banding of 6.5 across all modules despite making seven attempts to do so.

99. The tribunal attaches little weight to the Appellant's submissions that she was unable to achieve the relevant scores because of the time restrictions in the examinations themselves. That is because the time constraints themselves are part of the testing regime and it is no answer to simply say that the exams are too difficult.
100. The tribunal also attaches little weight to the submission that the Appellant scored an overall banding of 7 on two occasions. That is because on those occasions the Appellant also scored 5.5 in the domain of writing. The tribunal finds that the fact that the Appellant's scores have varied so much and inconsistently over individual domains tends to suggest that she has a degree of difficulty in showing that she has a sufficiency of English, rather than that the testing regime is flawed.
101. The tribunal therefore finds that the number of attempts and the scores suggest that there are real doubts as to whether or not the Appellant has sufficient knowledge of English to work in the NHS without giving rise to unacceptable risk to patient safety and efficiency of services.
102. As indicated earlier however, the tribunal is of the view that the whole of the evidential base should be considered in determining whether or not the Appellant has sufficiency of English and whether or not the Appellant should be removed for failing to achieve the relevant scores.
103. The Appellant submits, as noted above, that reliance can be placed on other evidence to show that she has sufficient English.
104. The tribunal rejects those submissions as explained below.
105. The tribunal attaches limited weight to the evidence of Dr Fallowfield who is said to have carried out an audit of the Appellant's work as shown at page D3 of the bundle. That is because D3 is a short email simply saying that the Appellant's records are fine and that mentor and patient feedback is excellent. However, the email is very short and does not provide the data on which the opinion was based. The Appellant's own account shows that the audit was limited in scope to between 5 and 10 cases and not undertaken systematically. The e-mail itself cannot be described as a formal report and does not set out the criteria that were applied in coming to the expressed opinion. Nor is any detail provided in relation to the feedback forms.
106. Accordingly, the tribunal finds that the e-mail at D3 is not a robust document on which reliance can be placed.
107. The tribunal forms a similar view in relation to the references (D21 onward) and the feedback information submitted by the Appellant. It is not necessary for the tribunal to set out its analysis of each document. Nevertheless, by way of example, the tribunal notes the evidence of Dr Seath. He was the Appellant's mentor with whom she worked at the

Polegate practice. He expressed the opinion that Appellant had a good level of both spoken and written English. However, such an opinion is expressed without reference to clear evidence other than impressions from experience, does not show how the opinion was derived and was, in any event, arrived at without the benefit of expertise in language assessment.

108. In considering the whole of the evidence, the tribunal has also taken into account the Appellant's knowledge of English as expressed in her written correspondence. The tribunal finds that such correspondence tends to undermine the Appellant's claim of sufficiency of English.
109. Thus for example, in e-mails to the Respondent dated 18 July 2018 and 3 August 2018 the Appellant variously used agrammatical sentences with inappropriate word usage, idiosyncratic features and confusing the use of the word *take* with that of *give*.
110. The Appellant's response, when such matters were put to her in cross examination, was to the effect that her meaning was clear in the correspondence, and that she understood what was written.
111. The tribunal does not find that to be a satisfactory response to the suggestion that she does not have a sufficient knowledge of English to be included on the performers list.
112. Taking account of all the evidence, the tribunal finds that the Appellant does not have sufficient knowledge of the English language necessary for the work which those included in the performers list perform.
113. The tribunal finds that in these circumstances it is proportionate to remove the Appellant from the performers list because she has breached a condition imposed on her and has not shown that she has sufficient knowledge of English.
114. The tribunal is of the view that it would not be appropriate for the Appellant to remain included on the list subject to yet a further condition giving her the opportunity to undertake further IELTS tests. That is because the Appellant has made 7 attempts over a two year period and has been unable to achieve the requisite standard; on her own account the Appellant is of the view that the tests are too demanding; the sequence of results themselves suggest that the Appellant is not likely to achieve the relevant level, at least without adopting a different approach; and the Appellant has failed to adopt a different strategy or approach to the tests.
115. The tribunal finds that the imposition of the provision that a practitioner has sufficient knowledge of English, to the extent that it might be said that this puts the Appellant at a disadvantage amounting to indirect discrimination, is a proportionate means of achieving the legitimate aim of providing services within the NHS that protects patient safety and avoids prejudice to the efficiency of the provision of those services.

116. In coming to that view the tribunal also considers that such a decision does not give rise to undue restrictions on the rights of EU nationals exercising treaty rights under EU law. That is because the general principles of proportionality are not substantively different from those as noted above and have not been infringed for the same reasons. It is not necessary to address in more detail the Appellant's general complaint in this regard.
117. For completeness, the tribunal also rejects the Appellant's submissions relating to the shortage of dentists being a material factor. The tribunal is of the view that the standards inherent in the performers regulations should not be adjusted and compromised in response to an acknowledged shortage of dental practitioners.
118. And finally, the tribunal also rejects the submissions to the effect that the Appellant has been some how singled out for poor treatment by the Respondent. Whilst the tribunal would accept that the Respondent has not dealt with her application as well as it could have, nevertheless there is no evidence of bad faith in this case or other factor that would weigh in the Appellant's favour.
119. The tribunal finds in weighing all the matters above that the decision to remove the Appellant is reasonable and proportionate in all the circumstances and that there is no other viable decision open to it.

### **Decision**

**Dr Barakzai is removed from the performers list**

**The appeal is dismissed**

**Judge J Atkinson  
Primary Health Lists/Care Standards  
First-tier Tribunal (Health Education and Social Care)**

**Date Issued: 03 April 2019**