

## **Primary Health Lists**

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

Heard at The Royal Courts of Justice on 4 June 2019

[2018] 3516.PHL

**BEFORE**  
**Tribunal Judge C Dow**  
**Specialist Member Ms M Harley**  
**Specialist Member Mr Z Kapadia**

**BETWEEN:**

**Mr Majid Salas**

**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 10 October 2018, refusing to include Mr Salas, the Appellant, on the dental performers list on the basis that his inclusion would be prejudicial to the efficiency of services under the National Health Service (Performers Lists) (England) Regulations 2013.

#### **Summary Background and Chronology**

2. The Appellant is a French citizen, born in Saudi Arabia. He completed his primary dental degree in Hyderabad in 2001 and practised as a general dentist in Pakistan, Saudi Arabia and Syria until taking up speciality training in orthodontics in

France in 2007. Having completed specialist training in 2011, he practised as an Orthodontist in private clinics in France until 2017.

3. In 2015, the Appellant obtained a statement of recognition of his primary degree in Romania for the purposes of registering as a dentist there.

4. On 8 September 2017 the Appellant was registered by the General Dental Council (GDC) under Section 15(1)(c) of the Dentists Act 1984.

5. On 3 April 2018 the Appellant made an application for inclusion on the dental performers list.

6. On 10 October 2018, following a consideration of the application 'on the papers' by the Performers List Decision Panel (PLDP), the Respondent refused to include the Appellant on the dental performers list because it considered there were reasonable grounds for concluding that to include him would be prejudicial to the efficiency of the services performed by those on the list.

## **The Law**

7. The law is to be found in National Health Service (Performers Lists) (England) Regulations 2013 (The Regulations). The relevant provisions are set out in the bundle and it is not necessary to set them out in full here.

8. In brief, Regulation 7 provides grounds by which the Respondent *must* refuse to include a practitioner on the list and grounds by which it *may* refuse to do so. Regulation 7(2)(g) provides that an application for inclusion on the performers list may be refused if there are reasonable grounds for concluding that including the Practitioner in the performers list would be prejudicial to the efficiency of services which those included in that list perform. This was the provision on which the Respondent relied in refusing to include the Appellant in its letter of 10 October 2018.

9. Regulation 34 describes additional grounds of refusal in the case of a dental practitioner, including, at Regulation 34(2), that the Respondent *must* refuse to admit a dental practitioner if they are have not completed nor are undertaking foundation training unless they are exempt from that requirement. The relevant exemptions are set out in Regulation 34(4). Regulation 30 explains that foundation training means training covering a comprehensive syllabus, completed in the UK under the supervision of an approved trainer.

10. Under Regulation 34(4) a dental practitioner is exempt from the foundation training requirement if either: (a) they have been registered (by the GDC) under s.15(1)(b) of the Dentists Act 1984, meaning that the GDC recognise a primary degree completed within the EEA; or (b) they have at least two years full-time experience in primary care as a dental practitioner in community dental practice or UK armed forces; or (c) they have been assessed by a dean or director of post-graduate dental education to have knowledge and experience equivalent to a dentist who has satisfactorily completed foundation training.

11. The appeal proceeded by way of a redetermination of the issues and the hearing was held in public.

## **Preliminary and procedural matters**

12. 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**

13. 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.

14. The Appellant produced two documents by way of late evidence. The first was a two-page document detailing the content of his speciality training in orthodontics in France between 2007 and 2011. The second was a letter from Dr Usman Qureshi, clinical director of Neo Orthodontics, dated 3 June 2019, outlining a proposal to employ Mr Salas at a new clinic in Folkestone, Kent.

15. Mr Thomas, on behalf of the Respondent, provided copies of a further application by the Appellant to be included on the dental performers list (Form NPL1), dated 21 May 2019, together with email correspondence between the Appellant and Health Education England (HEE) about the application. Mr Thomas applied for these documents to be admitted as late evidence because they showed that the Appellant's circumstances had changed and he now intended to join the performers list in relation to a different area. Mr Thomas clarified that although, for the purposes of the new application the Appellant appeared to accept a requirement to be assessed in respect of his knowledge and experience to meet the foundation training exemption, the Respondent agreed there could be no prejudice to his position in this appeal. Despite that assurance, the Appellant objected on the basis that the document was irrelevant because NHSE had requested he submit the form, then refused to accept it.

16. In considering any late evidence, the Tribunal applied rule 15 and took into account the overriding objective as set out in rule 2 of the Tribunal Procedure (First Tier Tribunal) (Health Education and Social Care Chamber) Rules 2008. Despite the Appellant's objections, we considered that his further NPL1 application was potentially relevant and could assist us in reaching a fair decision. As a specialist panel we could decide for ourselves what weight (if any) to place on it when we came to deliberate. We decided to admit it. There being no objection to either document produced by the Appellant and having decided they were relevant and helpful, we decided to admit them.

17. The Tribunal heard oral evidence for the Respondent from Dr Andy Furniss, a Dental Practice Adviser (DPA) for the Respondent and oral evidence and submissions from the Appellant.

## **Submissions and grounds of appeal**

18. 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 summarised as follows.

19. The Tribunal's role, by way of redetermination of the Appellant's application to be admitted to the dental performers list, is to apply the relevant law. The Regulations supply the framework for the decision whether to admit the Appellant and neither NHS England, nor the Tribunal in its place, have the option not to follow them.

20. The Regulations employ both mandatory and discretionary language.

21. The Respondent's decision of 10 October 2018 (B1) records that the Appellant's application has been refused. The Respondent relied on a discretion under Regulation 7(2)(g) but the factors which the Respondent took into account, including that the Appellant (a) did not have a primary dental degree from the UK or EEA; (b) did not have experience working in the UK in primary dental care; and (c) had not formal English language qualification, amounted, in substance, to reasons which required mandatory refusal.

22. The Respondent no longer contests, for the purposes of this appeal only, that the Appellant has the English Language skills required to be admitted to the performers list.

23. While the GDC decides on fitness to practice more generally, the Regulations concern the right to practice within the NHS, ensuring that each practitioner meets specific requirements in skills, knowledge and experience to practise safely and efficiently in the NHS primary care environment. Those requirements may be different from particular requirements in primary care in France or elsewhere in the EU. It does not follow in principle or in the Regulations that one can automatically work within the NHS because a practitioner has been registered by the GDC or because overseas qualifications and experience automatically entitle a person to practice within the NHS.

24. Except where the Regulations afford discretion, the Tribunal has no room to disapply the regulations if a practitioner fails to show that they possess the required training or experience.

25. In addition to the general grounds for refusal set out in Regulation 7, Regulation 34 details additional grounds to refuse to register a dental practitioner.

26. Further to Regulation 34(2), the Respondent *must* refuse to admit a dental practitioner if they have not completed nor are undertaking foundation training unless they are exempt from that requirement.

27. Regulation 30 explains that foundation training means training covering a comprehensive syllabus, completed in the UK under the supervision of an approved trainer. The Appellant has not completed, and is not proposing to complete foundation training. So, unless the Appellant falls within one of the exemptions described at Regulation 34(4) then the Tribunal must refuse to register him.

28. The Respondent submits that none of the exemptions at Regulation 34(4) apply. There are three ways to pass through the gateway. The first exemption at

Regulation 34(4)(a)) does not apply because the Appellant is not registered under s15(1)(b) of the Dentists Act 194. His registration is recorded at C83. The second exemption at Regulation 34(4)(b) does not apply because, as the Appellant accepts, he has never practised in England in any capacity. The third exemption at Regulation 34(4)(c) is potentially available to the Appellant. However, he has not submitted himself for assessment and is apparently unwilling to do so. The Appellant has the option of undertaking training and assessment, known as Performer List Validation by Experience (PLVE), to prepare himself to practice in the NHS. Given the training and experience he has, PLVE may well be a light touch process. However, he must still complete an assessment within the meaning of Regulation 34(4)(c) to determine what, if any, further training he must undertake.

29. The Appellant has indicated that he has a pending application to the GDC to be placed on the specialist register as an orthodontist, which could further narrow the requirement for him to undertake any further training. However, he would still need to undertake the assessment described at Regulation 34(4).

30. If the Tribunal did find that the Appellant has somehow satisfied Regulation 34(2) then the Tribunal would need to consider further whether to exercise its discretion under Regulation 7(2)(g). The Respondent maintains that the arrangements whereby the Appellant now proposes to practise in Kent are not necessarily suitable for his immediate or unconditional inclusion because it was not clear whether it could offer the level of supervision that might be required following assessment.

## **The oral evidence adduced by the Respondent**

### **Dr Andy Furniss**

31. The Respondent relied on the oral evidence of Dr Andy Furniss. Dr Furniss was appointed Dental Practice Advisor for the Respondent with effect from April 2002. He adopted his witness statement dated 29 January 2019 (C001) as evidence in chief and was questioned. It is not necessary to rehearse the full extent of his oral evidence. It may be summarised as follows.

32. Dr Furniss's credentials are as per his statement. It is relevant that he also holds a role as a panel member of the GDC determining applicants' fitness to practise.

33. Dr Furniss assesses between 50 and 75 applications per year. In the Appellant's case, a second adviser had looked at his initial assessment, which was based on the paper evidence submitted with the Appellant's application. Dr Furniss had prepared a summary based on that evidence. His summary had been shown to managers and then put before the Performers List Decision Panel (PLDP). Dr Furniss had not, himself, taken part in the PLDP, which had been differently constituted.

34. Dr Furniss had not personally written the information included within the briefing to the PLDP at page C1 of the bundle. He said that although the Board gave its decision to refuse by reference to Regulation 7.2(g), in his view it failed under Regulation 34. Dr Furniss said that in his advice to the PLDP he had not sufficiently expressed his concerns in relation to Regulation 34(2) but he was familiar with its requirement for foundation training and had borne that in mind. However, there had not been a great deal of evidence presented by the Appellant in support of his

application and his EU citizenship had made Dr Furniss believe that the PLDP might be able to exercise some discretion to admit him with conditions. He had not been entirely sure of the exemptions available under Regulation 34(4) and had preferred to rely on the knowledge of the PLDP to make the decision rather than 'put his neck on the line'.

35. Dr Furniss said that in light of the appeal he had read the Regulations and the Appellant's evidence carefully and had come to the view that he did not meet any of the exemptions in Regulation 34(4) and there was no other route available to the PLDP to admit him to the performers list.

36. Dr Furniss confirmed that he had no concerns about the Appellant's clinical decision making, nor his qualifications and experience. However, there was no way of bypassing the requirement for assessment and, if necessary, further training.

37. In the Appellant's case, he would have to be prepared to undertake PLVE, including a period of clinical supervision, working to an agreed timetable that could be tailored to his experience. Additional training would likely be based around NHS Regulations, CQC requirements, cross infection control and complaint handling.

38. Dr Furniss considered that if the Appellant were admitted by the GDC to the specialist register, limiting his practice to orthodontics then that would enhance his options, removing any requirement for clinical supervision but he would still need to demonstrate to the assessor that he was competent in those administrative areas he had outlined. It would not allow the Appellant to bypass any of those requirements and, in any event, Dr Furniss believed that the Appellant's application to the GDC for inclusion on the specialist register had not yet been decided.

39. It was important that, no matter what undertaking a practitioner gave, their inclusion on the performers list would be to practise general dentistry as there are no sub-categories to the list.

40. Dr Furniss confirmed the Appellant's belief that there would be a cost associated with assessment and some of the further training requirements identified. These are at nationally agreed rates.

41. Dr Furniss was not sure what impact the Appellant's non-EU country of birth should have on his application. Dr Furniss had noted the Appellant's country of birth on his advice to the PLDP because he wanted to alert the panel in case an EU citizen by birth who completes a primary dental degree outside the EU fell to be treated differently than a person who completes a primary degree outside the EU before becoming an EU citizen. In hindsight he thought there was no difference between these categories.

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

42. The Appellant's grounds of appeal had been drafted without the benefit of legal advice. However, he also relied on his written statement (page C001) and a skeleton argument prepared for the hearing (page A56). The Appellant's case may be summarised as follows.

43. The Respondent had failed to take into account the Appellant's qualifications and experience when deciding whether to include him on the performer's list.

44. In particular, the Respondent had failed to consider the Appellant's Certificate of Completion of Speciality Training (CCST) in orthodontics, coupled with the Appellant's clear indication that he only wished to practice in the area of orthodontics.

45. The Respondent had failed to take into account the recognition the Appellant had received in Romania in 2015 for his primary dental degree and the experience he had gained in primary dental care in Pakistan, Saudi Arabia and France.

46. Taken as a whole, the Appellant's qualifications and experience should have been considered by the Respondent, and should now be considered by the Tribunal, as being either: (a) equivalent to foundation training in England; or (b) amounting to an exemption from the requirement to complete foundation training. He should therefore be included on the performers list.

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

47. The Appellant adopted his witness statement dated 30 January 2019 (D001) supported by various documents included in the bundle.

48. The Tribunal explained that all the documents he had submitted had been read and that he would be asked questions by the Tribunal to enable him to put forward his case more fully. The Appellant's evidence may be summarised as follows:

49. The Appellant is now a French citizen.

50. The Appellant had been told it would cost him £1200 and would take at least 6-9 months to complete further clinical supervision. He didn't know what they wanted to assess. It was frustrating for him that no-one, including Dr Furniss, appeared willing to answer his enquiries.

51. When he had applied to the GDC for registration, he had not realised the significance of registration under s.15(1)(b) and that it would mean he would be exempt from the foundation training requirement. He didn't think it was important and despite the refusal of the Respondent to include him on the performers list, he had not asked the GDC to register him under s.15(1)(b).

52. The Appellant realised the legal force of the Regulations but he could not accept that no discretion was available, particularly given that he only wishes to practise orthodontics. He is a special case and there should be some flexibility to allow him to practise in the limited area of orthodontics. The Appellant cited examples of other public bodies, including the Disclosure and Barring Service, behaving flexibly when the Appellant's position was fully understood.

53. It was accepted that he had not completed foundation training in England, but that was not a necessary requirement. The Appellant had seen it written in other places that equivalent training and experience would satisfy the requirement. The Appellant believed he satisfied every element of foundation training as described in Regulation

33. All these areas were covered in his foundation year, in Pakistan, and when in France on CCST. The rest, and in particular the parts related to NHS administration, he could demonstrate through his verifiable completion of over 340 hours NHS CPD courses, and over 180 hours of GDC courses. This amounted to nearly 550 hours in total, the equivalent of 5 years CPD for NHS dentists.

54. The Appellant said that he didn't believe he had the equivalent experience in primary care as a general dentist but he did as an orthodontist. There was some confusion, he believed, between the meaning of primary care in general dentistry and in orthodontics. He was experienced in community dental service in a hospital outpatient department in Pakistan, although for less than a year.

55. In any case, there was no need to consider foundation training in the Appellant's case because he only wanted to practise orthodontics.

56. In relation to the acknowledgement of his primary dental degree in Romania, that had been achieved in 2015. He had been assessed against the 6<sup>th</sup> year of Romanian dental training, which enabled the authorities there to validate his primary dental degree. The Appellant was then invited by Romanian GDC to register with them.

57. Turning to his proposal to practice at NEO Orthodontics, the Appellant said that the practice was new and had not yet been inspected by the CQC or NHS. Mr Qureshi, the clinical director was expected to be at the new practice 5 days per week and it was the plan that the practice would become registered with HEE as an approved training practice with Dr Qureshi as clinical supervisor.

58. The Appellant sought to clarify that the NPL Form he had recently submitted should be regarded as an amendment or extension to the application in the current proceedings.

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

59. 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 summarised as follows:

60. The Respondent did not accept that the Appellant could attract an exemption under Regulation s.34(4)(b) because its provisions applied only to community dental service in England or in the UK armed forces. The Appellant clearly did not meet either limb.

61. There is no flexibility in the Regulations around whether he can bring himself as being within Regulation 34(2) or within the exemptions available under Regulation 34(4). The Appellant said he ought to be treated as being equivalent to a trained person but there was no such phrase in Regulation 34. The refusal described in Regulation 34(4) was mandatory not discretionary.

62. The legal framework applicable in the present case is not merely mechanical. It provides 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.

63. Addressing the Appellant's argument that imposing an assessment and possible PLVE requirements on him was unreasonable, the Respondent accepted that the Tribunal needed to consider whether such a requirement was proportionate.

64. While the Respondent did not accept that refusal to include the Appellant on the performers list for a failure to meet Regulation 34 amounted to indirect discrimination within the meaning of the Equality Act 2010 or within EU law, the proportionality requirement in any such decision could be read across from other Regulations. In particular, the requirement for any practitioner to demonstrate sufficient knowledge of the English language. *Haim v Kassenzahnärztliche Verein Nordrhein (C-424/97)(2000)(European Court Reports 2000 I-5123)* was the leading case and showed that it was justifiable to impose a language requirement on a medical professional in the public interest.

65. The requirement to demonstrate clinical and administrative competence through assessment and, where necessary, supervision, is similarly a proportionate means of meeting a legitimate aim for patient safety. One cannot simply say that administrative experience in France can be automatically imported. Regulation 34 allows for person to be assessed and requirement tailored to their qualifications and experience, including down to a zero requirement. The only impediment is the assessment itself, which was available to the Appellant, but he had chosen not to avail himself of it.

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

66. The Appellant made brief submissions that may be summarised as follows:

67. The Respondent accepts (at A21) that there is no requirement to have work experience in the UK, in primary care or anywhere else.

68. The Regulations say that applicants must have a primary degree from UK or a member state of the EEA. That requirement is met by the Appellant's certificate from Romania.

69. The Appellant is experienced in primary care by virtue of 12 months working in a small hospital outpatients' department with night duty in a hospital maxillofacial unit in Pakistan. He also has some primary care experience in France.

70. The Respondent should have, and the Tribunal must now, assess the Appellant's qualifications and experienced, based on the extensive information supplied by him, against the same criteria identified in Regulation 30. By doing so, the Tribunal will conclude that the Appellant has the requisite qualifications and experience.

71. The Respondent is confused about what it means to deliver primary care in orthodontics, rather than in general dentistry. The Appellant wants to practice orthodontics only so that he may become more specialised. The appellant was effectively providing high-level primary care in France and that system has only minor differences with the UK. The major difference is that in the UK classification of

treatment has to be made considering funding available rather than just on the complexity of the case.

72. The Appellant's new proposal to work at NEO Orthodontics places him in a different position to his original application which requires a fresh consideration.

73. By email dated 10 June 2019 the Appellant sought to clarify the evidence relating to the certificate he had obtained in Romania in 2015. The final hearing having been concluded, and no error of law having been identified or alleged, we did not take into account his submission.

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

74. The Tribunal considered all the evidence and the submissions. In coming to its decision, the Tribunal has looked at the evidence as a whole.

75. The material primary facts in the present case are, in essence, not in issue. The Respondent accepts that the Appellant is a well-qualified and experienced orthodontist, albeit with limited experience in primary care. For his part, the Appellant accepts that he is registered under s.15(1)(c) of the Dentists Act 1984 and so not recognised by the GDC as having a primary dental degree from within the EEA. Nor had he ever attempted to persuade the GDC that he should be registered under s.15(1)(b).

76. To the limited extent that he argued the point before us, and leaving aside whether or not the Tribunal has any jurisdiction to decide the point, the Appellant did not satisfy us that the acknowledgement he had secured from the Ministry of Education and Scientific Research in Romania in 2015 (D150) amounted to, or was equivalent to, an appropriate European Diploma that would have satisfied the requirements for registration under s.15(1)(b).

77. We made this finding because, as Mr Salas explained, the purpose of the acknowledgement was as a technical vehicle that enabled him to apply for registration in Romania as a dental practitioner. Although Mr Salas said that he had been required to sit examinations in various areas of dental competence in order to obtain the acknowledgement, the results of which were shown at D152, the acknowledgement did not itself amount to a qualification and there was no suggestion that its validity for the purposes of subsequent employment was intended to apply outside Romania. In his oral evidence Mr Salas said that he had included the documentation in his application to the GDC to be registered under s.15(1) of the Dentists Act 1984. On that basis, we took into account that it was open to the GDC to recognise that acknowledgement as sufficient basis to register the Appellant under s.15(1)(b) but they had not done so. Instead, they had registered him under s.15(1)(c), recognising his status as having a primary dental degree from overseas, other than from within the EEA or other recognised countries.

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 included in the performers list.

### **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 refusal to include the Appellant on the performers list. Although, by its letter of 10 October 2018 the Respondent had explained its refusal by reference to its discretion under Regulation 7(2)(g), it was submitted by the Respondent that as part of that exercise it was, in substance, applying the mandatory refusal under Regulation 34(2).

81. It was accepted by both parties that the mandatory requirements in Regulation 34(2) should be considered before the consideration of any factors that might result in a discretionary refusal. Therefore, it follows that the core issue for the Tribunal to decide was whether the Appellant met the requirements of Regulation 34(2) or was otherwise exempt from them by virtue of one of the gateways available under Regulation 34(4). Only if the Tribunal was satisfied that it was not required to refuse to register the appellant under that section would it be necessary to go on and consider any other grounds that might lead to mandatory refusal, for example under Regulation 7(4) or a discretionary refusal, for example under Regulation 7(2).

82. 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 refusal**

83. The Tribunal turns next to its own assessment of whether or not the Appellant should be included on the dental performers list. As described above, the starting point for that exercise is to consider whether the Appellant has met the requirement to have completed, or at least be undertaking, foundation training within the meaning of Regulation 34(2) and, if not, whether he is exempt from the requirement by virtue of one of the gateways available in Regulation 34(2).

84. The Appellant was equivocal in his written statement and skeleton argument about whether he believed he had completed foundation training. However, it was never put forward by him that he had practised in the UK and following an explanation of the meaning of foundation training within the Regulations, including the requirement to have undertaken such training with an approved trainer, he readily accepted that he had not done so.

85. The Tribunal therefore turns immediately to the availability of the exemptions under s.34(4).

86. Since it was not in dispute that the Appellant was not registered as a dental practitioner by virtue of s.15(1)(b) of the Dentists Act 1984, the exemption available under s.34(4)(a) was not available to him. To the extent that the point was argued by the Appellant that he should be treated as if he had been so registered, we reject that submission both because the Regulations gave us no power or discretion to do so and

because, even if we had such a power or discretion, we were not satisfied that either the acknowledgement of the Appellant's Dental Certificate from Romania or the completion of specialist training in orthodontics in France amounted to such equivalency.

87. The Tribunal explored the availability to the Appellant of an exemption under Regulation 34(4)(b) because the Appellant said that he was experienced in primary care as a dental practitioner, primarily by virtue of his practice during and after his foundation studies in Pakistan.

88. On its face, Regulation 34(4)(b) does not say that such experience must have been obtained in a particular place but it does say that it must have been in 'community dental service' or in the 'armed forces of the Crown'. The second category was clearly not relevant. Regulation 29(1) defines 'community dental service' as meaning dental services provided under s.3(1)(c) of the National Health Service Act 2006, which clearly describes the Secretary of State's duty to provide health services in England. We therefore concluded that to meet the criteria for exemption under Regulation 34(4)(b), such community dental service must have been undertaken in England. Given the Appellant has never practised in England in any capacity, that exemption is not available to him.

89. The exemption under Regulation 34(4)(c) applies where a post-graduate dental dean or director of postgraduate training has assessed the practitioner to have knowledge and experience equivalent to that of a dental practitioner who has satisfactorily completed foundation training.

90. The Respondent submitted that Regulation 34(4)(c) was the vehicle by which the Appellant could have satisfied the requirement for an exemption from Regulation 34(2). It was intended to be the gateway by which those in similar position to the Appellant, having secured substantial qualification and experience outside the UK, could be admitted to the performers list with the minimum delay.

91. The Appellant accepted that he had not undertaken any such assessment and it was his submission that he should not be required to do so.

92. In effect, the Appellant's core argument was that the Respondent should itself have carried out that assessment when it considered his application, and having done so, been satisfied by his qualifications and experience and therefore included him on the performers list. In light of the Tribunal's role in re-determining his application on appeal, the Appellant invited the Tribunal to make the same assessment, submitting in the same way that we should be satisfied, based on his qualifications and experience, that he met the criteria for exemption from the foundation training requirement. For completeness, the Appellant argued that any such assessment by us should be limited to his suitability as an orthodontist because he only intends to practise in that area.

93. We reject those submissions. The wording of Regulation 34(4)(c) is, in our judgement, clear in both its language and intent. Regulation 34(4)(c) makes no reference to the Respondent itself having any power, duty or discretion to make such an assessment when deciding whether to include a practitioner on the performer's list.

Accordingly, the Tribunal has no such power, duty or discretion when exercising its function by way of re-determining the Appellant's application and we decline to do so.

94. We accept and adopt the Respondent's explanation that its operation, with HEE, of the schemes, including the PLVE scheme, to arrange such assessments and the training and supervision that might be required to meet any gaps identified in a practitioner's knowledge and experience meets parliament's presumed intent that there should be a robust, thorough and independent mechanism for assuring that a practitioner of any level of qualification or experience can work safely and efficiently within the NHS before they are permitted to do so.

95. Having found that the Appellant has neither completed nor is undertaking foundation training, that he does not meet the criteria for any of the exemptions available under Regulation 34(4) and there being no other power, duty or discretion to apply an exemption, we find that in accordance with Regulation 34(2) we must refuse to admit him to the dental performers list.

96. Having made a finding that we must refuse to admit the Appellant under Regulation 34(2), there was no requirement for us to go and consider any other exercise of our duty or discretion under the Regulations.

97. More generally, the Tribunal finds that the imposition of the provision that a practitioner has completed, or is undertaking foundation training, or is otherwise exempt from doing so under s34(4), 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. As such it cannot be said that such a requirement puts the Appellant at a disadvantage amounting to indirect discrimination.

98. Although it was not argued by the Appellant, 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.

99. The Tribunal finds in weighing all the matters above that the decision to refuse to include the Appellant on the performer's list is reasonable and proportionate in all the circumstances and that there is no other viable decision open to it.

## **Decision**

**Mr Salas's application to be included on the performers list is refused.**

**The appeal is dismissed**

**Judge C S Dow  
Primary Health Listings  
First-tier Tribunal (Health Education and Social Care)**

**Date Issued: 18 June 2019**