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

[2021] 4325.PHL

Heard by Video Link on 1 & 2 February 2022

BEFORE
Mr H Khan (Tribunal Judge)
Dr M Gee (Specialist Member)
Mr M Cann (Lay Member)

BETWEEN:

Dr Rapinder Adekola

Applicant

-v-

NHS England

Respondent

DECISION

The Application

1. Dr Rapinder Adekola (“the Applicant”) has applied pursuant to Regulation 18A (6) of the National Health Service (Performers Lists) Regulations 2004 ("the 2004 Regulations"), to the First Tier Tribunal ("Tribunal") for her national disqualification from the Medical Performers List ("MPL") to be reviewed.

The Hearing

2. The hearing took place on 1 & 2 February 2022. This was a remote hearing which has not been objected to by the parties. The form of remote hearing was by video. A face-to-face hearing was not held because it was not

practicable, and no-one requested the same and we considered that all issues could be determined in a remote hearing. The documents that we were referred to are in the electronic hearing bundle (222 pages plus the additional evidence referred to below) provided for the hearing.

3. The Tribunal took account of the Appellant being unrepresented and made adjustments to enable the Appellant to fully participate in the proceedings such as ensuring that the Appellant was reminded about the decision that the Tribunal was considering. Furthermore, the Applicant was given some latitude in cross examination of the Respondent's witnesses. For example, some of the Applicant's questions focused on matters which were not relevant to the Tribunal's decision such as the employment of doctors from abroad.

4. The Applicant raised with the Tribunal at the end of day one about the possibility of her not giving oral evidence. Mr Corrie set out that the Respondent in those circumstances would be making submissions around the weight to be attached to the Applicant's evidence if this were to be the case. We gave the Applicant the opportunity to reflect on her decision overnight.

5. In dealing with procedural issues and in giving directions on the management and conduct of the final hearing, the Tribunal at all times took account of the Tribunal's overriding objective to deal with the case fairly and justly.

Attendance

6. The Appellant represented herself at the hearing.

7. The Respondent was represented by Mr Matthew Corrie (Counsel). The Respondent called Mr Mohammed Anwar and Dr Ash Samanta as witnesses.

Background

8. The background to this matter is well documented and has already been set out in the 2012 and 2014 Tribunal decisions. The 2014 Tribunal Decision summarises the background (Paragraphs 2-8) to the matter and is set out below;

> "…3. The Applicant worked as a GP from 2005 to 2011 in the Brackley/ Northamptonshire area. Following a referral from another agency in 2009 NHS Northamptonshire ('NHSN') became concerned about the Applicant's lack of insight into working with other agencies. NHSN also attempted to support her when the GP practice she was working for indicated concerns about own health and her severely adverse reactions to any perceived criticism of her.
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> 4. On 30 March 2011 the Applicant was arrested with her husband following a police visit to their home to enquire about the attempted acquisition of

scorpion / spider venom for research purposes. The police had been informed by the supplier of this attempted purchase that the request had come from a company which was no longer trading but had been set up by the Applicant's husband. The police alleged that both the Applicant and her husband were aggressive when contact was initially made and they were both interviewed under caution. No charges were brought against them.

5. On 4 April 2011 the Applicant was suspended from her GP practice pending investigations. At a final disciplinary hearing held on 21 July 2011 the Applicant appears to have been dismissed for gross misconduct, although she contends that she resigned and was constructively dismissed. She sought to make a claim against the GP Practice in the Employment Tribunal in November 2013, but this did not proceed to a full hearing because the claim was made out of time.

6. A multi agency meeting in April 2011 discussed issues of concern regarding the Applicant, including alleged aggression towards police, the attempted acquisition of venom and potential use of venom for research outside an approved research framework. A reference committee was set up to investigate these concerns and the hearing took place on 21 September 2011. The Applicant was invited to participate but did not attend. At that hearing the committee concluded inter alia that: the Applicant failed to cooperate with and engage with the PCT / NHSN following the referral in 2009; in March 2011 she had been actively involved in planning research involving death stalker scorpion and black widow spider venom; when the police attended to discuss the referral she behaved in a highly aggressive manner; she failed to cooperate with NHSN thereby demonstrating an unwillingness to be regulated; she failed to keep NHSN apprised of her current address / telephone number / disciplinary proceedings in breach of Regulations.

7. The committee concluded that there was sufficient evidence as a result of these findings for the Applicant to be removed from the list on 'unsuitability' grounds. The committee also concluded that failure to engage in both 2009 and 2011 indicated a pattern of non-cooperation demonstrating an unwillingness to be regulated and a breach of the GMC Good Medical Practice guidelines. NHSN also referred the case to the General Medical Council ('GMC') and Dr Adekola was suspended by the Interim Orders Panel from 30 August 2011.

2012 Tribunal decision

8. The Applicant did not engage with the 2012 Tribunal's proceedings and did not submit any detailed evidence or outline her position in response to the allegations made by NHSN. The Tribunal regarded this to be deliberate [5] and drew adverse inferences from the Applicant's failure to engage with the PCT [24]. The Tribunal concluded that the Applicant consistently failed to engage with NHSN and ignored the most basic regulatory requirements, and therefore nationally disqualification was justified…"

2014 Tribunal decision

9. The Applicant cooperated with the Tribunal in pursuing her review application. The Tribunal determined after carefully considering all the

evidence available to it together with the detailed representations from both parties that the Applicant's national disqualification remained appropriate and proportionate. The Tribunal determined in relation to the review period that that it had significant concerns that there was no realistic prospect of a further review being successful unless and until the Appellant undertakes a comprehensive period of self-reflection followed by demonstrable insight (and that the Appellant was some distance away from this). It went on to add that *"there remains the possibility that with or without professional assistance the Applicant will undertake the necessary self-reflection and be able to demonstrate the insight necessary."* That decision was appealed by the Appellant but was unsuccessful.

The Applicant's Position

10. The Applicant's position case included that;

    a. She denied she was "not fit" to be working as a GP
    b. She was allowed to work as a medical doctor in the UK without restriction according to the GMC
    c. She has never been convicted of an offence

The Regulatory Framework

11. Regulations 18A(6) and (7) provide that a person who is nationally disqualified may apply for a review. The review cannot be made before the end of the period of two years beginning with the date on which the national disqualification was imposed or one year beginning with the date of a subsequent review. The Tribunal may confirm or revoke the disqualification.

12. Regulations 18A (national disqualification) and 19 (review periods on national disqualification) of the 2004 Regulations continue to apply for the purposes of any appeal or review relating to a national disqualification imposed under those provisions prior to the date of transfer – see Schedule 2(10) of the National Health Service (Performers Lists) Regulations 2013.

13. In our view the overarching issue for us to determine is the Applicant's suitability for inclusion in the national performers list in light of all the evidence available to us at the date of hearing.

Evidence

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

12. Dr Anwar acknowledged that he had not worked with the Applicant nor did he have a personal knowledge of the Applicant's case.

13. Dr Anwar set out central issue was whether or not the Applicant had demonstrated sufficient insight into the findings that led to the disqualification. He set out that there was no evidence provided in the Applicant's witness statement, or within the exhibits that allowed him to form a view on the Applicant's insight.

14. Dr Anwar explained that he expected the Appellant to accept what has happened in the past was an aberration of standards. He expected the Applicant to acknowledge that she should have behaved differently in the circumstances. He would have expected the Applicant to apologise or show remorse for what has happened.

15. He made it clear that in order to remediate it was important to understand what the Applicant had been done and how she would react differently if the same circumstances happened again. He gave examples of how such insight could be evidence such as a reflection log. He described it as a journey to be travelled.

16. He acknowledged that the national disqualification covered a considerable period of time. However, he made it clear that time alone spent subject to a National Disqualification should not be the sole factor in determining whether or not to revoke the disqualification. He considered that whilst it was a factor, it needed to be considered in conjunction with factors such as a lack of insight and remediation.

17. Dr Anwar accepted that any concerns regarding clinical abilities such as maintaining skills and knowledge could be assessed as part of a Return to Practice programme.

18. Dr Anwar also acknowledged that he had limited knowledge on the Returners Scheme available in Scotland.

19. Dr Samanta acknowledged that he also had not worked with Applicant. He was employed by the same directorate as Dr Anwar. He agreed with Dr Anwar's evidence that the central issue was the lack of insight and remediation. This was an issue that had been identified by the First-tier Tribunal in 2014.

20. The Applicant informed the Tribunal that she would not be willing to be cross examined on her evidence.

The Tribunal's Conclusions with Reasons

21. We took into account all the evidence that was included in the hearing bundle and presented at the hearing. We also took into account the closing written submissions provided by both parties.

22. We had directed the parties to provide written submissions after the hearing. Both the Appellant and the Respondent provided written submissions (and

supporting documents including caselaw) which we have taken into account.

23. We wish to place on record our thanks to the Applicant and Mr Corrie for their assistance at the hearing. We would also like to thank the witnesses who dialled into the video hearing and gave evidence.

24. We acknowledge that the Applicant at the start of the hearing raised an issue that her witness statement (August 2021) and her application for a witness summons and supporting documentation were not in the hearing bundle. We stood the matter down in order to allow the parties to send us the documents and agreed that they should be included in the hearing bundle.

25. In considering any such 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). We concluded that the evidence was relevant and should be included in the hearing bundle.

26. The Applicant also raised at the hearing her application dated 14 January 2022 for a witness summons for Dr Lynn Cargill and Dr Charles Perrot. That application was dealt with and determined prior to the hearing and the reasons are set out in the order dated 28 January 2022.

27. We, as a panel, considered the decision made by the Judge Khan (who also sat on this panel) and considered that we did not see the need to reconsider the issue around the witness summons application as there wasn't a change in circumstances since the application was made and determined. We agreed entirely with the reasons set out in the order dated 28 January 2022. Those reasons included the following;

> "…The application is for a review of the national disqualification order which is in place. The issue to be determined is whether the Applicant remains unsuitable to be included on the Medical Performers List such that the national disqualification should remain in place.
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> I have considered the stated relevance of their evidence to the current proceedings. The two witnesses referred to are the partners of the GP Practice where the Applicant previously worked in 2011. Whilst I acknowledge what the Appellant states with regards to those witnesses being reliable references for her work as a GP (as well as her previously having met them on an informal basis), neither witness has worked with the Applicant since 2011 and I am not persuaded as to how those witnesses can comment on the Applicant's current suitability to be included on the Medical Performers List.
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> The issue to be determined is the Applicant's current unsuitability to be included on the Medical Performers List and any evidence either witness will

be able to provide in respect of the Applicant's work as a GP and clinical capabilities is now historic…"

28. It was clear during these proceedings that the Applicant does not agree with the findings of the original PCT or the Tribunal at previous hearings relating to these proceedings. However, we reminded ourselves that it is not open to the Applicant to seek to challenge previous findings made by the PCT or the Tribunal during the course of these proceedings.

29. We acknowledge that the 2004 regulations and the 2008 Rules are silent on the issue of burden of proof. Furthermore, we were not made aware of any direct authority as to which party bears the burden of proof at a review hearing of the national disqualification. However, the Respondent referred to caselaw in relation to reviews of orders made in fitness to practice proceedings brought by healthcare regulators.

30. In Abrahaem v General Medical Council [2008] EWHC 183 (Admin) at paragraph 23 in which it was held that:

> *"The statute is to be read together with the 2004 Rules (cited [12] above) and Rule 22(a) to (i) makes clear that there is an ordered sequence of decision making, and the Panel must first address whether the fitness to practice is impaired before considering conditions. In my judgment, the statutory context for the Rule relating to reviews must mean that the review has to consider whether all the concerns raised in the original finding of impairment through misconduct have been sufficiently addressed to the Panel's satisfaction. In practical terms there is a persuasive burden on the practitioner at a review to demonstrate that he or she has fully acknowledged why past professional performance was deficient and through insight, application, education, supervision or other achievement sufficiently addressed the past impairments."*

31. We acknowledge that fitness to practice proceedings are a different jurisdiction to proceedings under the 2004 Regulation, however, there are similarities between the proceedings such that the principles to apply at review hearings can be considered analogous. We reminded ourselves that a review hearing involves an application by the Applicant who seeks a revocation of the order. Accordingly, we concluded that the burden of establishing that the national disqualification should be revoked lies with the Applicant.

32. We reminded ourselves that the Tribunal is considering the matter at the date of the hearing and makes its decision on the basis of all of the evidence available to it.

33. The Respondent's evidence was concluded on day one of the hearing. This included the Applicant cross-examining the Respondent's two witnesses (Dr Anwar and Dr Samanta). We acknowledge that Dr Anwar (who had answered the Applicant's questions up to that point) declined to answer one of the Applicant's questions. This question focused around the "*morality*" of bringing foreign doctors to the UK. We did not consider it unreasonable for Dr Anwar to refuse to answer this question on the basis

that he could not comment on it and, in any event, it was not relevant to the issue before the Tribunal.

34. The Applicant informed us at the conclusion of day one of the hearing that she would not be willing to be cross examined on the second day of the hearing. We asked her to reflect on her decision and to notify us of her decision at the start of day two.

35. On 2 February 2002, the Applicant informed the Tribunal that having reflected overnight, she was not willing to be cross examined. Her concerns included that she was unrepresented, not trained legally, concerns around how the Respondent treated Black and Minority Ethnic (BAME) individuals, fear of "hostile" questioning", reference to the Respondent having not proved its case and she did not want to incriminate herself.

36. However, the Applicant made it clear that she was prepared to answer any questions at the Tribunal Panel may have and invited the Tribunal panel to ask any questions of her.

37. Mr Corrie objected to the Applicant not giving evidence in response to his questions. He considered that it would be a breach of natural justice if the Respondent was unable to ask any questions as to the Applicant's evidence. He also submitted that it would be unfair if the Applicant was willing to answer the Tribunal's questions but not those of the Respondent.

38. We made it clear to the Applicant that the Tribunal was well used to dealing with individuals who were unrepresented, not legally trained and would ensure that any cross examination was fair and appropriate. We made it clear that we would step in if there was any inappropriate cross examination.

39. We explored with the parties a number of alternative ways in which the Applicant could give her evidence. We wish to make it clear that in exploring the various different options, we were not directing either party to take that approach but simply inviting representations.

40. The options we explored included providing the Applicant with a list of questions in advance (which the Applicant agreed and the Respondent objected to), the Applicant being given a list of topics in which she would be cross examined (which the Respondent suggested and agreed but the Applicant objected to) as well as the Respondent asking questions after which it was up to the Applicant to decide how to answer it, i.e. she could answer or refuse to answer (the Applicant objected to this approach stating that she would not be willing to do so). It should be said that with regards to the latter, the Respondent in those circumstances did not object to the Tribunal asking questions at the conclusion of the Respondent's questions.

41. We made it clear to the Applicant on a number of occasions that her failure to answer the Respondent's questions would impact on the weight we attach to her evidence. We made it clear that we could attach little or no

weight to her evidence. However, the Applicant, despite being made aware of this, made it clear that she was not willing to be subject to any cross examination.

42. We adjourned on a number of occasions whilst we considered this issue. We carefully considered how to proceed. We have taken into account the overriding objective as set out in the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (as amended) ("2008 Rules"). The overriding objective of these Tribunal Rules is to enable the Tribunal to deal with cases fairly and justly. Dealing with a case fairly and justly includes ensuring, so far as practicable, that the parties are able to participate fully in the proceedings.

43. Whilst we acknowledge the Applicant's perceived concerns, we did not consider there was a reasonable basis for such concerns. The Respondent's representative and witnesses did not do anything during the hearing that would suggest that the Applicant's concerns were justified. On the contrary, Mr Corrie throughout the hearing ensured that that he took into account that the Applicant was self represented and indeed reminded the parties of this during the hearing. For example, in dealing with the missing documents in the bundle, Mr Corrie made sure that these were sent to the Tribunal promptly.

44. On balance, we concluded that we did not consider that based on the circumstances of this case, it was appropriate for the Tribunal to ask any additional questions given the Appellant's reluctance to be cross examined by the Respondent. We acknowledge our role as an inquisitorial Tribunal in reaching this decision. However, whilst we acknowledge the Applicant's reluctance to be cross examined and her stated reasons, nevertheless, we did not consider that there was a reasonable basis for the approach taken by the Applicant. There was no evidence presented as to the basis for the Applicant's belief that the cross examination would be hostile.

45. Furthermore, in our view, it was not in the interest of justice for one party to determine whose questions it would answer without there being at least a reasonable basis for doing so. The Applicant had only indicated her intention not to answer the Respondent's questions after spending considerable time cross-examining the Respondent's witnesses. In our view, it was only fair and proper for both parties to be given the same opportunities to test the evidence.

46. We concluded that in any event, if there were any particular matters that the Applicant wish to bring to our attention, then she could do so through her written closing submissions. The Appellant did provide detailed written submissions following the hearing.

47. We considered the circumstances of the case and concluded that the national disqualification should be confirmed. Our reasons are set out below. For the avoidance of any doubt, we wish to make it clear that we have taken into account all the information provided both before and after

the hearing.

48. We acknowledge the evidence of Dr Anwar and Dr Samanta. They both very fairly accepted that they had not worked with the Applicant nor had they had any direct dealings with her. We acknowledge that both were giving evidence in their professional capacity as employees of the Respondent. Both Dr Anwar and Dr Samanta gave their evidence in a neutral manner and both accepted that they had no knowledge of the Scottish GP Returner Scheme and conceded that any concerns of a clinical conduct could be met by the Return to Practice scheme. In fairness, the Appellant also emphasised some of these observations at the hearing and in her submissions as well setting out that there have been no previous concerns raised about her clinical skills.

49. Furthermore, we acknowledge that the Respondent made it clear in written submissions that it no longer sought to rely on the suggestion from Dr Samanta that in order to self reflect and demonstrate insight, it requires the input of a psychologist or psychiatrist. For the avoidance of any doubt, we also did not accept that in order to self reflect and demonstrate insight, it requires the input of a psychologist or psychiatrist.

50. We acknowledge that there was no dispute that the Applicant now has GMC full registration in APS (Approved Practice Settings) with licence to practise. The Respondent made it clear that it accepted that the Applicant is fully registered with the GMC and that she has no current restrictions on her practice other than being connected to a Designated Body.

51. The Applicant did not give evidence, having been warned about the potential consequences around the weight that would be attached to her evidence if she elected not to do so. We considered that in the circumstances, we would attach limited weight to the written evidence of the Applicant.

52. In our view, we agreed with the Respondent's submissions that the focus of the Tribunal's consideration in its assessment of suitability should be on whether the Applicant has demonstrated that she has developed insight into her previous conduct such that it is unlikely to be repeated in the future. Although we are not bound by the previous Tribunal's decision in 2014, that decision referred to "*a comprehensive period of self-reflection followed by demonstrable insight*".

53. We did not consider that acceptance of the previous findings is a condition precedent to showing an understanding of the gravity of past conduct and that it is unlikely to be repeated (*Yusuff v General Medical Council* [2018] EWHC 13 (Admin))

54. In our judgement, there is very limited material in respect of the Applicant's current role, any reflection carried out, insight developed or remediation of past conduct. Whilst we acknowledge the Applicant submission that she had recently started her role, nevertheless, there was a paucity of evidence of

the sort of material that might generally be relied upon to demonstrate insight and remediation.

55. The Applicant made limited reference in her statement (paragraph 54-56) referred to a "*period of self-reflection*" which became "*comprehensive*" during the last 18 months. However, it was not clear as to what was meant by "*comprehensive*".

56. We were made aware that the Applicant currently works as a child psychiatrist. However, no persuasive documentary evidence has been presented with regards to her performance in this role or any testimonial evidence from her current employer or colleagues. Furthermore, no character references have been submitted.

57. The Appellants own application for a witness summons set out the following in support

"…Should the Respondent wish to continue this case, the Appellant will also be seeking to introduce new witnesses she now works with – including doctors, psychiatrists and other medical personnel – to act as both character and professional witnesses. It is likely their attendances will be voluntary…."

58. It is also clear from the order dated 28 January 2022 dealing with the witness summons that the Applicant was made aware within that order as to the process as to which any such evidence could be admitted. We considered that given this was a personal conduct rather than a clinical conduct issue, such evidence was relevant to the Applicant's case.

59. Furthermore, we noted that there was no persuasive documentary evidence presented of any CPD undertaken and there was no documentary evidence of her having made contact with the administrators of the GP Returner Scheme in order to see whether she was eligible and could complete part of the process up to an inclusion of the MPL.

60. We were invited by the Respondent to provide a list of the sort of material evidence which might assist the Tribunal at any future review. We do not consider it appropriate to provide an exhaustive list as this will depend upon what the Applicant is doing at the time that the application is made and is a matter for the Applicant to consider. By way of an observation, information that might assist a future hearing might include her reflections upon any insight into working with other agencies, responding to perceived criticisms and co-operating with governance requirements. We also consider that general observations set out in the decision in relation to some of the evidence may also be helpful and might assist but we wish to make it clear that any future applications will be dealt with on its merits.

61. Finally, we have considered the Appellant's personal circumstances, the history of the case (including the events leading upto the national disqualification and events since) and the proportionality of maintaining an order for national disqualification in this case. We concluded that the

seriousness of the reasons for removal and the lack persuasive evidence relating to insight means that the decision remains proportionate and should, in our judgement, at this stage, therefore be confirmed.

Review period

62. We have considered extending the period within which an application for a review may not be made under Regulation 19 of the 2004 Regulations. The Respondent does not seek an order under Regulation 19 to extend the period which must elapse before a further review resort and in our judgement, based on the circumstances of the case, we do not consider it appropriate to make such an order. We determined that in the circumstances such an extension is not warranted.

DECISION

IT IS ORDERED that

1. An order for national disqualification shall continue in respect of the Applicant;

2. There shall be no order under Regulation 19 of the 2004 Regulations.

Judge H Khan
Lead Judge

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

Date Issued:08 March 2022