FIRST TIER TRIBUNALS, PRIMARY HEALTH LISTS

No: FHS/15115

Chairman: Mr Christopher Limb
Professional member: Dr S Sharma
Lay Member: Ms J Everitt

BETWEEN:

DR ASFAR HUSAIN
GMC Reg No 2369741

Appellant

and

WREXHAM LOCAL HEALTH BOARD

Respondent

DECISION

Introduction

1. This is our Decision upon the appeal of Dr Husain against the Decision of the Wrexham Local Health Board ("LHB") to remove him from its Medical Performers List. That was a Decision reached at a meeting of the LHB's Reference Panel on 2nd February 2009. Dr Husain did not attend that meeting. The Decision was communicated by letter of 6th February 2009. There had previously been a suspension of Dr Husain from the List at an earlier meeting of the Reference Panel on 11th September 2008. Dr Husain notified his intention to appeal against his removal from the List by letter of 3rd March 2009 with accompanying Statement of Grounds.

2. The Decision to remove Dr Husain from the List was made on the basis that his continued inclusion would be prejudicial to the efficiency of the services which those included in the relevant Performer's List may perform – "an efficiency case" in the terminology of the National Health Service (Performers List) (Wales) Regulations 2004 ("the Regulations").

3. We heard this case before the transfer of jurisdiction within the Tribunal Service. To avoid confusion we refer to the FHSAA in the body of this decision.

Legal framework

4. The appeal is brought pursuant to Regulation 15. Pursuant to Regulation 15(3) the FHSAA may on an appeal make any Decision which the LHB could have made. The hearing is in the nature of a re-hearing and the FHSAA is not normally concerned with arguments as to shortcomings or errors in the course of the hearing from which the Appeal is brought unless the quality of the evidence has been affected by such shortcomings. We have treated the Appeal as a re-hearing and decided the matter on the merits of the evidence presented to us.

5. Pursuant to Regulation 10(3) the LHB may remove a performer from the List where any of the conditions set out in paragraph 4 are satisfied. The relevant aspect of paragraph 4 is the reference to an "efficiency" case to which reference is made in paragraph 2 above.

6. Pursuant to Regulation 11(6) the LHB is required to consider (inter alia) various matters including the nature of the incident in question which is said to be prejudicial to the efficiency of services, the length of the time since the last incident, any relevant action by other bodies or Tribunals, the nature of the incident and whether there is a likely risk to patients, any failure to comply with a request to undertake an assessment by NCAA and any failure to supply information required on inclusion in the List. Pursuant to Regulation 11(7), the LHB has to take into account the overall effect of any relevant incidents relating to the performer of which it is aware.

History of the case

7. The LHB indicated by letter of 27th March 2009 that it intended to oppose the appeal and included various documents. On 5th May 2009 we gave various directions in relation to service of documents and statements so as to try and ensure a smooth and efficient hearing. The Appellant was represented until shortly prior to the recent hearing by the Medical and Defence Union of Scotland ("MDUS") or solicitors instructed by them and an application for adjournment was made on Dr Husain's behalf on the basis that he was suffering from significant ill health such that it was impossible for him to either attend a hearing or give instructions. A short medical report dated 7th April 2009 from Mr Bakran (consultant in Transplant and Vascular Surgery) was enclosed. We gave further directions in such context (a hearing date of 1st June 2009 having been given) requiring the Appellant to provide a fuller medical report. We refer to the full details of such Order dated 7th May 2009 but the final element required a medical report including the current diagnosis or diagnoses and an opinion as to prognosis including the foreseen timetable within which it was foreseen (if at all) that the Appellant would be fit to give instructions relating to the proceedings and to attend a hearing. The further medical report was not provided within the timescale ordered but it was indicated that it was expected in the near future and in such a context (and with the agreement of the Respondent) the hearing of 1st June was vacated. By Order of 29th May 2009 we extended the time for service of the required medical report until 12th June and extended the time for compliance with the Order of 5th May 2009 until 26th June. The medical report was not served within such timescale and by Order of 29th June the Appellant was given notice to show cause why the appeal should not be dismissed by reason of his

failure to serve such a report. No report was served and by Order of 17th July 2009 the appeal was to be dismissed unless either the report was served by 24th July or either party applied prior to 24th July for a hearing to consider the issue of dismissal for failure to comply with directions. Following instruction of solicitors on behalf of Dr Husain a short extension of the time limit from 24th July to 28th July was ordered on 24th July 2009. The Appellant applied for a hearing to consider the issue of dismissal. We heard such application on 17th September 2009 and gave a formal written Decision dated 5th October 2009 (the essence of our Decision having been communicated orally at the time) and allowed the appeal to proceed. We refer to our Decision for its full terms but, in essence, found that there was no reasonable excuse for a failure to provide an appropriate report complying with the terms of the Order but that having received a clear statement on behalf of Dr Husain that he was now fit to participate in the proceedings and to give instructions such as necessary to enable conduct of the proceedings, the hearing of the merits should proceed. Although the parties indicated an estimated length of hearing of two days we allowed for three days (which in the event proved to be required).

8. Further statements and documents were provided by both sides prior to the hearing and have assisted our determination of the appeal. Shortly prior to the hearing, notice was given that Dr Husain was no longer to be represented. The hearing before us therefore proceeded with Dr Husain representing himself (his wife being present throughout and giving him some assistance) and Counsel, Mr Jenkins, representing the LHB.

9. A further relatively small bundle of documents was produced by Dr Husain on the morning of the hearing to which the Respondent made no objection. Shortly after the hearing various further documents were faxed to the FHSAA by Dr Husain. Such included a letter from a patient which was to the same broad effect as various testimonials and letters previously available but in particular the documents included letters notifying the Decision of the General Medical Council that they were to take no further action on the information provided by the LHB. We have received no further comment on those documents from the LHB.

10. At the hearing (9-11 December 2009) we heard oral evidence from Mr Lang, Chief Executive, on behalf of the LHB. His evidence-in-chief was principally that set out in a helpful and comprehensive written statement which incorporated many references to documentation. Mr Lang was cross-examined by Dr Husain. We also heard oral evidence from Dr Husain. In the course of the case we attempted to give assistance to Dr Husain to ensure that the issues he wished to raise were put to and responded to by Mr Lang in cross-examination. We also on more than occasion took the view that a short break was appropriate when it appeared that Dr Husain was in need of such a break : we also adjourned early on the first day and gave advice to Dr Husain to make some ordered notes of the questions he wished to put to Mr Lang so as to ensure that his questions were in a logical order and covered all the matters he wished to challenge.

Facts/evidence

11. We preface our summary of central aspects of the evidence and our observations upon the evidence with several initial observations.

12. Dr Husain provided numerous letters and documents from patients which indicate that he is a widely respected and appreciated local General Practitioner. Many of such patients expressed a clear wish that he be allowed to return to practise. The LHB made plain in the course of the hearing that they do not challenge the high regard and affection in which Dr Husain is held by his patients. Furthermore it is to be noted that there is no allegation of concerns as to the clinical performance of Dr Husain prior to the incident at the beginning of 2008 which was the catalyst for investigations which eventually led to this case. Such matters spring from concerns as to the health of Dr Husain and the impact of any ill health upon his ability to practice safely and efficiently and not upon his clinical capacity in the absence of ill health.

13. It is important to emphasise that the allegations which we are considering have their roots in the concerns of the LHB as to Dr Husain's fitness to practice as a result of ill health but that we are not deciding whether he is or is not fit to practice as a result of ill health. The allegations with which we are concerned are in essence that there has not been a satisfactory or reasonable response by Dr Husain to questions and concerns raised by the LHB as to his state of health and its impact upon his ability to efficiently provide medical services.

14. Dr Husain is an independent contractor and has conducted his practice as a sole general practitioner without either partners or employed general practitioners save for locums. He has therefore not only been the provider of care requiring a medical practitioner but been the only medically qualified person to have oversight of the management of matters requiring clinical knowledge.

15. Mr Lang as Chief Executive of the LHB gave evidence concerning both his own actions and the actions and communications of others within the LHB or connected with the LHB which were variously evidenced by written notes e-mails and letters.

16. In the course both of Mr Lang's cross-examination by Dr Husain and to some extent in Dr Husain's own evidence it became apparent that there was something of a "history" between the LHB and Dr Husain in relation to various matters relating to quality assessments or practice management of one sort or another. We do not proceed upon the basis that we are asked to judge such matters (and have inadequate material to enable us to judge such matters) but proceed on the basis that there is no criticism of Dr Husain in such regard which is relevant to this case. We mention such history solely because it appears to have caused an element of mistrust between the parties and certainly a feeling on the part of Dr Husain that he has been harassed in some regards such that he did not trust the motives of the LHB.

17. The matters which are centrally relevant to this case commence with the report of a nurse who worked with Dr Husain at Chirk Hospital (where he undertook some minor surgery) and who communicated concern as to his health affecting

his performance. We emphasise that the rights and wrongs of such concern have not been explored : its relevance is that it caused the LHB to start to raise questions and make enquiries. The first formal meeting was one between Dr Lyttle (the LHB Medical Director) together with a Dr Myers who visited Dr Husain on 20th March 2008 (the notes of which are available to us in e-mail form). Dr Husain indicated that the concerns expressed by the nurse were untrue but did state he was suffering from hypertension and had been considering taking an extended holiday. Dr Lyttle referred to an occupational assessment which had been previously mentioned but in respect of which Dr Husain had not sought an appointment. Dr Lyttle and Dr Myers communicated to Mr Lang that they were concerned that Dr Husain did not appear well and indicated that if he was working with them as a colleague "we would encourage him to seek medical attention and take steps to prevent him seeing patients if he refused". They informed Mr Lang that they were also concerned that Dr Husain may be in denial in relation to his health based on a fear for the future. It was agreed that Dr Husain would take a month's sick leave in April and participate in an occupational health assessment. There was a somewhat uneasy agreement as to locum cover (Mrs Husain indicating that she was adamant the practice could arrange locums whereas Dr Lyttle doubted such ability and believed the LHB should be involved). Mrs Husain is Dr Husain's Practice Manager as well as his wife.

18. The meeting of Dr Lyttle was followed by a meeting between Mr Lang and Dr Husain. In addition to practical matters of locum cover Mr Lang expressed concern that he had not been provided with a sick note from Dr Husain's GP (Dr Husain indicating he had not been to see his own general practitioner) and Mr Lang confirmed that he would wish to see either a sick note or alternatively formal confirmation of fitness to work. Dr Husain agreed to confirm by 4th April his preferences as to the way in which an occupational health assessment should be arranged but by the time of Mr Lang's letter of 8th April had not been back in touch. At about that time (but it appears probably received slightly after the letter of 8th April) a Medical Certificate (form Med 3) dated 7th April was provided indicating that Dr Husain's general practitioner had examined him and advised him that he should refrain from work for three months. The diagnosis of the disorder causing absence from work was hypertension and stress anxiety.

19. We interpose the observation that there appears to have been agreement between the LHB and Dr Husain that sick notes would be provided even though the form used is expressly said to be "for Social Security and statutory sick pay purposes only".

20. Members of the LHB staff either met with or talked by phone with Mrs Husain later in April 2008 and on each occasion were assured that Dr Husain was either "fine" or "ill but fine..will be back in three months". A letter was written by Mr Lang concerning the measures that were or were not in place to ensure the practice was operated safely and effectively until Dr Husain was able to return to practice. There was no reply to such letter and in a meeting on 2nd May with members of the LHB staff, Mrs Husain confirmed that the letter had been received but that Dr Husain was not well enough to be

handling such matters and she did not want him to be pressured. At a further meeting on 6th May Mrs Husain indicated that Dr Husain had suffered hypertension and would be off for the three month period of the sick note. The LHB now make the observation that Dr Husain had in fact suffered a stroke in April 2008 but they were not informed of such. It is noted that all subsequent sick notes until that of March 2009 referred exclusively to hypertension and diabetes.

21. During May 2008 the LHB requested the involvement of a local Medical Committee ("LMC"). Dr Gruff Jones (the LMC Medical Secretary) visited Dr Hussain and by letter of 28th May 2008 informed Mr Lang that "As you are aware Dr Husain has been off with a serious illness and it is anticipated that he will be away from the surgery until 7th July at the earliest. I visited him recently at home and his health seems to be improving steadily". Mr Lang gave express evidence that he was not given further details and considered that he was neither entitled nor was it appropriate for him to ask Dr Jones for further details on the basis of Dr Husain's right to privacy and confidentiality relating to the details of his health and communications with a doctor. Mr Lang gave evidence that the arrangements for locums (in particular from July onwards) were not satisfactory and the LHB were having difficulty coordinating matters with Mrs Husain as the Practice Manager. By letter of 26th June 2008 Mr Lang indicated to Dr Husain that it was imperative that there was discussion as to his plans for return to work and that the "piecemeal approach" to delivering a service to patients was unsatisfactory. It was in such context that on 30th June Mr Lang met with both Dr and Mrs Husain. On this occasion Dr Husain informed Mr Lang that his health was improving and he intended to return to work on the 11th August. Mr Lang accepted he was told at this meeting that Dr Husain had suffered a transient ischemic attack but was given no further details. When cross-examined Mr Lang indicated that he did not as a lay person understand that a transient ischemic attack was necessarily serious and in his mind was not equivalent to a stroke. The meeting amongst other matters led to Dr Husain agreeing to obtain a report from his treating consultant as to his fitness to work. We interpose the observation that Dr Husain gave evidence that when he attended his consultant at the beginning of August he was advised that it was too early to give such a report and such would be better given about six months after the stroke. The LHB and Mr Lang in effect say that they do not necessarily dispute that such was the advice of the consultant but emphasise that they were not so informed and were not given any further information as to the nature or seriousness of the condition.

22. At a further meeting on 14th July between Dr Husain and Mr Lang there was discussion in relation to the LHB concerns as to the arrangements for locum cover and clinical oversight but also further discussion of the need for a specialist report and Dr Husain's agreement to provide such. In his letter of 18th July following such meeting Mr Lang dealt with various matters of concern in relation to the arrangements in place at the practice whilst Dr Husain was off sick but also confirmed that a sickness certificate was currently awaited and emphasised the importance of receiving the report from his treating consultant at the earliest opportunity to assure the LHB that Dr Husain would be in a position to return to work as planned. At such time the LHB

were still under the impression that Dr Husain was intending to return to work at the beginning of August.

23. Following contact from Dr Jones who had himself spoken to Mrs Husain as Practice Manager, the LHB were informed that a letter was to be expected confirming that Dr Husain was fit to return to work. In a subsequent telephone conversation the LHB were informed by Mrs Husain that Dr Husain had seen his consultant and a letter was being sent to his general practitioner and that Dr Husain would be returning to work on 13th August. Mrs Husain indicated that the LHB would not be receiving a specialist's report. The LHB were dissatisfied with such position and made arrangements for locums to be booked throughout August and informed Mrs Husain of such. Another meeting was held with both Dr and Mrs Husain on 22nd August at which Dr Husain indicated that his health was improving and he anticipated being assessed to be fit to return to work in September when he saw his specialist again.

24. It is an important part of the LHB case before us that they were not kept fully informed or accurately informed by Dr Husain as to either the true state of his health and the conditions he was suffering from nor as to his consequent objective fitness to practise and/or timetable for return to fitness to practice. This case is not concerned with the genuineness of Dr Husain's illnesses to which we shall refer more fully later in this Decision but to the information being given to the LHB. In such context we took some trouble in establishing to what extent Dr Husain challenged Mr Lang's evidence as to the information given as to his state of health and prospective fitness to return to practice. Although Dr Husain suggested that the LHB and Mr Lang were aware of his illness and in particular that he had had a stroke, such suggestions were made not on the basis that either Dr Husain or Mrs Husain on his behalf had directly informed the LHB of such fact but on the basis that it was common knowledge both in the community and amongst his staff who on various occasions met with employees of the LHB and that it was known to Dr Jones. Whilst we were a little surprised that Mr Lang did not make more specific enquiries as to the precise nature of the illness (for example, after Dr Jones' letter of 28th May 2008 had said that Dr Husain had been off "with a serious illness") we conclude having heard Mr Lang that, whilst he increasingly became concerned as to whether or not he had full information as to the true nature and extent of Dr Husain's illness, he did not have any clear information as to the nature of that illness, felt unable to take any steps which might breach Dr Husain's confidentiality in relation to his medical treatment, and took the overall view that the most appropriate way to obtain fuller information was by a medical report from Dr Husain's specialist provided with Dr Husain's cooperation and agreement and as promised to be obtained by Dr Husain. We are further satisfied that, whilst he was probably sceptical, he felt that he could not act on the basis that Dr Husain's repeated assurances that he would be returning to work in the relatively near future were not correct and that he had no objective basis to reject such assurances. It was not directly suggested by Dr Husain but in any event we do not find that Mr Lang or any other senior member of the LHB had been told that Dr Husain had suffered either a stroke or any other condition which was relevant to long term fitness to practice.

Whilst it may well be the case that the implications of a transient ischemic attack are subject to some debate and such might be considered by some doctors to fall within the generic description of a stroke, we accept that Mr Lang did not believe that it was serious and was informed that Dr Husain would be resuming work in the relatively near future.

25. Mr Lang gave evidence that on 8th September 2008 the LHB Medical Director, Dr Lyttle, was informed by the North Wales Trust's medical director (Dr Gozzard) that Dr Husain was receiving treatment and had a very serious and potentially life threatening illness. The communication was given in the context of the General Medical Council "Good Medical Practice" paragraph 43 requiring protection of patients from risk of harm posed by a colleague's, i.e. doctor's, health, and requiring doctors to take appropriate steps without delay if they had concerns that a colleague may not be fit to practice. Such communication caused Mr Lang and the LHB grave concern and, so far as most particularly relevant to this case, concern that they had been misled as to Dr Husain's health status and fitness. By letter of 10th September Dr Husain was informed that the LHB was considering suspension on the basis that "the LHB has received information with respect to your health status and is concerned that you have withheld information regarding the severity of your illness and its impact on your ability to discharge your duties as a single handed GP. This contradicts the assurances that you have previously given to the LHB with respect to your capacity to discharge these responsibilities and your intent to return to work". The LHB refused a request to adjourn the hearing of 11th September by Dr Husain by his solicitor's letter (the letter referring to the lack of opportunity to prepare, him not being well enough to attend, and him being due to undergo an operation the next week). The LHB decided to proceed on the basis that the nature of the concerns leading to the hearing were such that it should proceed to urgently consider suspension in the context of potential risks to patients safety. When Mr Lang was cross-examined as to why there was such need for urgency when it was plain that Dr Husain would not be returning to his practice or treating patients in the near future, it was in effect said by Mr Lang that there could be no confidence that Dr Husain would not return to practice before receiving objective confirmation of his fitness to do so in view of his repeated indications that he was intending to return to practise within a relatively short timescale and that there were wider concerns as to the proper provision of services to his patients in his absence and in the context of him being unfit to have any clinical oversight.

26. Because our own Decision is in the nature of a re-hearing, we are not directly concerned as to whether earlier Decisions were or were not appropriate either in their motivation or in their objective reasoning. We do however note that by letter of 28th August 2008, Dr Husain had given notice that he intended to take his wife as a non-clinical partner as from 1st October 2008 and that Dr and Mrs Husain both believe that such influenced the LHB. We entirely understand why Dr and Mrs Husain might be sceptical in such regard but we do not accept that such was the motivation or that there were not otherwise objective reasons for the decision to suspend which was made on 11th September.

27. The Reference Panel which met and decided to suspend Dr Husain on 11th September 2008 relied very heavily upon the report and opinion of their Medical Director, Dr Lyttle. His written opinion and also the Minutes of the meeting made plain that the principal concerns in such regard were the failure of Dr Husain to give a formal explanation of his condition to the LHB as the contracting body in conjunction with whom he provided services and the apparently serious nature of his illness against a background of repeated statements by Dr Husain that his health was improving and that he would return to work in the near future. It also appears that a part of the motivation was the ability following suspension to formally request a medical assessment facilitated by the LMC, although it appears to us that the distinction with the previous position of seeking voluntary cooperation is relatively slight – as demonstrated by subsequent events which illustrate that assessment cannot be obtained unless there is practical cooperation from the practitioner.

28. The essence of Mr Lang's evidence is that subsequent to September 2008 the LHB did not have any direct communication from Dr Husain although it continued to receive sick notes. The extent of non-communication is illustrated by the facts confirmed by Dr Husain that he left the United Kingdom on 21st October in order to undertake or to investigate the possibility of undertaking a live donor kidney transplant in Pakistan, underwent such transplant on 28th November 2008 and returned to the United Kingdom on 1st January 2009 but during such period the LHB were told by Mrs Husain by letter of 17th November 2008 that Dr Husain "has gone abroad to recuperate from ill health" and received a sick note dated 2nd December 2008 referring to hypertension and diabetes without reference to the transplant. (It may be noted that the sick note was given without the general practitioner either confirming that he had examined Dr Husain or had received any recent report upon the basis of which he gave the Certificate). The LHB further note the letter from Mrs Husain of 17th January 2009 which enclosed a short letter from Mr Dhanda and which indicated "he is well on the road to recovery" and she expected him to be "able to resume his duties at the end of the stated period of convalescence", namely 2½ months. The letter of Mr Dhanda (Specialist Registrar in Renal Transplant Surgery) referred solely to a kidney transplant and the kidney now working satisfactorily.

29. The hearing of 2nd February 2009 was therefore held without further detailed evidence being available in relation to the health of Dr Husain and the precise date of such hearing had been put back a few days in order to enable a Mr Owen of the BMA to attend – although in the event he did not do so on the basis that he had been unable to make direct contact with Dr Husain and was therefore unable to assist the hearing.

30. Dr Jones attended the hearing and gave information that he had had several conversations with Mrs Husain including one the previous evening and been informed by Mrs Husain that, despite Dr Jones' request that Dr Husain attend the hearing, he would not be attending but was said by her to be well. We note from the Minutes of the hearing of 2nd February 2009 that there was concern that the details of a kidney transplant were not available and that even the brief information available was only available very recently, that there was

no evidence available that Dr Husain's fitness to work was going to change or that his underlying health problems were or were not resolved, and that there had been no cooperation with or provision of any full medical assessment. There was consideration of the three possible steps of extending the suspension, removal from the Performers List, and contingent removal from the Performers List on the basis of requirement of attendance for a full medical assessment. It was plain that there was concern that there was still not any comprehensive information available and that there was (in our words and not those of a witness) a failure to engage with or cooperate with the LHB in relation to matters in which there was real and mutual interest and concern, namely his present and future fitness to practice. It is plain that the lack of openness and what were felt to be misleading failures or partial failures to give information were an important consideration and differentiated the case in the view of the Panel from a case in which there was ill health preventing practice but in which there had been full information provided and full cooperation with steps taken whilst the practitioner was unwell.

31. Before considering the evidence of Dr Husain, we remind ourselves of the initial grounds of his appeal but also remind ourselves that at the time of entering an appeal and at the time of the hearing Dr Husain was not represented (albeit there was a substantial period in between when he was represented by the MDDUS or by solicitors). We do not hold him strictly bound by his initial statement and grounds of appeal (and indeed would in any event reconsider the matter on all its merits on a re-hearing) but it is helpful to refer to his statement in support of his appeal so as to ensure that those matters are taken into consideration. In relation to the period up to September 2008 Dr Husain states that the LHB were kept fully aware of his medical condition and says that he was unable to have an independent health assessment because of hospitalisation in April 2008 and an emergency operation in September 2008. He says that the LHB were kept fully informed of the hospitalisation in April 2008. In relation to the period after September 2008 he says that he had a further operation in November 2008 but was not well enough to provide adequate information regarding his illness to the LHB and not able to comply with their requests for an appropriate medical examination to be arranged by the LMC. He contends that prior to the hearing in February 2009 he did however provide the letter of Dr Dhanda indicating that his recent operation had been successful and that he would be able to resume normal duties.

32. In his formal statement of October 2009 (prepared by solicitors on his behalf) he indicates that up to the time of the meeting with Mr Lang on 2nd April 2008 he had been diagnosed as suffering from hypertension but (in effect) did not feel he was particularly unwell and agreed to undergo an occupational health assessment. He says that he had also intended to see his own GP whilst taking a period of leave during April 2008 but suffered a stroke resulting in hospitalisation as an emergency on 13th April for 7 days. He says in his statement that it was during such admission that he had a CT brain scan and was also found to have renal damage with impaired kidney function in addition to high blood pressure and diabetes. In that context he says that "I believe" the LHB were made aware that I would be off work for a period of three months as I had a Medical Certificate for that time but that "I do not

know precisely what further information was passed on to the LHB about my health". He indicates that he thought it was common knowledge. In relation to at least some of the periods in question he indicates that he thinks his wife protected him from communications from the LHB because of her concern as to his fitness and ability to deal with such matters and indicates that he thought Dr Jones (the LMC Medical Secretary) would notify the LHB of the detail of his visit. He indicates that at the meeting with Mr Lang on 30th June he explained that he hoped to be able to return to work on 11th August 2008 and that he agreed to see his consultant to ask him to provide an independent medical report. He indicates that he was expecting his consultant to provide such a report at his appointment on 8th September 2008. He explained to us in his oral evidence that he was very ill at that time and it was on 15th September 2008 that he had surgery for a bladder neck obstruction and that it was after consequent discussion of dialysis that he decided to travel to Pakistan to see whether any of his siblings could provide a kidney suitable for transplant. He in fact had such transplant in Pakistan on 28th November 2008 and indicates in his written statement that he did not understand that he needed to notify the LHB of his plans (and implicitly of his travel and the reasons for his travel) on the basis that he was suspended at the time and therefore could not work in any event. He later referred to the report from Mr Dhanda obtained for use at the February 2009 hearing.

33. We do not ignore the other aspects of Dr Husain's statement but the foregoing are those which appear most relevant to the main issue in this case of the information and cooperation exchanged and undertaken between the parties relating to Dr Husain's health and fitness to practice.

34. It is to be noted that at no stage did Dr Husain indicate that Mrs Husain (whether in her capacity as wife or as Practice Manager) was refusing to make any communication to the LHB requested by Dr Husain even within any period when she may have been not passing on communications from the LHB. In his oral evidence (although it was not always entirely clear) Dr Husain did not identify any means by which he tried to make communication with the LHB about his health other than the meetings to which reference has already been made (the contents of which were not challenged in a material way by Dr Husain) or by his wife or by the provision of sick notes (or at the very end by the provision of a short medical report). He relied so far as provision of information about his health was concerned on what he considered to be common knowledge rather than any specific communication to the LHB.

35. In the course of his evidence he was on several occasions adamant that his health was by the time of our hearing in December 2009 "perfectly alright". He did not produce any further medical evidence other than that which we shall now refer to and most of which was produced for the purposes of the Order of this Tribunal when considering whether the case should be heard or adjourned.

36. We have already mentioned the fact that it is plain that Dr Husain felt that the LHB were harassing him and putting undue pressure on him but he did not in

any way suggest that such would provide a reason why as a consequence he would not provide information or cooperate if such information or cooperation was reasonably required.

37. The one medical report obtained prior to the commencement of this appeal was the letter of Mr Dhanda dated 15th January 2009. The entire text reads "We have examined Dr Asfar Husain who has had a kidney transplant operation. The new kidney is working satisfactorily according to our tests. We assess that he would need approximately two and a half months more to recover from the operation and resume normal duties". In a short report of 7th April 2009 addressed to the MDDUS, Mr Bakran confirmed that Dr Husain had had a transplant in Pakistan and was under his care, had had several problems following the transplant but "is now out of hospital and as far as I know remains well". He then continues "There are certain issues regarding Dr Husain that will require professional review. The question of his ability to return to work is certainly one area of debate. He does have some cognitive loss following a stoke and I am awaiting review by a consultant neurologist to assess cognitive function. I think that until that review has taken place it will be unfair to make a final assessment of his fitness to practice. However it must be made clear that he cannot return to work as a GP until that assessment has been undertaken and he is considered not to be a risk to patients". Such report therefore gave certain information but made plain the gap in such information in relation to cognitive function arising from the stroke.

38. In a report of 19th August 2009 addressed to the solicitors then acting for Dr Husain, Mr Bakran gave a slightly fuller history so far as kidney problems were concerned and then continued to indicate that "After his return to the UK and on his initial admission, there was some concern about his cognitive function". Such is plainly a reference to the earlier part of 2009. He states that he then obtained reports from Dr Larner, Consultant Neurologist, in the context of assessing cognitive function and that regard should be had to Dr Larner's reports so far as such aspect is concerned. Mr Bakran confirmed that there was now excellent renal function and from a physical point of view there was no contra indication to returning to work.

39. In a letter typed 10th August 2009 relating to a clinic appointment on 4th August 2009, Dr Larner refers to the stroke in April 2008 and indicates that Dr Husain felt he had made a full recovery. Dr Larner continues "I explained to Dr Husain from the outset that I would be able to assess his cognitive function today but that I am in no way qualified to say whether or not he can return to his work. I do not know who has advised him that he cannot work". He then refers to various cognitive tests. Various aspects are good but the negative aspects included some impairments in memory, verbal fluency, language and visuospatial function with specific impairments in delayed recall and some difficulties in fluency. He also refers to difficulties with repetition and word finding. He undertook a further set of tests which were specifically related to impaired verbal fluency and tendency to answer too soon and such showed difficulties with programming, sensitivity to interference and inhibitory control. Dr Larner arranged a further CT scan and in his letter dictated 14th August 2009 indicated that such showed an ischemic lesion in the left basal

ganglia area extended to the internal capsule, probably reflecting involvement of the anterior coronal artery. In his subsequent letter of 18th August 2009 he compares such CT scan with the earlier CT scan and indicates there has been progression in the cerebrovascular disease. Dr Larner does not directly address the issue of fitness to practice and would appear to consider that he is simply providing information to assist whoever may be deciding such issue.

40. None of the foregoing medical reports were available to the LHB prior to the Decision to remove Dr Husain from the Performers List except for the report of Dr Dhanda. There is also a report/letter obtained from Dr Husain's GP, Dr Ahmed, dated 2nd June 2009. Such letter appears to be based either upon records or upon a single visit to Dr Husain at the end of January 2009 or the beginning of February 2009. He refers to various conditions including those directly or indirectly already referred to and relating to the stroke and renal problems although he also refers to a transient ischemic attack beginning in July 2007 (i.e. earlier than other indications). He ends his report by saying that at the time of his assessment at the end of January/early February 2009 "My assessment at that time was that he could not go back to his normal work. I have not seen him since that time. It is very difficult to visit him at his house as his wife is not very keen and is quite difficult. I have written asking him to come to the surgery for blood tests but he has not done so as yet".

41. Because our consideration of the case is in the nature of a re-hearing we consider that such medical reports are potentially relevant and we take account of them even though most were not available to the LHB at the time of their decision (and the reports were in response to our order relating to fitness to participate in the proceedings and give instructions rather than fitness to practice). Whilst a combined reading of the reports gives much more information than was previously available in any ordered and independent medical format, it must be noted that none of the reports indicate a view that Dr Husain was at the time of their being written fit to practice as a GP and several of the reports expressly indicate to the contrary.

42. We have already briefly referred to the various sick notes provided. We further note that the sick notes on 3rd March 2009, 3rd April 2009, 5th May 2009, 4th June 2009, 2nd July, 31st July and 2nd September 2009 all refer to kidney transplant as the reason for unfitness to work. The later references to a kidney transplant as the reason for not being able to work appear to be directly contrary to the views of Mr Bakran. It appears plain that the later difficulties related to cognitive effects of the stroke rather than physical problems arising from the kidney transplant.

43. Dr Husain was at pains to emphasise that he could not control what his own GP put upon the sick notes. That is undoubtedly correct. On the other hand Dr Husain cannot rely upon sick notes as a means of providing information unless those sick notes do in fact provide the correct, relevant and full information.

44. We were left with no formal assessment of fitness to practice which concluded that Dr Husain was fit to practice. Although Dr Husain himself indicated his

belief that he was fit to practice (and we have no reason to doubt his genuineness in holding such belief) it was plain that he had some difficulties in fluency or concentration and it was certainly not within the ability of this Panel to conclude that he was self-evidently fit to practice. In such context it is to be noted that an actual decision upon fitness to practice was not suggested by either party to be the issue to be decided in this case.

45. In relation the central issue relied upon by the LHB as to a failure to give them proper information as to his state of health and consequent fitness to practice and/or to cooperate with medical assessments, it appears to us that there is little actual dispute between the parties as to what was or was not said and done. The disputes such as they are relate to arguments as to whether what was said and done were appropriate or reasonable or adequate and/or relate to the motives behind the extent of communication and information.

46. Having heard and observed Mr Lang over a notable number of hours we formed the view that he is both an honest witness and an accurate witness. The majority of his evidence was based upon contemporaneous documentation and we formed the view that he was a careful historian who was very careful not to exaggerate what was or was not said or done at particular times. In the nature of an administrator he has obviously been careful throughout the relevant history to make records at the time and upon many occasions to share that record with others present at the meetings to confirm their agreement with the accuracy of the record.

47. Our impression of Dr Husain was that he is a man who has devoted a major part of his life to his practice as a general practitioner and is plainly extremely concerned as to the prospect of not being able to continue to practice as a general practitioner. We believe that he genuinely believes that he has not been treated fairly by the LHB either in relation to his removal from the List or in relation to contractual matters and/or their overall supervision of his practice in the last few years. He did not identify in his evidence any notification of details of his health and their implications for his continuing practice and/or his return to practice other than those identified by Mr Lang. His explanations as to the very restricted information given to the LHB were not clear. He upon several occasions indicated that he relied upon "common knowledge" of the true nature of his illness but never descended into detail as to what such common knowledge amounted to. We found his explanations as to the failure to undertake or cooperate with a full medical assessment unsatisfactory : we are not able to make a positive finding one way or the other as to the suggestion from the LHB that in effect Dr Husain was deliberately trying to mislead, but we are satisfied that Dr Husain made no serious attempt to give full information to the LHB as to the state of his health relevant to his potential return to practice. Such is exemplified by the failure to mention kidney problems until after the kidney transplant and thereafter his concentration upon contending that the kidney function was now satisfactory without addressing the more relevant issue (more relevant so far as the long term was concerned) of his cognitive function consequent upon his stroke. The sick notes did not provide a true and full picture and could not objectively be relied upon in such a context (insofar as it is suggested that they were a

means of giving the requested information). The extremely short report from Mr Dhanda just before the final hearing was very far from comprehensive and entirely confined to the kidney problem. The piecemeal and not fully satisfactory nature of the reports obtained during the course of these proceedings after commencement of the appeal indicates a failure to attempt to obtain an overall assessment of fitness to participate in the proceedings and broadly comparable to the earlier suggested failure to cooperate with a full and formal medical assessment of his general fitness to practice.

Decision

48. We accept the fundamental argument lying behind the LHB case. Dr Husain not only has obligations directly towards his patients to consider his fitness to practice but the LHB has a legitimate interest in such matters once they are aware of possible problems as to fitness to practice. It is reasonable for the LHB to ask for information, and for Dr Husain to respond in a timely manner, and their requests were not disproportionate.

49. We note the guidance within "Good Medical Practice" of the General Medical Council and in particular that relating to health in paragraph 79 advising that a doctor must consult a suitably qualified colleague if he thinks he has or might have a condition which could affect his judgment or performance and must then ask for and follow the advice of a suitably qualified colleague as to investigations, treatments and changes to practice considered necessary and not rely upon his own assessment of the risk posed to patients. Such appears to be a reflection of what would in any event be implicit necessary practice in the interests of patients and recognises that an independent assessment is necessary when there is doubt as to fitness to practice. The relationship of a LHB and an independent contractor general medical practitioner is such that gives the LHB a legitimate interest in the conduct of the doctor's practice relating not only to his direct provision of treatment and advice to individual patients but also his general running and oversight of the practice and in particular its clinical aspects.

50. The LHB had objectively good reason to start to ask questions of Dr Husain as to his fitness to practice following the reported incident in February 2008. Their subsequent requests were reasonable and proportionate. Dr Husain did not provide objectively full information. There was very limited initial information which could have led the LHB to be aware of a stroke and no information as to the impact of such stroke upon cognitive function at any time prior to their decision to remove Dr Husain from the List. Indeed, the subsequent information available indicates that there were good grounds to have concern as to Dr Husain returning to practice safely. His repeated and plainly optimistic and over-enthusiastic statements of intention to return to practice in the relatively near future were not objectively justified and indicated the danger of not taking fully independent advice to which Good Medical Practice refers. It is plain that the kidney problems were at one stage extremely serious and information in such regard was not given until very much "after the event".

51. In addition to Dr Husain's failure to give reasonably requested information he failed to take any active steps to obtain or cooperate in an independent medical assesment over a long period of time. Whatever reasons may have been present within certain periods there is no arguably sensible or objectively reasonable explanation for his failures over the entirety of the period from April 2008 until February 2009.

52. In addition to the failures to give full information and cooperate with assessments referred to in previous paragraphs, it is also reasonable and proper to consider such failures as undermining the relationship of trust which is necessary between the general medical practitioner and his LHB to enable their respective roles in relation to the efficient provision of services to be undertaken. Whatever the genuinely held views of Dr Husain as to the LHB's approach to him and his practice they did not justify his actions and inactions in relation to health matters arising from February 2008 onwards.

53. In considering the issue of efficiency we remind ourselves we must take account of those matters specifically referred to in the Regulations and more generally that it is appropriate to look at the nature of the incidents or facts in question, the potential risk to patients, the length of time and number of occasions on which the incidents arise, and any mitigating circumstances. Our findings that Dr Husain failed to give appropriate information to the LHB about his health, failed to cooperate with assessments, failed to treat the relationship of the LHB as one of appropriate trust, and apparently repeatedly made his own decision as to his fitness to practice in the near future when such was objectively not appropriate, all lead us to conclude that we are satisfied the continuing inclusion of Dr Husain on the Performers List would be prejudicial to the efficiency of the services which those included upon the List perform. The protracted period over which such matters arose and the continued failure to enable a full independent medical assessment make it reasonable and appropriate in the present case to consider that removal rather than contingent removal is appropriate. Dr Husain did not specifically argue for a contingent removal but in view of his being unrepresented we have considered the same and do not consider that it would be appropriate in the context of the period of time in question and of the removal of the essential ingredient of trust between practitioner and LHB as a result of the various failures we have referred to. Moreover the piecemeal fashion in which evidence has been provided in relation to fitness for the purpose of participating in these proceedings tends to indicate that there is little basis for concluding that there would be a difference in approach from Dr Husain in the future if a condition relating to independent medical assessment (the only realistic argument in our view) were to be otherwise considered.

54. After the hearing had finished and after the Panel's initial consideration of this case we were sent copies of correspondence from the General Medical Council by Dr Husain which indicate that the GMC decided to take no action by reference to an allegation that Dr Husain's fitness to practice was impaired by reason of his health. Such is a different albeit related issue to the one with which we are concerned and in any event we do not know what evidence and information was provided to the GMC. We give due consideration and respect

to the decisions of professional regulatory bodies such as the GMC but are not bound by them. In the present case the issue is not the same and as previously indicated we are not deciding the issue of fitness to practice as such even though concerns in such regard are an important part of the background to this case.

55. We dismiss the appeal and uphold the removal of Dr Husain from the LHB's Performers List.

56. We have received no formal application to consider the issue of national disqualification. We are not minded to consider such of our own volition. Although in the event of an application being made we would be willing to further consider the matter, our present view is that this is a case with an important local element of lack of trust and such would not necessarily be reflected if Dr Husain were to apply elsewhere. In any event we are aware that if making an application to be admitted to another List, Dr Husain would have to disclose the present proceedings and the issues in this case would therefore be made known to the relevant LHB or PCT.

Summary

57. We dismiss the appeal of Dr Husain and uphold the Decision of the LHB to remove him from their Medical Performers List pursuant to Regulations 10(3) and 4(a).

58. We notify the parties that if they seek permission to appeal this Decision on a point of law under Section 11 of the Tribunals Courts and Enforcement Act 2007 a written application must be made within 28 days of the date of this Decision being sent by the Tribunal.

CHRISTOPHER LIMB

Dated the 22nd day of January 2010