

PRIMARY HEALTH LISTS

**IN THE MATTER OF THE NATIONAL HEALTH SERVICE (PERFORMERS
LISTS) (ENGLAND) REGULATIONS 2013**

[2015] 2411.PHL

B E T W E E N

HONORATO FERNANDES

Applicant

v

**NHS COMMISSIONING BOARD
(South West)**

Respondent

Panel

Judge John Burrow
Derek Styles – Specialist Member
Mary Harley – Lay Member

The matter was considered by agreement by both parties on the papers pursuant to r 23 of the 2008 Rules. The Tribunal accepted that it was able to decide the matter on the papers.

1. Dr Jose Fernandes is 45, and is a Portuguese citizen, with Portuguese as his native language. He trained as an optometrist at universities in Portugal, and between 1999 and 2012 worked as a locum optometrist in several positions in Portugal. In August 2013 he worked as an optometrist at Bradford Hospital for two months and on 28.March 2014 he was registered with the UK General Optical Council. In July 2014 he started working as an optometrist at Vision Express, Truro.
2. On 18 August 2014 he applied to be included on the National Ophthalmic Performers List. The application form he used indicated that in relation to his communication skills he must achieve a pass score of 6 on the Academic International English Language Testing System (IELTS). With his application form he submitted an IELTS Test Report Form showing he had achieved 5.0 in listening; 5.5 in reading, 6.0 in writing and 5.5 in speaking, giving an overall band score of 5.5. His two references attached to the application form (which were not included in the bundle) were both apparently Portuguese.
3. By the time he sent the application form on 18 August 2014, it was out of date. A new Standard Operating Procedure (SOP) for primary care support services was issued and published on 29 July 2014. The new

SOP applied to applications to join the Ophthalmic Performers List, and envisaged a new form of electronic application. It allowed for existing handwritten forms to be used in an interim period up to 1st September 2014, after which the new electronic forms would have to be used. It was one of the old handwritten forms which Dr Fernandes used to make his application on 18 August 2014.

4. The SOP also set out the documents required to demonstrate communication skills. For those applicants who had not studied or trained in the UK or Irish Republic they must provide a pass certificate at the required level of IELTS 7.5 or equivalent or a certificate of graduation or postgraduate training within the last two years from a recognised medical school taught and examined in English. Dr Fernandes did not produce a graduation or post graduate certificate, and he therefore had to rely on a pass certificate of 7.5 in IELTS or equivalent.
5. Because the SOP was published and came into effect on 29 July 2014, the required level for IELTS at the time of the application was 7.5. Dr Fernandes had only achieved 5.5, significantly below the required level. Although applications are expected to be considered and decided within 3 months, the Performers List Decision Panel (PLDP) for NHS England South (South West) (called NHS England hereafter) allowed the application to remain valid for longer to give Dr Fernandes an opportunity to retake the IELTS and if possible to achieve the required score of 7.5.
6. NHS England emailed his employers, Vision Express, several times to ascertain the current position with respect to Dr Fernandes' IELTS score. On 15 November 2014 Vision Express responded and said Dr Fernandes had achieved a score of 6.5, and that he would have to resit the test in several weeks' time. However no certificate was ever sent, either by Vision Express or Dr Fernandes, to confirm he had achieved the 6.5 score.
7. On 3 December 2014 Vision Express emailed to say Dr Fernandes was sitting a further language test on 6 December 2014. Although Vision Express said they would inform NHS England of the result neither they nor Dr Fernandes did so. No certificate was ever submitted in respect of this test.
8. On 5th January 2015 Dr Fernandes sent an email to NHS England. He said, "I have performed three English exams and got the 5.5 score." He does not say what date these exams were taken, and did not submit certificates in respect of them. On 27 February 2015 Vision Express emailed NHS England to say Dr Fernandes was starting English lessons to help him pass his ILETS exams. He was to be assessed by the provider of the lessons on 2 March 2015 to ascertain how many lessons would be necessary before being entered for the IELTS exam.
9. By 11 March 2015, nothing further had been heard from Dr Fernandes or Vision Express and, because of the exceptional lapse of time – over 7 months – the application was referred to the Performers List Decision

Panel (PLDP). Because of the employer's reference to the need for English lessons and because the DBS checks and references would be out of date and would need to be renewed, it was decided not to extend the application for any further period, but refuse it and inform Dr Fernandes he should reapply once he had passed his language assessment.

10. The refusal was sent to Dr Fernandes on 27 March 2015. It set out the grounds for refusal under regulation 7(4)(b) of the NHS (Performers Lists) (England) Regulations 2013 which provides:
*“the grounds on which the Board must refuse to include a Practitioner in a performers list are...
b) it is not satisfied that the Practitioner has sufficient knowledge of the English Language necessary for the work which those included in that performers list perform.”*

The Case for Dr Fernandes

11. Dr Fernandes appealed the Board's refusal to include him on the performer's list on 9 April 2015. He put forward 7 grounds of appeal:-
1. He had done training for 2 months in Bradford Royal Infirmary NHS Trust and was issued a contract for this “without ever be questioned about my skills on the English Language skills”.
 2. He was as he put it a registered optometrist with the GOC and the AOP (although there is no registration with the AOP merely membership).
 3. He works in the UK “in a private optician” but also treats patients referred by Truro Hospital for Scleral Lens fitting.
 4. He says he has “references attesting his good understanding, wrtting and spoken of English language.”
 5. He is undertaking a course in of what he refers to as “independent prescriber for optometrists” but which appears to be Supplementary (additional Supply) Prescribing for optometrists at Glasgow University, although no written confirmation or progress report of this was included.
 6. He said the refusal to include him in the Ophthalmic Performers List was discriminatory by the NHS, and in breach of the EU rights of free movement.
 7. The delay in his application of 7 months was too long, causing him loss of earnings.
 8. The delay has meant he will have to renew his application and get further documentation.
12. Dr Fernandes's case was further set out in an email dated 5 January 2015. Some of the grounds were repeated. He said he had been informed the requirement for IELTS was illegal, that his references should be sufficient to attest his knowledge of English, that his language ability had never been questioned at Bradford Royal Infirmary. In an email dated 5 February 2015 he again raised the issue of compatibility of free movement in the EU, suggesting he had made a formal complaint to the EU, and that he was considering a further complaint.

13. In his position statement (undated but received July 2015), he reiterated many of these grounds. He said the refusal to allow him onto the performers list hindered his establishment rights within the EU. He said his English language skills had not been queried by Glasgow University. He said he was currently treating NHS patients referred from the Royal Cornwall Hospital for “adaptation” of Scleral lenses. He referred to the case of Haim II and that language requirements may not exceed what is objectively necessary for practicing the profession.
14. He attached 5 references from patients and work colleagues. He was described by one patient as “clearly explaining tests, his findings and his recommendations to my wife and daughter”. He was described by an optometrist colleague as having excelled clinical and communication skills. In a letter from Mrs Martin, the Vision Express manager, it was said there had not been any problems arising from his grasp of English, and that he gives clear information to his patients. Mrs Martin says an IELTS score of 7.5 is extremely hard to achieve, and that it is roughly equivalent to an A Level in English, which, she suggests, is unreasonable given English is a second language for him. Dr Fernandes in an email dated 5.1.15 said 7.5 is “far above normal, native UK, unlikely to reach this score in accord with.”
15. With his appeal he attached a letter from SOLVIT dated 22 May 2015. SOLVIT is an organisation which seeks solutions where EU law is applied incorrectly. However it appears SOLVIT believed Dr Fernandes’ query related to regulation by the GMC, and gave advice accordingly. SOLVIT said he may not need to take a language test as he may have enough evidence of speaking English at work. Dr Fernandes is not regulated by the GMC, but by the GOC and the AOP.

Case for NHS England

16. In their position statement (undated but received in July 2015) the Respondents considered European Law, quoting Article 53 of Directive 2005/36/EC which states “*Knowledge and Language – persons benefitting from the recognition of professional qualifications shall have a knowledge of languages necessary for practicing the profession in the host Member State.*”
17. The Respondents then considered four interpretive decisions in the European Court of Justice – the first being *Hocsman v Ministre de l’Emploi et de la Solidarite* C – 238/98 [2000] E.C.R. 1-6623 which held that any assessment of linguistic abilities of the applicant must be proportionate. Three aspects could be taken into account – the ability to communicate with patients, the ability to cope with administrative work and the ability to communicate accurately and effectively with professional colleagues. The Court recognised that language requirements may be justified in certain cases.
18. *In Groener v Minister for Education and the City of Dublin Vocational Education Committee* (C-379/87) the ECJ held that national provisions which required a certificate of proficiency in the Irish language as a precondition of employment as a teacher were justified even though the language of instruction for the post was English. In *Salomone*

Haim v Kassenzahnärztliche Vereinigung Nordrhein (C-424/97)(2000) E.C.R. 1-5123 “Haim II”) the ECJ held that the reliability of a dental practitioner’s communication with patients, administrative authorities and professional bodies constituted an “overriding reason of general interest” and that accordingly, national measures which made the appointment of dentists subject to language requirements could be justified, albeit set at an appropriate level. That level was one which demonstrated appropriate knowledge and effective communication.

19. The decision in Haim II was followed by the Court of the European Free Trade Area in the case of Dr A (C-E-1/11), which held that making authorisation to practice as a doctor subject to language requirements was justified in the public interest. Guidance subsequently issued by the European Commission states that host Member States may require a professional to have a knowledge of the language where this was justified by the nature of the profession but the language requirements may not exceed what is objectively necessary for practicing the profession in question.
20. The Respondent’s position statement then referred to the Department of Health publication in February 2010 “Delivering Quality in Primary Care: Performers Lists – Language Knowledge” which emphasised that NHS employers are responsible for ensuring that their staff have the necessary language and communication skills to perform safely and effectively.
21. A more recent document published in July 2014 by NHS Employers – “Language competency Good Practice Guidance for Employers” again emphasised the responsibility of any employer or organisation contracting health services to ensure employees or contractors have the appropriate language competence. The Guide states that while inclusion on the register of a professional regulatory body indicates a person is fit to practice in a profession generally, employers have an additional duty to ensure that each individual is competent to carry out safely and effectively the specific duties of the role appointed to, including language competency. The requirement for an applicant to pass an English Language Competency test (such as IELTS) is one way to meet and evidence the English language requirement.
22. The Guidance points out that most health regulatory bodies including the GOS have set language competency at the IELTS overall English Language score of 7.0 in the academic IELTS test. The GMC has set the level higher at 7.5. The Guidance document goes on to say “Employers may choose to set the required level to be achieved higher than that set by the regulatory body if they deem this appropriate for the post and apply the same equivalence test to all applicants.”
23. The SOP of July 2014 set the IELTS score at 7.5. Band 7 of IELTS provides: -
“*Good user: You have an operational command of the language, though with occasional inaccuracies, inappropriate usage and misunderstanding in some situations. Generally you handle complex language well and understand detailed reasoning.*”
Band 8 provides:

“Very good user: You have fully operational command of the language with only occasional unsystematic inaccuracies and in appropriate usage. You may misunderstand some things in unfamiliar situations. You handle complex detailed argumentation well.”

24. The respondent's position document then goes on to note that the Appellant's correspondence throughout the course of the application has demonstrated a number of “inaccuracies, inappropriate usage and misunderstandings” as described for IELTS band 6.
25. The Respondent's position document then sets out the professional responsibilities of NHS optometrists. They must work with members of the public, often on a one-to-one basis, and provide important health care advice and guidance; they need to elicit symptoms which may indicate a range of serious conditions including macular degeneration and cancer; they can issue prescriptions and need to keep accurate and thorough records. The Respondents suggested these responsibilities necessitated at least an ability to “handle complex negotiations well”, and that the level of language competency indicated by his correspondence did not meet that standard. They submitted the requirement of IELTS 7.5 was proportionate, necessary and justified, and met the criteria in Haim II.
26. No proceedings have been brought in the English Courts to challenge the SOP or the 2013 Regulations. The requirement in regulation 7(4)(b) of the 2013 Regulations is mandatory. No complaint to the European Court of Justice has been notified to NHS England.

Decision of the Tribunal

27. We considered the issues. We reminded ourselves of the criteria under Rule 7(4)(b) of the 2013 Regulations: -
*“The grounds on which the Board must refuse to include a Practitioner in a performers list are...
(b) it is not satisfied that the practitioner has sufficient knowledge of the English Language necessary for the work which those included in the performers list perform.”*
28. The requirement is a mandatory one, that is to say, if the Board are of that belief they have no discretion to allow the applicant onto the list – they must refuse.
29. The right of appeal in respect of this decision is contained in regulation 17(2)(a) of the 2013 Regulations which provides the Practitioner may appeal (by way of redetermination) to the First Tier Tribunal against a decision to refuse to include a Practitioner in a performers list on the grounds referred to in Regulation 7(1) (which includes the language requirement in Regulation 7(4)).
30. Regulation 17(4) provides *“On appeal the First Tier Tribunal may make any decision the Board could have made.”* Accordingly the First Tier Tribunal on appeal, steps into the shoes of the Board and re-decides the case. Regulation 17(6) provides that conditions may be imposed on the inclusion of a Practitioner in the performers list.

31. We considered the duties of a Practitioner which were “necessary for the work which those included in the Performers List perform.” We noted the professional responsibilities of NHS optometrists as set out in the Respondent’s position document. These were not challenged by Dr Fernandes and we accepted them as an accurate description. The responsibilities are significant and serious and include the need to diagnose possibly life-threatening conditions such as cancer. We concluded that in eliciting symptoms from patients to make a diagnosis, it may be necessary to communicate with patients who may be elderly, or young or vulnerable, or who may speak English with an accent, and who may be reluctant to provide full symptoms, or lack knowledge as to what symptoms to mention.
32. This inevitably requires a high standard of communicative ability, and in our view requires a significant language and listening requirement on the part of the optometrist in the performance of his professional duties. The need for a high quality language capability is reinforced by the need to explain both findings and treatment to the patient. Further, the requirement to write accurate prescriptions and to keep accurate, comprehensive and understandable notes and records, was again a important one, requiring a significant ability in written language.
33. We considered the criteria adopted by NHS England of a pass rate of 7.5 in IELTS tests. This level lies between bands 7 and 8, which are set out above. We accepted there must be operational command of the language. Inaccuracies and inappropriate usage must be kept to a minimum, and must occur only occasionally; in our view practitioners must be able to handle complex language well. We noted health care regulatory bodies require similar IELTS pass rates at 7.0 or 7.5. These minimum levels are broadly accepted across the health care professions. We noted the NHS guidance which provided that employers may impose higher levels of pass rate to ensure appropriate levels of English.
34. Taking all these matters together we accepted a requirement by NHS England for an IELTS pass rate of 7.5 was necessary, appropriate and proportionate. We accepted it met the requirements of Haim II and the other interpretive EU cases referred to above. We accepted the requirement met the provisions of Article 53 of Directive 2005/36/EC.
35. We considered whether Dr Fernandes language ability met the requirements of IELTS 7.5. We noted the only certificated pass was for 12 July 2014, giving an overall banding of 5.5, well below the required level. We were particularly concerned his listening abilities were assessed to be at 5.0, a particularly low score. His highest score of 6.0 in written English was also of concern, given his many spelling and grammatical errors in his correspondence with the Respondent and the Tribunal. Suggestions of a subsequent improvement in his IELTS score were uncertain, contradictory and not evidenced appropriately. A claim of a 6.0 pass by Dr Fernandes’ employers on 15 November 2014, was apparently contradicted by Dr Fernandes’ own later assertion on 5 May 2015, that he had only a 5.5 pass. It was unclear exactly which tests he was referring to but there has been one

certificate provided. A further test on 6 December 2014, mentioned by his employers, was not subsequently referred to or evidenced.

36. We considered the correspondence from SOLVIT, who incorrectly believed Dr Fernandes is regulated by the GMC. In fact this is not the case, he is regulated by the GOC. Further the appeal concerns language requirements by his prospective employer NHS England, not his regulatory body, and as the Guidance documents make clear, the requirements may differ, with higher requirements by an employer.
37. We considered Dr Fernandes' references. Most mentioned his professional competence, and some dealt solely with this aspect, such as Rosemary Lumb and Valter Castelao, without mentioning his language abilities. As NHS England make clear, the issue of his professional competence outside of his language ability is not in dispute. The reference from Alberto Lopes refers to Dr Fernandes clearly explaining the tests he performed in respect of members of his family but fails to mention which language was being used. The reference from Jemma Ramburan, who appears to be an optometrist colleague in the Truro Vision Express refers to 'excellent clinical and communication skills.' However as a colleague she would not be working in a supervising capacity and would not generally be present when Dr Fernandes is examining patients.
38. The thrust of Ms Martin's reference (she is the manager at Vision Express) is that Dr Fernandes has significantly increased their business and as a business, they need him to test NHS patients, and his language skills have not caused any problems. Ms Martin believes an IELTS score of 7.5 is an unreasonable expectation because English for him is a second language. However, Ms Martin is not an optometrist, does not apparently supervise Dr Fernandes' treatment sessions, and offers no supporting evidence for her opinion that the 7.5 requirement is too onerous. Further her opinion that his language skills are such as to not having caused any problems so far falls short of establishing that his language abilities are appropriate for his professional responsibilities.
39. We considered Dr Fernandes' grounds of appeal. We noted his appointment to Bradford Royal Infirmary in a training capacity, but this would be a supervised position, and did not provide reassurance of language competence. We considered his registration with the GOC. Language requirements for registration with regulatory bodies and with employers are commonly different, and go to different requirements. Registration with a professional body indicates he is fit to practice his profession generally while requirements by employers are to ensure appropriate skills for his particular appointment.
40. In so far as his particular skills in Scleral lens fitting are concerned these are specialist skills which give no assurance of general language abilities. The course at Glasgow University is not appropriately evidenced, nor is there any mention of progress. In any event it is a supervised training course which in itself gives no assurance of language ability in practice. The refusal to include Dr Fernandes in the performers list is not discriminatory or in breach of EU requirements,

which are dealt with above. The language requirements are applied to all NHS England applications.

41. The delay complained of by Dr Fernandes has been caused largely by the failure of Dr Fernandes to reach the required IELTS language level. Taking into consideration all factors considered above we have concluded Dr Fernandes does not have sufficient knowledge of English language necessary for the work which those included in the Ophthalmic Performers List perform. Accordingly the appeal is dismissed.
42. However we wish to reiterate that the dismissal of the appeal is because of Dr Fernandes' current language abilities, not because of his other professional abilities. Dr Fernandes is free to reapply to the Performers List once his language abilities are appropriate to the work required.

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

Date Issued: 30 July 2015