The First-tier Tribunal

(Health, Education and Social Care Chamber)

Primary Health Lists

Appeal Number: [2012] PHL 15465

Between

Dr Michael Diago Noronha

(GMC registration number 4174158)

Appellant

and

NHS Trafford

Respondent

Hearing

8 May 2012 Manchester IAC

The panel

Mr Brayne, Judge

Dr Lone, medical member

Ms Brougham

Representation

Mr Hill, Hill Dickinson Solicitors, for the respondent. Dr Noronha was unrepresented.

The Appeal

1. By notice dated 24 February 2012 Dr Noronha appeals against the decision of the Trafford Primary Care Trust (the Trust) dated 24 January 2012, and communicated to Dr Noronha in a letter to Dr Noronha dated 30 January 2012, to refuse to enter his name onto its medical performers list (MPL).
2. The Respondent's decision was made on two grounds: failure to provide satisfactory evidence, under Regulation 6(2(a) of the National Health Service (Performers' List) Regulations 2004, as amended, of his intention to undertake

the majority of his work in Trafford; and failure, under Regulation 4(2)(f), to provide two clinical references from referees who had worked with Dr Noronha recently and were able to complete the forms fully.

The legal framework for refusal of entry to the list

3. Regulation 4 sets out how an applicant for inclusion in a performers list is to make the application. It includes under 4(2)(f) the requirement for the applicant to provide

   names and addresses of two referees, who are willing to provide clinical references relating to two recent posts (which may include any current posts) as a performer which lasted at least three months without a significant break, and, where this is not possible, a full explanation and the names and addresses of alternative referees.

4. Regulation 6 sets out grounds for refusal. Those which state that a PCT may refuse admission include

   (1)(b) having contacted the referees provided by him under regulation 4(2)(f), [the PCT] is not satisfied with the references

   Those which state that the PCT must refuse admission include

   (2)(a) he has not provided satisfactory evidence that he intends to perform the services, which those included in the relevant performers list are to perform, in its area.

Chronology

5. The following information is taken from the decision of the First-tier Tribunal (FTT) dated 8 August 2011, a copy of which we were given at the hearing. Although that decision is challenged, we do not believe the following chronology is disputed.

6. Dr Noronha was suspended from employment by Warrington PCT in late 2006 and suspended from the MPL in February 2007, as a result of complaints from the senior partner at his practice that he had made a number of religious references to patients without consent, including advising patients to address their concerns to God rather than seek medical treatment.

7. Dr Noronha was made subject to a warning by the General Medical Council (GMC) on 14 September 2009, to remain on his record for five years. Following psychiatric assessment the suspension was lifted in September 2008 and he was permitted to return to work subject to educational and clinical supervision.

8. Following a complaint, he was suspended from the Warrington PCT's MPL on 20 October 2010 and was removed on 23 March 2011. His appeal against the removal was dismissed by the FTT in a decision dated 8 August 2011. The Upper Tribunal has given permission to appeal the FTT's decision.

9. The respondent provided the Tribunal with a helpful chronology of subsequent events, and the following is based on that document. We are satisfied that it is accurate, having seen the relevant documents.

10. Dr Noronha applied to join NHS Trafford's MPL on 14 November 2011.

11. On 25 November 2011 the respondent sent Dr Noronha an application pack. On 15 December 2011 the completed application was received by the respondent.

12. On 18 January 2012 the respondent wrote to Dr Noronha to ask for proof of where he intended to provide services. On 20 January Dr Noronha replied to the above request.

13. On 24 January 2012 the respondent's performance management group rejected the application.

Jurisdiction of the FTT

14. The PCT made written submissions at the outset of the hearing in respect of the Tribunal's jurisdiction.

15. Regulation 15 provides a right of appeal to the FTT against certain decisions relating to performers lists. The list of decisions which can be appealed is set out in Regulation 15(2). Decisions made, in particular, under regulation 6(1) can be appealed

16. Regulation 15(2) does not provide a right of appeal against decisions made under 6(2). We cannot hear that part of Dr Noronha's appeal.

17. Mr Hill submitted that in these circumstances we should adjourn the hearing into the regulation 6(1) part of the decision. He pointed out that any challenge to the regulation 6(2) decision would have to be made to the Divisional Court. In these circumstances, he argued, the continuation of an appeal into the regulation 6(1) decision had little merit. If Dr Noronha did not apply, was found to be out of time, or failed in a judicial review, any FTT decision would be of no effect, as he would still be excluded from the MPL. If Dr Noronha were to succeed in judicial review in relation to the matters decided under Regulation 6(2), he would then be able to restart his appeal under 6(1).

18. We explained the situation to Dr Noronha. We then determined that we should postpone a decision on this application in order to hear the evidence of Dr Tyrer, who had had to cancel a surgery to attend, so that at least his evidence was heard in case the appeal continued, either now or later.

19. Having done so, we determined that we should continue to hear that part of the appeal over which we had jurisdiction. It was our view that it would be disproportionate and unfair to adjourn for what might be a considerable period, when the Tribunal and the parties were available for this one day hearing. Dr Noronha had already indicated he did not want the appeal adjourned. If the appeal were to fail, Dr Noronha would probably not wish to attempt judicial review. If it were to succeed he would be able to make an informed choice. If we were to adjourn, however, he could not delay an application for leave to bring a judicial review, which would probably be a costly matter, undertaken while not even knowing if the outcome would result in any benefit, since it would only address the regulation 6(2) decision.

Other procedural matters

20. The following procedural matters arose in written application by the respondent prior to the hearing, renewed at the hearing. The respondent sought a postponement because the Upper Tribunal had given permission to

appeal a decision on matters closely related to the present appeal. The background is as follows.

21. Dr Noronha, in his application of 14 November 2011,had informed the respondent that he had previously been removed from the MPL maintained by Warrington PCT, and that a decision from the Upper Tribunal was awaited as to his appeal against the FTT's dismissal of his appeal against that decision.

22. In his witness statement in the present proceedings, the respondent's medical director, Dr Kissen, explained that the respondent had determined the application solely on the basis of references and where the appellant intended to practise (paragraph 22 of Dr Kissen's witness statement). In the written submissions for a postponement the respondent now considered the circumstances of the Warrington decision to remove as unsuitable, not just the matters referred to in the respondent's decision to refuse, should be taken into consideration by the Tribunal. It was stated that the Trust had not previously had the benefit of legal advice when making the decision.

23. The respondent in fact had a duty to take into account matters set out in Regulation 4(4), and these would include the circumstances of the Warrington PCT's removal of Dr Noronha from its MPL. All relevant matters should have been investigated before the decision was made. This failure was relevant to our decision as to whether a postponement of the hearing would be fair.

24. The respondent first applied on 19 April 2012 for a postponement in order to await the outcome of the Upper Tribunal appeal. Judge Brayne refused that application, and the respondent applied for a review of his decision, or permission to appeal against that interlocutory decision. That application was considered by Judge Hillier, who again declined to postpone the hearing, and advised that the parties should attend the appeal prepared to make initial submissions in respect of the scope of the present appeal.

25. Thus, after we had determined the jurisdictional issue, and before we were able to start to hear the appeal itself, we had to decide if it was in the interests of justice to adjourn the hearing. Dr Noronha made it clear that he opposed an adjournment. When the adequacy of the information contained in references arose later in the hearing, he again opposed quite forcefully the idea that any adjournment would be appropriate, even for the purpose of enabling him to name other referees or to obtain further information from existing referees. He felt there had been enough delay.

26. The respondent relied on the fact that the FTT has the power to make any decision that the respondent could have made (Regulation 15(3)), and the fact that the appeal is by way of a redetermination (Regulation 15(1)). The respondent submitted that the Tribunal should take account of the full circumstances surrounding the respondent's removal from the Warrington MPL, and could only do so by waiting for the Upper Tribunal decision. Mr Hill said that documents relating to the Warrington decision needed to be considered and served. To proceed immediately, in the respondent's view, would mean either proceeding on narrow grounds of references, or taking into account matters which the parties have not yet prepared and which may in any event be superseded by the Upper Tribunal's decision.

27. We take into account that the Upper Tribunal would be very unlikely, if it found an error of law, to make its own determination. The FTT would still have to rehear the appeal. Any adjournment would last for several months.

28. We also take into account that the Regulations are worded so as not to prevent a performer to apply to a different PCT while suspended or removed, and that no national disqualification was imposed by the FTT in its dismissal of the appeal against Warrington PCT's decision. The outcome of the Warrington appeal cannot, logically, bind this Tribunal in such circumstances. There has at no point been any reason, other than a failure to take appropriate legal advice, presenting the respondent from relying on the matters which led to Warrington PCT's decision.

29. We also accept the proposition from the respondent that it is not for this Tribunal to relitigate the issues which arose in the Warrington appeal. Our task is to redetermine the decision to refuse to enter Dr Noronha onto the Trafford NHS list, and in our opinion we were in a good position to explore those issues without having the full body of evidence which the respondent might have obtained from Warrington PCT had we agreed to adjourn.

30. We also consider, in the absence of Dr Noronha's agreement to a postponement, that it is unfair to Dr Noronha to delay this hearing. He has a right to apply to the respondent while removed from Warrington's MPL. He now has a right to have that application decided, and to exercise his right of appeal against that decision.

31. Moreover, the Tribunal in a redetermination is required to take into account all circumstances set out in Regulation 6(4). We can take all relevant matters into account without waiting for the outcome of Dr Noronha's appeal to the Upper Tribunal.

32. The respondent has in any event at all times been aware of the situation regarding Warrington PCT and itself had a duty to consider those matters. It is not now able to argue that it has been placed at a disadvantage by the Tribunal refusing its application for a postponement. To argue, as it does in its letter of 30 April 2012, that it has not yet considered the issues raised by Dr Noronha's removal by Warrington PCT, is not sustainable.

33. For these reasons it was not considered fair or in the interests of justice to postpone or adjourn.

The Respondent's case

34. In his application Dr Noronha named two referees, Dr Malcolm Tyrer, GP Tutor, and Dr Mike Dennis, Senior Partner, both of the Medical Centre, Folly Lane, Warrington.

35. Dr Tyrer returned a reference form in which he said he had known Dr Noronha since 1999 when Dr Noronha was his GP trainee for six months, and from April 2008 to present as a mentor and trainer on Dr Noronha's return from work after sickness absence. He also included the following in relation to Dr Noronha's development needs: "I am not sure where he is up to re annual appraisal and PDP and he may need some help with these." The referee also stated "He has had some performance issues concerning the inappropriate introduction of religious advice to patients during

consultations…I understand that he has now gained insight into these and is certain that the problem will not be repeated."

36. In relation to clinical and other skills Dr Tyrer ticked each of the boxes which indicated "satisfactory".

37. Dr Dennis returned a form which stated "I have known him for about ten years, he was a registrar in this practice and I have not worked with him recently". In relation to strengths and development needs he said "I have no recent knowledge of these." He ticked the boxes to express a satisfactory opinion of Dr Noronha's clinical skills.

38. The respondent referred in the statement of Dr Kissen, Medical Director, to a meeting with Dr Noronha on 19 April 2012. Dr Noronha had at that meeting provided two further references, which were not considered suitable as they were not in the correct format, did not cover all the areas which had to be assessed, and did not, in Dr Kissen's opinion, address the area of practice that had been the basis of the GMC warning and the Warrington PCT removal.

39. However it is now apparent that the respondent after that meeting on 19.April 2012 sent pro forma reference forms to these practitioners, and we are therefore able to consider below the additional information set out there. It remains the respondent's case that even with this information, and the oral evidence of Dr Tyrer, satisfactory references have not been provided. It is not submitted that references are not recent.

40. It is submitted, though the submission arose only at the hearing, that Dr Noronha should have provided referees from more than one post he had held, and, in the alternative, provided a satisfactory explanation as to why this was not possible.

41. It is, in addition to the grounds given in the refusal letter, now also the respondent's case that Dr Noronha is not suitable for inclusion on the MPL, for reasons relating to his previous history, but also including the manner in which he completed his application to the respondent for inclusion on their MPL.

The appellant's case

42. Dr Noronha, in his appeal, said he had provided older references because he had been suspended and removed from another PCT. He had thought it appropriate to provide referees who were familiar with his entire professional and personal background. He had worked in the practice from 25 April 2008 to 9 September 2009. These references were preferable to references from more recent practices where he had acted as a locum. He was willing to provide references from these practices and would comply with any reasonable request.

43. Dr Noronha's case is further set out in his statement of 18 April 2012. He did work closely with Dr Dennis, which we take to mean he submits that this reference is acceptable. Dr Miller, another partner at the same medical centre, can testify to the extent of Dr Noronha's activities. We now have Dr Miller's reference.

44. By the time of the hearing we had further references and Dr Noronha's own evidence that he would not repeat the professional conduct which had led to his previous removal. On this basis, and that of his witness Dr Tyrer, he submitted he was not unsuitable to be included on the respondent's MPL.

The evidence

45. The respondent provided a bundle containing relevant correspondence and appeal documentation. The witness statement from Dr Kissen referred to a number of exhibits, including Dr Noronha's application to the respondent, correspondence between the parties, the decision letter, and references. Missing pages from the references were supplied later.

46. Documents exhibited to Dr Noronha's statement consisted of testimonials from other doctors.

47. We received a considerable number of documents at the hearing. No objection was raised and in each case we considered it in the interests of justice that we consider these documents. Some pages had been accidentally omitted from copies of references, and these were provided. Post-it notes had been attached to references, in one instance giving a false impression of that part of the content. Clearly the respondent should not have allowed this to occur. However we determined that it did not affect our ability to weigh the relevant issues now we were aware that these comments were not attributable to the referee.

48. We were provided with a copy of the Upper Tribunal bundle in the Warrington PCT appeal. This included the FTT decision as well as the grounds on which permission to appeal had been given.

49. Dr Noronha provided a case summary with further documents appended.

50. We heard oral evidence from Dr Kissen and Dr Tyrer, as well as from Dr Noronha. This was noted by the Judge and, where relevant to the decision, is referred to below.

51. We accepted a witness statement from Mr Kynaston, Dr Noronha's landlord. This offered Mr Kynaston's positive opinions as to Dr Noronha's character. He believed that Dr Noronha would not be likely to raise inappropriate matters in his patient consultations. We declined to allow the witness to give oral evidence; the statement had been served late, and we did not consider the witness's oral evidence of his opinion would be of particular help on this issue, and in any event it was clearly expressed in the statement.

Determination with reasons

52. The two grounds upon which we are asked to uphold the refusal to include Dr Noronha in the respondent's MPL are found in Regulation 6(1) as follows.

> *(a) having considered the declaration required by regulation 4(4) …and any other information or documents in its possession relating to him, it considers that he is unsuitable to be included in the performers list*
>
> *(b) having contacted the referees provided by him under regulation 4(2)(f), it is not satisfied with the references.*

53. The requirements for references are set out in regulation 4(2)(f), and is for referees who are willing to provide

> *clinical references relating to two recent posts …as a performer which lasted at least three months without a significant break, and, where this is not possible, a full explanation and the names and addresses of alternative referees.*

54. Mr Hill also submitted that Dr Noronha in his application had failed to provide an appropriate explanation on his application, and this refers to regulation 4(2)(h), which requires with the application

> *Details of any list or equivalent from which he has been removed or contingently removed … with an explanation as to why.*

55. The failure to provide any of the above information can lead to a refusal of the application. However since we are required to redetermine the matter, we can consider evidence supplied to the Tribunal even if not included with the application. For this reason we do not need to consider at any length the concerns of Dr Noronha that the respondent's application form did not make clear the requirement for referees to be selected from different posts he had held, since we can now take into account the explanation he gave why he felt unable to meet this requirement. Similarly, where he did not, in the respondent's submission, make full disclosure of the circumstances of his removal from the Warrington PCT MPL, we can take into account information supplied subsequently. This approach does not interfere with the respondent's right to make submissions that the failure to provide the full information is relevant to our assessment of his suitability.
56. In evaluating Dr Noronha's references, we consider it axiomatic that what is a satisfactory reference can vary according to the applicant's particular circumstances. Where a performer has been warned by his professional body and removed from another PCT's performer's list, it is appropriate to expect one or both references to address the relevant issues. As well as receiving comments on clinical skills and other aspects of the performer's history, therefore, the respondent is entitled to the professional opinion of the referees on matters upon which are of potential concern. In particular if Dr Noronha has been warned and removed for making inappropriate reference to his religious views as part of his consultations, then to be a satisfactory reference that issue must be addressed in the reference. The respondent will otherwise not be able to be satisfied that the PCT's patients will not be at risk.
57. In evaluating the references, we took all available information into account. Therefore Dr Tyrer's reference was considered in light of his oral evidence. We considered references received after the decision under appeal, and supportive letters submitted by other doctors. We did not in this context consider Mr Kynaston's supportive witness statement, as the referees must

be medically qualified. As the Regulations allow for an explanation if the requirements for referees from two posts, or from posts lasting three months or more without a break, are not met, we consider explanations now available to us through Dr Noronha's evidence. However the important issue for the Tribunal is whether the references, taken together, can be considered "satisfactory" under regulation 4(2)(f).

Reference from Dr M Dennis

58. We have indicated that in his reference on the respondent's pro forma Dr Dennis stated "I have not worked with him recently." In relation to development needs he stated "I have no recent knowledge of these." Dr Noronha refers to evidence to supplement the content of this reference. He provided a letter from Dr Dennis dated 25 April 2012, saying that after talking to Dr Tyrer he wished to add to the information provided. He still confirmed that during the relevant period, April 2008 to November 2008 "I had only brief contact with Dr Noronha and this was entirely satisfactory". He confirmed Dr Noronha's duties during this period, and his satisfactory performance in relation to expertise, knowledge, and attitude. Dr Noronha told us that Dr Dennis declined to attend the hearing, so his understanding of Dr Noronha's ability to avoid inappropriate matters arising in consultation could not be explored.
59. Dr Dennis's experience of Dr Noronha was before 2010. The complaint which led to Warrington PCT's decision to suspend and then remove Dr Noronha from the MPL arose after this time. This later complaint and decision is a legitimate concern of any Trust asked to take Dr Noronha onto its list, and a reference based on knowledge which entirely predates those matters does not address that concern. This is not to say that Dr Dennis' reference cannot stand as one of the two references, if that matter is adequately addressed in another reference and we are satisfied with the explanation as to why Dr Noronha did not provide referees from different posts he has held.
60. We will, before considering subsequent referees, consider Dr Noronha's explanation for the choice of referees from the same post. This is because the issue will also arise in relation to the reference from Dr Miller, a partner at the same practice as Drs Tyrer and Dennis. Dr Noronha's explanation to us was consistent with what he said in his grounds of appeal and statement. He felt that these doctors knew him best. He also said that though he had been a salaried doctor for nine months after this period, his employer, Warrington PCT, and the medical director, did not work with him personally during that period, and his colleagues had been locums, usually covering for him when he was in fact attending mentoring sessions with Dr Tyrer once a week. We consider this is capable of justifying his choice of referees.
61. Dr Noronha supplied a letter from Dr Miller, also a partner with Dr Dennis and Dr Tyrer. He confirmed the dates when Dr Noronha had worked at the

practice, and referred to an absence from work followed by Dr Noronha having a period of mentoring at the practice. Dr Miller also knew Dr Noronha from when the latter did GP sessional work for Warrington PCT Out of Hours Centre, though extent and dates are not mentioned. Dr Miller always found Dr Noronha pleasant, polite and cordial and would expect him to behave in the same manner with patients and to have good relationships with them. He confirmed that Dr Noronha would have joined in with the practice's journal clubs and protected learning times. However he also cautioned that he did not have close contact with Dr Noronha and had, prior to writing the letter, consulted Dr Tyrer. To that extent the submission from Mr Hill that Dr Miller's evidence is not independent of Dr Tyrer's evidence is justified.

62. Dr Miller subsequently completed the respondent's pro forma reference form, giving a satisfactory rating on clinical skills, commenting on his enthusiasm and manner as strengths, but in terms of weaknesses stating: "Needing to exclude his personal religious faith and beliefs from his professional relationships with patients." The referee therefore acknowledges this issue as an ongoing developmental need. He provides no basis for assurance that the problem has been addressed. We also have no evidence of recent experience, so Dr Miller's reference is based on experience with Dr Noronha before the complaint which led to his removal from Warrington's MPL.
63. Dr Noronha supplied a letter from a Dr Kurzeja, which the respondent followed up by asking Dr Kurzeja to complete a proforma. The letter confirmed Dr Noronha worked in Dr Kuzeja's practice as a locum from December 2009 to May 2010, that there were no complaints and no concerns about his clinical judgement, and that he maintained good relationships with staff. Dr Kurzeja ticked the boxes to indicate "satisfactory" in relation to clinical abilities. However in relation to strengths and development needs he stated: "Don't know well enough to complete this. Did review patient care and I didn't identify any outstanding issues or areas for concern." In relation to other observations, the doctor wrote: "We have had no issues with his performance within the primary care setting and would have used him as a locum at any other time."
64. The reference from Dr Kurzeja is positive, and in normal circumstances might be acceptable as one of the references under the regulation 4 criteria. The referee has, however, no knowledge of Dr Noronha's ability to maintain appropriate consultations in light of the complaint which led to his removal by Warrington PCT, as he only knew Dr Noronha before this complaint. Also, in these circumstances, it is difficult to accept the reference as satisfactory, given the referee's overt qualification that he does not know the applicant well enough to comment on strengths and developmental needs. Finally, in terms of the ability of this reference to be considered satisfactory, the referee made no reference to the existing GMC warning or Dr Noronha's history. It could be argued that no specific questions were put to the referee about specific concerns, but this does not help the Tribunal. A reference does not become

satisfactory just because there may have been a reason for it not to address a crucial issue. In fact since the GMC had put a warning on Dr Noronha's record, Dr Kurzeja must have known and chosen not to comment on these issues.

65. Dr Noronha supplied a letter from a Dr Hussein, for whom he had provided, over a period of some ten months, locum duties on some eight to ten occasions. This referee had not returned a completed pro forma to the respondent by the time of the hearing. The letter speaks very positively of Dr Noronha's skills and rapport, and says no complaints were received. Given the limited extent of Dr Noronha's work at the practice it is difficult to see this letter as a suitable reference, particularly having regard to the requirements of regulation 4(4). Dr Noronha's choice of this referee in preference to someone from the salaried nine month post he held with Warrington PCT is not, in our view, appropriate. In any event Dr Hussein does not address the primary concerns of the respondent and this Tribunal.
66. In light of Dr Noronha's history, and concerns as to his ability to maintain appropriate consultations with patients, none of the above references can, in themselves, be seen as satisfactory, notwithstanding that they all rate Dr Noronha's clinical and other skills and attributes positively. The reference and evidence of Dr Tyrer is therefore of critical importance.
67. We have summarised the contents of his reference already. The part which the Tribunal was anxious to explore was the following: "He has had some performance issues concerning the inappropriate introduction of religious advice to patients during consultations. This followed a 'born again/conversion experience. I understand that he has now gained insight into this and is certain that the problems will not be repeated." We were in particular anxious to find out whether, and if so on what basis, Dr Tyrer himself accepted Dr Noronha's certainty that the problems would not be repeated.
68. Dr Tyrer was evidently very anxious to support Dr Noronha. He made reference to the waste of resource if he should not return to practice, and the difficulty for Dr Noronha of demonstrating a negative (i.e. that he would not behave in the future as he had done previously) . We are very sympathetic to this supportive approach, but in understanding the framework for our decision, the core issue for the respondent, and the Tribunal on appeal, is whether Dr Noronha should be admitted to the list on the stated criteria. A satisfactory reference must mean one which leaves no real concerns for patient safety or standards of performance unaddressed. Where a doctor is subject to a GMC warning and has been removed from an MPL it must address those issues, and if it does not the difficulties the doctor may then have in continuing his career are unfortunate but not particularly relevant for the Tribunal.
69. On the proforma Dr Tyrer expressed some reservations on appraisal, but his explanation that this was simply an administrative concern as to when he had last undergone appraisal means we need not look at this issue.

70. Dr Tyrer answered questions in a great deal of detail concerning Dr Noronha's work and progress under his mentorship. He was, however, unable to recall clearly the conditions under which Dr Noronha had been permitted to continue to practise at the time of the mentorship, and until prompted was content to describe Dr Noronha's needs for training as arising from sickness absence. It is clear that Dr Noronha was also suspended from practice for reasons which we might have expected Dr Tyrer to be both aware of and concerned with.
71. Dr Tyrer accepted that any conviction on his own part that Dr Noronha would not repeat such behaviours could not be grounded in the evidence of what happened during the period of mentorship. We therefore asked him about the evidence of change since the complaint which now led to him feeling confident that Dr Noronha would no longer be at risk of introducing his religious beliefs into consultations.
72. Dr Tyrer quite rightly said nothing could be guaranteed, but he felt confident that Dr Noronha's attitude had changed. He used the term "the penny finally dropped". His basis for saying this was, he said, some four or five telephone conversations with Dr Noronha in the last few months, each conversation lasting between five and 15 minutes. He had not met Dr Noronha in person. He had not had any formal involvement.
73. Dr Tyrer did not volunteer to the Tribunal that he knew of the complaint in September 2010. In fact he said initially to us that he was not aware of this. This is slightly surprising, given that it is this subsequent incident which led to the GMC warning and the Warrington PCT suspension and removal. In fact he must have been aware as we saw in the Upper Tribunal papers that Dr Tyrer, in the capacity of clinical tutor, attended a meeting of the Warrington PCT PPAG on 5 October 2010 where this and other complaints were discussed.
74. Clearly the support of an experienced, wise and trusting mentor (whether formal or informal) has been of great benefit to Dr Noronha, and we would in any other circumstance place great weight on Dr Tyrer's conviction that Dr Noronha has changed. However we are unable to agree that he has had sufficient interaction with Dr Noronha since the complaint to be able to show the Tribunal that his personal confidence in Dr Noronha's changed attitude can be relied on. He accepted that Dr Noronha had given previous assurances that he would discontinue references to religious matters in consultations, and then received further complaint. While it is possible that there has indeed been a change in Dr Noronha's understanding of his obligations, we are unable to make a finding that the reference of Dr Tyrer can be considered satisfactory in the circumstances.
75. In our view, none of the referees, taken together or singly, enables the respondent, and on appeal the Tribunal, to conclude that the requirement of regulation 4(4) for a satisfactory reference from two referees has been met. The opinions of two of the doctors at Dr Tyrer's practice contain concerns as to how well they know Dr Noronha, and neither addresses the core concern of

this Tribunal. Referees approached by Dr Noronha for the purpose of the appeal cannot be accepted as satisfactory. In one case Dr Noronha had only carried out locum work on up to ten occasions. In all cases the referees do not assist with what remains the core concern. We could only have accepted the package of references as satisfactory if we had accepted Dr Tyrer's personal opinion, which for reasons stated above we did not.

76. The appeal must fail, therefore, on the ground that Dr Noronha has not supplied satisfactory references under regulations 4(4) and 6(1)(b).
77. In his cross examination and summing up Mr Hill elicited evidence and made submissions relating to the wider issue of suitability. Mr Hill submits that, notwithstanding the submission that the Tribunal should have postponed the hearing beforehand, or adjourned at the hearing itself, there is now sufficient evidence to make a finding of unsuitability under regulation 6(1)(a).
78. We are aware that this is a matter which occupied the FTT in August 2011, covering identical ground, namely whether Dr Noronha is suitable for inclusion on an MPL. Although the FTT did not impose a national disqualification, there is nothing in the decision which indicates a local dimension. The issue was then, and remains now, whether the risk that Dr Noronha will raise his own religious views during patient consultations has been satisfactorily addressed. The FTT decision was made on the papers, and Judge Wikeley has given leave to appeal on the basis that the FTT may have erred in law in proceeding without an oral hearing. The other possible error of law is the nature of the apology given by Dr Noronha.
79. It is not our remit to relitigate that decision, but the fact that we have had the benefit of oral evidence potentially places us in a better position than the previous Tribunal to consider Dr Noronha's claim that he has changed. Given that our decision, and the earlier jurisdictional decision means that Dr Noronha could not be entered on the respondent's list even if we considered unsuitability was not established, we will do so briefly.
80. The oral evidence Dr Noronha gave shows that he remains, and this is not a criticism, firmly committed to his religious views. He told the Tribunal that he now understood the GMC guidelines as to separating his religious views from the professional duties to his patients. Previously, as we understand his evidence, which is confirmed by Dr Tyrer and the material in the Upper Tribunal papers, Dr Noronha felt unable to confirm this. The question, therefore, is what has changed? Dr Noronha had given assurances before, including to Dr Tyrer, which we are now asked to accept were qualitatively different from those now given. The concerns as to his behaviour in consultations stretch from his suspension in 2006 to his removal in 2010. Dr Noronha has had previous opportunities to demonstrate that he has changed.
81. Dr Noronha's explanation as to why we should now accept he has changed requires, to some extent, an understanding of his faith. He told us that previously he believed he had been "gifted" by God; in other words he was obliged, in some way which we do not need and in any case lack the

expertise to analyse, to override his professional guidelines and follow what he believed to be a higher level of authority. He tells us that he now realises this is not appropriate, and that in any event he was not gifted. He also told us that it "would be foolish to operate without the gifting", which is not the same as saying that it would be wrong to do so even if he were, in his view, gifted. From our point of view, whether or not Dr Noronha feels he has been gifted is a matter for him; he should understand and be able when asked to demonstrate that whether or not he is gifted is irrelevant to the question of what takes place during a patient consultation. He failed to show us that he appreciated this.

82. In our view the complex relationship between Dr Noronha's profound faith and his understanding of his professional duties cannot be disentangled on the basis of the evidence we now have. He told us that he now understands the guidelines of his profession, and that he must follow them. This is somewhat puzzling: these guidelines were never ambiguous, and if Dr Noronha felt previously that he could not comply with them, his professional duty was clear. He should have ignored the pressure he perceived his faith put him under, or alternatively he should have ceased to work in a situation where he felt he must do so. That he claims only to understand this now is troubling. We accept that this reasoning puts Dr Noronha in a difficult situation, because he cannot rectify his past mistakes. However, it does give credence to submissions on behalf of the respondent that Dr Noronha, if he wants to demonstrate change, should seek a clinical role in which there would be little or no risk of succumbing to the wish to talk about his religious views, and that could enable him to demonstrate he is not unsuitable, in due course, to be placed on an MPL for a primary care role. In any event Dr Noronha's future is a matter of concern, but not the issue which this Tribunal must determine.
83. We would add that the supportive evidence from Mr Kynaston was much appreciated, but we do not believe that in his capacity as friend and landlord, he is able to address our concerns.
84. We would further note that in some of his answers in cross examination Dr Noronha's understanding of the respondent's concerns appeared deficient. Dr Noronha maintained in his appeal form that he had provided the respondent with all relevant information and had been transparent. However it was pointed out to him that he had told the respondent in his application that he had been suspended after a complaint from a patient "for offending her religious views". We have seen the patient's complaint and her witness statement to the FTT, and there is no reference to her own religious views. This was put to Dr Noronha, and he appeared to us to find it difficult to appreciate that raising his own religious views in a consultation was not the same as offending a patient's religious views. His response at one point was to say that in selecting what to put in his application he had understood he was to be offered a fresh start, and "did not want to assassinate myself". This

is clearly an inappropriate justification for withholding information, and inconsistent with his claim to transparency and full disclosure.

85. We also note that in his application to the respondent Dr Noronha omitted to explain over a year of his career, despite a clear indication that all periods, whether working as a doctor or not, were to be accounted for. Dr Noronha described this as an error, which it clearly was, but it is difficult to be satisfied that it was wholly inadvertent. This was a time when he was suspended from practice, and it required an explanation, as should have been obvious.
86. It is the respondent who has the burden of showing unsuitability, not the appellant who must disprove it. However, the evidence of previous unsuitability is stark, and the question of whether Dr Noronha is correct in now maintaining that "the penny has dropped" can only be answered, and demonstrated as having been answered, by himself. We remain at this point unable to conclude that this is the case, and therefore find that he is unsuitable, because of the risk to patients in consultations with Dr Noronha, to be included on the MPL of NHS Trafford.

Decision

87. There is no right of appeal against a decision made under regulation 6(2)
88. The appeal against the decision under regulation 6(1) is dismissed
89. Dr Michael Diago Noronha is unsuitable for inclusion in the NHS Trafford performers list.

Tribunal Judge Hugh Brayne

10 May 2012