

IN THE FAMILY HEALTH SERVICE APPEAL AUTHORITY

IN THE MATTER OF

MR STANISLAW CIARKA (GDC membership number 84847)

Appellant

and

HASTINGS AND ROTHER PRIMARY CARE TRUST

Respondent

DECISION WITH REASONS

Oral hearing 15.5.07 (panel retired 21.6.07)

Miss M Corbett	Chair
Dr D Kooner	Professional Member
Dr D Ratzer	Member

Introduction

1. The Appellant, Mr Ciarka, appeals from the decision of the Respondent PCT (“the PCT”) to refuse his application to be included on its dental performers list. The decision was notified to Mr Ciarka by letter dated 5th February 2007.
2. Mr Ciarka has appealed against the decision of the PCT. The appeal is by way of re-determination. The FHSAA panel is entitled to make any decision which the PCT could have made (Regulation 15 NHS Performers List Regulations).
3. The panel was provided with a bundle of case papers from the parties, which was read in advance of the oral hearing on 15.5.07. The PCT was represented by Mr Reynolds, solicitor; Mr Ciarka did not have legal representation but was accompanied by a friend, Mr King. Only one day was set aside for the hearing, at the end of which the parties had completed their oral evidence. The panel made directions for the filing of written submissions, and informed the parties that the panel were not able to meet to retire and consider its decision until 21.6.07. The parties exchanged and filed written submissions; Mr Ciarka’s dated 21.5.07, the PCT’s dated 25.5.07.
4. Oral evidence was heard on behalf of the PCT from Mr Allan Lewis, Dental Lead for the PCT, and Mrs Julie Campbell. These witnesses explained the procedure generally for such applications and specifically in relation to this application. We heard from Mr Ciarka and his witness, Mr King. Mr King’s undated statement at A10-11 deals with

what Mr Ciarka had told him about conditions at the Hayes practice, says he is not qualified to comment on Mr Ciarka's professional ability and that his use of English is totally intelligible.

5. The panel was very mindful throughout the hearing and the deliberations that Mr Ciarka was not legally represented. The panel is used to hearing from litigants in person and took care to ensure that Mr Ciarka had received and read all of the papers. He stated that he knew them off by heart. We ensured that all relevant and necessary questions were asked of the PCT witnesses, whether by Mr Ciarka or by the panel. There were several breaks during all of which (except one when Mr Ciarka was in the middle of his evidence), Mr King and Mr Ciarka were able to confer. The panel was pleased to read in Mr Ciarka's final submissions that "he felt able to follow every argument in a foreign language and produce replies that the members of the panel had no difficulty in understanding". Mr King, who had prepared a statement on behalf of Mr Ciarka, had asked the FHSAA in advance whether he could put questions to the PCT witnesses and also add to his own written statement. The reply sent on 27.4.07 was that the panel would decide on the day about putting questions but that he could in any event remain in the hearing room and assist Mr Ciarka with the documentation. On 15.5.07 Mr King was informed that, given he was a witness, the panel had decided he should not question the witnesses, but remain to help Mr Ciarka and give evidence on his behalf. This is what Mr King did. Mr King sat next to Mr Ciarka throughout the hearing and was able to assist him in formulating questions.

Background

6. The Appellant is a qualified dentist. After qualifying in Poland he worked as a nurse (in London) and as a dentist (in various practices in Poland). In February 2005 he sought to establish himself as a dentist in this country. Accordingly, he registered with the GDC on 30th March 2005. He successfully applied to join the list of Hillingdon PCT during the middle of 2005. He worked for a dental practice in the Hillingdon PCT's area for a period of two months, though he remained on the Hillingdon list for no longer than five months. He then moved to a practice in Sheffield in October 2005 and sought to join the performers list of Barnsley PCT. That application was refused by letter dated 11.4.06 (R24). This was on the basis that one of the references that the PCT had received for Mr Ciarka had been unsatisfactory. The referee had indicated that Mr Ciarka's communications skills were poor. Additionally, areas of concern had been identified in respect of his ability to provide the appropriate level of clinical skills and knowledge and his ability to apply these to clinical practice.
7. On 31.7.06 Mr Ciarka applied to come onto the list of the Respondent PCT in order to practice from Warrior Square Dental Practice, St Leonards on Sea, East Sussex. The application form and CV is at R1-19. That application was considered by the PCT and refused. That decision now forms the basis of the present appeal.

Chronology

Dates	Description
1982	Mr Ciarka obtained a diploma in dentistry in Poland.
December 1982 to April 1989	Worked as a dentist in Kolobrzeg/Plok/Zyrdow.
May 1989 to January 1995	Worked as a nurse in London.
July 1995 to September 1995	Worked as a dentist in Warsaw for the Polish NHS.
July 1995 to November 1996	Worked as a dentist in Warsaw for a private clinic.
December 1996 to December 1999	Worked as a nurse in London.
August 2000 to May 2001	Worked as a dentist in Warsaw for the Polish NHS.
June 2001 to September 2001	Worked as a dentist in Kolobrzeg (private).
October 2001 to February 2002	Worked as a dentist in Kolobrzeg (Prodent).
March 2002 to January 2005	Worked as a dentist in Warsaw (private).
February 2005 to July 2005	Arranging to work as a dentist in the UK.
1 st August 2005	Approval for admission to Hillingdon PCT's list as an associate.
8 th August 2005	Commenced work at 115 Station Road, Hayes.
4 th October 2005	Left practice at 115 Station Road, Hayes.
31 st October 2005	Commenced work at Hoyland, Sheffield.
3 rd December 2005	Mr Ciarka took the dental professional's language test.
11 th April 2006	Letter from Barnsley PCT to Mr Ciarka refusing his application to join its performers list.
11 th June 2006	Left Hoyland.
31 st July 2006	Application to join Hastings and St Leonards PCT's performers list.
5 th February 2007	Letter from J Flory to Mr Ciarka notifying him of the PCT's decision to refuse his application.
11 th February 2007	Letter from Mr Ciarka to FHSAU re notification of appeal.

8. In brief, the Respondent PCT took account of the following factors in support of its decision:

- (i) The Appellant's failure to complete his application form accurately and/or properly; he did not refer to the refusal of Barnsley PCT to allow him onto their list.
 - (ii) There was a lack of consistency and detail relating to Mr Ciarka's professional experience.
 - (iii) There were concerns relating to his communication skills and knowledge of English.
 - (iv) The quality of the references provided by Mr Ciarka.
9. The mandatory grounds upon which the PCT may refuse an application by a performer to join a performers list are set out in paragraph 6(2) of the NHS (Performers Lists) Regulations 2004. This includes the position, as in this case, where the PCT is not satisfied that the applicant has the knowledge of English which, in his own interests or those of his patients, is necessary in performing the services, which those included in the relevant performers list perform, in its area.
10. The discretionary grounds upon which the PCT may refuse an application by a performer to join a performers list are set out in paragraph 6(1) of the NHS (Performers lists) Regulations 2004.
11. Regulation 6(1)(a) states that the PCT may refuse to include a performer on its list if, having considered the declaration required by Regulation 4(4) and (if applicable) Regulation 4(5), and any other information or documents in its possession relating to him, it considers that he is unsuitable to be included in its performers list.
12. Regulation 6(1)(b) states the PCT may refuse an application if having contacted the referees provided by him under Regulation 4(2)(f), it is not satisfied with the references. Accordingly, the Respondent PCT relied on the fact that the declaration required by Regulation 4(4) and the other information that was provided by Mr Ciarka in his application form was incorrect and that therefore he was unsuitable to be included in the list. The PCT was also not satisfied with the references provided by Mr Ciarka.
13. When the case was opened on behalf of the PCT, it was said that they also relied upon Regulation 6(1)(e) namely that admitting Mr Ciarka to the list would be prejudicial to the efficiency of its services
14. In brief, Mr Ciarka based his appeal (A1 – A2) on the following factors:
- (i) That he did not receive the notification sent out by Barnsley PCT that his application had been rejected.
 - (ii) That the adverse comment as to his clinical practice and other matters made by Barnsley PCT and relied on by the Respondent PCT, were based on the reference that had been acceptable to Hillingdon PCT, but not to Barnsley PCT. He states that the references given by his Polish referees were still valid since

they had been provided within five years of his application to the Respondent PCT.

- (iii) That the Respondent PCT did not consider his application with the appropriate level of care in respect of his curriculum vitae and failed to properly take account of the period that he had worked in England.
 - (iv) That his language skills were adequate as evidenced by his passing an English language test at the University of Bath and that no concerns had been raised by Hillingdon PCT (on whose list he remained for five months from around the middle of 2005).
 - (v) That the Respondent PCT delayed consideration of his application.
15. The Respondent PCT's response to Mr Ciarka's appeal (R1 – R4) included the following points (in summary):
- (i) The PCT did draw a proper conclusion that Mr Ciarka failed to accurately and properly complete his application form.
 - (ii) It was reasonable for the PCT to deem that service of the notification had taken place, given that the letter had been sent by first class post to Mr Ciarka's work address. The decision had therefore been properly notified to Mr Ciarka.
 - (iii) That the PCT took proper account of the reasons why Mr Ciarka's application to join Barnsley PCT's performers list was refused.
 - (iv) The decision of Hastings and Rother PCT was not only based on the references received but also other factors.
 - (v) That there was nothing to suggest that the grounds relied on by Barnsley PCT to refuse Mr Ciarka's application was inappropriate or unreasonable.
 - (vi) That the concerns relating to Mr Ciarka's communication skill were justified.
 - (vii) That the delay in considering Mr Ciarka's application was because of the delay in obtaining references from Mr Ciarka's referees.

16. Failure to make a proper declaration

In order to apply for inclusion of his name on the performers list Mr Ciarka had to send a written application to the PCT, including information set out in Reg 4(2), the undertakings, certificate and consents required by Regs 4(3) and (6) and any other declarations required under Regs 4(4) and (5) and any further information, undertakings, consents or declarations required under Reg 4(7).

By Reg 4(4)(m) an applicant is to provide a declaration as to whether he has been refused admission to any list or equivalent list kept by a PCT or equivalent body.

At para 10.14 of his application form Mr Ciarka stated that he had never been removed, contingently removed, refused admission, conditionally included or suspended from any other PCT list. He signed and dated the application form stating that he had read and understood the declarations.

At page 5 of the application form, Mr Ciarka stated that he did not have any outstanding applications to be included on a PCT list.

Barnsley PCT had written to Mr Ciarka on 11.4.06 (p24-25) refusing him admission to their list. This letter is addressed to Mr Ciarka at the dental practice in Hoyland, Barnsley, where he worked until June 2006. A copy was sent to the owner of that practice, Mr Sheikh.

In cross examination Mr Ciarka told the panel for the first time that he had also made an application to Sheffield PCT which was outstanding.

Mr Ciarka's position is that he did not receive the letter dated 11.4.06, that he put Barnsley PCT out of his mind and made no attempt to discover why he had not heard from them, since to perform NHS work in that area was of no interest to him (submissions Mr Ciarka p3). He says his failure to "tick a box" on the Respondent PCT's form was "inadvertence and not a wish to deceive".

Mr Ciarka stated that the Respondent PCT should not have relied on the Barnsley PCT decision, on the grounds that the referee who provided the reference was hostile to Mr Ciarka.

The panel finds:

The decision of Barnsley PCT was properly notified to Mr Ciarka. The 11.4.06 letter was not returned to Barnsley PCT.

Either Mr Ciarka knew that he had been refused admission to another PCT's list/s OR he was reckless as to the accuracy of the form completed and signed by him. At the very least Mr Ciarka knew he had applications outstanding to Barnsley and to Sheffield PCTs, neither of which are mentioned by him on the form. Either Mr Ciarka was aware that his application had been refused or he failed to take any steps to check the position with Barnsley PCT, or with Sheffield PCT. In either case this reflects an unsuitable attitude to the application process.

The application form is, in the view of the panel, quite clearly set out, and requires a signed declaration as to the accuracy of the contents. In order to consider an application to join a list, a PCT has to rely for information in the first instance from the applicant.

17. Inaccurate application form

The PCT rely upon a number of inaccuracies on the application form, quite apart from the failure to provide relevant information as dealt with above.

Nurse – On his CV Mr Ciarka describes himself as working as a nurse. In cross examination he accepted he was not, but in fact worked as a carer. The PCT say that to describe himself as working as a nurse on his CV is fundamentally different from a carer, which carries a different implication. Mr Ciarka said that this was irrelevant to his application.

Part-time work – in evidence he accepted he worked part time at times. There is no reference to this on his CV.

Extent of time - Mr Ciarka said on his CV that he worked for almost 10 years for Mr King as a carer. When the periods on his CV are added up it appears that this is more like 8 years. Mr Ciarka told us that he did not think this was important and he did not pay attention to this.

The panel finds:

Mr Ciarka signed a declaration that the contents of the application form were accurate. Mr Ciarka did not appear to accept in evidence or in submissions that it is important to have an accurately completed form. When taking into account the overall accuracy of the form, the panel is left with the impression that Mr Ciarka completed the form with a lack of care and attention to the provision of information. However the panel does not place so much weight on these shortcomings in filling in the form as those identified in the section above but they are symptomatic of Mr Ciarka's attitude.

18. Language skills

On 3.12.05 Mr Ciarka obtained a score of 3.5 in the Bath University dental profession language test. This makes him an "Advanced Independent User". The pass mark is 2.5. The PCT submit that they are concerned as to the standard of his written English and the fact that he has a strong Polish accent. The PCT rely on the fact that there are a number of spelling mistakes in the application form. Mr Ciarka refutes this and states that despite the length and complexity of the hearing he had little difficulty in communicating with the panel and PCT representatives.

The panel agrees with Mr Ciarka on this point and does not find this ground for refusal made out. The panel understood Mr Ciarka's spoken English perfectly well and although there may be some grammatical errors in his written material, these are minor. In any event, the panel noted spelling and other errors in the material provided by the PCT eg at R4 and 20-21. Whilst anyone may make minor spelling mistakes, it seems to the panel to ill behave the PCT to criticise Mr Ciarka's written use of English in a sentence "...dated 8th Janury.....the PCT notes they had concerns about.....spoken and written english.....standard of written english in the emails...." [sic].

Mr Ciarka has obtained a good grade in the professional test designed to test language competence.

19. Hayes practice

Mr Ciarka worked at the practice in Hayes for 2 months from 8.8.05 to 4.10.05. In his letter dated 29.3.07 at A8, Mr Ciarka says he was horrified by the conditions there, by the lack of basic dental materials, implements were in some cases rusty or dirty and the failures of water supply. He states that the director of the practice would not remedy this so Mr Ciarka quit. On arrival at the panel hearing Mr King, before the case was opened, wished to impress upon us his great concern at the state of that surgery as related to him by Mr Ciarka.

In oral evidence Mr Ciarka expanded upon his concerns about that practice in Hayes, calling it a “dentists’ nightmare”. He told the panel that he thought it “would be rude” to say anything to Hillingdon PCT, that “I hinted to a nurse that I would resign if there was no improvement, that by the time I left I still had concerns about what going on there, “I was in despair at what I had experienced”. However Mr Ciarka did at one stage in the oral evidence present a different view, saying that he had worked hard to clean the dental tools etc and that the state of the surgery when he left was satisfactory.

The panel finds

Mr Ciarka had a professional obligation to report his observations of sub-standard practice. He accepted that he had read the GDC paperwork in relation to such obligations. The panel accepted the considerable weight of evidence that the surgery was sub-standard and Mr Ciarka therefore failed in his professional duty towards his patients and to the wider dental profession in not taking further action.

20 References

On his application form at page 8 Mr Ciarka includes the names of Mr Letuka and Mrs Boratyn. Their references appear in the bundle beginning at page 47. Ms Boratyn describes herself as a colleague, and in oral evidence Mr Ciarka said that she worked in the same practice “once per month”, then said “once per week”. He expanded upon this to say she had worked about 20 working days in the same surgery as him and that she practised mainly from another surgery.

Mr Letuka worked in the same surgery as Mr Ciarka from 10/05 to 6/06. He had been very slow to respond to the PCT’s request for a reference. The reference is dated January 2007.

The PCT says that neither of these are an employer or supervisor, but are merely colleagues at most.

The panel finds:

Mrs Boratyn is not someone who can properly be described as a clinical reference relating to a recent post lasting 3 months without a significant break, as required by Reg 4(2) (f). She only worked for about 20 days with Mr Ciarka over a period of about 6 months.

On balance we cannot reject Mr Letuka as falling within the definition of a reference in Reg 4 (2)(f) since he does appear to have been a colleague for over 3 months. The panel reluctantly accepts this reference. It notes that the limited information that is given is not disadvantageous to Mr Ciarka but is most dissatisfied with the quality of the reference as a whole.

The PCT would have preferred a referee to have been from someone in a supervisory role or an employer. However the PCT form for referees does not specify this as a preference, nor does it ask how the referee feels qualified and able to provide a reference for the applicant.

Mr Ciarka also provided references relating to clinical practice in Poland around 5 years ago. The panel finds that these do not fall within the requirement of "recent" posts.

The panel is aware that Barnsley PCT wrote to the PCT on 8.1.07 informing them that Mr Ciarka had submitted an application to Barnsley PCT in 10/05, which had been refused in 4/06, and that one of the referees had indicated two categories as "areas of concern" and one category as "poor". The "poor" was communication skills; the "areas of concern" were appropriate level of clinical skills and knowledge, and the ability to apply these to clinical practice.

Mr Ciarka says that this reference to Barnsley PCT was underpinned by malice. He at one stage, on 29.3.07 at A8, says he surmises that this is from the Hayes practice. Later on, on 21.4.07 at A15, he states that it was to his extreme reluctance that a reference from the Hayes practice was procured.

The panel does not need to decide whether Mr Ciarka knew or surmised that the reference to Barnsley PCT was from the Hayes practice.

The panel did not see the reference sent to Barnsley PCT. The summary of the reference in the Barnsley PCT letter of 11.4.06 forms no part of our reasons.

The panel rejects any suggestion that the Respondent PCT delayed consideration of Mr Ciarka's application. If anything it was impressed by the care taken by Mrs Julie Campbell to chase the references, especially Mr Letuka who took several months to provide a reference. The panel accepted the PCT's position that the reason for delay was the difficulties in obtaining Mr Ciarka's references.

The panel finds that Mr Ciarka has failed to provide satisfactory references as required by Reg 4(2)(f).

21. The panel had sufficient information, references and documentation in order to make its decision. The panel considered all the written material and oral evidence. No further material is necessary for the panel to make its decision.

22. Decision:

Regulation 6 (1) (a)

Mr Ciarka is unsuitable to be included upon the list:

Due to his failure to give accurate information on the application form either as to the refusal by Barnsley PCT to admit him onto their list or to state that he had an outstanding application to Barnsley PCT (and, as it was revealed at the hearing, to Sheffield PCT as well). The first alternative is a gross failure and makes him unsuitable for inclusion on this PCT's list. The second alternative demonstrates an unprofessional attitude to providing information essential for appointment to a particular PCT's list. It again makes him unsuitable for inclusion on this PCT list.

Regulation 6(1)(b)

Mr Ciarka has not provided 2 satisfactory clinical references relating to 2 recent posts as a performer which lasted at least 3 months without a significant break. The references from Poland relate to a period in 2000-2001 which are much too old to be at all satisfactory.

Regulation 6(1)(e)

Admitting Mr Ciarka's name to the list would be prejudicial to the efficiency of services. His lack of appreciation of the importance of accuracy in information provided in documents, submitted to a PCT eg on an application form, means that on a balance of probabilities that the efficiency of PCT services would be prejudiced if his name were included on the list. The PCT would in future be likely to have to spend more time and resources confirming the accuracy of information being given by him as opposed to others on list.

In addition Mr Ciarka's failure to take steps to bring the alleged shortcomings at the Hayes practice to the attention of the relevant PCT leads the panel to conclude that there is a real likelihood that his inclusion on the list would be prejudicial to the efficiency of services.

23. Taking into account the number and combination of findings made, the panel is in no doubt that the only necessary and proportionate decision is to exercise its discretion to refuse to include Mr Ciarka's name on the performers list and to dismiss his appeal.

24. Either party to this appeal may exercise a right of appeal against this decision by virtue of section 11 of the Tribunal and Inquiries Act 1992, by lodging an appeal with the Royal Courts of Justice, The Strand, London, WC2A 2LL, within 28 days of receipt of this decision. Under rule 43 of the 2001 Rules a party may also apply for a review or variation of this decision no later than 14 days after the date on which this decision is sent.

