IN THE FAMILY HEALTH SERVICES APPEALS AUTHORITY No: 14619

IN THE MATTER OF THE NATIONAL HEALTH SERVICE ACT 2006
And in the Matter of the NATIONAL HEALTH SERVICE (PERFORMERS LISTS) REGULATIONS 2004 as amended

Miss Siobhan Goodrich: Legal Chair
Dr Howard Freeman: Professional Member
Mrs Linda Thurlow: General Member

Heard on 27th August 2008

BETWEEN:

Dr Dhanraj Aggarwal

Appellant

AND

South East Essex Primary Care Trust

Respondent

Representation
For the Appellant: Mr Neil Davy, Counsel, instructed by Berrymans Lace Mawer
For the Respondent: Mr Giles Colin, Counsel, instructed by Capsticks

DETERMINATION

Introduction

1. On a hearing on 27th August 2008 this panel heard submissions from Counsel on behalf of both parties in relation to the issue of national disqualification of the Appellant from NHS Performers Lists under section 159 of the National Health Service Act 2006. The Appellant sought an adjournment of the hearing pending the outcome of a fitness to practise hearing before the General Medical Council ("the GMC") and/or pending a decision by the High Court.

The Decision

2. The panel rejected the application for an adjournment and, following further submissions, made an order for national disqualification against the Appellant.

3. When making the order for national disqualification we also stated that we were not of the opinion that the conduct of the performer was such that there is no realistic prospect of a further review being successful if held after two years.

This determination sets out the reasons for these decisions.

The Background

4. In April 2008 we heard evidence over several days in the appeal of Dr Aggarwal against the Respondent's decision of 14th September 2008 to remove his name from the list of general medical practitioner performers maintained by South Essex Primary Care Trust. We reserved our decision. At the request of Counsel for the Appellant we did not hear submissions on the potential order of national disqualification pending our decision on the facts.

5. By written determination (hereafter "the substantive decision") dated 3rd June 2008 we made findings of fact and decided the Dr Aggarwal was unsuitable to be included in list of the

Respondent PCT. We also gave directions to enable a hearing on the issue of national disqualification to be arranged.

6. On 3rd July 2008 the Appellant lodged an appeal against the substantive decision in the High Court.

7. The power to make an order for national disqualification is to be found in Section 159 of the National Health Service Act 2006. It arises whenever the FHSAA dismisses an appeal against removal made by a practitioner. It is freestanding power and is not dependent upon any application by the PCT. The Respondent PCT did, however, lodge an application for an order of national disqualification on 4th July 2008.

8. On 7th July 2008 the Appellant by his solicitors made representations to the FHSAA seeking that the issue of national disqualification be adjourned pending the outcome of the High Court appeal. The panel gave directions. The Appellant lodged a skeleton argument. In summary:
    - he sought an adjournment of the issue of national disqualification pending the outcome of proceedings before the GMC and/or his appeal to the High Court.
    - in the event that his application was rejected he did not contend that an order for national disqualification could not be made.
    - he did, however, make submissions in relation as to the duration of any order made.

The Application for an Adjournment

9. Mr Davy contended that it is inappropriate to consider national disqualification when there is an outstanding appeal which directly challenges the findings made. He accepted that there may be cases where it is appropriate to consider the issue of national disqualification prior to a High Court appeal but that this is not such a case because:

    a. The public interest does not require that an order for national disqualification be made pending the High Court appeal because under existing interim conditions imposed by the GMC Dr Aggarwal is unable to work as a doctor in any position other than as an associate specialist for the South Essex PartnershipTrust. In fact his position at that Trust has been terminated. In the event that he were to be re-employed by that Trust or another there is adequate protection for patients in place because the interim conditions imposed by the GMC also require that he have a chaperone present for all consultations.

    b. The substantive GMC hearing is due to commence on 13th October 2008 and is listed for 10 days. It concerns the same patients and allegations as those found proved by this panel. If the GMC consider that the Appellant should be permitted to practise, the imposition of a national disqualification by the FHSAA pending his High Court appeal will have a significant impact upon the Appellant's ability to practise as a general medical practitioner and by this means to earn his livelihood. He would also become deskilled.

    c. The public interest pending the High Court appeal would be adequately protected because the Appellant would only be permitted to practise if the GMC determined that he was able to do so safely. The issue of National Disqualification would be heard by the FHSAA in the event that the High Court appeal is unsuccessful.

10. Mr Davy also submitted in the alternative that we should consider adjourning the issue of national disqualification at least until after the GMC hearing.

11. We invited Mr Davy to consider the following: if it is correct that an order for national disqualification is the appropriate course the earlier such order is made the better not least because any restriction in relation to review would run from the date of any order made. Mr Davy said that Appellant had taken this into account but nonetheless sought an adjournment pending his appeal.

12. Mr Colin for the PCT opposed the application for an adjournment. In broad terms he relied upon the factors that support the need for the imposition of an order as set out in

Respondent's application. He submitted that the findings made by this panel indicate a pattern of wholly unacceptable and inappropriate behaviour towards vulnerable patients that was in fundamental breach of trust. The Appellant did not and does not accept the findings made and has shown no insight or remorse. In these circumstances (and in any event) the risk to female patients is grave indeed. There are no local or geographical factors that bear upon the Appellant's fundamental unsuitability.

The Decision concerning adjournment

13. We considered all of the material placed before us and the submissions of both counsel. In our view the thrust of the Appellant's submissions seemed to treat the functions of the GMC as the same as those of the FHSAA. Although similar, the functions of each are separate and distinct. At the GMC hearing that panel will make its own findings and will decide whether the Appellant's fitness to practise is impaired. If so, it will decide what action, if any, should be taken in respect of his registration as a medical practitioner**.** The FHSAA have already determined that the Appellant is unsuitable to be included in the NHS performers' list maintained by the Respondent and have directed his removal from that list. We are still seized of whether, in the light of the findings we have made, it is appropriate that the Appellant be permitted to seek to gain entry to the list of other NHS primary care trusts across England and Wales. The issues are, of course, connected but at times it appeared that the Appellant regarded the potential views of the GMC as determinative of his future as an NHS performer delivering primary care services. It is true that a favourable outcome in the forthcoming GMC proceedings could result in the Appellant's continued registration with the GMC which, absent an order for national disqualification, would enable him to apply for inclusion in the lists of other PCTs. The fact is, however, that even the GMC were to reach entirely different conclusions as to the facts alleged in its proceedings, the findings of this panel will still stand unless or until successfully challenged on appeal to the High Court.

14. In our view the real issue is whether it is appropriate to adjourn the issue of national disqualification pending the outcome of High Court appeal. It is accepted that this is a matter of discretion. A hearing date has not been given. It is accepted that it may be many months before an appeal is heard. We were informed that the appeal of **Dhoshi v Southend PCT** was heard a year after the FHSAA decision.

15. If the issue of national disqualification is not decided pending the High Court appeal the Appellant will be at liberty (subject to any current interim or future restrictions imposed by the GMC in relation to his ability to practise as a medical practitioner *at all*) to apply to any PCT for inclusion in its list. As a matter of law any future application the Appellant might make to any PCT for inclusion in its list as a performer would have to be considered on its individual merits. Even if an application is not granted, the process absorbs time and resources. Moreover, any refusal to include entitles the unsuccessful applicant to a right of appeal to this body. On the other hand if it transpires that the Appellant :
    - is permitted to remain registered as a medical practitioner by the GMC *and*
    - is ultimately successful on appeal against the substantive FHSAA decision

    he would, in the period pending appeal, have been deprived of the possibility of gaining entry to the lists of other PCTs and may become further deskilled.

16. Mr Davy accepted that it is appropriate to consider the merits of the grounds of appeal in weighing the competing considerations. The grounds of appeal challenge the weight attached to the evidence of witnesses who gave oral evidence and were extensively cross examined by very experienced counsel. No challenge is made in relation to the directions given. We are mindful that any appeal against findings of fact presents certain challenges.

17. A further matter is relevant. The Appellant does not suggest that an order for national disqualification could not properly be made on the facts we found although he takes issue with any additional restriction being placed upon the review period. Mr Davy accepts that if an order were to be made for national disqualification any appeal against it would very probably be joined with the pending appeal against the substantive decision. In our view it makes sense that this panel makes a decision on national disqualification so that any appeal concerning this can be determined at or immediately following the forthcoming appeal. A decision on national disqualification would enable all possible issues to be authoritatively

determined at one hearing so avoiding multiplicity of appeals and the unnecessary protraction of proceedings which is against the general public interest.

18. Having balanced the various factors we concluded that the public interest in determining the issue of national disqualification far outweighed any harm to the Appellant's interests and we refused the request for an adjournment.

The Decision on National Disqualification

19. We refer to the substantive decision. We found the allegations of patients 1, 2 3 and 4 proved to the extent indicated. The appeal was dismissed and in the light of our findings of fact in relation to the Appellant's conduct towards Ms 1, 2, and 4 we decided that he was unsuitable to be included the performers list of the Respondent PCT. In our determination we expressly stated that the allegations found proved in respect of any *one* of patients 1, 2 and 4 justified removal on the grounds of unsuitability. We directed removal of the Appellant's name.

20. We noted that the Appellant does not accept the findings of fact made. We considered all the circumstances, including the nature and gravity of the incidents, the period of time over which they took place, the vulnerability of the patients concerned and the effect of the Appellant's conduct upon those patients. We also considered the length of time since his conduct and the absence of any further complaint. The core fact is that the sexualised behaviour of the Appellant towards these three patients was in breach of the trust that each was entitled to expect of him.

21. We noted that, albeit in the context of the application for an adjournment, the Appellant submitted that any future risk to patients can be avoided by the imposition of conditions such as those imposed by the GMC on an interim basis requiring the presence of a chaperone. This submission has some bearing on the proportionality of a national disqualification order. Three points arise. At the time that these incidents took place a chaperone *policy* was, in fact, in existence at the relevant surgeries but this did not prevent the sexualised behaviour that we found proved on the evidence before us. Secondly, whilst the GMC have imposed an *interim* order with conditions pending its consideration of the factual allegations and the Appellant's fitness to practise, we have made findings of fact and a *substantive* decision to remove the Appellant's name from the Respondent's list. Thirdly, and more fundamentally, the power vested in the FHSAA to decide to remove contingently upon specified conditions only exists in an "efficiency" case or in a "fraud" case (see Regulation 12). In an "unsuitability" case there is no power to consider contingent removal from a list or impose conditions. Moreover there is no power to impose national disqualification on a contingent basis.

22. We weighed the effects of an order for national disqualification upon the Appellant against the public interest including the protection of patients and the maintenance of confidence in primary care services provided by the NHS. We are fully aware that this order will have profound and long lasting effects upon the Appellant's personal life and will bring to an end his chosen and long career as a general practitioner in the NHS for the foreseeable future. In practical terms and given the Appellant's age it may well bring his career as an NHS general practitioner to an end in the long term (irrespective of the length of the review period). We considered that there are no geographical or location issues involved in the facts we found. In the light of the findings made in our redetermination we considered it reasonable, necessary and proportionate to make an order for national disqualification.

23. Accordingly we directed pursuant to Section 159 of the National Health Service Act 2006 that the Appellant, Dhanraj Aggarwal, (GMC registration number 3645633) is nationally disqualified from inclusion in:

    (i) the supplementary lists prepared by each Primary Care Trust;
    (ii) the lists of persons performing primary care services prepared by each primary Care Trust under Section 91 of the Act and
    (iii) the lists corresponding to the lists mentioned above prepared by each Primary Care Trust and each Local Health Board under or by virtue of the National Health Service (Wales) Act 2006.

The Review period

24. Under Regulation 18A (8) (a) the disqualified practitioner may not apply for a review of national disqualification until two years has elapsed from the date of its imposition. At such a review the FHSAA may confirm or revoke the disqualification. Regulation 18 A is subject to Regulation 19 which provides as follows:
"The period for review shall be the different period specified below instead of the in regulation 18A (8) (a) where the circumstances are that-
(a) on making a decision to impose a national disqualification the FHSAA states that it is of the opinion that the criminal or professional conduct of the performer is such that there is no realistic prospect of a further review being successful, if held within the period specified in regulation 18A (8) (a), in which case the reference to "two years" in that provision shall be a reference to five years…"

25. We were referred to **Swain v Hillman [2001] 1 All ER 91** where in the context of the court's power to summarily dispose of claims in civil proceedings and the overriding objective Lord Woolf MR stated:
"The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, as [Counsel] submits, they direct the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success."

26. The issue at stake for the Appellant is his potential ability to work as a general medical practitioner delivering NHS primary care services after a minimum of two years following national disqualification. In proper context the burdens of entertaining an application for review of national disqualification are not substantial. The Respondent need not be represented although it may wish to be heard. When weighing the practitioner's ability to apply for review at two years (or at some stage before five years) with such factors as the general public interest in the efficient use of tribunal resources and the overall interests of justice we do not consider that it is proportionate to preclude the ability of a performer to seek review at or within two years unless the prospects of success are fanciful. Whilst it is our opinion that the conduct of the Appellant is such that it might be considered improbable that a review at or after two years will be successful, we are not of the opinion that it can properly be said that there are no realistic prospects of success on review at that stage. We do not consider that it would be fair to preclude a review which will be judged on the circumstances and merits then prevailing.

Further Directions

27. We direct, pursuant to Rule 47(1) of the Family Health Services Appeal Authority (Procedure) Rules 2001 that a copy of this decision is sent to the Secretary of State, The National Assembly of Wales, the Scottish Executive, The Northern Ireland Executive and the Registrar of the General Medical Council.

28. The attention of both parties is drawn to the provisions of Rule 43 of the Rules.

29. Finally, in accordance with Rule 42 (5) of the Rules we hereby notify both parties that they may have rights of appeal from this decision under section 11 of the Tribunals and Inquiries Act 1992. Any right of appeal lies to the High Court and either party who wishes to exercise any right of appeal should file any notice of appeal with that court within 28 days from service of this determination.

Dated: 9th October 2009

Siobhan Goodrich-Chair