IN THE FAMILY HEALTH SERVICES APPEAL AUTHORITY

CASE NO 13383

APPEAL ON 11TH JANUARY 2007

DR RAJENDRA SHUKLA
(GMC Registration No 2761958)

Appellant

and

HARROW NHS PRIMARY CARE TRUST

Respondent

Appeal by the Appellant under section 15 of the National Health Service (Performers Lists) Regulations 2004 against the Respondent's decision to remove him from the Performers List

DECISION AND REASONS

PRELIMINARY MATTERS

1. The appeal was heard by Mrs D Shaw (Chairman), Dr H Freeman (professional member) and Dr D Ratzer (member) at the NHS Litigation Authority, Napier House, 24 High Holborn, London.

2. Prior to the hearing all three panel members had signed a declaration confirming they had not had any prior interest or involvement in the appeal which would preclude them from considering the evidence in an independent or impartial manner.

3. The Appellant was represented by Mr David Pittaway QC of Counsel and Mr Will Childs of RadcliffesLeBrasseur Solicitors and the Respondent was represented by Ms Fenella Morris of Counsel and Mr Duncan Gordon-Smith of Capsticks Solicitors.

HISTORY OF THE APPEAL

4. This was an appeal by the Appellant against the Respondent's decision to remove him from the Performers List on the ground of unsuitability under Regulations 10(3) and 10(4)(c) of the NHS (Performers Lists) Regulations 2004 as amended (the Regulations).

5. The case for the Appellant's removal from the Performers List centred on his conviction in April 2004 on two grounds of indecent assault under section 14 of the Sexual Offences Act 1968. The Appellant appealed his conviction.

6. In May 2004 the Respondent confirmed to the Appellant's representatives that it would suspend proposals to remove him from the Performers List pending the outcome of the appeal process.

7. The Appellant's appeal against his conviction was dismissed by the Court of Appeal on 6th April 2006. Leave to appeal to the House of Lords was refused.

8. In July 2006 the Respondent notified the Appellant that it would consider his removal from the Performers List on the ground of unsuitability.

9. Messrs Jordans Solicitors acting for the Appellant on his convictions

subsequently wrote to the Respondent asking it to delay its consideration pending the outcome of an application the Appellant had made in respect of his convictions to the Criminal Cases Review Commission (CCRC) and an application he intended to make to the European Court of Human Rights (ECHR).

10. Both the Appellant and Messrs RadcliffesLeBrasseur (RLB) acting for him on this appeal also wrote to the Respondent asking it to refrain from acting until the Appellant's further appeals had been dealt with and asking for the justification and basis upon which the Respondent considered it was bound to take action at this juncture.

11. On 23rd August 2006 the Respondent notified RLB that it considered the Appellant's appeal was now concluded, that it considered a referral to the CCRC went beyond the original conviction and consideration of whether or not to make an application to the ECHR was speculation which was not relevant to the Respondent's decision. In these circumstances the Respondent's position was that it was proportionate and fair to proceed with consideration of the Appellant's removal from the Performers List. The Respondent noted the removal process included the right of appeal to the Family Health Services Appeal Authority (FHSAA), should the Respondent decide that removal was appropriate.

12. On 29th August 2006 the Respondent considered whether the Appellant should be removed from its Performers List on the ground of unsuitability. The Appellant did not attend. The Respondent decided he should be so removed.
13. On 2nd October 2006 RLB appealed to the FHSAA on behalf of the Appellant on the basis the Respondent erred in both fact and law in proceeding with the decision to remove the Appellant from the Performers List at the above hearing whilst his conviction remained the subject of appeal proceedings which were currently live and ongoing.

THE LAW

14. The relevant regulations are contained in the NHS (Performers Lists) Regulations 2004:

> 10(3) The Primary Care Trust may remove a performer from its performers list where any of the conditions set out in paragraph (4) is satisfied
>
> 10(4)(c) he is unsuitable to be included in that performers list ("an unsuitability case")

15. The criteria for a decision for removal under regulation 10 are set out in regulation 11:

> 11(1) Where a Primary Care Trust is considering whether to remove a performer from its performers list under regulation 10(3) and (4)(c) ("an unsuitability case"), it shall -
>
> (a) consider any information relating to him which it has received in accordance with any provision of regulation 9;
>
> (b) consider any information held by the Secretary of State as to any record about past or current investigations or proceedings involving or related to that performer, which information he shall supply if the Trust so requests; and
>
> (c) in reaching its decision, take into consideration the matters set out in paragraph (2).

(2) The (matters referred to in paragraph (1) include -

(a) the nature of any offence, investigation or incident;

(b) the length of time since any such offence, incident, conviction or investigation;

(c) whether there are other offences, incidents or investigations to be considered;

(d) any action taken or penalty imposed by any licensing or regulatory body, the police or the courts as a result of any such offence, incident or investigation;

(e) the relevance of any offence, incident or investigation to his performing relevant primary services and any likely risk to any patients or to public finances;

(f) whether any offence was a sexual offence to which Part I of the Sexual Offences Act 1997 applies, or if it had been committed in England and Wales, would have applied;

16. The relevant provisions relating to appeal are set out in regulation 15:

15(1) A performer may appeal (by way of redetermination) to the FHSAA against a decision of a Primary Care Trust mentioned in paragraph (2) by giving notice to the FHSAA.

(2) The Primary Care Trust decisions in question are decisions -

(a) to refuse admission to a performers list under regulation 6(1);

(b) to impose a particular condition under regulation 8, or to vary any condition or to impose a different condition under that regulation;

(c) on a review, under regulation 14, of a conditional inclusion under regulation 8;

(d) to remove the performer under regulations 8(2), 10(3) or (6), 12(3)(c) or 15(6)(b);

(e) to impose a particular condition under regulation 12, or to vary any condition or to impose a different condition under that regulation;

(f) on a review, under regulation 14, of a contingent removal under regulation 12; and

(g) which the relevant Part prescribes that the performer may appeal to the FHSAA.

(3) On appeal the FHSAA may make any decision which the Primary Care Trust could have made.

DOCUMENTS AND EVIDENCE CONSIDERED

17. The evidence before the Panel comprised:
    - the Appellant's bundle of scheduled evidence indexed and paginated A1-25
    - the Respondent's bundle of evidence indexed and paginated R1-25
    - the bundle in support of the PCT's Statement of Grounds numbered B2-41

- additional documents numbered 1-196
- further evidence submitted on the day, including the Appellant's curriculum vitae and his application to the ECHR, numbered A26-65
- various other documents submitted during the course of the appeal including correspondence relating to locum reimbursement (now numbered R26-30), a letter dated 7th May 2004 from RLB to the Respondent referring to the appeal against conviction being to the Court of Appeal (now numbered A66-67) and the Minutes of the Respondent's Oral Hearing held on 29th August 2006 (now numbered A68-72).
- In addition the parties filed Skeleton Arguments and submitted written closing submissions following the hearing. The Appellant's closing submissions are numbered A34-41, and further documents submitted with his closing submissions relating to his suspension payments, a record of completion of the general practice assessment questionnaire and a letter dated 25th April 2004 are numbered A42-49. The Respondent's closing submissions are numbered R35-52, and the Appendices referred to therein are numbered R53-61.

It is not necessary to set out the contents of those bundles and documents in detail here.

18. The Appellant did not give evidence on the day but the Panel heard oral evidence from Andrew Morgan, Chief Executive of Harrow PCT, and submissions from the parties' representatives.

SUMMARY OF SUBMISSIONS AND ORAL EVIDENCE

Mr Pittaway on behalf of the Appellant

19. Mr Pittaway indicated his submissions at the appeal would be restricted to the argument that consideration of Dr Shukla's appeal against removal should be delayed or adjourned whilst his applications to the CCRC and the ECHR were processed.

19. If that argument failed he would make submissions questioning whether the convictions themselves were sufficient for the PCT to conclude that Dr Shukla was unsuitable to remain on the Performers List under Regulation 10.

20. It was therefore not relevant for Dr Shukla or anyone else to give evidence.

21. Regulation 15 provided that the FHSAA can make any decision which the PCT could have made. This included deferring a decision on removal pending the outcome of the appeal process as the word "may" in regulation 10(3) indicated a permissive power on the PCT as to whether or not it should go on to consider removal, as opposed to the mandatory power in regulation 10(1) (whereby a PCT "must" remove a performer from its performers list). It was therefore open to the Panel to quash the PCT's decision and delay the decision on removal until the appeal process had been concluded. Alternatively, the Panel had an overriding inherent power to adjourn the proceedings in any event, even though the only reference to adjournment in The Family Health Services Appeal Authority (Procedure) Rules 2001 (the Procedure Rules) was where a party failed to attend.

22. Dr Shukla was suspended from the Performers List shortly after he was charged in the summer of 2003 and his suspension remained in force. He was also suspended by the GMC. Suspension by the PCT was a neutral act but the effect on Dr Shukla was that he could not practice as a GP within his own practice and coupled with the GMC suspension, he was not currently in a position to practise medicine. Mr Pittaway submitted this was sufficient protection for the public until the appeal process was concluded.

23. The course of events to date might leave the Panel a little uneasy. Dr Shukla was convicted in April 2004 of two counts of indecent assault – one each on two girls aged 14 or 15 working in his practice as part-time filing clerks. The indictment contained four counts; two counts (Counts 1 and 3) were of a general allegation of indecent assault, one each against each of the two girls known as N and A and two counts (Counts 2 and 4) were of a specific more serious allegation of indecent assault, again one each against each of the two girls. The jury convicted Dr Shukla on the two unspecific allegations of indecent assault (Counts 1 and 3), acquitted him of the specific allegation of indecent assault against A (Count 2) and failed to reach a verdict on the specific allegation of indecent assault against N resulting in Dr Shukla being discharged from that count (Count 4).

24. It appeared the Court of Appeal did not have the trial judge's sentencing remarks before it because the judges there referred to many occasions when Dr Shukla assaulted N and A, whereas it was evident from RLB's attendance note at the trial *(at pages A27-28)* (the formal transcript having been lost) that the indictment only specified *"a day"* and therefore the sentencing was based on Dr Shukla having indecently assaulted each of the girls on one occasion. Mr Pittaway submitted this put the appeal in context because in these types of cases the court had to decide if the conviction reached the custody threshold, but Dr Shukla was only fined, ordered to pay compensation and costs and placed on the Sex Offenders Register.

25 The Court of Appeal's final judgment differed from its draft judgment in a material respect which formed part of the application to the ECHR. It summarized the evidence heard in the case; the main issue was the credibility of the two girls and the defence case that they had falsified their statements to the police and their evidence to the Crown Court. There was very limited supporting evidence available, other than a discussion one of the girls had with her mother and the other girl had with her friend, who also gave evidence which the trial judge said should be considered with a great deal of caution. In the course of the trial prosecuting counsel cross-examined Dr Shukla on his omissions during his police interview compared with his evidence at the trial, especially in relation to the specific count against A that he had failed to mention there was a handyman present on the morning in question and also that his neighbour had seen him drive off. Defence counsel objected to this line of questioning. The issue then arose as to whether the trial judge should have given a direction as to adverse inference *(The judge's comments are set out at paragraph 47 page B16).*

26. The thrust of the appeal to the Court of Appeal on behalf of Dr Shukla was that the judge should have given an adverse inference direction to the jury and the ECHR application is based on the premise that the trial judge was wrong to encourage the jury to consider the discrepancies between Dr Shukla's evidence in the interview and at the trial in respect of the handyman and the neighbour, which might have encouraged the jury to doubt his credibility, without giving such direction.

27. The Court of Appeal concluded that the trial judge did err in the way in which he summed up the evidence relating to Count 4 and had Dr Shukla been convicted on that count, it would have been concerned about the safety of that conviction, but it did not consider the inadequacy of the direction under Count 4 affected Dr Shukla's credibility so as to affect the safety of the convictions under Counts 1 and 3 *(see paragraphs 53-55 pages B17-18)*.

28. The ECHR application was made in time and lodged by Dr Shukla's solicitors in criminal proceedings on 3rd or 4th January 2007, that is within six months of the Court of Appeal judgement on 7th July 2006.

29. As well as the thrust of the application being that the Court of Appeal's final judgment differed from its draft judgment in a substantial and significant respect, and the failure to give an adverse inference direction, it also related to the application to

the House of Lords on a point of law of general importance and for leave to appeal being refused, leaving no further avenue of appeal from a criminal matter *(see paragraph 14.23 page A53-54).* It also alleged violations of Article 6(1) ECHR.

30. Mr Pittaway submitted he had gone into detail on the Court of Appeal judgement and the ECHR application not because he wanted the Panel to form an opinion on the merits of the ECHR application ,but to enable it to see in this instance that there were matters clearly giving rise to a bona-fide application to the ECHR as to whether Dr Shukla received a fair trial. The Court of Appeal had recognized the trial judge's decision was defective in so far as it failed to consider if an adverse inference direction should have been given and the ECHR application went to the issue of whether credibility on Counts 1 and 3 would have been affected by such a direction. He submitted Counsel for the PCT was wrong to say it was a hopeless application.

31. Mr Pittaway made further submissions in relation to Dr Shukla's application on 28th June 2006 to the CCRC, which can investigate an application and if it considers it is appropriate, refer the matter back to the Court of Appeal leading to the possible quashing of a conviction. The basis of Dr Shukla's application was there is different and fresh evidence *(see page A15)*. No further information had as yet been provided by Dr Shukla's criminal solicitors as full submissions were not worked up until a Case Review Manager was appointed.

32. Both matters were ongoing but the ECHR application was the most important. The papers showed the PCT was content to adjourn consideration of Dr Shukla's removal until the conclusion of the appeal process. Whilst Mr Pittaway conceded the PCT was not bound by that and Mr Morgan (Chief Executive of Harrow PCT) had stated this was up to and including the Court of Appeal and would have included the House of Lords, he submitted the same principle applied pending the outcome of the ECHR application in the circumstances of this case as the facts were sufficiently unusual for the issue of consideration of removal to be deferred.

33. Mr Pittaway was not criticising the PCT in so far as in August 2006 it did not have the documents before it the Panel now had, including the ECHR application setting out why Dr Shukla did not receive a fair trial. That was why this appeal to defer or adjourn consideration of removal had considerable force. He conceded the ECHR application had been served at the last moment and could not say why it had not been filed at an earlier stage, but submitted this should not be held against Dr Shukla in these proceedings.

34. Dr Shukla's curriculum vitae (CV) *(pages A32-43)* showed he had been a full-time principal GP at Harrow PCT since 1992. He was a 59 year old single-handed practitioner and had been a doctor for 36 years. The PCT had said it was necessary for public confidence for the Panel to confirm its decision to remove him but Mr Pittaway submitted this had to be balanced against Dr Shukla's interests and in that balancing exercise, with safeguards in place, the balance was in favour of postponing or deferring removal. If Dr Shukla was now removed he faced the loss of his practice built up over ten years because it was inevitable that the PCT would then re-organise the practice so patients were either transferred to other practices or the practice would be tendered under GMS or other contract, with the result that if Dr Shukla's application to the ECHR succeeded he would have no possibility of being able to return to his practice. There was no proper basis on which it could be argued that delaying the appeal would discourage patients from seeking treatment. Dr Shukla had been suspended from the Performers List and by the GMC since summer 2003 and had since been unable to practise as a doctor. Mr Pittaway contended there was therefore adequate protection in place pending the outcome of the appeals process and whilst there might be circumstances in which the offences of which Dr Shukla had been convicted were so serious there might be a proper reason for pursuing an appeal expeditiously, his convictions were not for abuse of the doctor-patient

relationship, the trial judge's sentencing remarks having referred to "minor but unpleasant behaviour".

35. Dr Shukla's practice had been run by locums since 2003. Mr Morgan had not adduced any evidence that the service from the locums was deficient in any way. Mr Pittaway submitted the reverse was true and referred to the Patients Forum letter dated 26th August 2006 in support of Dr Shukla with many signatures attached *(pages A44-45)*.

36. Any changes in the contractual arrangements following the removal of Dr Shukla from the Performers List would require consultation under section 11 of the Health and Social Care Act 2001; this would be costly and time-consuming and might prove wholly unnecessary if the ECHR application succeeded. Mr Morgan's Witness Statement *(pages R8-13)* set out the financial situation and Mr Pittaway accepted there would be some financial downside to the PCT but contended this was considerably reduced from July 2006 before which the PCT was paying directly for locums, and it had to be balanced against the alternative of effectively ending Dr Shukla's career as although Regulation 5 provided for re-admission to the Performers List without a full application, that would be of little use to Dr Shukla if his practice ceased to exist or was taken over.

37. If the Panel was unwilling to put the matter off indefinitely Mr Pittaway submitted it could postpone it for a fixed period of say, six months, when it would be incumbent upon Dr Shukla to bring the Panel up to date with a progress report on his two applications. If his criminal solicitors were not processing the case as expeditiously as they should, it would then be open to the Panel to consider his appeal.

38. <u>In response to questions</u> – Mr Pittaway confirmed that the locums were employed and paid for directly by the PCT until July 2006, since when they had been paid for by Dr Shukla. There were four locums, each of whom worked at the practice on a fixed day. Some of the locums had been there for over a year and a female locum had worked there for several years. It was Dr Shukla's intention that these arrangements should continue and Mrs Shukla should continue as practice Manager.

39. The reason for the delay in Dr Shukla's criminal solicitors lodging the ECHR application appeared to be because when the decision was taken to instruct Counsel after leave to appeal to the House of Lords was refused, Counsel was away for two months. He was asked to advise on the merits of an appeal and his workload was such that the draft application was not completed until the Xmas/New Year break despite Dr Shukla chasing for it.

40. The fresh evidence behind the CCRC application came from Dr Shukla's bookkeeper, who had made a written note in her books at the time of the girls' dismissal that the girls had been fired after Dr Shukla had given them two oral warnings. It was the only contemporaneous record available about their dismissal. That evidence had been lodged with Dr Shukla's criminal solicitors and the bookkeeper had given them a written statement. This evidence had not been available before as the bookkeeper had been away on sick leave for a considerable period of time.

<u>Ms Morris on behalf of the Respondent</u>

41. The PCT submitted the Panel had no power to adjourn or defer the decision whether or not to remove Dr Shukla from the Performers List. If the PCT was wrong about this and there was some power, the PCT contended a fair balance would be struck by upholding the decision to remove and not by adjourning that decision.

42. The legislation behind the PCT's first submission was contained in The Family Health Services Appeal Authority (Procedure) Rules 2001, which provided

that the Panel has the power to do anything the PCT has the power to do. There was an express power to give directions under Rule 32 but this was not the same as a power to adjourn a decision of the PCT. A Panel could adjourn if, for example, someone fell ill during a hearing or if particular information was required, but Ms Morris submitted such a power of adjournment was distinct from a power to adjourn a PCT decision as the former was procedural whereas the latter was substantive. There was a procedural power to adjourn if a party failed to attend under Rule 40 and Rule 44 set out the miscellaneous powers of a Panel, which did not include the power to adjourn a PCT decision. The Panel was not a court of law but a statutory body with powers conferred on it by Parliament and Ms Morris submitted there was nothing in the Procedure Rules to allow it to adjourn the decision whether or not to remove.

43. The power which a Panel had was to do anything a PCT could do and Regulation 7 of the NHS (Performers Lists) Regulations 2004 was the only place where there was a power to defer expressly conferred on the PCT and it related to inclusion in the Performers List. Ms Morris submitted this was highly material because it showed there was only power to do what was expressly conferred by Parliament and there was no other power of referral or deferment conferred on the PCT. She submitted Parliament had expressly decided not to confer such a power of deferment elsewhere because it plainly believed it was undesirable for a PCT not to move promptly in instances of suspension or removal. In the Department of Health Guidance it was stated suspensions should last no longer than necessary and the baseline period was six months *(paragraph 18.4 page 22)*.

44. Regulation 10 covered removal. There was a mandatory power to remove under Regulation 10(1), a discretionary power to remove under Regulation 10(3) and Regulation 10(4)(c) covered the unsuitability ground. Mr Pittaway had submitted a power to defer or adjourn must be construed from this Regulation but Ms Morris contended no such inherent power was conferred by it because whilst there was express power to defer inclusions there was no such power to defer suspensions or removals and this was also the case in the Procedure Rules.

45. This Panel today had the power to put itself in the position of the PCT and to decide if Dr Shukla's convictions were sufficient evidence for it to make a decision on the ground of unsuitability. Mr Pittaway's arguments on an inherent discretion to adjourn in Regulation 10(3) were very contrived.

46. Ms Morris further submitted there were two key sets of powers under the Regulations; one in relation to suspension and one in relation to removal. The PCT first suspended Dr Shukla and then initiated the removal process. Suspension was governed by Regulation 13, with power under Regulation 13(1)(b) to extend the period of suspension if it was awaiting a court decision from anywhere in the world. The PCT had exercised this power whilst it awaited the outcome of Dr Shukla's appeal to the Court of Appeal. When this failed the PCT then started the removal process. Ms Morris submitted the PCT could have continued the suspension but that was a separate decision to considering removal and Dr Shukla could only ask the PCT to consider the extension of his suspension if the Panel struck out its decision to remove him. He was not appealing the PCT's decision to terminate his suspension but its decision to remove him, and there was no right of appeal under Rule 15 against a Regulation 13 decision to suspend. Nor was there a power to contingently remove under Regulation 12 in an unsuitability case. Under Regulation 15 the Panel only had the power to put itself in the PCT's shoes in a Regulation 10 removal application and either to say Dr Shukla was unsuitable or that it was not appropriate, balancing all the considerations, for him to be removed.

47. In any event, a six month adjournment would not assist because the ECHR process currently took about five years. The Panel would have to decide if a doctor could remain suspended for a total of eight or nine years whilst he was pursuing an ECHR application, his appeal having being rejected by the highest

courts domestically. Even if the PCT had given Dr Shukla a legitimate expectation it would wait until the end of the appeal process whenever that might be, it was open to the Panel to override that.

Andrew Morgan's evidence

48. Mr Morgan's Witness Statement *(pages R8-13)* set out the financial arrangements during Dr Shukla's suspension. Suspension was a neutral act so the PCT wanted to protect Dr Shukla's income in accordance with the Regulations and also to provide locum cover to his practice.

49. From June 2003 to July 2006 the PCT paid the locums direct and then changed the arrangement to reimbursing Dr Shukla up to £978.91 per week for him paying the locums. During the period of his suspension Dr Shukla was being paid 90% of his normal monthly drawings.

49. From June 2003 to July 2006 the PCT paid the locums direct and then changed the arrangement to reimbursing Dr Shukla up to £978.91 per week and Dr Shukla took responsibility for paying the locums.. During the period of his suspension Dr Shukla was being paid 90% of his normal monthly drawings (i.e. what would be considered as his personal income) and the practice continued to receive its GMS contractual payments.

50. Mr Morgan had seen correspondence indicating that the locums had not been paid since the end of July 2006 and the PCT was concerned whether they would continue to work for the practice and provide a service to Dr Shukla's patients.

51. The consequence of these financial arrangements was that the money paid to the locums could not be used to cover other things within the PCT, which was economising on various items and had to consider how tenable it was to continue paying locum costs ad infinitum.

52. The PCT also had to continue patient welfare; its concern was to provide a settled practice. It did not doubt the commitment or calibre of the locums but it was concerned the practice was now manned by a number of locums with all the implications that had for patient care, leadership of the practice, development issues such as practice-based development, clinical protocols etc. Patients had written to the PCT asking when the uncertainty would be resolved, which called into question the reputation of the practice and the PCT. If Dr Shukla's appeal was to take several more years it would cause the PCT considerable unease and the indefinite continuation of the situation would not be in the patients' best interests.

53. In response to questions – Mr Morgan confirmed he had not been aware of a meeting held on 27th July 2006 between Julie Taylor (Head of Contracting at the PCT) and Dr Shukla, in which Dr Shukla was informed that the weekly payment of £978.91 was not available for locums and was for doctors on maternity leave or that it was agreed Dr Shukla would submit his last year's accounts to the PCT so it could calculate 90% of his income. Further, he did not know that Dr Shukla had submitted his accounts and had written to Julie Taylor on 13th November 2006 *(see pages R28-29)* setting out his understanding of the position but had not received any drawings from the PCT since July 2006 although he had received his GMS contractual payments of £12,000 per month, with the result Dr Shukla was not in a position to pay the locums. Mr Morgan accepted that Dr Shukla's annual income for a list of 2,500 patients should be approximately £250,000, that is £20,000 per month, but he did not know why he was only receiving £12,000 per month.

54. The current approximate additional annual cost to the PCT of providing locums as compared to Dr Shukla running the practice was £50,000.

55. Following an adjournment to enable Mr Morgan to speak to Julie Taylor he submitted she did not recognise the scenario (in paragraph 53 above).

56. As well as the PCT having received patients' complaints about the situation at the practice, Mr Morgan was aware there had also been letters of support such as the Patients Forum letter *(pages A44-45)* and that other patients had written requesting Dr Shukla be reinstated.

57. He considered the offences of indecent assault committed at the practice against people over whom Dr Shukla held a position of power and who were vulnerable because of their age and because they were employees of the practice to be very serious

58. Notwithstanding the trial judge's sentencing remarks *(page A30 –*"[*these were] 2 individual incidences of minor but unpleasant behaviour aggravated by the fact that the girls were employees where they felt safe and trusted [Dr Shukla] and that, further, they were girls under the age of 16")* Mr Morgan still believed that where a GP was dealing with vulnerable people in a surgery where he had power and responsibility over people coming to see him, such offences were none the less serious as the trial judge had gone on to say, because they went to the heart of public confidence in a public servant and to the heart of the doctor-patient relationship where a doctor was seeing vulnerable and sometimes emotional people.

59. Dr Shukla had been on the PCT's list for many years and there had been no previous complaints about him.

60. Whilst Dr Shukla remained on the PCT's List it had not made any plans for his practice; it would have the normal range of options. If his applications ultimately succeeded the PCT would have to look at the merits of the case at the time; the possibility of him returning to his practice remained an option although Mr Morgan did not know how this would be achieved.

61. The PCT had changed the funding arrangements in July 2006 because they went way beyond what it would offer other practices when a GP was absent. The PCT had been looking at what it was doing on all fronts and it could not afford to continue.

62. The list size had dropped by about 200 patients over the totality of the suspension. This was similar to the list turnover in neighbouring practices; there was no great patient dissatisfaction on that level.

63. The locums broadly covered the same surgery hours as Dr Shukla had done but there were several doctors rather than one doctor. They were long-term locums known to the PCT and other GPs.

64. The 90% of his drawings Dr Shukla was being paid represented 90% of his profit based on his previous year's income. He was not expected to pay the practice expenses out of that sum; the PCT paid expenses such as rent.

FINDINGS, REASONS AND DECISIONS

65. The Panel considered all the documentary evidence, the oral evidence and the submissions of the parties.

66. The Panel finds that there is no factual dispute between the parties about the sequence of events leading up to the Respondent's decision to remove the Appellant from its Performers List and the Appellant's subsequent appeal against

that decision. A summary of those events is set out in paragraphs 4 to 13 above.

67. The Panel first considered the submissions from the parties relating to whether or not it could defer consideration of the removal of the Appellant from the Respondent's Performers List until the determination of his applications to the ECHR and the CCRC.

68. The Panel noted the submissions on behalf of Dr Shukla that Regulation 15 allowed it to make any decision which the PCT could have made and this included deferring a decision on removal pending the outcome of the appeal process as the word "may" in regulation 10(3) indicated a permissive power on the PCT as to whether or not it should go on to consider removal, as opposed to the mandatory power in regulation 10(1) whereby a PCT must remove a performer from its performers list. It was therefore open to the Panel to quash the PCT's decision and delay the decision on removal until the appeal process had been concluded. Alternatively, the Panel had an overriding inherent power to adjourn the proceedings in any event, even though the only reference to adjournment in the Procedure Rules was where a party failed to attend.

69. It was also submitted that if the Panel was unwilling to put the matter off indefinitely it could postpone it for a fixed period of say, six months, when it would be incumbent upon Dr Shukla to bring the Panel up to date with a progress report on his two applications and if his criminal solicitors were not processing the case as expeditiously as they should, it would then be open to the Panel to consider his appeal.

70. Further submissions were made in relation to Dr Shukla's application to the CCRC, although it was acknowledged the ECHR application was the most important.

71. In closing submissions it was submitted that the Procedure Rules expressly provide for *"the just handling of the proceedings"* (Rule 41(2)), which would permit the Panel to exercise its discretion to adjourn proceedings. It was open to the Panel to reach the same decision that the PCT could have made, namely that no decision on removal should be reached until the result of the applications to the ECHR and/or the CCRC were known..

72. It was further submitted that as the PCT had been content to adjourn consideration of Dr Shukla's removal until the conclusion of the appeal process, the same principle applied pending the outcome of the ECHR application in the circumstances of this case, as the facts were sufficiently unusual for the issue of consideration of removal to be deferred. The PCT had suspended Dr Shukla under Regulation 13(1)(b) *"while it wait[ed] for a decision affecting him of a court anywhere in the world or of a licensing or regulatory body"* and it had gone back on its position when it decided to consider Dr Shukla's removal following dismissal by the Court of Appeal of the appeal against his convictions.

73. It was submitted on behalf of the PCT that the Panel had no power to adjourn or defer the decision whether or not to remove Dr Shukla from the Performers List. The Procedure Rules conferred power on the FHSAA to do anything the PCT had the power to do, but where no power to adjourn had been conferred by Parliament, there was no inherent power to adjourn for a statutory body such as the FHSAA. The only express power similar to a power of adjournment in the Regulations was a power to defer a decision in relation to an application for inclusion (Regulation 7) and the only express power to adjourn in the Procedure Rules arose where a party failed to attend or was not represented (Rule 40(1)). The fact Parliament had conferred these express powers of adjournment indicated that it intended there should be no other powers of adjournment of a more general type. Likewise, the "miscellaneous powers" conferred on the Panel by Rule 44 neither conferred a power

to adjourn or a power from which a power to adjourn could be implied. The PCT accepted a Panel could adjourn if, for example, someone fell ill during a hearing or if particular information was required, but submitted such a power of adjournment was distinct from a power to adjourn a PCT decision as the former was procedural whereas the latter was substantive.

74. It was further submitted that a six month adjournment would not assist because the ECHR process currently took about five years and the Panel would have to decide if a doctor could remain suspended for a total of eight or nine years whilst he was pursuing an ECHR application, his appeal having being rejected by the highest courts domestically. Even if the PCT had given Dr Shukla a legitimate expectation it would wait until the end of the appeal process whenever that might be, it was open to the Panel to override that.

75. In closing submissions, given the likely timescales of years for both of Dr Shukla's applications, Counsel for the PCT questioned the utility of a six month adjournment, since it was highly unlikely that any significant information about the merits of either application would then be available and all the demerits of the existing situation would remain. Counsel submitted the purpose of Dr Shukla's appeal appeared to be merely to retain for a while longer the financial benefits of suspension, without any realistic prospect of being able to persuade the PCT to reach a decision materially different from that which it reached in 2006.

76. Having carefully considered all of the submissions on this point, the Panel considers that in allowing it to *"conduct the hearing in such manner as it considers most suitable to the clarification of the issues before it and generally to the just handling of the proceedings",* Rule 41(2) would permit it to adjourn or defer the appeal in the particular circumstances of this case if it considered it appropriate to do so.

77. However, mindful of the time which has already elapsed since the original conviction in April 2004 and the fact that the PCT was not bound to delay consideration of removal pending the outcome of the appeal process, the Panel considers the PCT demonstrated the utmost fairness in its handling of Dr Shukla in its willingness to wait until he had exhausted the domestic appeal process. The Panel notes Mr Morgan's evidence that the PCT was content to adjourn consideration of Dr Shukla's removal until the conclusion of the appeal process, which was up to and including the Court of Appeal (leave to appeal to the House of Lords having been refused by the Court of Appeal) and the acknowledgement by Counsel for Dr Shukla that the PCT was not bound by that. The Panel further notes and accepts the submission of Counsel for the PCT that even if the PCT had given Dr Shukla a legitimate expectation it would wait until the end of the appeal process whenever that might be (which the Panel does not necessarily accept in relation to the outstanding applications to the ECHR and the CCRC), it is open to the Panel to override that. Accordingly, the Panel considers it should determine Dr Shukla's appeal without further delay

78. The Panel went on to consider whether Dr Shukla was suitable to remain on the PCT's Performers List and, if he was unsuitable, whether the discretion not to remove him should be exercised?

79. Counsel for Dr Shukla made submissions questioning whether the convictions themselves were sufficient for the PCT to conclude that Dr Shukla was unsuitable to remain on the Performers List under Regulation 10. These are set out in paragraphs 23 to 30 above. However, in closing submissions it was conceded that if the Panel rejected the primary submissions relating to the adjournment of the hearing pending the outcome of the outstanding applications to the ECHR and the CCRC, then no submissions were made as to Dr Shukla's suitability to remain on the list.

80. The Panel heard evidence from Mr Morgan that he considered the offences of indecent assault committed at the practice against people over whom Dr Shukla held a position of power and who were vulnerable because of their age and because they were employees of the practice to be very serious. Notwithstanding the trial judge's sentencing remarks, Mr Morgan still believed that where a GP was dealing with vulnerable people in a surgery where he had power and responsibility over people coming to see him, such offences were none the less serious as the trial judge had gone on to say, because they went to the heart of public confidence in a public servant and to the heart of the doctor-patient relationship where a doctor was seeing vulnerable and sometimes emotional people.

81. He also gave evidence that the consequence of the financial arrangements during Dr Shukla's suspension was that the money paid to the locums could not be used to cover other things within the PCT, which was economising on various items and had to consider how tenable it was to continue paying locum costs ad infinitum. Furthermore, the PCT needed to provide a settled practice and whilst it did not doubt the commitment or calibre of the locums, it was concerned the practice was now manned by a number of locums with all the implications that had for public confidence, patient care, leadership of the practice, development issues such as practice-based development, clinical protocols etc.

82. In closing submissions Counsel for the PCT contended that by reason of his convictions, Dr Shukla could be nothing other than unsuitable. Counsel pointed out that it appeared to have been conceded on Dr Shukla's behalf that if the PCT was entitled to rely on his convictions then it could not be argued that he was suitable to remain on the Performers List. He made further submissions as to unsuitability on the basis of Dr Shukla being on the Sex Offenders Register by reason of his convictions, and contended that the argument that Dr Shukla's offences were not as serious as, say, rape, did not mean they were not significant in the context of deciding on his suitability to remain on the Performers List. He contended there were inevitably additional considerations when assessing a person's suitability for professional practice as against his liability to a custodial sentence.

83. Counsel for the PCT further contended that the balance between the interests of Dr Shukla remaining on the Performers List and continuing to be paid on the basis of suspension did not outweigh the detriment to the NHS and the public interest generally of his continuing to be suspended rather than removed. In summary, the cost to the NHS of Dr Shukla remaining suspended was approximately £90.000 per annum, the use of locums over a long period was undesirable in terms of continuity of care, health development and leadership, there was damage to public confidence in the NHS, for example, because of the uncertainty over the practice's future and removal did not prevent Dr Shukla working as a doctor in another capacity, and if his applications to the CCRC or ECHR were successful, he could apply to return to the Performers List on an expedited basis.

84. Counsel for Dr Shukla countered this had to be balanced against Dr Shukla's interests and in that balancing exercise, with safeguards in place, the balance was in favour of postponing or deferring removal. If Dr Shukla was now removed he faced the loss of his practice built up over ten years because it was inevitable that the PCT would then re-organise the practice so patients were either transferred to other practices or the practice would be tendered under GMS or other contract, with the result that if either of Dr Shukla's applications to the ECHR and/or the CCRC succeeded he would have no possibility of being able to return to his practice.

85. He also submitted that if Dr Shukla was removed, then expedited re-admission

would not enable him to return to his practice. It was clear from Mr Morgan's evidence that the PCT had made no decision as to whether the practice should be retained in its present form or the type of contract that would be put out to tender. The financial detriment to the PCT in continuing to pay Dr Shukla during his suspension had to be set against the cost involved in tendering the contract for the same or a revised service.

86. The Panel notes they have a discretion under paragraph 10(3) whether or not to remove Dr Shukla and in considering whether or not to remove him they are obliged to take into consideration the matters set out in Regulations 11(1) and (2). These criteria include, inter alia, the nature of any offence, the penalty imposed, the relevance of any offence to the practitioner's performance of primary relevant services and the likely risk to any patients ~~and~~ or to public finances and whether any offence was a sexual offence to which Part I of the Sexual Offences Act 1997 applies.

87. The Panel heard evidence of the effect on Dr Shukla of removal from the list. In addition both parties gave evidence relating to the cost of supplying locums for the practice which the Panel did not find entirely clear or conclusive, despite further explanations in closing submissions. Moreover, at the hearing Counsel for Dr Shukla took the Panel behind the face of the convictions and submitted the course of events might leave the Panel a little uneasy. However, the Panel consider they should not be deflected from the issue the subject of this appeal, which is the consideration of Dr Shukla's suitability and removal on the basis of his convictions for indecent assault.

88. The Panel notes Counsel for Dr Shukla appears to have conceded in closing submissions that if the PCT was entitled to rely on his convictions then it could not be argued that he was suitable to remain on the Performers List. The Panel considers this must be the correct position; it would be improper for the Panel to go behind the convictions and consider the merits of the decisions of the Crown Court and the Court of Appeal. This being the case, the Panel is persuaded by Mr Morgan's submissions relating to suitability by reason of his convictions for indecent assault and on the basis of Dr Shukla being on the Sex Offenders Register. Notwithstanding the consequential financial and professional effects on Dr Shukla of removal from the Performers List, the Panel concludes that he is unsuitable for inclusion in that List and is not persuaded that its discretion to remove him should not be exercised.

NATIONAL DISQUALIFICATION

89. Counsel for the PCT submitted this was a case in which national disqualification was appropriate and if the Panel accepted Dr Shukla should be removed from the Performers List on the grounds of his convictions, and the pending applications did not alter that, then there was no reason for him to practice in the same capacity elsewhere.

90. Counsel for Dr Shukla submitted that national disqualification was unnecessary in this case as Dr Shukla had been suspended by the GMC Interim Orders Panel in June 2004 following his conviction in April 2004 and he remained suspended pending the outcome of his referral to the Fitness to Practise Panel.

91. The Panel notes the grounds for removal are not essentially local and accordingly, given it is satisfied the nature of Dr Shukla's convictions and his placement on the Sex Offenders Register render him unsuitable to be on the

PCT's List, consider these reasons are equally relevant to any other List.

92. The Panel is aware of the effect of an Order for National Disqualification upon Dr Shukla and the practical effect of it preventing him pursuing his career as a general practitioner within the NHS for a minimum of two years, but considers an Order for National Disqualification to be reasonable, necessary and proportionate. However, this is not a case in which the Panel considers that it should make an Order under Regulation 19 that an application for review cannot be made for five years.

SUMMARY

93. The Appellant's appeal against removal from the Performers List is dismissed.

94. The Appellant is unsuitable to be included in the Respondent's Performers List and should be removed forthwith.

95. The Appellant is to be nationally disqualified from inclusion in all Lists prepared by all Primary Care Trusts and all Health Authorities including but not limited to those referred to in Section 49N(1) of the National Health Service Act 1977 as amended.

.

APPEAL.

96. Finally, in accordance with Rule 42(5) of the Procedure Rules, the Panel hereby notifies the parties that they have the right to appeal this decision under and by virtue of section 11 of the Tribunals and Inquiries Act 1992 by lodging notice of appeal in the Royal Courts of Justice, The Strand, London WC2A 2LL within 28 days from receipt of this decision.

Dated this day of 2007

……
Debra R Shaw
Chairman of the Appeal Panel