

IN THE FAMILY HEALTH SERVICES APPEAL AUTHORITY

Case No: 15163

Panel

Mrs D Shaw - Chairman

Dr S Ariyanayagam - Professional Member

Miss K Wortham - Member

BETWEEN

DR RAHUL THAKUR

(GMC NO: 60472)

Appellant

And

NORFOLK PRIMARY CARE TRUST

Respondent

Appeal by Dr Rahul Thakur against refusal to include on the Performers List

DECISION WITH REASONS

The Appeal

1. This is an appeal by Dr Rahul Thakur (“the Appellant”) against the refusal of Norfolk Primary Care Trust (“the PCT”) to include him on its Performers List under section 6(1)(a) of the National Health Service (Performers Lists) Regulations 2004 (as amended) and associated regulations (“the Regulations”).

History

2. Dr Thakur qualified as a doctor in 1999 in New Delhi. He came to the United Kingdom in June 2002, the GMC gave him limited registration in May 2003, and since October 2007 he has had full registration.
3. In November 2004 Dr Thakur was convicted for driving while being under the influence of alcohol. He was fined a fixed sum and banned from driving for 15 months. Six weeks before his ban was due to end, on New Year’s Eve, Dr Thakur, confronted with a difficult family situation, felt compelled to breach the ban. He was caught driving while disqualified and without insurance, and this led to his driving ban being extended by 3 more months. He was also ordered to

undertake 100 hours of unpaid community service. Dr Thakur has not committed any other driving offence and he has no other criminal conviction.

4. Dr Thakur's convictions were referred to the General Medical Council (GMC) and the matter came before a Fitness to Practise (FTP) Panel, which determined that Dr Thakur's fitness to practise was impaired by reason of his convictions. The FTP Panel also found that his decision to drive while disqualified was:

“a spontaneous reaction to exceptional circumstances and a naïve error of judgment due to exceptionally strong cultural pressures” and stated that *“The Panel believes that you have expressed remorse for your actions at all stages and that this has been genuine and deeply felt.”*

It also noted that there had been no harm to patients and the behaviour of Dr Thakur was not incompatible with continuing to be a registered doctor.

5. In considering the appropriate sanction to apply the FTP Panel commented:

“The Panel considers its finding that your fitness to practise is impaired is in itself a substantial signal to the public, the profession and to you that this type of behaviour is unacceptable. It will remain on your record indefinitely and you will have to declare your impairment each time you apply for any position for which medical registration is required. In addition you will always have to declare your convictions for the driving offences when applying for medical positions in the NHS.”

6. The FTP Panel went on to conclude that the consequences of its finding of impairment, by reason of Dr Thakur's convictions, in this case was sufficient both to maintain public confidence in the profession and to declare and uphold proper standards of conduct and behaviour. Taking into account the mitigating factors in the case, it concluded that to impose conditions or to suspend registration for what it considered to have been a foolish and irresponsible error of judgement would be disproportionate and overly punitive, and determined that the only appropriate and proportionate conclusion was to make no direction against Dr Thakur's registration.
7. In February 2008, Dr Thakur applied for a place on the GP Speciality Training rotation via the East of England Deanery. In the application he declared both of his convictions as well as the GMC finding of impaired Fitness to Practise.
8. Dr Thakur was successful in his application and was assigned to commence GP raining in a practice within the Respondent PCT. Before he could commence this, he was required to register his name on the PCT's Performers List. The declaration made while seeking this registration is the issue to which this appeal relates.
9. The relevant questions and the answers provided by Dr Thakur on the PCT application form to the PCT, dated 18th November 2008, are as follows:

- (1) “Have you any criminal convictions in the UK?” Dr Thakur replied ‘Yes’ to this.

- (2) “Have you ever been the subject of an investigation by any licensing

regulatory or any other body into your professional conduct or performance ... where the finding was adverse?" Dr Thakur replied 'No' to this.

- a. On April 7th 2009, some five and half months after Dr Thakur had commenced training, he received a letter from the PCT. Mr Martin Payne, the Clinical Governance Manager of the PCT, wrote:

"In your application you indicated that you had not been the subject of an investigation by a regulatory body into your professional conduct. However, the GMC has confirmed that you were the subject of a Fitness to Practise Panel Hearing on 15th September 2006, when it was determined that your fitness to practice was impaired because of the conviction.... This false declaration seriously prejudices your application to join the Norfolk Performers List."

11. In a further letter dated 8th April 2009 Mr Payne wrote to say that he had discussed the situation with the PCT's Medical Director and in view of Dr Thakur's false declaration about an investigation by the GMC, and the previous decision of the GMC that his fitness to practise was impaired by his conviction, the PCT intended to refuse his application. However, before a final decision was taken, he indicated Dr Thakur would have an opportunity to explain any circumstances regarding the application that he wished the PCT to take into consideration.

13. Dr Thakur met with the PCT's Medical Director and Mr Payne on 9th April 2009. Mr Payne's notes state:

"The serious concern that the PCT had resulting from Dr Thakur's application was that he had made a false declaration on the application form as he had failed to declare the Fitness to Practise investigation that had taken place in September 2006. The GMC's investigation had determined that his actions that had led to the convictions had fallen short of the standards of behaviour expected of doctors. The subsequent false declaration had caused the PCT to doubt Dr Thakur's honesty and integrity, and to consider that he was unsuitable to be included on the List."

14. Although Dr Thakur said that it had been a misunderstanding on his part and that he had provided details of his convictions and the Fitness to Practise hearing when applying to join the Deanery's training scheme, because the wording of the PCT form did not specifically mention a Fitness to Practise hearing, he had not felt he was required to declare it. The form had referred to an investigation into his professional conduct or performance and as there had never been any question about his professional conduct or clinical abilities, he had not felt the form required him to declare the GMC investigation. He had not sought to withhold the information, and when completing other forms which specifically mentioned a Fitness to Practise hearing, he had declared it.

15. Notwithstanding Dr Thakur's explanation, the PCT's Chief Executive wrote to him on 24th April 2009 rejecting his application. She indicated that whilst she had taken account of Dr Thakur's explanation, she had also taken account of the direction from the GMC that he was under a responsibility to declare his impairment and concluded that the wording on the application form to join the PCT's Performers' List was clear and unambiguous, and therefore Dr Thakur had made a false declaration by failing to declare the Fitness to Practise investigation by the GMC. She went on to say that she considered the false declaration raised serious concerns about Dr Thakur's honesty, trustworthiness and integrity, which are part of the essential qualities required of GPs and that she had concluded that these concerns, taken into consideration with the previous determination by the GMC, made him unsuitable to be included on the PCT's Medical Performers List.

16. On this basis the PCT declined Dr Thakur's application and consequently, his training was suspended.

Grounds of Appeal

17. Dr Thakur appealed on the following grounds:

- (i) The PCT erred in law in assuming that Dr Thakur was subject of an *investigation* by a regulatory body.
- (ii) If the Fitness to Practise Hearing was an investigation then the assumption that the investigation was into Dr Thakur's "*professional conduct*" is an error.
- (iii) Dr Thakur's response in the negative was the only reasonable response to the query and any other response would have been inaccurate; alternatively, Dr Thakur's was one of the reasonable responses possible and was not inaccurate. The PCT erred in law in regarding the response as inaccurate.
- (iv) The PCT erred in law in concluding that the Fitness to Practise Panel directed that Dr Thakur would have to declare the finding of impairment of fitness to practise each time he applied for a position for which medical registration was required.

- (v) The PCT regarded the response to the query as misleading (the issue of honesty and integrity were considered) Even if the response (and therefore the declaration) was inaccurate, the PCT failed to distinguish between a response that may be inadvertently inaccurate and a response that is false and consequently misleading, and therefore erred in law.
- (vi) In finding that Dr Thakur intended to mislead, the PCT has failed to establish the element of deceit. This is an error of law.
- (vii) In all the circumstances the sanction imposed by the PCT is disproportionate, particularly if the PCT did not regard the response as misleading.

PCT's response to appeal application

18. (i) The GMC undertook an enquiry into the circumstances of Dr Thakur's criminal convictions, by means of the Fitness to Practise hearing, and this constituted an investigation.

(ii) The wording of the PCT's application form was taken from the Regulations. Paragraph 4(4) requires an applicant to declare if he has been the subject of any investigation into his professional conduct by any licensing, regulatory or other body, where the outcome was adverse. The PCT accepted the term "professional conduct" was open to investigation. However, it contended that the GMC investigation was concerned with the behaviour and conduct of Dr Thakur, which was judged to have been inconsistent with the conduct expected of the medical profession, as judged against the GMC's Good Medical Practice. The PCT therefore contended that the GMC investigation was concerned with Dr Thakur's professional conduct, pointing out it had stated in its decision that:

"The Panel considers that your conduct, in driving whilst disqualified, falls below the proper standards of conduct and behaviour the public is entitled to expect from a registered medical practitioner."

(iii) Given the above, the PCT contended that Dr Thakur was under an obligation to inform it that he had been the subject of a FTP Panel hearing, as this was an investigation into his professional conduct by a regulatory body where the outcome was adverse.

(iv) The PCT took account of the comments of the Chair of the FTP hearing. Whilst the PCT accepted there were no sanctions imposed by the FTP Panel and the Chair's direction to Dr Thakur to declare the impairment each time he applied for a position for which medical registration was required, may not have had any formal status, it contended that this direction by the FTP Panel Chair should have been a sufficient reminder to Dr Thakur that the investigation which resulted in the finding of impaired fitness should have been declared on the application form.

(v) & Dr Thakur was given the opportunity to explain the circumstances of the completion of the application form at a meeting with the PCT's Medical Director on 9th April 2009. The (vi) notes of this meeting, together with Dr Thakur's letter of 16th April and accompanying e-mail message of the same date were taken into account by the PCT, but having established he had made a false application, the PCT considered this raised concerns about his honesty, trustworthiness and integrity. This taken with the previous reckless and unlawful behaviour of Dr Thakur which resulted in his convictions was sufficient to persuade the PCT that he was unsuitable currently to be included on the Performers List. Given his unsuitability the Regulations did not permit any other sanction but refusal.

References

19. In response to Directions issued by the Appeal Panel Chair, Dr Thakur provided:

- (i) Letter dated 5th May 2009 from Alison MacLeod FRCS FCEM, Consultant in Emergency Medicine at Watford General Hospital, who was Dr Thakur's mentor and supervisor from February 2006 to February 2009 when he was initially employed as a Trust Grade doctor (SHO level) but re-employed after six months as Clinical Fellow (middle grade doctor). Dr MacLeod attested to Dr Thakur's openness about his dealings with the GMC and confirmed he had never attempted to conceal this referral. She had been his referee when he applied for a number of different training and locum posts, so she had seen his application forms, on all of which the GMC referral had been noted. She further confirmed she had always found Dr Thakur to be a man of reliability and integrity, which had been apparent in his dealings with staff and patients. She also confirmed he was popular with all members of staff in their department as a helpful and friendly doctor and a good support to the more junior doctors and that she would have no hesitation in re-employing him. She considered he would make an excellent GP.

- (ii) Witness Statement from Dr Steven Taylor, Norwich Vocational Training Scheme (VTS) Programme Director, confirming that throughout the application process Dr Thakur had made no secret of his driving convictions and the GMC hearing that resulted. Having read the appeal papers he did not feel there was any intent to mislead on Dr Thakur's part. As part of the selection process for VTS training Dr Thakur had been assessed for integrity and probity and successfully demonstrated his suitability for training on these grounds. He was confident that Dr Thakur would continue to demonstrate his suitability on these grounds and had held open the hospital posts he was due to start.

- (iii) Witness Statement from Dr Peter Franklin, Dr Thakur's trainer for his GP training. He confirmed he had seen the PCT application form and could see why Dr Thakur had answered the particular question in the negative. He had also seen Dr Thakur's application to the Eastern Deanery, which asked a different worded question about professional hearings, and he had noted that Dr Thakur was very open and full in his answer to the Deanery. He confirmed the Deanery were fully aware of Dr Thakur's background when accepting him into the VTS. Both Dr Franklin and the second trainer at the practice, Dr Deborah Clark, felt Dr Thakur was entirely honest and dependable and would not question his integrity. They fully supported his appeal.

Hearing

20. The Hearing took place on 4th August 2009 at Sprowston Manor Marriott Hotel, Wroxham Road, Norwich NR7 8RP. A list of the persons present is attached at Appendix I.

Summary of Additional Oral Evidence at the Hearing

21. Mr Martin Payne on behalf of the PCT – acknowledged Dr Thakur appeared to have all the clinical skills to make an excellent GP. He submitted the PCT's decision was not taken lightly but after careful consideration of the circumstances and Dr Thakur's comments and explanations. This was the first time the PCT had exercised its powers under the Regulations on grounds of suitability.
22. The administrative process was provided by Anglian Support Partnership (ASP) which was a NHS Agency providing core functions on behalf of several PCTs in the region. Once the application was completed it was referred to the PCT's Medical Director who looked at an application in its entirety, but with particular reference to the clinical references and the applicant's history, before making a decision. As the Medical Director was aware convictions were routinely reported to the GMC he had asked Mr Payne to contact the GMC.
24. The main basis of Dr Thakur's appeal was the legal interpretation of the wording on the application form and whether the GMC's determination that Dr Thakur's fitness was impaired could be considered as an investigation into his professional conduct or performance. Mr Payne was not legally trained and the PCT had not taken legal advice but they were aware this Panel had a legal chair and would give a legal opinion.
25. When the FTP Panel gave its decision there was a clear direction that Dr Thakur would have to declare his impairment each time medical registration was required. The PCT now knew that direction had no legal basis; it was not a formal sanction or a condition on Dr Thakur's registration, but at the time of his application to join the PCT's Performers List he was unaware of that fact. It was only after the PCT refused Dr Thakur's application that he sought

clarification of that direction and learned it was not a formal condition or sanction, yet he chose to ignore it when he made his application. His omission in this regard was mentioned twice in the PCT's decision letter

26. The primary purpose of having an extended application process and the wording on the application form was to ensure any misdemeanours or investigations were declared during the application. The Panel should consider the intention in the drafting of the Regulations to ensure any FTP impairment was declared.
27. The GMC's Factsheet for FTP procedures (*pages AA10-13 of appeal bundle*) describes the 'Investigation' pre 'Adjudication'; this was evidence the FTP hearing constituted an investigation. Moreover, the e-mails from the GMC Adjudication Manager (*pages AA2-4*) stated Dr Thakur was obliged to declare the GMC investigated allegations concerning Dr Thakur's fitness to practise. Accordingly, there was no doubt that the GMC's actions constituted an investigation.
28. With regard to the question of 'professional conduct', doctors were required to demonstrate certain essential qualities and attributes. The GMC's Good Medical Practice stated doctors should be honest, trustworthy and act with integrity and that they should never abuse a patient's trust in the doctor or the public's trust in the profession. Accordingly, it was the PCT's contention that the investigation was relevant to Dr Thakur's professional conduct.
29. The FTP Panel decision stated:
"The Panel is aware of its responsibility to protect the public interest, particularly with reference to maintaining public confidence in the profession and upholding proper standards of conduct and behaviour. It has determined that your actions fell considerably short of the standards of behaviour the public are entitled to expect from doctors and undermines the confidence that the public is entitled to place in the medical profession. The Panel has taken account of all the circumstances relating to your convictions and has determined that your fitness to practise is impaired by reason of your convictions."
The PCT contended this indicated the investigation was in relation to professional conduct.
30. In response to questions Mr Payne submitted the PCT could not say whether it would otherwise have accepted Dr Thakur onto its Performers List because it never had the opportunity to consider his application, or his convictions in isolation, without knowledge of the disputed question. He would say that applicants had previously been admitted onto its Performers List when they had declared convictions.
31. On this occasion the PCT decided Dr Thakur had knowingly made an untruthful declaration. Mr Payne was not part of the Performance Decision Making Group (PDMG) but their difficulty was in relation to whether or not Dr Thakur had knowingly completed his application form with the intention of withholding information relating to the FTP hearing. The basis for their decision that his declaration was untruthful or dishonest was the declaration itself; the PCT did not consider there could be any reasonable doubt about the interpretation of the wording. Whilst it was accepted this appeal was not to look at Dr Thakur's convictions, the PCT did take account of the fact he had

two convictions – for drink/driving and for pre-meditated driving whilst banned. The PCT had taken account of Dr Thakur’s submissions, the fact the FTP Panel had said it was “a naive error of judgement” and the fact Dr Thakur had said it was a painful experience, that he had learned from it and become more mature and careful. The PCT considered that at the very least Dr Thakur should have erred on the side of safety and asked the GMC if he needed to declare the FTP hearing and concluded Dr Thakur knowingly chose not to declare it.

32. The PCT took account of the fact Dr Thakur had knowingly broken the law when he drove; it was not his drink/driving conviction but the fact he felt his personal circumstances were such that he would break the law.
33. The PCT agreed Dr Thakur had been open and forthright to the Deanery in his declaration about the FTP hearing but considered an element of dishonesty had crept in by the time he completed the PCT application form. The PCT did not have to make a decision about his possible motivation but it did take account of the fact that in their meeting with Dr Thakur on 9th April he had indicated that he was aware that if he declared the GMC investigation, this might have given the wrong impression about his professional conduct, and he would have to provide the paperwork to prove that the GMC action had not been about his clinical abilities.
34. The note of that meeting had been e-mailed to Dr Thakur for his comments. On 16th April he had written a letter to the PCT qualifying the notes.
35. The PCT felt the wording of the question on the application form was clear; it was taken directly from the Regulations. The PCT had drawn this issue to the attention of ASP and at the very least the wording will be reviewed.
36. The PCT considered the GMC hearing in its entirety constituted an investigation; it came down to interpretation and the PCT felt the GMC undertook an “enquiry”, which is an alternative dictionary definition of “investigation”. It was as a result of the investigation that Dr Thakur was referred to the FTP Panel. The PCT accepted the GMC’s Factsheet indicated its procedures were divided into two stages and that the investigation took place before adjudication but it considered the GMC action which resulted in a FTP hearing included an investigation.
37. When it made its decision the PCT was aware the FTP Panel’s statement was not a formal condition, but considered it was a strong instruction which had some formality to it. The PCT had now clarified with the GMC this type of narrative is inappropriate to be included in FTP decisions, which should only contain specific conditions and it is inappropriate to include instructions which have no formal sanction. Mr Payne could not say if this would have altered the PCT’s decision but he accepted the Chief Executive had referred to the GMC making a formal direction in her decision letter and that this was a major consideration in the PCT coming to the decision it reached. He would say Dr Thakur would not have known at the time he completed the application form that it was not a formal sanction.

38. The PCT had not taken any advice on the meaning of “professional conduct”. It relied on its own understanding of what it meant. The PCT considered it to be conduct associated with professional standards and it did not accept Dr Thakur’s interpretation was reasonable.

39. In his letter dated 16th April Dr Thakur had qualified what the FTP Panel had said; he stated that:

“They also said that I have to declare about this hearing every time I apply for a job in the NHS, whenever they ask me for it.” (emphasis added)

However, at their meeting on 9th April it was put to Dr Thakur that the FTP Panel had said he would always have to declare it and he did not question it at the time. He had had the opportunity to challenge the notes of that meeting if he felt they were inaccurate. And the PCT did not accept his subsequent qualification was an accurate interpretation of the FTP Panel’s wording.

40. Since the Regulations came into force in 2004 the PCT had received about forty applications per annum. This was the first occasion on which the PCT was aware of a possible challenge to the legal interpretation of the wording of the application form. Mr Payne was not aware of the application form having been subject to any quality assurance in terms of ambiguity but he did know that this form was used by several different PCT’s in the East of England because the administrative processing was undertaken by one agency.

41. The PCT’s Medical Director had referred the decision to the PDMG, which considered the case and made a recommendation to the Chief Executive. They had before them the notes of the meeting on 9th April and Dr Thakur’s letter dated 16th April.

42. Dr Peter Franklin appeared as a witness on behalf of Dr Thakur. He confirmed Dr Thakur had worked in his practice under his supervision for eight weeks before this problem had arisen and he had been there for a further four weeks before his training had been suspended. He was aware of the PCT’s reasons for suspending Dr Thakur but he had no reservations that Dr Thakur would make a good GP having seen him at the Holt Practice. Since Dr Thakur’s suspension, having seen the way he had conducted himself, it had confirmed to him that he was a straightforward, honest, dependable doctor.

43. Dr Thakur gave evidence that he did not agree that the FTP hearing was an investigation. As far as he was aware investigation was a stage prior to a FTP hearing. A criminal conviction was one of the reasons for which the GMC could take action if a doctor’s fitness to practise was impaired; there was no investigation of the conviction by the GMC and he did not agree a FTP hearing itself was an investigation. Dr Thakur’s understanding was that criminal convictions were referred to the FTP Panel and the investigation stage was by-passed. The FTP Panel then decided if fitness to practise was impaired and if sanctions were necessary.

44. The expression “professional conduct” was not mentioned at any time during the FTP hearing. Convictions were not professional conduct and Dr Thakur’s convictions were not related to anything he did professionally.

45. Dr Thakur had made his declaration with full honesty. He thought it was the right answer even at the time. He did not feel he had made a false declaration and he had declared his GMC hearing on other forms, including the Deanery form for the same job.

47. At the GMC hearing Dr Thakur had heard the statement about declaring his impairment every time he applied for a job requiring medical registration. Following that the Chair had also mentioned there would be no sanctions or conditions on his registration. His understanding was that this was not a direction and the Chair was just narrating the fact that he would have to declare the GMC hearing when asked for. Had the statement not been made in the determination he would not have written anything different on either the Deanery or the PCT forms because the FTP hearing was not an investigation into his professional conduct.

48. Dr Thakur’s statement in his letter of 16th April that he would have to declare about the hearing every time he applied for a job in the NHS whenever he was asked for it was a reflection of his understanding at the time and it had not changed in any way.

49. He had never concealed his convictions or the GMC hearing in the past or present and he would never do so in the future. If he had wanted to mislead, why would he have declared it on the Deanery form? It had all been going well until April 2009, five and a half months after he had completed the PCT’s application form.

50. Dr Thakur was currently suspended on full pay by the Deanery. As part of his GP training he was supposed to work at the Holt Medical Practice until 4th August and then move to a hospital post on 5th August. The hospital Medical Director had said that post all depended on the outcome of this appeal, so his entire GP career was dependent on it.

51. In response to questions Dr Thakur confirmed that after the PCT had written to him on 8th April he had contacted the Norwich & Norfolk Hospital Trust (NNHT) and locum agencies he was registered with because he wanted to check how he had completed their forms. The locum agency forms he had filled in before the FTP hearing did not contain any declaration but the forms he filled in subsequently included a declaration on a separate piece of paper. He had not given incorrect information on any of these forms.

52. As a result of this case there had been a ripple effect from the PCT to the hospital. He had ticked a box on the NNHT form saying he had not been given a caution by the GMC and the NNHT was reserving its position pending the outcome of this appeal and querying whether the FTP hearing constituted a caution. He understood the NNHT felt he had made a dishonest statement to

the PCT which resulted in the PCT refusing to include him on its Performers List.

53. Dr Thakur had been quite positive the PCT PDMG would look favourably on his application. Even if he had been wrong he was happy to be told he was wrong but this was destroying his career.
54. He had filled in the Deanery form before the PCT form to enter GP training. He had thought the PCT form was just more paperwork. He had not even known he had to complete it; his colleagues who had begun GP training in August had started in hospital posts so they had not completed PCT forms. He had commenced GP training in February but he was still not sure whether his training would depend on his PCT form.
55. After the PCT had told him he had made a false declaration Dr Thakur had telephoned the MDU who had indicated he should speak to the BMA. When he had succeeded in making the BMA Advisor understand the situation, he was advised that on the wording of the PCT form he had not done anything wrong and because he had declared the FTP hearing on the Deanery form there was no intention to mislead.
56. *[Mr Payne explained at this point that the Regulations specify a number of agencies which the PCT is required to inform of its decision, including the FHSAA. There had been no communication between the PCT and the NNHT. The PCT had become aware the NNHT was withholding consent because the NNHT contacted the PCT direct to inform the PCT that the NNHT had withdrawn its offer of a post to Dr Thakur because he had omitted to mention on the NNHT application form that he had been the subject of a GMC investigation. The purpose of the call was because the hospital had heard the PCT had rejected Dr Thakur and its Personnel Director was looking at the situation and enquiring if an appeal decision had been made. It was the NNHT's independent decision to withdraw its offer.]*
57. Dr Thakur explained that the question on the hospital form asked if he was currently the subject of any investigation by the GMC. He had answered that he was not currently the subject of any investigation but he did declare the FTP hearing in 2006. The form had also asked if he had any restrictions placed on his practice by the GMC and he had replied "No". The NNHT had picked up on the point that he had declared there was no condition on his registration and its position was that he had made a false declaration.
58. The e-mail from the Adjudication Manager at the GMC (*page AA2*) that the statement in the FTP Panel determination was not a condition on his registration was in response to the NNHT's actions.
59. It was Dr Thakur's understanding that there had never been any condition on his registration but he felt the NNHT's decision had been influenced by the PCT's decision. Dr Chaudhary had sent the GMC's e-mail to the Medical Director at the NNHT, who had responded that the outcome of his hospital application depended on the outcome of this appeal. He had also indicated he was looking

at whether the GMC's FTP Hearing came under the definition of a caution. Dr Thakur felt it was clear the FTP Panel's determination stated no warning was given to him.

60. After the PCT had rejected Dr Thakur the Deanery had been very supportive and had tried to place him in hospital pending the outcome of this appeal, but the Medical Staffing Officer had said she would love to have placed him but a probity issue had arisen.

Closing Submissions

61. Mr Payne on behalf of the PCT – submitted the PCT believed that at the time Dr Thakur made his application he knew he should have declared the FTP Panel's decision but he decided to withhold this information. The PCT's position was that it had a statutory responsibility to scrutinize applications and only to accept onto its Performers List GPs whom they considered suitable. Given Dr Thakur had decided to break the law, leading to his two convictions, the PCT believed he knowingly decided to withhold information from the application form.
62. Dr Thakur had provided several testimonials attesting to his honesty and integrity, but the PCT believed GPs had to maintain integrity 100% of the time. The reason for refusing Dr Thakur's application was because the PCT did not believe it could rely on his integrity.
63. Dr Chaudhary on behalf of Dr Thakur – submitted that the NNHT was prompted to act as a result of the PCT's actions and this had caused serious damage to Dr Thakur's credibility. He asked the Panel to try to restore his credibility as far as possible and make a clear and unambiguous declaration to that effect.
69. The Panel were not bound by the PCT's decision and had power to make a full decision afresh. They had heard Dr Franklin's evidence and seen he had taken time out to support Dr Thakur. They had also seen Dr MacLeod's supportive letter.
70. The Panel had also heard Dr Thakur's own evidence and seen his demeanour. Dr Thakur was entirely honest and forthright; he had fully answered Mr Payne's questions and the Panel's questions and he was not a person who appeared to be hiding anything.
71. The PCT's Chief Executive and PDMG had not had the benefit of seeing Dr Thakur give evidence. In matters of honesty and integrity a person's appearance was of paramount importance.
72. The FTP Panel had seen the FTP Panel's determination that it accepted Dr Thakur had made a naive mistake; the FTP Panel had heard Dr Thakur's live evidence and had not made a finding in relation to his probity, honesty or integrity or found that he had gone out of the way to break the law as the PCT was suggesting. They could have imposed a considerably greater sanction but they let him off.

73. The Panel had heard the PCT make concessions; it accepted it had misunderstood the FTP Panel's statement to be a direction to Dr Thakur. Any reasoning now being advanced by the PCT which was not given as the basis of its decision at the time should be considered very carefully. The PCT had made its decision based on certain assumptions and that decision should stand or fall on the basis of the reasons it gave at the time. It was not clear what those precise reasons were; Mr Payne said Dr Thakur had proven convictions, he had broken the law and he had withheld information, but this was not the case as Dr Thakur had clearly declared his two convictions. The PCT had also attempted to use the NNHT's actions to support its flawed decision, but as the NNHT had not started to question Dr Thakur until after the PCT's decision, its actions could not be seen as supportive of the PCT's decision.
74. As to whether Dr Thakur's declaration was false, the PCT had included an element of dishonesty. However, dishonesty must include two elements (**R v Ghosh [1982] Q.B. 1053**):
- (i) would a reasonable person consider the act to be dishonest; and
 - (ii) would the appellant have known that it was dishonest
- The PCT had failed to prove that Dr Thakur's declaration could be regarded as dishonest and his evidence was that he plainly believed he gave a full answer to the PCT. Even if he was mistaken, that did not of itself make his declaration dishonest.
75. The PCT had misread its own question on the application form. At best it was ambiguous and open to interpretation. The PCT's interpretation was not the only possible interpretation; Dr Thakur's interpretation was possible and he answered the question correctly. If the PCT was confident of its interpretation, why had it asked ASP to review the wording? It would be a draconian sanction to destroy a doctor's career on the basis of such an ambiguous question.
76. Dr Chaudhary again referred the Panel to Dr Thakur's grounds of appeal and to the submissions in the Skeleton Argument. He requested the Panel admit Dr Thakur to the PCT's Performers List. He also submitted that if the Panel allowed Dr Thakur's appeal, in view of the damage caused to his reputation and character and the fact the NNHT was also waiting to hear if the allegations against him had been upheld, it should go further and also find that:
- (i) Dr Thakur did not make a false declaration
 - (ii) Dr Thakur answered the question believing his answer to be correct
 - (ii) Dr Thakur's answer was the correct answer
 - (iv) Dr Thakur's conduct in this matter had been completely beyond reproach and he should not in any way be victimised by the PCT's findings against him.

Consideration of the Evidence and Conclusions

77. We have carefully considered all of the written and oral evidence, bearing in mind that the burden of proof lies with the PCT and that as this tribunal is a civil and not a criminal tribunal, the standard to which we must be satisfied is whether facts or allegations are proved on the balance of probabilities, and whether it is more likely than not to be true. The Panel recognises that where serious allegations are raised, cogent and compelling evidence is required if

they are to be found proved. When considering whether we are satisfied that an allegation is established we bear in mind that the more serious the allegation, the less likely it is that it occurred and the stronger should be the evidence. We have considered the evidence in relation to each of the grounds of appeal on this basis.

78. The PCT erred in law in assuming that Dr Thakur was the subject of an investigation by a regulatory body.

78.1 We noted the parties' submission in this regard. Whilst we acknowledged the GMC's Factsheet explaining FTP Procedures (*pages AA11-13*) did state its procedures were divided into two separate stages: 'Investigation' and 'Adjudication' and that it investigates cases in the investigation stage to assess whether it needs to refer them to adjudication and that the adjudication stage consists of a hearing of those cases it has referred to a FTP panel, we also noted that this explanation all came under the title of 'Investigation of concerns'. Accordingly, we consider the PCT was correct in submitting that part of the GMC process comprised an investigation or enquiry into the circumstances of Dr Thakur's criminal convictions, by means of the Fitness to Practise hearing, and this constituted an investigation. We consider the Appellant's argument that criminal convictions are referred to the FTP Panel and the investigation stage is by-passed, meaning that the FTP hearing itself is not an investigation, to be somewhat disingenuous.

78.2 We concluded that investigation is a prerequisite in any FTP hearings relating to a criminal conviction. Accordingly, we are satisfied that the GMC's actions constituted an investigation.

79. If the Fitness to Practise Hearing was an investigation then the assumption that the investigation was into Dr Thakur's "professional conduct" is an error.

79.1 We note that the wording of the PCT's application form was taken from the Regulations and that paragraph 4(4) requires an applicant to declare if he has been the subject of any investigation into his professional conduct by any licensing, regulatory or other body, where the outcome was adverse.

79.2 We also note the PCT's submission that the GMC investigation was concerned with the behaviour and conduct of Dr Thakur, which was judged to have been inconsistent with the conduct expected of the medical profession, as judged against the GMC's Good Medical Practice and its contention that the GMC investigation was therefore concerned with Dr Thakur's professional conduct, having stated in its decision that his conduct, in driving whilst disqualified, fell below the proper standards of conduct and behaviour the public is entitled to expect from a registered medical practitioner.

79.3 However, we are also aware of the reference in Dr Thakur's Skeleton Argument to the case of **Skidmore v Dartford and Gravesham NHS Trust [2003] UKHL 27**, in which the House of Lords was required to determine where the line should be drawn between professional and personal conduct. Lord Steyn in his speech said:

"The line drawn between professional conduct and personal conduct is conduct arising from the exercise of medical or dental skills" and "other" conduct. ... The line drawn between professional conduct and personal conduct is conduct arising from the exercise of medical or dental skills" and "other" conduct."

79.4 Accordingly, we were persuaded that Dr Thakur's convictions for driving offences were capable of being regarded as personal, as opposed to professional, conduct and that the category of conduct into which they fell was not definitive.

80. Dr Thakur's response in the negative was the only reasonable response to the query and any other response would have been inaccurate; alternatively, Dr Thakur's was one of the reasonable responses possible and was not inaccurate. The PCT erred in law in regarding the response as inaccurate.

80.1 We noted the PCT's evidence that it considered the wording of the question on the application form was clear; having been taken directly from the Regulations and that it did not consider there could be any reasonable doubt about the interpretation of the wording.

80.2 We also noted the PCT's submission that the primary purpose of having an extended application process and the wording on the application form was to ensure any misdemeanours or investigations were declared during the application and the Panel should consider the intention in the drafting of the Regulations to ensure any FTP impairment was declared.

80.3 Dr Chaudhary submitted that Dr Thakur had made his declaration with full honesty, believing it to be the right answer even at the time. He contended that the PCT had misread its own question on the application form and that, at best, it was ambiguous and open to interpretation. He submitted that the PCT's interpretation was not the only possible interpretation; Dr Thakur's interpretation was possible and he had answered the question correctly. He queried why, if the PCT was confident of its interpretation, it had asked ASP to review the wording.

80.4 We considered the PCT's evidence on this point was contradictory; on the one hand it had submitted that it did not consider there could be any reasonable doubt about the interpretation of the wording, but on the other hand it had asked ASP to review the wording. Accordingly, we accepted that Dr Thakur's interpretation of the question and his response was one of several possible interpretations and that his response was one of a number of possible correct responses.

81 The PCT erred in law in concluding that the Fitness to Practise Panel directed that Dr Thakur would have to declare the finding of impairment of fitness to practise each time he applied for a position for which medical registration was required.

81.1 We noted Mr Payne's evidence that when the FTP Panel gave its decision it considered there was a clear direction that Dr Thakur would have to declare his impairment each time medical registration was required. He subsequently qualified this submission, stating that when it made its decision the PCT was aware the FTP Panel's statement was not a formal condition, but considered it was a strong instruction which had some formality to it. He went on to say that the PCT had now clarified with the GMC this type of narrative was inappropriate to be included in FTP decisions, which should only contain specific conditions and it was inappropriate to include instructions which have no formal sanction. However, he submitted that the PCT felt that at the time of his application Dr Thakur would have been unaware of that fact and it was only after the PCT refused Dr Thakur's application that he sought clarification of that direction and learned it was not a formal condition or sanction, yet he chose to ignore it when he made his application.

81.2 We also noted Dr Chaudhary's submission that the PCT had made concessions and that it now accepted it had misunderstood the FTP Panel's statement to be a direction to Dr Thakur.

81.3 Given the GMC's subsequent clarification that the FTP Panel's narrative had no formal status and it was neither a direction nor a condition, and the PCT's acceptance of this, we consider the PCT was wrong to conclude that the FTP Panel had directed that Dr Thakur would have to declare the finding of impairment of fitness to practise each time he applied for a position for which medical registration was required.

82. The PCT regarded the response to the query as misleading (the issue of honesty and integrity were considered) Even if the response (and therefore the declaration) was inaccurate, the PCT failed to distinguish between a response that may be inadvertently inaccurate and a response that is false and consequently misleading, and therefore erred in law and in finding that Dr Thakur intended to mislead, the PCT has failed to establish the element of deceit. This was an error of law.

82.1 We noted the test of dishonesty in **R v Ghosh** that Dr Chaudhary had referred to.

82.2 Mr Payne had submitted that the PDMG's difficulty was in relation to whether or not Dr Thakur had knowingly completed his application form with the intention of withholding information relating to the FTP hearing and the basis for their decision was that they did not consider there could be any reasonable doubt about the interpretation of the wording. He further submitted that the PCT had also taken account of the fact Dr Thakur had knowingly broken the law when he drove; it

was not his drink/driving conviction but the fact he felt his personal circumstances were such that he would break the law. The PCT had felt that at the very least Dr Thakur should have erred on the side of safety and asked the PCT if he needed to declare the FTP hearing. All of this had led the PCT to the conclusion that Dr Thakur had knowingly made an untruthful declaration.

82.3 Notwithstanding the above, the PCT did agree that Dr Thakur had been open and forthright to the Deanery in his declaration about the FTP hearing. Mr Payne contended that an element of dishonesty had crept in by the time Dr Thakur completed the PCT application form and he pointed out that in their meeting on 9th April, Dr Thakur had indicated he had thought that if he declared the GMC investigation, this might have given the wrong impression about his professional conduct, and he would have to provide the paperwork to prove that the GMC action had not been about his clinical abilities.

82.4 Dr Thakur told us he had filled in the Deanery form on which he had declared the FTP hearing before he had completed the PCT form, which he had thought was just more paperwork. We noted that he told Mr Payne at their meeting on 9th April that his FTP hearing was not related to professional conduct as he had wanted to avoid having to provide the paperwork to prove that the GMC action had not been about his clinical abilities. We further noted that he also declared the FTP hearing on the NNHT's form when applying for his hospital post.

82.5 We also took into account the very supportive testimonials which Dr Thakur received from Dr MacLeod, Dr Taylor and Dr Franklin and the fact Dr Franklin had taken time out from his practice to come and give evidence in support of Dr Thakur..

82.6 Whilst we suspect Dr Thakur may only have thought up this explanation of his actions after the event, we consider this amounts to damage limitation rather than dishonesty. Whilst it would have been prudent for Dr Thakur to have consulted with the PCT to ensure he correctly interpreted the question and that he understood the purpose of the form, given that he had declared the FTP hearing on both the Deanery and NNHT forms and given the very supportive testimonials to his honesty and integrity, we do not consider that the PCT established an element of deceit and we are not convinced that Dr Thakur knowingly intended to be dishonest. We accept that even if he was mistaken, that does not of itself make his declaration dishonest.

83. In all the circumstances the sanction imposed by the PCT is disproportionate, particularly if the PCT did not regard the response as misleading.

83.1 We noted the PCT's position that having considered Dr Thakur had made a false application, it felt this raised concerns about his honesty, trustworthiness and integrity and that this, taken with his previous reckless and unlawful behaviour which resulted in his convictions, was

sufficient to persuade the PCT that he was unsuitable currently to be included on the Performers List. Given his unsuitability the Regulations did not permit any other sanction but refusal.

83.2 Given that we have concluded that no element of deceit on the part of Dr Thakur has been established, we consider the consequences of upholding the PCT's decision to refuse to include him in its Performers List would be disproportionate, as he would be unable to continue his GP training either in the GP Medical Practice or in a hospital post.

Decision

84. For all the above reasons we hereby allow Dr Thakur's appeal to be included in the PCT's Performers List.

85. We note that Dr Chaudhary asked us to go further and make some further findings. However, whilst we have concluded that on the balance of probabilities Dr Thakur did not knowingly make a false declaration and whilst we do not consider he should in any way be victimised by the PCT's findings against him, we are not prepared to go further. We have already indicated that the more prudent course of action would have been for Dr Thakur to have consulted with the PCT to ensure he correctly interpreted the question and that he understood the purpose of the form, and we would urge him in future to check with the organisation requesting the information what it is necessary to disclose when asked any questions of this nature.

Supplementary matters

86. We direct that a copy of this decision be sent to the persons and bodies referred to in section 47 of the FHSAA (Procedure) Rules 2001 (the Rules).

87. In accordance with Rule 42(5) of the Rules, we hereby notify 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 2009

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Debra R Shaw
Chairman of the Appeal Panel

APPENDIX I

Panel Members

Mrs D Shaw Chair

Dr S Ariyanayagam Professional Member

Miss K Wortham Member

Persons Present

Dr R Thakur Appellant

Dr R Chaudhary Appellant's Representative

Dr Peter Franklin Witness for the Appellant

Mr M Payne Norfolk PCT