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Judgment: approved by the Court for handing down | *Delivered:* **3/11/2010**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

NARENDRAN THIRUVENGADAM

Appellant;

and

GENERAL MEDICAL COUNCIL

Respondent.

GILLEN J

Application

[1] This is an appeal by the plaintiff Narendran Saridha Thiruvengadam (hereinafter called "the appellant") against a decision of the General Medical Council Fitness to Practise Panel (Performance) ("the FTP Panel") under the provisions of the Medical Act 1983, as amended ("the Act") and the General Medical Council (Fitness to Practice) Rules 2004 made under the Act (the "Rules") and the General Medical Council's own "Indicative Sanctions Guidance for Fitness to Practice Panels (April 2009 EDN) ("the ISG").

[2] Section 40 of the Act makes provision for appeals from Panel decisions to this court. Section 40(1)(a) provides that appealable decisions include a Panel decision under Section 35(d) giving a direction for erasure, suspension, conditional registration or varying the conditions imposed by a direction for conditional registration. Under Section 40(7) of the Act, this court's powers on appeal include the power to dismiss the appeal, to allow the appeal and quash the direction appealed against, to substitute its own direction, or to remit the case to the Registrar for referral to a panel to dispose of the case in accordance with the court's directions.

[3] An appeal under section 40(1)(a) is a full appeal by way of rehearing. The question for the court to determine is whether the panel was wrong either as a matter of fact or law.

[4] In the instant case the procedure adopted by the panel in the course of a hearing which commenced on 21 September 2009 was that set out at Rule 17 which provided for a hearing to take place in three stages. Firstly, the fact finding stage. Secondly, the impairment stage. Thirdly the sanction stage. The panel determined that the appellant's name should be erased from the Medical Register and in accordance with section 38 of the Act determined that his registration be suspended immediately.

[5] Notice of appeal to the High Court of Justice in Northern Ireland was filed by the appellant dated 23 October 2009.

Background Facts

[6] The appellant qualified as an MD BS Madras in 1978, Master of Surgery (MS) 1982 and FRCS (Ireland) 1990. He has worked as a doctor mainly in surgical specialities in the Republic of Ireland and United Kingdom from 1980 onwards.

[7] In May 2002 he was employed by the Western Area General Hospital ("the hospital") as a Staff grade officer in Accident and Emergency medicine.

[8] In 2003 the hospital suspended the appellant from clinical duties and in January 2004 referred him to the National Clinical Assessment Authority after concerns about his clinical practice surfaced. The NCAA reported in January 2005 concerns about the appellant's clinical practice and concluded that the appellant should not be permitted to return to front line practice until he had been given an opportunity to engage in a retraining programme.

[9] The appellant commenced a one year programme at Royal Oldham Hospital Accident and Emergency Department on 20 March 2006. The training was not completed.

[10] In December 2007 the Western Area Health Authority referred the appellant to the General Medical Council ("GMC") and he subsequently agreed to undergo a GMC assessment of his professional performance in July 2008.

[11] The Emergency Medicine Test of Competence was performed on 29 July 2009 at the GMC Clinical Skills Centre in London. This test comprised a knowledge test and objective structured clinical examinations ("OSCEs"). The knowledge test consisted of 135 questions in an Extended Matching Format ENQ and 60 single best answer ("SBA") questions. In the OSCE, role playing actors were used to simulate patients together with mannequins where appropriate. Each station had its own room. The performance of the appellant was observed and marked by the assessment team who

accompanied him around the skill stations. A total of 12 skill stations were examined. The Panel also had access to notes of 50 patients who had been seen by the appellant in or around May 2006 at the Weston hospital before the decision was taken to suspend the appellant

[12] The assessment team considered that the appellant's performance was deficient, that it was not amenable to retraining and that the appellant was not fit to practice.

[13] An Interim Orders Panel ("IOP") hearing took place on 20 February 2008 and the appellant was suspended from practice for a period of 18 months.

[14] On 9 February 2009 the appellant was advised in writing by the GMC that his case was to be referred to the FTP Panel and the date of 21 September 2009 was fixed. A notice of hearing was served on him on 14 August 2009 reiterating the date of that hearing.

[15] On 27 May 2009 the appellant's then solicitor, Simon Eastwood of Eastwoods Solicitors, London, ("Eastwoods") was sent a letter from Shemin Shariff, Solicitor to the GMC with a Schedule of Disclosure with enclosures "of the relevant documents which may assist or undermine the GMC's case to the best of my knowledge and belief." The material disclosed was said to include in particular the patient notes and records used for the Case Based Discussion (CBD) and Peer Review. It also made clear that it was refusing to disclose information relating to the OSCEs and the assessor's marks sheets relating to this aspect of the assessment on policy grounds "that it is in the greater public interest for the Knowledge Test to remain undisclosed in order to safeguard the integrity of the test to ensure that the GMC may use it with confidence in the future".

[16] It was a live issue at the hearing before me as to whether or not these patient records had actually been received by Eastwoods or indeed the appellant himself. I consider the likelihood is that Eastwoods did receive them although it has been impossible to obtain any confirmation to this effect from Eastwoods either by the GMC representatives or the solicitors now acting on behalf of the appellant. It is at least possible however that these had never been passed on to the appellant.

[17] On 13 August 2009 the Medical Defence Union (MDU) had written to the appellant advising that he would not be assisted further with legal representation subject to a possible 25% expenses assistance. Thereafter the appellant has remained unrepresented.

[18] On 28 August 2009 the appellant wrote to the GMC seeking an adjournment of the FTP Panel hearing making it clear that he was

unrepresented and he wished to have copies of the OSCE case history sheets given to him before he was allowed to examine the patients. He requested an adjournment for 6 months.

[19] On 7 September 2009 Ms Leslie Rudd, Adjudication Coordinator of the Fitness to Practise Directorate refused the request for the reasons set out in an attached memorandum emanating from Professor Green of the FTP Panel. At paragraph 8 of that memorandum the following appears:

> "In this case I do not find the reasons advanced for a postponement to be supported by enough details or evidence to make a sufficiently cogent case to grant the postponement. I am sympathetic to the possible lack of representation, but the doctor appears to have had some time to sort this out and I have no details of what he had done".

[20] I pause to observe at this stage that the appellant had only had from 13 August at the earliest to take such steps to obtain alternative representation.

[21] On 10 September 2009 the appellant again wrote to the GMC reiterating his request for an adjournment and asserting his right to the OSCE examination information sheet. He concluded:

> "I need to look for other avenues to represent me for the hearing. I request again for a postponement of the hearing".

[22] On 16 September 2009 Ms Rudd replied to the appellant indicating that his application had been carefully considered under rule 29 of the Fitness to Practice Rules but had been refused for the reasons in an attached memorandum. That memorandum recorded at paragraphs 5, 6 and 7 as follows:

> "(5) It seems to me that little has changed except that he has forwarded a letter which sets out that MDU will not help further. There is no indication of why he was applying for ongoing assistance. There is no background given and I cannot question him about the circumstances.
>
> (6) Because of this I feel I do not have enough information to accede to his request.
>
> (7) It may be that the best way forward is for Dr Thiruvengadam to present his application to

> the panel at the beginning of the hearing and to let the panel adduce all the evidence underlying the request. This may be unsatisfactory from the point of view of the hearing and the witnesses but I do not feel that I have enough to postpone the hearing. Dr Thiruvengadam needs to be made aware of the opportunity to ask the Panel for a postponement".

[23] On 17 September 2009 the appellant contacted Michael Ehanire, Solicitor of the GMC by telephone.

[24] It is common cases that on 17 September 2009 Simon Haywood of the GMC Case Presentation Team emailed the appellant stating that he was aware that the appellant had requested the OSCE history sheets and advising that they would not be disclosed.

[25] On 17 September the MDU advised the appellant in writing (following a meeting of the Board of Management on 8 September 2009) that it would not assist him in the forthcoming FTP hearing.

[26] On 18 September 2009 the appellant emailed Simon Haywood seeking copies of the 50 case notes reviewed by assessors in order that he could make his response and further seeking time to consider same. These would have been notes of patients who had been seen by the appellant in or around May 2006 at the Weston hospital before the decision was taken to suspend the appellant. Of the 50 sets of notes which the appellant requested 8 of these 50 notes were not available for disclosure. It was the case of the GMC that 42 of these had already been disclosed on 27 May 2009 to the appellant's solicitor and only 12 of these notes and records were used as part of the case based discussion. It was also the case of the GMC that the first indication that there was an issue about the 50 medical records used by the assessment team was in the course of this email on 18 September 2009.

[27] An important telephone call occurred between Mr Haywood of GMC Legal and the appellant on 18 September 2009. It is common case that when the appellant reiterated his request for an adjournment and his requirement for the OSCE sheets and medical records Mr Haywood informed him that the OSCE sheets would not be released. However he mistakenly added that GMC did not have the 50 sets of medical records and that it would not be the usual practice to obtain and disclose these documents. It is frankly conceded by the GMC that this was mistaken information tendered by Mr Haywood and ought not to have been given.

[28] The FTP Panel sat on 21, 22 and 23 September 2009. At that hearing the panel made a determination in respect of the appellant's request for an

adjournment. It refused to adjourn and proceeded with the hearing. The chairman concluded as follows:

> "The Panel considered Dr Thiruvengadam's application to adjourn the case under Rule 29(2) of the General Medical Council (Fitness to Practice) Rules Order of Council 2004. His application was made on two grounds. The first ground related to the disclosure of material in relation to the OSCE procedure and the failure to provide 50 sets of medical notes used in their performance assessments. You (*Mr Kitch who presented the case on behalf of the GMU)* told the Panel that the GMC regards it as contrary to the public interest to disclose examination material used in the assessment. This is because to do so would put the information in the public domain and render it useless for future assessments. The Panel has accepted this contention. In respect of the medical records, you told the Panel that, of the 50 used, 42 have been disclosed to the doctor through his solicitors, these being the ones which were available to GMC. The Panel regards this level of disclosure to be adequate.
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> The second ground related to Dr Thiruvengadam's lack of legal representation. The Medical Defence Union advised Dr Thiruvengadam on 13 August 2009 that it was only prepared to fund 25% of the costs of his defence. He has therefore been aware of that since that date and appears to have taken no steps to provide himself with legal representation, nor has Dr Thiruvengadam chosen to appear before the Panel today to represent himself. The Panel therefore finds that the doctor's lack of representation is not sufficient grounds to grant an adjournment".

The appellant's case on the issue of adjournment

[29] Mr Brangam QC, who appeared on behalf of the appellant, submitted that Article 6 of the European Convention on Human Rights and Fundamental Freedoms required a hearing to be fair. The appellant had been deprived of disclosure of the raw data contained in the OCSE which was necessary in order to allow him to challenge the assessment. Moreover he did not have the medical records necessary to challenge the assessments arising therefrom. Eastwoods, his solicitor, had never provided him with this material and in effect had done nothing on his behalf between May and August 2009. Whilst it

was regrettable that he had not appeared before the hearing, without this material and unrepresented it was impossible for him to make any meaningful contribution to the proceedings. In short this material should have been regarded as highly relevant to the proceedings and to have been produced to the appellant in advance of the proposed hearing of 21 September 2009. The appellant had recently become unrepresented and therefore equality of arms demanded that in a complex case of this nature – which took 3 days even in his absence – he should have been afforded a realistic opportunity to obtain legal representation.

The respondent's case on the issue of adjournment

[30] Mr Shields, who appeared on behalf of the respondent, argued that the 42 medical records had been provided to the appellant's solicitor as early as May, that the OSCE material was unnecessary and in any event inappropriate to be disclosed because of the damage that disclosure could occasion to the whole process in the future. In any event it was an exceptionally minor participant in the overall discussion of the case. The appellant had been provided with a wealth of material in the assessment report about the conduct of the OSCEs and his performance therein. The decision arrived at, including the sanction imposed, was as a result of overwhelming evidence gathered from a range of sources by the assessment team upon which the Fitness to Practise Panel acted.

[31] Mr Shields further contended that the appellant had been given ample notice of the refusal to adjourn, he had not given information as to what steps he had taken to obtain representation and did not turn up at the hearing itself in order to further process his application for an adjournment.

Conclusion

[32] I have to come to the conclusion that I must allow the appeal and remit this matter to the Fitness to Practise Panel with a direction that a date now be fixed for determination of any interlocutory matters concerning disclosure and a date for the hearing making due allowance for an opportunity for the appellant's legal representatives to familiarise themselves with the case. Given that the appellant now has had plenty of time to obtain such legal representation (which may indeed be the representation he currently retains for this appeal) I consider that the time for the hearing of such matters should be in the very near future. My reasons for my conclusion are as follows.

[33] First, there can be no doubt as to the seriousness of the outcome for the appellant in proceedings of this nature. An adverse finding would inevitably deprive him of his ability to practise professionally as a clinician by virtue of the alleged deficiencies in his professional performance in the event the sanction of erasure from the register was deemed to be the appropriate step.

Nonetheless, he was to be required to represent himself in proceedings which were of great complexity lasting several days and required in my view an informed review of detailed expert evidence. In such circumstances, the interests of an effective access to a hearing and fairness required that if possible he should have received legal assistance if that was his desire. Even if he had been acquainted with the documentation in this case, I am not persuaded that, absent some exceptional circumstances, he should have been expected to take up the burden of conducting his own case when he clearly wished to have legal representation. His case for representation became all the more compelling where there was a live issue about the nature of documents to be disclosed to him.

[34] Secondly, whilst it was manifestly ill advised for the appellant not to have appeared in person at the hearing (and doubtless contributed materially to the failure to secure an adjournment) nonetheless it seems to me that the burden of conducting a case of this kind without legal representation may have seemed to him so insuperable that there is considerable mitigation for his apparent feeling of helplessness and failure to appear. I am satisfied that he could not have been certain that he was without legal representation until 13 August 2009. Given the complexity of this case, I consider it virtually inconceivable that he could have obtained the benefit of solicitor and/or counsel during the remaining weeks of August and beginning of September in order to fully service this case. Whilst no specific detail was provided to me, I am sympathetic to Mr Brangam's assertion on behalf of the appellant that he did make efforts but could not find anyone who would take the case on in the time available. That seems to me to be virtually an inevitable consequence of the shortness of time between his search beginning post August 13 2009 and the date of the hearing.

[35] Thirdly, I am not convinced that the importance of proceeding with expedition necessitated the draconian action of proceeding to a full and complex hearing without appropriate opportunity being given to him to obtain legal assistance. He was suspended from practice and so the public was not endangered by a further delay. Though it was doubtless desirable for the appellant's future to be settled as soon as possible, the seriousness of the process was such that I consider some more time ought to have been given to him to obtain legal representation with a realistic timescale being set for this to be achieved. The request of 6 months made by him may have been too ambitious, but a shorter period should have been contemplated in order to afford him the opportunity to obtain skilled legal representation. In short it would have been entirely possible for the Panel to place strict time limits on any lawyers who were to be instructed and for instructions to be given for relisting the matter with due regard to priorities.

[36] Whilst I recognise that the Panel was endeavouring in good faith to strike a balance between the interests of the appellant and the interests of the public in having this matter expeditiously determined, I am satisfied that the

procedure adopted in this case gave the appearance of unfairness and prevented the appellant from putting forward his case in a proper and effective manner on the issues which were important to him. An obvious area here is the matter of disclosure of the OCSE documents. It is clear to me that the representation upon which he had relied prior to August 13 2009 had not brought any interlocutory application to obtain the OCSE. The complexity of a disclosure application – which will of course involve not only questions of fact and relevance but also legal issues as to the appropriate test to be applied – were in my view beyond the competence of a non lawyer. He must be afforded the opportunity to apply for relevant disclosure and a fair and reasoned decision given on this matter. Similarly, I am not convinced that he does have the 42 medical records. Attempts have been made by the appellant's solicitors to obtain confirmation from his previous solicitors that these were furnished to him but to no avail. At the very least I would have thought that copies can be made and furnished to him directly by the FTP Panel by notwithstanding the fact that he did request these at rather a late stage.

[37] In short I consider that Article 6 of the Convention renders the opportunity for the assistance of a lawyer during this hearing to be an indispensable requirement given the crucial consequences which lie in the wake of an adverse decision. See PC and S v. UK [2002] All ER (D) 239. I am not satisfied therefore that the appellant has had a fair and effective access to the proceedings and I therefore make the order referred to in paragraph [32] of this judgment.

[38] I am aware that the decision of a Panel such as the instant case to grant or refuse an adjournment is usually a matter for its discretion, with the exercise of which the court is unlikely to intervene. It is unarguably in the public interest that trials and proceedings should take place on the date that they are scheduled to do so and that an adjournment should not be granted absent good and compelling reasons. However I believe that the instant case is a rare one in which, having balanced the public interest in there being an expeditious hearing against the gravity of the consequences to the appellant, the court should determine that access to justice required an adjournment.

[39] Since it is my view that the appellant's wilful failure to appear before the Panel on the day of the hearing may well have contributed materially towards the failure to be grant him an adjournment, I have decided in the exercise of my discretion that I will make no order for costs in this case.

[40] I conclude by indicating that in light of my decision that the matter should be remitted to the Panel because of the failure to grant an adjournment it is inappropriate that I should make any ruling on the vexed area of disclosure in this case which should, if necessary, be the subject of interlocutory applications before the Panel. I have not had the opportunity to view the OSCEs or the relevant patients records .Thus I make no finding on the issue of

whether disclosure requires to be granted. This is a matter for determination by the Panel in light of any factual or legal arguments put before it.