

Appeals pursuant to section 40A of the Medical Act 1983 (“section 40A appeals”) – Guidance for Decision-makers

Introduction

1 Section 40A of the Medical Act 1983 empowers us to appeal a “relevant decision” by a Medical Practitioners Tribunal (MPT) if it considers that the decision is not sufficient (whether as to a finding or a penalty or both) for the protection of the public.

2 “Relevant decisions” are defined at section 40A(1) to include:

Decisions (following the determination of the question of a doctor’s fitness to practice) under section 35D to make:

- a** No direction;
- b** A direction for the imposition, extension or termination of an order of suspension;
- c** A direction for the imposition, extension, variation or revocation of an order for conditional registration.

Decisions (following the determination of an application by an erased doctor) under section 41 to make

- d** A direction restoring a doctor’s name to the Register;

Decisions (where doctor has been found to have failed to comply with an order that they undergo an assessment) under Sch.4 para.5A(3D) or 5C(4) to make:

- e** A direction for the imposition of an order for suspension;
- f** A direction for the imposition of an order for conditional registration

- 3** The right of appeal under section 40A also extends to cases where a MPT has failed to make a finding of impairment of a doctor's fitness to practise when it should have done.¹
- 4** Section 40A gives us a discretionary power to appeal such decisions. Accordingly, we must consider in each case:
 - a** whether there are grounds to consider that the decision is not sufficient for the protection of the public; and, if so,
 - b** whether it should exercise its right of appeal in respect of that decision.
- 5** This document is intended to provide guidance as to how and in what circumstances our power to appeal such decisions should be exercised.

The structure and process for making decisions

- 6** Decision making in prospective appeals involving decisions of Medical Practitioners Tribunals is delegated to an Executive Panel comprising Chief Executive and Registrar as Chair, the Medical Director and Director of Education and Standards and the Director Fitness to Practise (or their nominated Deputies if not available) ("the section 40A Panel").²
- 7** There is an established, three stage process supporting the section 40A Panel in its decision-making:
 - a** Firstly an assessment is undertaken by senior GMC lawyers (with input from the external counsel who conducted the case at the MPT) of the determinations in all concluded MPT hearings where the tribunal's decision did not meet the GMC submission on sanction. This assessment is to determine whether there are, in principle, any realistic grounds of appeal.
 - b** If this assessment identifies there may be realistic grounds of appeal, external legal advice is then obtained from a different expert counsel as to the legal merits of an appeal. This advice is then incorporated into a submission from the Deputy General Counsel for consideration by the section 40A Panel at a meeting.

¹ Confirmed by the Court of Appeal in *Raychaudhuri v General Medical Council* [2019] 1 WLR 324,

² When the right of appeal was first introduced in December 2015, the GMC Council agreed to delegate decision making to the Registrar (the Chief Executive). This delegation remained in place until January 2019 when GMC Council agreed to delegate decision making to an Executive Panel.

- c The section 40A Panel will then consider the case at a meeting and make a decision, having regard to the legal advice received and all the circumstances of the case, to determine whether we should exercise our right of appeal.

The decision whether to appeal

- 8 Bringing a section 40A appeal is not a decision we will take lightly.
- 9 This is because:
 - a We recognise and respect that the MPT is a specialist tribunal with particular experience and expertise. The operational independence of the MPT is an important part of the statutory scheme in which we operate. It would be improper for us to bring an appeal simply to invite the court to substitute the MPT's reasonable view of the merits of the case with its own reasonable view.
 - b Any decision to exercise the right to appeal under section 40A will undoubtedly place strain upon a doctor, whose case would otherwise have been closed. However, considerations of pressure on the doctor must be a secondary consideration to our overarching objective to protect the public.
- 10 Whilst considering the above factors, we must also have regard to our overarching objective of protecting the public. The right to appeal pursuant to section 40A is an important mechanism by which we can ensure that we meet this objective.
- 11 We have a power to bring a section 40A appeal where we consider that the decision of the MPT in the particular case is not sufficient to protect the public. The purpose of the appeal is not to seek to punish the doctor but rather to protect the public in line with the GMC's over-arching objective.³
- 12 When considering whether a decision is sufficient for the protection of the public the section 40A Panel will need to consider whether the decision is sufficient⁴ —
 - a to protect the health, safety and well-being of the public;
 - b to maintain public confidence in the medical profession; and/or
 - c to maintain proper professional standards and conduct for members of that profession.

³ Section 1(1A) of the Medical Act 1983

⁴ Section 40A(4) of the Medical Act 1983

- 13** We are required to act reasonably in the exercise of our statutory powers, including the power to bring a section 40A appeal. We would not be acting reasonably if we were routinely to bring appeals which were likely to fail. Therefore, the section 40A Panel will need to consider the likely merits of any appeal (the prospects for success of any such appeal before the court) before making a decision to bring a section 40A appeal even when, in principle, there may be grounds for us to consider that the decision of the MPT in the particular case is not sufficient for the protection of the public.

Questions which section 40A Panel will need to address in deciding whether or not to bring a section 40A appeal

- 14** When considering whether to bring a section 40A appeal in a particular case, it will be necessary for the section 40A Panel to consider the following questions:
- a** Based on their assessment of all of the information held, and in the particular circumstances of the case including, where relevant, the degree to which the MPT gave or ought to have given due weight to the context of the practitioner's failings and the impact of any systemic issues on the same, and having regard to the factors set out in paragraph 12 of this Guidance, does the s40A Panel consider that the MPT's decision is not sufficient to protect the public?

If the answer is yes, they go on to consider:

- b** In all of the circumstances, would exercising the power of appeal further, rather than undermine, the achievement of our overarching objective to protect the public?

If the answer is yes, then we may exercise our power of appeal

- 15** In considering 14b above, it may be that the section 40A Panel will be required to consider and weigh a number of competing factors. This would include their assessment of the likely effect on patient safety of a decision to appeal in the case under consideration, their assessment of the prospects of success of the appeal, and the nature and importance of the issues which would be aired.

The assessment of whether the decision is "not sufficient" for the protection of the public

- 16** Unless we conclude that there are grounds for considering that the decision which has been reached by the MPT is not sufficient for the protection of the public, the power to appeal pursuant to section 40A of the Medical Act will not arise and we will not need to proceed to consider whether we should exercise our power to bring a section 40A appeal.
- 17** Whilst regard will be had to decisions of the MPT relating to other issues and earlier stages in the hearing, the question as to whether the decision of the MPT is not

sufficient for the protection of the public will turn in most cases upon the ultimate outcome (if any) in relation to sanction.

- 18** Whilst we may conclude that there are grounds for considering that one or more of the MPT's other decisions (for example as to fact or impairment) has been wrong, it will be the effect (if any) of such decisions on the ultimate outcome in terms of their finding of impairment and, in particular, the determination as to sanction which will in most cases determine whether this threshold for the section 40A appeal is met.
- 19** If the sanction is ultimately considered to be an appropriate sanction, then it is unlikely that we will consider that decision which has been reached by the MPT is not sufficient for the protection of the public.
- 20** When considering whether the decision which has been reached by the MPT is not sufficient for the protection of the public, the section 40A Panel will need to have regard to such factors as whether:
 - a** the MPT has made an error of fact; and/or
 - b** the MPT has made an error in its application of the relevant legal principles; and/or
 - c** the MPT has failed adequately to apply the relevant guidance published by the GMC and the MPTS, whether as to Standards or as to Sanctions, when reaching its decision as to impairment and/or sanction in a given case; and/or
 - d** the MPT has failed adequately to set out the reasons for the decision made.
- 21** When considering the matters referred to at paragraph 20 above, the section 40A Panel will be mindful that the MPT:
 - a** is itself a specialist, quasi-judicial tribunal with particular expertise in relation to the determination of such issues in the exercise of its statutory function under the Medical Act 1983, and
 - b** plays a central role in the statutory scheme under which we fulfil our statutory functions and meet our statutory objectives.

The assessment of prospects and the legal framework governing the determination of section 40A appeals

- 22** When considering whether a proposed appeal may have reasonable prospects of success, the section 40A Panel will need to have regard to the approach which the court will take in determining the appeal in accordance with the provisions of the Medical Act itself, any relevant case law and the relevant Rules of Court.
- 23** This is because, when assessing whether a section 40A appeal has reasonable prospects of success, the section 40A Panel is assessing whether a judge hearing the appeal, acting in accordance with the law, is more likely than not to allow the appeal.
- 24** A section 40A appeal is governed by the same court rules which govern other statutory appeals, including appeals brought by doctors pursuant to section 40 of the Medical Act 1983 ('section 40 appeals') and references to court by the Professional Standards Authority for Health and Social Care (PSA) made pursuant to section 29 of the National Health Service Reform and Health Care Professions Act 2002 ('section 29 references').
- 25** The legal framework in place will vary depending on which jurisdiction the appeal is to be heard in, whether that be Northern Ireland, Scotland, or England and Wales. However, as the following makes clear, the principles which the courts of the respective jurisdictions in the United Kingdom will apply in determining section 40A appeals will be essentially the same in substance.
- 26** Where the relevant court before whom the appeal is brought is the Administrative Court of England and Wales, the appeal will be governed by the provisions of Part 52 of the Civil Procedure Rules (CPR).
- 27** CPR 52. 21(3) provides as follows:
- The appeal court will allow an appeal where the decision of the lower court was —
- a** (a) wrong; or
 - b** (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.
- 28** The Court of Appeal has confirmed the correct approach to appeals under section 40A, setting out that the well settled principles in relation to section 40 appeals can be applied to section 40A appeals.⁵ It summarised the following key points:
- Proceedings under section 40A of the 1983 Act are appeals and are governed by CPR Part 52. A court will allow an appeal under CPR Part 52.21(3) if it is

⁵ General Medical Council v Chandra [2018] WLR(D) 542: full reference of the decision can be found in Annex C para 40.

'wrong' or 'unjust because of a serious procedural or other irregularity in the proceedings in the lower court'.

- It is not appropriate to add any qualification to the test in CPR Part 52 that decisions are 'clearly wrong'.
- The court will correct material errors of fact and of law. Any appeal court must however be extremely cautious about upsetting a conclusion of primary fact, particularly where the findings depend upon the assessment of the credibility of the witnesses, who the Tribunal, unlike the appellate court, has had the advantage of seeing and hearing.
- When the question is what inferences are to be drawn from specific facts, an appellate court is under less of a disadvantage. The court may draw any inferences of fact which it considers are justified on the evidence.
- In regulatory proceedings the appellate court will not have the professional expertise of the Tribunal of fact. As a consequence, the appellate court will approach Tribunal determinations about whether conduct is serious misconduct or impairs a person's fitness to practise, and what is necessary to maintain public confidence and proper standards in the profession and sanctions, with diffidence.
- However there may be matters, such as dishonesty or sexual misconduct, where the court is likely to feel that it can assess what is needed to protect the public or maintain the reputation of the profession more easily for itself and thus attach less weight to the expertise of the Tribunal. The appellate court will afford an appropriate measure of respect of the judgment in the committee, but the appellate court will not defer to the committee's judgment more than is warranted by the circumstances.
- Matters of mitigation are likely to be of considerably less significance in regulatory proceedings than to a court imposing retributive justice, because the overarching concern of the professional regulator is the protection of the public.
- A failure to provide adequate reasons may constitute a serious procedural irregularity which renders the Tribunal's decision unjust.

29 The Court of Appeal has also given the following reasons why there is limited scope for overturning decisions of the MPT on sanction⁶:

⁶ In *Bawa-Garba v GMC* [2018] EWCA Civ 1879

- a Decisions on sanction are 'multi-factorial' decisions, akin to jury questions, which first-instance tribunals are best placed to judge as they turn not just on the explicit findings of fact but also the other evidence which the tribunal heard – i.e. the 'penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, *la vérité est dans une nuance*), of which time and language do not permit exact expression'⁷
- b The MPT is the body best equipped to determine the sanction to be imposed. The assessment of the seriousness of the misconduct is essentially a matter for the MPT in the light of its experience. It is the body best qualified to judge what measures are required to maintain the standards and reputation of the profession⁸

30 Accordingly;

- a when an appeal is against a multi-factorial decision, such as the MPT's view as to what sanction may be required to maintain public confidence in the profession, "the appeal court's approach will be conditioned by the extent to which the first instance judge had an advantage over the appeal court in reaching his/her decision. If such an advantage exists, then the appeal court will be more reticent in differing from the trial judge's evaluations and conclusions";
- b that general caution applies with particular force in the case of a specialist adjudicative body, such as the MPT, which (depending on the matter in issue) usually has greater experience in the field in which it operates than the courts;
- c an appeal court should only interfere with such an evaluative decision if:
 - there was an error of principle in carrying out the evaluation, or
 - for any other reason, the evaluation was wrong, that is to say it was an evaluative decision which fell outside the bounds of what the adjudicative body could properly and reasonably decide.

31 The Court of Session has confirmed that essentially the same legal principles apply to section 40A appeals heard in Scotland.⁹

32 It is anticipated that, in relation to section 40A appeals brought in Northern Ireland, the High Court of Justice in Northern Ireland will adopt the principles set out in the above cases, and in particular the English Court of Appeal cases.

⁷ See Bawa-Garba at [61]-[66]

⁸ See Bawa-Garba at [67] & [94]

⁹ See Annex C para 41 for the relevant extract of the Court of Session's Opinion.

33 In summary, when assessing whether a proposed appeal has reasonable prospects of success the section 40A Panel will need to consider:

- a** Whether there is a reasonable prospect that the court will conclude that the decision of the MPT was unjust because of a serious procedural or other irregularity in its conduct of the hearing before it. For example:
 - i** that it improperly excluded or otherwise failed to have regard to evidence upon which the GMC sought to rely at the hearing;
 - ii** that the unreasonable exercise, or failure to exercise, Case Management powers by the MPT had the effect of rendering the hearing before it unjust;
 - iii** that it failed to give adequate reasons to explain the decision which it reached;

and/or

- b** Whether there is a reasonable prospect that the court will be satisfied that the decision of the MPT was wrong, having paid due regard to both:
 - iv** the specialist expertise of the MPT, particularly in relation to multi-factorial evaluative decisions on matters within its specialist area of expertise, and
 - v** the MPT's particular advantages in evaluating the evidence as the Tribunal which has heard the live evidence.

34 Having appropriate regard to all the circumstances of the case, and in particular to:

- a** the overarching objective (public protection),
- b** the role of the MPT,
- c** where relevant, to the degree to which the MPT gave or ought to have given due weight to the context of the practitioner's failings and the impact of any systemic issues on the same and
- d** the principles which the relevant court will apply in determining any appeal if issued

the s40A Panel will therefore decide to exercise the power to appeal under s.40A only if they consider that the MPT's decision was wrong and insufficient to protect the public.

ANNEX A

Appeal under section 40A: The role of the Professional Standards Authority for Health and Social Care (“the PSA”)

- 35** The GMC’s right to appeal exists concurrently with the PSA’s power to refer a case under section 29 of the National Health Service Reform and Health Care Professions Act 2002. Once one party has brought an appeal/referred the case, the other party is precluded from bringing separate, like proceedings.
- 36** Where we decide to exercise the power of appeal, the Registrar must notify the PSA without delay. While the PSA will not be able to take separate proceedings once we have commenced an appeal, it can become a party and make representations in our appeal in cases where it considers that there is insufficient protection of the public. If we withdraw an appeal, the PSA can continue the proceedings.
- 37** If we wish to withdraw the appeal or agree terms of a settlement with the respondent, then we must communicate this to the PSA, whether or not the PSA is a party to the appeal. The PSA may then take over conduct of the appeal, which from that time would be treated as a section 29 reference.

ANNEX B

References under section 29 of the National Health Service Reform and Health Care Professions Act 2002: Our role

- 38** Where the PSA refers a case under section 29 the PSA must notify us without delay.
- 39** Where we are the respondent in a case referred under section 29, and the PSA wishes to withdraw the reference (or has agreed a settlement with the practitioner and wishes for the case to be resolved on those terms) the PSA must notify us. In those circumstances we may take over conduct of the proceedings, which from that time would be treated as a section 40A appeal.
- 40** When determining its view on whether the proceedings should continue, we will review any information held as to why the PSA no longer wishes to proceed with the section 29 reference. It will also be necessary to review why it was we did not bring an appeal following the Tribunal decision (for example, this may be because the PSA referred the case before we brought an appeal and so precluded us from bringing an appeal). We will consider whether the tests set out in paragraph 12 above are met, in light of all of the information held.

Annex C

- 41** As the Court of Appeal confirmed in its judgement in *General Medical Council v Chandra* [2018] WLR(D) 542:

In *General Medical Council v Jagjivan and another* [2017] EWHC 1247, [2017] 1 WLR 4438, Sharp LJ sitting in the Divisional Court considered the correct approach to appeals under section 40A and held as follows:

"39. As a preliminary matter, the GMC invites us to adopt the approach adopted to appeals under section 40 of the 1983 Act, to appeals under section 40A of the 1983 Act, and we consider it is right to do so. It follows that the well-settled principles developed in relation to section 40 appeals (in cases including: *Meadow v General Medical Council* [2006] EWCA Civ 1390; [2007] QB 462; *Fatnani and Raschid v General Medical Council* [2007] EWCA Civ 46; [2007] 1 WLR 1460; and *Southall v General Medical Council* [2010] EWCA Civ 407; [2010] 2 FLR 1550) as appropriately modified, can be applied to section 40A appeals.

40. In summary:

- i) Proceedings under section 40A of the 1983 Act are appeals and are governed by CPR Part 52. A court will allow an appeal under CPR Part 52.21(3) if it is 'wrong' or 'unjust because of a serious procedural or other irregularity in the proceedings in the lower court'.
- ii) It is not appropriate to add any qualification to the test in CPR Part 52 that decisions are 'clearly wrong': see *Fatnani* at paragraph 21 and *Meadow* at paragraphs 125 to 128.
- iii) The court will correct material errors of fact and of law: see *Fatnani* at paragraph 20. Any appeal court must however be extremely cautious about upsetting a conclusion of primary fact, particularly where the findings depend upon the assessment of the credibility of the witnesses, who the Tribunal, unlike the appellate court, has had the advantage of seeing and hearing (see *Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)* [2002] EWCA Civ 1642; [2003] 1 WLR 577, at paragraphs 15 to 17, cited with approval in *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23, [2007] 1 WLR 1325 at paragraph 46, and *Southall* at paragraph 47).
- iv) When the question is what inferences are to be drawn from specific facts, an appellate court is under less of a disadvantage. The court may draw any inferences of fact which it considers are justified on the evidence: see CPR Part 52.11(4).
- v) In regulatory proceedings the appellate court will not have the professional expertise of the Tribunal of fact. As a consequence, the appellate court will

approach Tribunal determinations about whether conduct is serious misconduct or impairs a person's fitness to practise, and what is necessary to maintain public confidence and proper standards in the profession and sanctions, with diffidence: see *Fatnani* at paragraph 16; and *Khan v General Pharmaceutical Council* [2016] UKSC 64; [2017] 1 WLR 169, at paragraph 36.

- vi) However there may be matters, such as dishonesty or sexual misconduct, where the court "is likely to feel that it can assess what is needed to protect the public or maintain the reputation of the profession more easily for itself and thus attach less weight to the expertise of the Tribunal ...": see *Council for the Regulation of Healthcare Professionals v GMC and Southall* [2005] EWHC 579 (Admin); [2005] Lloyd's Rep Med 365 at paragraph 11, and *Khan* at paragraph 36(c). As Lord Millett observed in *Ghosh v GMC* [2001] UKPC 29; [2001] 1 WLR 1915 and 1923G, the appellate court "will afford an appropriate measure of respect of the judgment in the committee ... but the [appellate court] will not defer to the committee's judgment more than is warranted by the circumstances".
- vii) Matters of mitigation are likely to be of considerably less significance in regulatory proceedings than to a court imposing retributive justice, because the over-arching concern of the professional regulator is the protection of the public.
- viii) A failure to provide adequate reasons may constitute a serious procedural irregularity which renders the Tribunal's decision unjust (see *Southall* at paragraphs 55 to 56)."

42 In their Opinion in *General Medical Council v a Decision of the Medical Practitioners Tribunal in the case of Dr Milind Mehta* [2018] CSIH 69, the Inner House of the Court of Session cited with approval the decision of the Divisional Court in *GMC v Jagjivan* [2017] 1 WLR 4438 as confirming that the approach to appeals set out by Lord Malcolm in *The Professional Standards Authority For Health And Social Care* against a decision of the Conduct and Competence Committee of the Nursing and Midwifery Council 2017 SC 542 [para 25] governed section 40A appeals, namely:

"There is a well-established body of jurisprudence relating to the proper approach to appeals from regulatory and disciplinary bodies. The general principles can be summarised as follows. In respect of a decision of the present kind, the determination of a specialist tribunal is entitled to respect. The court can interfere if it is clear that there is a serious flaw in the process or the reasoning, for example where a material factor has not been considered. Failing such a flaw, a decision should stand unless the court can say that it is plainly wrong, or, as it is sometimes put, 'manifestly inappropriate'. This is because the tribunal is experienced in the particular area, and has had the benefit of seeing and hearing the witnesses. It is in a better position than the court to determine whether, for

example, a nurse's fitness to practise is impaired by reason of past misconduct, including whether the public interest requires such a finding. The same would apply in the context of a review of a penalty."