

GMC Right of Appeal – s.40A Medical Act 1983

Submission of General Counsel for consideration by Registrar

Dr Hadiza Bawa-Garba (UID 6080659)

Introduction

- 1 With effect from 31 December 2015, the General Medical Council acquired the power to appeal to the High Court (or equivalent courts in Scotland and Northern Ireland where relevant) against relevant decisions of 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 The basis upon which the GMC will consider whether or not to exercise this power to appeal is described in “Appeals by the GMC pursuant to s.40A of the Medical Act 1983 (“s.40A appeals”) – Guidance for Decision-makers” (“the Guidance”).
- 3 As the Guidance makes clear, when considering whether to bring a s.40A appeal in a particular case, it will be necessary to consider the following questions:
 - 3.1 Based on his assessment of all of the information held, and in the particular circumstances of the case, and having regard to the factors set out in the Guidance, does the Registrar consider that the MPT’s decision is not sufficient to protect the public?
 - 3.2 Only if the Registrar is of the view, on his assessment of all the information held, in the particular circumstances of the case, that there are grounds to consider that the MPT’s decision is not sufficient, does he go on to consider:
 - 3.3 In all of the circumstances, would exercising the power of appeal further, rather than undermine, the achievement of the over-arching objective?
 - 3.4 If the answer is yes, then the GMC may exercise its power of appeal

3.5 In considering the question in 3.3 above, above, it may be that the Registrar will be required to consider and weigh a number of competing factors (including his assessment of the prospects of success of the appeal, and the nature and importance of the issues which would be aired).

4 The purpose of this submission is to provide considered advice to the Registrar, following a legal review of the MPT decision, as to whether or not there are:

4.1 Grounds for Appeal;

4.2 Sufficient merit to any appeal to warrant the exercise of the power to appeal.

Background and the MPT hearing

5 This case concerns the determination of the MPT, which concluded on 13 June 2017, considering the matter under Part 4 of the 2004 Rules.

6 The MPT was asked to consider an allegation that the doctor's fitness to practise was impaired by reason of his conviction.

7 On 4 November 2015 at Nottingham Crown Court, the doctor was convicted of manslaughter on the grounds of gross negligence. On 14 December 2015, the doctor was sentenced to 24 months imprisonment suspended for 24 months.

8 The underpinning case related to the doctor's care and treatment of Patient A, a six year old boy who had been admitted to the Children's Assessment Unit (CAU) at Leicester Royal Infirmary on 18 February 2011 following a referral from his General Practitioner. At the time, the doctor was a specialist registrar in year six of his postgraduate training (ST6), and the most senior doctor present in the CAU.

9 Patient A had sepsis, a particularly dangerous condition, which required treatment with antibiotics. The doctor's initial diagnosis was gastro-enteritis with moderate dehydration. Though his initial treatment of Patient A was appropriate, the doctor did not pursue the investigation and treatment of Patient A's condition with the urgency, priority and attention it demanded.

10 The prosecution in the criminal case relied on a substantial number of failings by the doctor which were said to have contributed to the death of Patient A. They included:

10.1 the doctor's initial and hasty assessment of Patient A (at about 10.45-11am) after receiving the results of blood tests which ignored obvious clinical findings and symptoms; and

10.2 her subsequent consultations and the reassessment of Patient A's condition, in particular, that she:

- i. did not properly review a chest x-ray taken at 12.01 pm which would have confirmed pneumonia much earlier;
 - ii. at 12.12 pm, did not obtain enough blood from Patient A to properly repeat the blood gas test and that the results she did obtain were, in any event, clearly abnormal but she then failed to act upon them;
 - iii. failed to make proper clinical notes recording times of treatments and assessments;
 - iv. failed to ensure that Patient A was given appropriate antibiotics timeously (more particularly, until four hours after the x-ray); and
 - v. failed to obtain the results from the blood tests she ordered on her initial examination until about 4.15 pm and then failed properly to act on the obvious clinical findings and markedly increased test results; these results indicated both infection and organ failure from septic shock (CRP measurement of proteins in the blood indicative of infection, along with creatinine and urea measurements both indicative of kidney failure).
- 11** The doctor appealed her conviction in the Court of Appeal ([Bawa-Garba v R. \[2016\] EWCA Crim 1841](#)). The appeal was rejected. The Court also referred to *the truly exceptional degree of negligence* which must be established for the offence to be made out.
- 12** The MPT found the doctor's fitness to practise to be impaired. At the sanction stage, the GMC submitted that the only appropriate sanction was that of erasure, particularly in the light of a series of widespread and varied failures, which had the ultimate consequence of contributing to Patient A's early death. On 13 June 2017, on assessment of the evidence, the mitigating and the aggravating features, the MPT proceeded to suspend the doctor for 12 months, with both immediate suspension and with a review.

Possible Grounds of Appeal

- 13** On review by the legal team it was felt that there were possible grounds of appeal to be considered.
- 14** The GMC is of course mindful of the respect any appeal court will afford to the view and assessment of the specialist tribunal, but there is a concern that the sanction imposed is insufficient to protect the public, in the light of the seriousness of the clinical failures underpinning the conviction, and the exceptional degree of negligence required to be made out for the offence of gross negligence manslaughter.
- 15** There is a concern around a reliance in the determination on the passage from *Bijl v GMC* [Privy Council No 78, 2000] (the public interest in keeping an otherwise good

doctor who presents no danger to the public on the medical register), and an emphasis upon the doctor's personal remediation, with no reference to the words of Bingham MR in *Bolton v Law Society* [1993] EWCA Civ 32, when the case is one where a high public interest is clearly engaged.

- 16 Further, the nurse who was sentenced alongside the doctor, and whose role was described by the judge as "at the junior end" of responsibility, was struck off the NMC register. It was also noted that the judge in his sentencing remarks was clearly of the view that as a result of the conviction the doctor's career as a doctor was over.
- 17 Ivan Hare of Blackstone Chambers was instructed to advise on the matter.

Counsel's Advice

- 18 The MPT's decision to suspend the doctor's registration falls within s.40A(1)(a) of the 1983 Act and is appealable.
- 19 The MPT relied principally on two matters: the circumstances at the hospital which may have contributed towards Patient A's death, and the remediation and personal mitigation in the doctor's case. It is strongly arguable that the MPT placed too much weight on both matters.
- 20 The systemic failings, including the failings of the computer system, the lack of a Senior House Officer, the shortage of permanent nursing staff, and the failings of the nurse, were referred to by Leveson P in the doctor's unsuccessful appeal against conviction to the Court of Appeal. As such, these matters must have been considered by the jury which was nonetheless satisfied that the doctor's conduct crossed the very high threshold of gross negligence in relation to her personal culpability.
- 21 For the MPT to rely on these same factors in mitigating the doctor's conduct involves the MPT going behind the jury's verdict and undermines Rule 34(3) & (5) of the General Medical Council (Fitness to Practise) Rules Order of Council 2004 ("2004 Rules") which provide:

Production of a certificate purporting to be under the hand of a competent officer of a Court in the United Kingdom or overseas that a person has been convicted of a criminal offence or, in Scotland, an extract conviction, shall be conclusive evidence of the offence committed.

...

The only evidence which may be adduced by the practitioner in rebuttal of a conviction or determination certified in the manner specified in paragraph (3) or (4) is evidence for the purposes of proving that he is not the person referred to in the certificate or extract.

- 22** The MPT erred in so doing.
- 23** On remediation: such factors are relevant to the question of the risk the doctor may pose to patients in the future (and to impairment), but are of limited relevance to the public confidence in the profession and the need to maintain professional standards. The MPT erred in placing such weight on these matters in this doctor's case, especially where (as here) the MPT was not satisfied that she had complete insight into her actions. It is noted that the Committee of the NMC considering the nurse's fitness to practise determined, notwithstanding substantial insight and evidence of subsequent safe practice, that *public confidence in the nursing profession and in the NMC as its regulator would be undermined were the panel not to impose a striking-off order*.
- 24** Finally, matters of personal mitigation are less relevant in professional conduct settings in relation to the public interest. In a case which was so clearly about maintaining confidence in the profession, the MPT erred in failing to have regard to the consideration in Bolton v Law Society [1993] EWCA Civ 32 at [16]: *Because orders made by the [Solicitors Disciplinary] Tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases... The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price*.
- 25** For these reasons, Counsel considers that there should be a good prospect of success on appeal in respect of the MPT's determination (above 50%).

Conclusion and Recommendation

- 26** Accordingly, for these reasons my recommendation is that a decision is made to exercise the s.40A power of appeal in this case, in respect of the MPT's decision on sanction.
- 27** In the light of the seriousness of the conviction and its underpinning facts, and with the over-arching statutory patient safety and public interest principles in mind, there was a clear mishandling on the part of the MPT in its assessment of remediation and mitigation in this case.
- 28** I attach, at Annex A, a draft decision document accordingly.

Anthony Omo

Director, Fitness to Practise and General Counsel

Dr Hadiza Bawa-Garba (UID 6080659)

Decision of the Registrar regarding GMC Right of Appeal – s.40A Medical Act 1983

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 - 3.2 Only if I am of the view, on my assessment of all the information held, in the particular circumstances of the case, that there are grounds to consider that the MPT’s decision is not sufficient, should I go on to consider:
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- 4 In considering the question in 3.3 above, above, I may be required to consider and weigh a number of competing factors (including my assessment of the prospects of success of the appeal, and the nature and importance of the issues which would be aired).

Background and the MPT hearing

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proteins in the blood indicative of infection, along with creatinine and urea measurements both indicative of kidney failure).

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- 12 The MPT found the doctor's fitness to practise to be impaired. At the sanction stage, the GMC submitted that the only appropriate sanction was that of erasure, particularly in the light of a series of widespread and varied failures, which had the ultimate consequence of contributing to Patient A's early death. On 13 June 2017, on assessment of the evidence, the mitigating and the aggravating features, the MPT proceeded to suspend the doctor for 12 months, with both immediate suspension and with a review.

Discussion

- 13 I have asked myself a number of questions when considering whether the test in paragraph 3 above is made out in this case. These, and my summary answers, appear in the table below.

• Summary

Is there a compelling explanation as to why impairment was not found?	NA
Did the exercise or failure to exercise case management powers by the MPT render the hearing unjust?	No
Did the MPT make an error of fact?	No
Did the MPT make an error in the application of legal principles?	Yes
Did the MPT fail to adequately apply the relevant guidance of the GMC/MPTS, either Standards Guidance or Sanctions Guidance?	Yes

Did the MPT improperly exclude or fail to have regard to GMC evidence? Did it improperly admit evidence from the doctor?	Yes
Did the MPT fail to give adequate reasons for its decisions?	Yes

- 14** In light of the above, further explanation for which follows, I conclude that the test for considering whether the s.40A Power to Appeal should be exercised is satisfied in this case.
- 15** For the further reasons also set out in my decision below, I consider that there is sufficient merit in this particular case to warrant the exercise of the GMC's right of appeal.

Reasons

- 16** In assisting my decision as to whether the MPT's decision is sufficient to protect the public, I have considered the full reasoning given by the MPT, from which I note the following:

16.1 The MPT relied on the circumstances at the hospital which may have contributed to Patient A's death. The systemic failings, including the failings of the computer system, the lack of a Senior House Officer, the shortage of permanent nursing staff, and the failings of the nurse, were referred to by Leveson P in the doctor's unsuccessful appeal against conviction to the Court of Appeal. As such, these matters must have been considered by the jury which was nonetheless satisfied that the doctor's conduct crossed the very high threshold of gross negligence in relation to her personal culpability.

For the MPT to rely on these same factors in mitigating the doctor's conduct involves the MPT going behind the jury's verdict, and undermines Rule 34(3) & (5) of the General Medical Council (Fitness to Practise) Rules Order of Council 2004 ("2004 Rules") in relation to the meaning and rigidity of the certificate of conviction.

16.2 Remediation is relevant to the question of the risk the doctor may pose to patients in the future (and to impairment), but is arguably of limited relevance to the public confidence in the profession and the need to maintain professional standards. The MPT erred in placing such weight on these matters in this doctor's

case, especially where (as here) the MPT was not satisfied that she had complete insight into her actions.

16.3 Matters of personal mitigation are less relevant in professional conduct settings in relation to the public interest. In a case which was so clearly about maintaining confidence in the profession, the MPT erred in failing to have sufficient regard to the reputation of the profession, in the grave circumstances of this case.

17 Overall, I am of the view that the decision of the MPT was wrong and therefore insufficient to protect the public.

Conclusion

18 For the reasons given above I consider that the MPT's decision is insufficient to protect the public, and as such warrants the exercise of the right of appeal under s.40A of the Medical Act 1983 in this particular case.

Charles Massey

Registrar