Meeting of the s40A Panel to consider the case of Dr Azubuike Udoye
Held on 26 February 2020

Panel members present

Charlie Massey, Chief Executive (in the Chair)
Colin Melville, Medical Director and Director of Education and Standards
Anthony Omo, General Counsel and Director of Fitness to Practise

In attendance

Kate Takes, Senior Legal Adviser
Jim Percival, Principal Legal Adviser and Deputy General Counsel
Mark Swindells, Assistant Director, Corporate Directorate (Panel Secretary)

Purpose of this note

1 This meeting note records a summary of the Members’ consideration of the relevant decision of the Medical Practitioners Tribunal (‘MPT’) which considered the Doctor’s case (“the decision”), and the Panel’s decision on behalf of the General Medical Council as to whether or not to exercise the power to appeal the decision pursuant to section 40A Medical Act 1983.

The relevant decision

2 The Principal Legal Adviser confirmed that the decision was a relevant decision for the purposes of s40A as it was a decision not to make a direction under s35D Medical Act 1983, within the meaning of s40A(1)(d) Medical Act 1983

Consideration

3 The Panel considered the record of the MPT’s determination and the legal advice in detail.
The Panel noted that Dr Udoye withdrew his witness statement to the MPT and did not give oral evidence at the resumed hearing into his case.

The Panel further noted that in 2016 Dr Udoye applied unsuccessfully to the GMC for Certificate of Eligibility for GP Registration ("CEGPR"). Dr Udoye sought a review of that refusal of the GMC to grant a CEGPR, which was in turn refused.

The Panel felt that it is implausible therefore that Dr Udoye, having attempted and failed to secure a CEGPR, was unfamiliar with the process and status implications of being on the GP register.

The Panel could not follow the MPT's findings at paragraph 86 of its determination in respect of the MPT's deliberations about the term “independent GP”. They considered that the MPT had failed to understand the nature of the case by the GMC in relation to the meaning of “practising as a GP”;

This misinterpretation of the GMC’s case had caused the MPT to fail to go on to address the other elements of the allegation, which in turn, potentially impacted on the finding of no misconduct;

The Panel considered that the MPT appeared also to have erred in its understanding and/or application of the principles in relation to drawing an adverse inference from the doctor’s silence (set out in the case of R (On the application of Kuzmin ) v General Medical Council [2019] EWHC 2129);

The Panel felt that the MPT’s decision not to consider these allegations in full, and to conclude that Dr Udoye’s actions did not amount to misconduct, was insufficient to protect the public.

The Panel therefore decided to appeal the MPT’s decision pursuant to section 40A Medical Act 1983.

Charlie Massey (Chair)     Dated

14 April 2020
Background

12 This case concerns the determination of an MPT, which concluded on 31 January 2020, considering the matter under Part 4 of the General Medical Council (Fitness to Practise) Rules 2004 (‘the Rules’).

13 The allegations relate to Dr Udoye’s application for the GP Induction & Refresher Scheme (‘the Scheme’) and declarations made on the registration form, subsequent practice as a GP as part of the Scheme and submission of claims (to cover the costs of indemnity, Annual Retention Fee and bursary) in 2016-2017, when he knew he was not eligible to do so because he was not on the GP Register or National Medical Performers List. It was alleged that Dr Udoye’s actions had been dishonest.

MPT hearing


Facts

15 Dr Udoye admitted some of the factual charges – that he had completed the registration form and made the declarations in question and also that he had submitted the 10 claims referred to in the allegations – but not that he knew the two relevant declarations (on the registration form) were untrue, that he was not entitled to practise as a GP or claim the payments or that any of his actions had been dishonest.

16 Two of the charges – that Dr Udoye knew it was untrue to state on the registration form that his status entitled him to work as a GP and the dishonesty allegation relating to this – were deleted following a successful submission under Rule 17(2)(g) of the GMC (Fitness to Practise) Rules 2004; the MPT explained their finding related to ‘the lack of clarity as to what the word “status” meant.’ Therefore, the MPT found that the question could have been understood to have meant something different to being on the GP register (it was also noted that this was also a separate question on the form, which could have also added to any confusion as to the meaning on the question).

17 Following the determination under Rule 17(2)(g), the hearing went part-heard. Upon reconvening in January 2020, Dr Udoye’s representative presented fresh evidence in relation to National Health Service Performers List (England) Regulations 2013 (‘the Regulations’). The GMC were given permission to reopen its case and call a witness in rebuttal of this matter – that the referred to Regulations were not relevant to the doctor’s specific situation as he was not a GP in training – which was accepted by the MPT.
In addition, upon the hearing reconvening in 2020, Dr Udoye withdrew the witness statement he had produced at the start of the hearing and confirmed that he would not be giving evidence. In light of this position, a reference to drawing an adverse inference from the doctor’s silence and the case of *R (Kuzmin) v General Medical Council [2019] EWHC 2129 (Admin)* were discussed at this stage: the MPT gave a ‘warning’ to the effect set out by this case authority.

The MPT found the rest of the allegations, including relating to the doctor’s knowledge and the alleged dishonesty, to not be proved.

In relation to the allegations that it was untrue, and the doctor knew it to be untrue, to state on the registration form that he was on the GP register, the MPT determined that it was 'satisfied, given: the supporting documents Dr Udoye provided with the NRO form; his failure to indicate on other parts of the form that he was on the GMC’s GP Register; and the all-round confusion by those responsible for monitoring and delivering the I&R Scheme, that sufficient evidence exists to give rise to a compelling argument that he made an innocent, negligent or mistaken error when completing the form.’ This finding, in turn, meant that the allegation of dishonesty that stemmed from this matter fell away and was not considered by the MPT.

With regard to the allegations relating to the doctor practising as a GP, when he knew he was not entitled to (for the reasons noted in the background at paragraph 7 above), the MPT stated that the issue came down to what was meant by Dr Udoye practising as a GP; whether this meant ‘as an ‘independent GP’ or meant ’carried out work as a GP.’

The facts determination stated that the GMC had confirmed its case was that Dr Udoye had worked ‘as an ‘independent GP’ and ‘did not mean that the Doctor ’carried out work as a GP.” The MPT stated that, in light of this position, the GMC’s witness evidence did not support its case. The MPT found that Dr Udoye was not practising as an ‘independent’ GP and, therefore, that the fact was not found proved. This, in turn, meant that the allegation of dishonesty that stemmed from the earlier allegation relating to Dr Udoye practising as a GP fell away and was not considered by the MPT.

The MPT determined that the admitted facts did not amount to misconduct.

The General Medical Council’s power to appeal pursuant to s.40A

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.

25 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”).

26 Decisions concerning the exercise of the s40A power to appeal were originally delegated by the Council to the Registrar. However, following recommendations from Sir Norman Williams’ Review Council agreed that decision-making in prospective appeals involving decisions of Medical Practitioners Tribunals be delegated to a three person Executive Panel comprising: the Chief Executive and Registrar as Chair; the Medical Director and Director of Education and Standards; and the Director of Fitness to Practise (or their nominated Deputies if not available) (“the Panel”).

27 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:

27.1 Based on their 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 Panel consider that the MPT’s decision is not sufficient to protect the public?

27.2 If the Panel is of the view, on its 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, it will consider whether exercising the power of appeal would further, rather than undermine, the achievement of the over-arching objective.

27.3 If the answer is yes, then the GMC may exercise its power of appeal.

27.4 In considering that question the Panel will be required to consider and weigh a number of competing factors (including its assessment of the prospects of success of the appeal, and the nature and importance of the issues which would be aired).