



Neutral Citation Number: [2019] EWHC 2640 (Admin)

Case No: CO/3318/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MANCHESTER DISTRICT REGISTRY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/10/2019

Before :

MR JUSTICE JULIAN KNOWLES

Between :

**Professional Standards Authority for Health and
Social Care**

Appellant

- and -

General Dental Council

1st Respondent

-and-

Ikhlaq Hussain

2nd Respondent

David Bradly (instructed by **Weightmans LLP**) for the **Appellant**
Iain Steele (instructed by **General Dental Council**) for the **First Respondent**
Fiona Neale (instructed by **BLM Law LLP**) for the **Second Respondent**

Hearing dates: 8 May 2019

Approved Judgment

The Honourable Mr Justice Julian Knowles:

Introduction

1. This is a reference under s 29(4) of the National Health Service Reform and Health Care Professions Act 2002 (the 2002 Act) by the Professional Standards Authority for Health and Social Care (the Authority) in relation to the decision of the Professional Conduct Committee (PCC) of the General Dental Council (GDC) on 27 June 2018 to restore Ikhlq Hussain, the Second Respondent, to the dentists' register, subject to conditions. By s 29(7) the reference is to be treated as an appeal to the High Court and that is how I shall refer to it. The GDC is the First Respondent and does not oppose the appeal.
2. The Authority was originally known as the Council for the Regulation of Health Care Professionals. It was established by s 25 of the 2002 Act. Its role is to promote the interests of users of health care (*inter alia*) in relation to the performance by medical regulatory bodies of their functions, and to promote best practice in the performance of those functions. Those bodies include the GDC. The Authority's origins can be traced to the report of Professor Ian Kennedy following the public inquiry into heart surgery carried out on children at the Bristol Royal Infirmary. Professor Kennedy referred to a public perception that a system of regulation of health care professionals which involves the determination of disciplinary allegations by a panel or committee largely comprising members of the profession in question was not necessarily in the best interests of patients. He recommended an overreaching body for the regulation of health care professionals. The Secretary of State announced that he would act on this recommendation. The result, after consultation, was Part 2 of the 2002 Act, of which s 29 is part: see *Ruscillo v Council for the Regulation of Health Care Professionals* [2004] EWCA Civ 1356, [6].
3. The main issue arising on this appeal is as follows. In 2010 Mr Hussain was convicted of conspiracy to defraud relating to his dental practice and was sent to prison. As a consequence, in 2011, his name was erased from the register. In 2017 he applied for his name to be restored. Following a hearing, on 27 June 2018 the PCC decided to restore him to the register because it felt that he had remediated his dishonesty. I will set out the detail later. Unbeknownst to the Committee, however, in October 2017 he had been found by a judge sitting in the High Court to have lied on oath in civil proceedings relating to his practice at a time when he had, on his case, become a reformed person. So, says the Authority, supported by the GDC, the PCC's decision is flawed because it failed to take relevant evidence into account. It argues that the matter should, at a minimum, be remitted for a fresh determination in light of all of the relevant evidence, including the 2017 judgment.
4. In a letter dated 10 September 2018 the GDC informed the Authority that it would not defend the appeal for the reasons set out in the Appellant's Notice. There are four grounds of appeal, namely that the decision of the PCC involved a serious procedural irregularity because:
 - a. the GDC failed to present, and so the PCC did not consider, a High Court judgment from September 2017 (the judgment was actually delivered in October

- 2017) in which Mr Hussain gave evidence which the judge found was untrue (Ground 1);
- b. that finding was relevant to the PCC's consideration of Mr Hussain's fitness to practice as a dentist, his conduct since his conviction, and other matters (Ground 2);
 - c. hence, the PCC's decision to restore Mr Hussain's name was taken on an evidential basis which was incomplete (Ground 3);
 - d. if the PCC had been aware of that finding, it would have done various things, including exploring the finding with Mr Hussain and the witnesses he called who attested to his insight into, and remediation of, his earlier dishonesty (Ground 4).
5. The Authority applies to amend its Grounds of Appeal to include an additional Ground (as Ground 5) that:
- “The Committee failed in any event to (i) properly characterise the seriousness of Mr Hussain's conduct and the impact of that conduct upon the public interest; and (ii) address, or to address adequately, whether public confidence and the maintenance of professional standards would be damaged by the restoration of Mr Hussain to the register.”
6. This application is opposed by Mr Hussain.

Factual background and chronology

7. Mr Hussain qualified as a dentist in 1996. Together with his business partner, Jaspal Singh Bachada (also a dentist), he owned a number of dental practices, some together (including the Droitwich Dental Practice, and the Litchfield Road Practice in Wednesbury), and some separately.
8. Between 2006 and 2010 Mr Hussain received a number of warning letters from the GDC. On 1 June 2007 he was suspended from the register by the PCC for 12 months. The misconduct found against him included sending intentionally misleading letters to patients and the previous employer of a former associate dentist. The PCC found that (a) he had threatened the former associate to the effect that he would never work in the area again; (b) he had given an untrue explanation of events; (c) he had put his own interests ahead of those of his patients; and (d) he had had not developed any true insight into the nature and gravity of his actions, even during the course of the proceedings.
9. In July 2010 Mr Hussain was convicted of conspiracy to defraud between 2002 and 2006. He was convicted of defrauding:
 - a. the NHS, by agreeing that Mr Bachada would perform NHS dental treatment at the Droitwich surgery and secure payment from the NHS for that treatment when they knew that Mr Bachada's application to join the relevant dental performers' list (in order to lawfully provide NHS dental services) had not been granted. The

NHS was therefore misled into paying the fees for the treatment on the basis that it had been provided by other practitioners and/or at another dental practice;

- b. patients, by misleading them into believing that they were receiving NHS treatments at NHS fees at the Droitwich surgery when in fact they were not (Mr Bachada was not permitted to provide NHS dental services), and were being charged higher fees than NHS fees.
10. Also, in order to avoid the discovery of this conspiracy, Mr Hussain concealed or destroyed some patient records and re-wrote others.
11. Following his conviction, Mr Hussain's name was erased from the register in November 2011.
12. Other episodes of dishonesty by Mr Hussain gave rise to civil proceedings. The details are as follows.
13. In April 2008 Mr Hussain and Mr Bachada sold the Droitwich practice to AG Family Care Ltd. In December 2010 judgment was given in the High Court in *AG Family Care Limited v Hussain and Bachada*, Claim 8BM30286, in favour of the claimant/purchaser for sums lost as a consequence of deceit on the part of Mr Hussain and Mr Bachada as to the value of the business including its good will. That had been valued at £850 000 on the false basis that the practice was a private practice rather than an NHS practice. In fact, the practice was not profitable.
14. The judge said this about Mr Hussain's evidence:

“20. Mr Hussain was a very unimpressive witness constantly repeating questions and page references, re-reading the documents whilst in the witness box and failing to answer the very simple direct but searching questions posed to him in cross examination or even the simple elucidating questions put to him by the court.

...

23. I place no reliance upon Mr Hussain's self serving evidence in this case, save where it is corroborated by a document or an another witness whom the court feels able to trust.”
15. Hence, the judge accepted the submission of the Claimant's counsel that Mr Hussain had given deliberately false evidence to the Court. The judge made a number of other adverse comments about Mr Hussain, including that he had not disclosed important documentation (see at [14]).
16. Mr Hussain made his application for restoration to the register on 12 July 2017. In a witness statement signed on 12 June 2017 he gave evidence about (amongst other things) the reflection he said he had undertaken as to his behaviour in the past and the choices he had made, his identification of the changes that were necessary and his

realisation of the importance of ethical and moral behaviour. He recorded the mentoring he had undertaken with a Dr B, which he said had enabled him to retrain his ethical approach and delve deeply into professional standards, the cognitive behavioural therapy he had undergone to challenge his core values, his completion of a post-graduate diploma in Dental Law and Ethics and his attendance on a programme at the Interactive Studies Unit of Birmingham University during which he examined ethical decisions by way of situational judgment exercises. He also explained that the forces which had driven him at the time of his misconduct were no longer present.

17. On 31 October 2017 HHJ David Cooke, sitting as a High Court judge, gave judgment in the High Court in *Dr Navdeep Dhaliwal v Hussain and Bachada* [2017] EWHC 2655 (Ch). The trial took place in September 2017. This claim arose out of the sale of the Litchfield Road Practice in Wednesbury. Mr Hussain and Mr Bachada were again alleged to have dishonestly made false representations during the sale of the practice about its turnover. The judge found in favour of the claimant and concluded that Mr Hussain had given false evidence. I will say more about this judgment later.
18. The PCC hearing which led to Mr Hussain's name being restored to the register took place in June 2018.

Chronology

19. The principal relevant events are as follows:
 - 1.7.96 Mr Hussain registered as a dentist
 - 1.6.07 Registration suspended for 12 months by reason of his misconduct
 - 11.1.08 Sale by Mr Hussain and his business partner Mr Bachada of the Litchfield Road Dental Practice, Wednesbury
 - 30.4.08 Sale by Mr Hussain and business partner Mr Bachada of Droitwich Spa Dental Practice to AG Family Care Ltd
 - 9.7.10 Mr Hussain convicted on indictment (after his guilty plea and a trial) of two counts of conspiracy to defraud (with business partner Mr Bachada)
 - 5.10.10 Mr Hussain sentenced to 30 months imprisonment for each offence, to run concurrently
 - 22.12.10 Judgment of HHJ Simon Brown QC in the High Court in *AG Family Care Ltd v Hussain and Bachada*
 - 8.11.11 PCC erases Mr Hussain's name from the register
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- 12.7.17 Mr Hussain applies to be restored to the register
- 31.10.17 Judgment of HHJ David Cooke in the High Court in *Dr Navdeep Dhaliwal v Hussain and Bachada*
- 25.6.18-
27.6.18 PCC restoration hearing
- 27.6.18 Decision to restore
- 13.8.18 The Authority determines that the decision was ‘not one which no reasonable panel could have made ... it was not insufficient for public protection’ and writes to Mr Hussain to advise him it is not referring the decision under s 29 of the DA 1984
- 21.8.18 The Authority writes to Mr Hussain to say that, in fact, it will be referring his case in the light of further information
- 22.8.18 Appellant’s Notice filed and served containing only Grounds 1 to 4
- 5.10.18 The Authority applies to amend its Notice of Appeal to add Ground 5.

The decision to restore Mr Hussain’s name to the register

20. The PCC’s decision of 27 June 2018 restoring Mr Hussain’s name to the register can be summarised as follows. It said that:
- a. the burden was on Mr Hussain to satisfy the PCC of the matters in s 28(5) of the Dentists Act 1984 (the DA 1984);
 - b. the GDC did not accept that he was fit to practice as a dentist (s 28(5)(a)) or that he was of good character (s 15(3)(b));
 - c. it had been referred to evidence that Mr Hussain had taken steps to address his dishonest behaviour;
 - d. it had been referred to the 2010 High Court judgment which, it said, had spoken of Mr Hussain’s ‘gross duplicity’ in the sale of the Droitwich practice;
 - e. it had heard from Professor S, who works with healthcare professionals in relation to behavioural matters. He said that Mr Hussain had developed ‘very considerable insight’ and that he did not pose a major risk of re-offending;
 - f. it had received a witness statement from Dr B who had provided coaching/mentoring sessions and said that Mr Hussain had developed a ‘deeper sense of self-awareness and an understanding of the factors that contributed to his unacceptable behaviour and actions’;

- g. Mr Hussain had given evidence on oath about the steps he had taken since his erasure;
- h. Mr Hussain's convictions were 'very serious', involving a conspiracy to defraud the NHS and patients and an attempt to cover up the offences by withholding, destroying or altering patient records and included repeated dishonesty over a protracted period of time;
- i. the events giving rise to the 2010 civil judgment amounted to further examples of Mr Hussain's dishonesty;
- j. it kept in mind Mr Hussain's fitness to practise history;
- k. it was clear that Mr Hussain had reflected extensively over the last seven years, with his release from prison being the turning point, weight being accorded the opinions of Professor S and Dr B;
- l. Mr Hussain recognised that what he did was wrong, had acknowledged why he had acted in the way he did and stated that it was satisfied that the factors which had caused him to do so are no longer present;
- m. it determined that the risk of repetition of the behaviour was low, as there had been no further evidence of misconduct on the part of Mr Hussain since his erasure in 2011, which (then) had been almost seven years ago, and the pressures he faced between 2002 and 2006 were no longer present. The PCC referred to the dishonest conduct as having spanned the period from 2002 until 2010.
- n. this was not a case in which the misconduct was so serious that the public interest required Mr Hussain to be kept permanently out of practice;
- o. it considered that his convictions were now to be regarded as spent for the purposes of the Rehabilitation of Offenders Act 1974;
- p. it observed that it had received extensive feedback from a range of people as to Mr Hussain's recognition of his wrong doing and how he had changed for the better, in particular from Dr B, who believed Mr Hussain to be sincere in wishing to change and to demonstrate that change;
- q. it found that Mr Hussain was to be considered of good character for the purposes of section 15(3)(b) of the Dentists Act 1984;
- r. it imposed conditions upon Mr Hussain's return to practice, in particular as to reporting to the Council by a workplace supervisor and limiting his dental practice in accordance with the workplace supervisor's advice.

The issues on the appeal

21. This appeal is brought on the following basis.

22. By the time of the PCC hearing in June 2018 the GDC had come into possession of the second, 2017, High Court judgment, against Mr Hussain and Mr Bachada arising out of their sale of the Litchfield Road Practice. As I have said, the claim was for fraudulent misrepresentation and breach of warranty relating to the turnover of the practice. The trial took place in September 2017.
23. In his judgment delivered the following month the judge said:
 - “42. I did not however form a good impression of either of the defendants as witnesses ...
 43. In answering cross examination, in my view both defendants were throughout evasive. ... Mr Hussain frequently interrupted questions, launching off into a long statement about matters irrelevant to the question being asked. Both of them when dealing with their own actions and motivations in the sale process gave answers that in my view were implausible and untrue.”
24. On its face, this was therefore a finding that Mr Hussain had given untrue evidence on oath in 2017, by the time when he had supposedly remediated his dishonesty in the ways described in the PCC decision.
25. The PCC was provided with the determinations in the previous fitness to practise hearings, in 2007 and 2010; the material available from the Crown Court proceedings in 2010; Mr Hussain’s application and accompanying documents; a further bundle of witness statements and documents relied upon by Mr Hussain; and the 2010 judgment in the civil case arising out of the sale of the Droitwich Practice. It did not have the 2017 judgment.
26. Hence, while the first civil judgment was made available to the PCC, the GDC did not place the second judgment before the PCC, and neither Mr Hussain nor his witnesses or documentation made any reference to it. I will explain why later. The PCC therefore had no knowledge of the decision and the findings the judge had made about Mr Hussain’s approach to giving evidence on oath to the Court.
27. As I have summarised, the PCC relied on evidence that Mr Hussain had remediated his dishonesty. In light of the 2017 judgment, however, the Authority (supported by the GDC) submits that the PCC’s decision to allow Mr Hussain’s application for the restoration of his name to the register arose from a serious procedural irregularity, for the reasons set out in its Grounds of Appeal, namely because the PCC acted on incomplete evidence.
28. The fifth, additional, ground of appeal follows from the Court of Appeal’s decision in *General Medical Council v Chandra* [2018] EWCA 1898 handed down after the Grounds of Appeal were settled. In that case at [59] the Court of Appeal said that the over-arching objective applies to both sanctions and restoration cases. The question in each case is the same namely, having regard to the over-arching objective, is the

doctor/applicant fit to practise ? At [70] it said that a tribunal considering restoration must consider the circumstances which led to the erasure. They must make findings as to what extent the applicant has shown remorse and insight and remediated him/herself and satisfy themselves that he or she is no longer a risk. The passage of time will be important. The tribunal must then stand back and have proper regard to the over-arching objective.

Legal framework

Statutory provisions

29. Section 28 of the DA 1984 governs applications for restoration. Section 28(5) provides that such an application shall not be granted unless the applicant satisfies the PCC that (a) he is fit to practise as a dentist; and (b) he meets the requirements of s 15(3). This provides that a person shall not be entitled to be registered in the dentists' register under unless he satisfies the registrar as to the following matters, namely:
 - a. his identity;
 - b. that he is of good character;
 - c. that he has the necessary knowledge of English; and
 - d. that he is in good health, both physically and mentally.
30. Section 29 of the 2002 Act allows the Authority to refer specified disciplinary decisions made by medical regulatory tribunals to the High Court where it is dissatisfied with the outcome. By s 29(2)(c) a decision to restore a practitioner's name to the register is a decision that can be referred.
31. Section 29(4) of the 2002 Act, as amended, has the effect of providing that where the PCC restores a person's name to the register then the Authority may:

“(4) ... refer the case to the relevant court 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.

(4A) Consideration of whether a decision is sufficient for the protection of the public involves consideration of whether it is sufficient—

 - (a) to protect the health, safety and well-being of the public;
 - (b) to maintain public confidence in the profession concerned; and
 - (c) to maintain proper professional standards and conduct for members of that profession.”

32. As I have said, s 29(7) of the 2002 Act provides that where a reference is made under s 29(4), the case is to be treated by the court to which it has been referred as an appeal by the Authority against the relevant decision (even though the Authority was not a party to the proceedings resulting in the relevant decision), and the body which made the relevant decision (as well as the person to whom the decision relates) is to be a respondent to the appeal.

The appeal court's approach

33. The correct approach of the Court to a reference under s 29, at a time when s 29(4)(a) provided that the question was whether the decision was unduly lenient, was considered by the Court of Appeal in *Ruscillo*, supra, [69]-[83]. The principles relevant to this appeal are as follows; the paragraph numbers refer to that judgment. I have amended the CPR references in line with the up to date version of the rules.
34. The primary object of s 29 is not to penalise for misconduct. It is to protect the public and the reputation of the profession in question ([60]).
35. If the Court decides that the decision as to penalty was 'wrong', it must allow the appeal and quash the relevant decision, in accordance with CPR r 52.21(3)(a) and s 29(8)(b) of the Act. It can then substitute its own decision under s 29(8)(c) or remit the case under s 29(8)(d). It may be that the Court will find that there has been a serious procedural or other irregularity in the proceedings before the disciplinary tribunal. In those circumstances it may be unable to decide whether the decision as to penalty was appropriate or not. In such circumstances the Court can allow the appeal and remit the case to the disciplinary tribunal with directions as to how to proceed, pursuant to CPR r 52.21(3)(b) and s 29(8)(d) of the Act ([71]-[72]).
36. In any particular case under s 29 the issue is likely to be whether the disciplinary tribunal has reached a decision as to penalty that is manifestly inappropriate having regard to the practitioner's conduct and the interests of the public ([77]). Where all material evidence has been placed before the disciplinary tribunal and it has given due consideration to the relevant factors, the Council and the Court should place weight on the expertise brought to bear in evaluating how best the needs of the public and the profession should be protected. Where, however, there has been a failure of process, or evidence is taken into account on appeal that was not placed before the disciplinary tribunal, the decision reached by that tribunal will inevitably need to be reassessed ([78]).
37. Where an applicant for restoration has by his misconduct fundamentally fallen short of the necessary standards of probity and good conduct, a tribunal is required to address the issue of whether public confidence in the profession and professional standards would be damaged by restoring the applicant's name to the register by considering first the evidence adduced in relation to remediation against the backdrop of the true nature and full extent of the misconduct and making appropriate findings and then by balancing its findings against each of the three limbs of the over-arching objective: see *General Medical Council v Chandra* [2018] EWCA Civ 1898.
38. In relation to fresh evidence, if the Council is led to believe that a case has been 'under prosecuted' or that relevant evidence has not been put before the tribunal with the

consequence that the tribunal's decision is flawed, the Council should, in the first instance, make inquiries of the relevant health care regulatory body as to what occurred. There will be cases where it is in the public interest that additional evidence should be placed before the court on a reference under s 29. This may be necessary to ensure that a practitioner does not escape the sanctions that his conduct has made essential if patients are not to be exposed to risk ([81]-[82]).

39. Where an application is made to the Court to adduce additional evidence pursuant to CPR r 52.11(2) the Court should not apply the principles in *Ladd v Marshall* [1954] 1 WLR 1489. The principles in that case have no application to a reference under s 29. The fact that the evidence could have been, but was not, placed before the disciplinary tribunal can have no bearing on whether it should be admitted by the Court. The Court will, however, be concerned, just as the Council should be, to be sure that the introduction of such evidence is truly in the public interest ([83]).
40. It is also relevant to note the recent decision of the Court of Appeal presided over by the Lord Chief Justice (sitting with Sir Terence Etherton MR and Rafferty LJ) in *Bawa-Garba v General Medical Council* [2018] EWCA Civ 1879. At [67] the Court said that an appeal court should only interfere with such an evaluative decision on sanction if (a) there was an error of principle in carrying out the evaluation, or (b) 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.

Dishonesty

41. The cases make clear that dishonesty in any health care professional is always to be considered as serious and as adversely affecting the public interest. That is because trust and honesty lie at the heart of the relationship between such a professional and the public. The cases establish the following principles. Findings of dishonesty lie at the top end of the spectrum of gravity of misconduct: *Theodoropolous v General Medical Council* [2017] EWHC 1984 (Admin), [35]. Where dishonest conduct is combined with a lack of insight, is persistent, or is covered up, nothing short of erasure is likely to be appropriate: *Naheed v General Medical Council* [2011] EWHC 702 (Admin), [22]. The sanction of erasure will often be proper even in cases of one-off dishonesty: *Nicholas-Pillai v General Medical Council* [2009] EWHC 1048 (Admin), [27]. The misconduct does not have to occur in a clinical setting before it renders erasure, rather than suspension, the appropriate sanction: *Theodoropoulos*, supra, [35]. Misconduct involving personal integrity that impacts on the reputation of the profession is harder to remediate than poor clinical performance: *Yeong v General Medical Council* [2009] EWHC 1923, [50]; *General Medical Council v Patel* [2018] EWHC 171 (Admin) at [64]. Personal mitigation should be given limited weight, as the reputation of the profession is more important than the fortunes of an individual member: *Bolton v Law Society* [1994] 1 WLR 512 at 519; *General Medical Council v Stone* [2017] EWHC 2534 (Admin) at [34].
42. The GDC's *Guidance for the Practice Committees, including Indicative Sanctions Guidance* (effective 1 October 2016) says of dishonesty:

“48. Patients, employers, colleagues and the public should be able to rely on a dental professional’s integrity. Dishonesty, particularly when associated with professional practice, is highly damaging to the dental professional’s fitness to practise and to public confidence in the profession. Examples of dishonesty in professional practice include, but are not limited to:

- defrauding an employer or contracting body;
- falsifying and/or improperly amending patient records;
- issuing practice policies which unduly influence patients to receive expensive or unnecessary treatment;
- misrepresenting the NHS position;
- submitting or providing false references;
- providing misleading information on a CV;
- failing to take reasonable steps to ensure that statements made in formal documents are accurate;
- misconduct in relation to research for example presenting misleading information in publications or dishonesty in relation to clinical trials.

49. Dishonesty is serious even when it does not involve direct harm to patients (for example defrauding the NHS or providing misleading information) because it can undermine public confidence in the profession. The Privy Council has emphasised that ‘Health Authorities must be able to place complete reliance on the integrity of practitioners and the Committee is entitled to regard conduct which undermines that confidence as calculated to reflect on the standards and reputation of the profession as a whole’.

50. The High Court has also held that, when considering impairment, a panel is entitled to take into account the way in which a registrant has conducted his or her defence and any dishonesty therein.”

43. In relation to restoration, the Guidance says:

“10.4 The burden of proof is on the applicant to satisfy the PCC that they:

- are fit to practise. This means satisfying the PCC that not only do they have the necessary knowledge and skills to practise the profession safely and effectively, but also as to their identity,

good character, necessary knowledge of English and health, as specified in the Act;

- meets the requirements of any CPD rules relevant to their case; and
- meets any other requirements as to education and training as directed by the PCC.

10.5 When considering the applicant's application for restoration, the PCC must have regard to all three aspects of the over-arching objective of the Council, as set out in the Dentists Act i.e. the protection of the public via the pursuit of the following objectives:

- to protect, promote and maintain the health, safety and well-being of the public;
- to promote and maintain public confidence in the professions regulated under the Act; and
- to promote and maintain proper professional standards and conduct for members of the dental professions.”

Submissions

The Authority

44. So far as Grounds 1 to 4 are concerned, the Authority submits that:
- a. Honesty is a fundamental tenet of the dentists' profession. In the furtherance of its over-arching objective in s 1(ZA) of the DA 1984 (namely, protection of the public), the GDC was obliged to present the PCC with all the evidence in its possession material to the issues under consideration but did not do so. If anything, more than the 2010 judgment, the 2017 judgment was material to Mr Hussain's application, because it undermined Mr Hussain's evidence, and that of Professor S and Dr B, that he now had insight into his dishonesty and had acquired an understanding of and insight into it, and that he had changed his ethical and moral outlook since his release from prison. That is because it amounted to a finding that in September 2017, Mr Hussain, during the course of protecting his own interests (to the detriment of the purchaser of one of his practices), had not told the truth on oath;
 - b. The 2010 and 2017 judgments demonstrate Mr Hussain behaving in a similar (dishonest) fashion, when giving evidence on oath in Court whilst seeking to protect his own interests, to the detriment of the purchasers of his practices. The 2017 judgment is evidence of very recent dishonest behaviour on the part of Mr Hussain and shows that he has not remediated his dishonesty;

- c. another element of Mr Hussain's case was that his convictions arose out of pressures to which he was subject in 2002 to 2006 and that those pressures were no longer present, however the 2017 judgment shows that is not true;
- d. the terms of the 2017 judgment are such that Mr Hussain cannot be considered to be of good character for the purposes of the s 15 of the DA 1984;
- e. without the 2017 judgment the PCC was unable to make any assessment of the significance of the judge's finding in relation to the lack of truth in Mr Hussain's evidence on oath to the Court;
- f. had the PCC been made aware of the finding that Mr Hussain had been found to have given evidence to a Court in September 2017 which was untrue it would have been able to ascertain whether Mr Hussain had informed the witnesses called by him to attest to his insight into and remediation of the dishonest conduct which resulted in his conviction of the finding that he had given evidence in the High Court which was untrue;
- g. the 2017 judgment is capable of undermining the PCC's conclusions about Mr Hussain's reformed character, which was the basis of its decision to restore his name to the register.
- h. overall, what happened here was a serious procedural error within CPR r 52.21(3)(b) because there was an error in process in Mr Hussain's restoration application, which resulted in the PCC not being provided with information which was material to the issues it had to consider.

45. In light of *Chandra*, supra, the Authority submits in relation to Ground 5 that:

- a. the PCC should have considered the evidence as to Mr Hussain's remediation and the behaviour which resulted in his erasure from the register, and in the event that it made positive findings it should have balanced those findings against each of the limbs of the over-arching objective, in order to satisfy itself that the restoration of Mr Hussain to the register would promote and maintain public confidence in the profession, thereby ensuring that the over-arching objective would be achieved;
- b. the PCC failed to have adequate regard to the nature and seriousness of Mr Hussain's convictions, and its decision is wrong. Mr Hussain's dishonesty went to the heart of dental practice, impacting upon patients and the public purse, to the detriment of patients' interests and public confidence in the profession, all in Mr Hussain's own interests. In order to further his own interests in escaping the consequences of his dishonesty Mr Hussain withheld, destroyed and re-wrote patient records. In response to such conduct the most robust affirmation of the acceptable standards is required. No dentist who has chosen to further his own interests in this way should remain on or be restored to the register;
- c. contrary to the finding of the PCC, Mr Hussain is not a person of good character within the meaning of section 15 of the Dentists Act 1984 and his convictions are

not to be considered as spent within the meaning of the Rehabilitation of Offenders Act 1974;

- d. contrary to the finding of the PCC, Mr Hussain is not fit to practise dentistry. No individual with convictions of the nature and seriousness of Mr Hussain's (even without his other fitness to practise history) would be considered a fit person to be registered as a dentist and no such individual should be considered a fit person to be restored to the register;
- e. having failed to identify the true nature and seriousness of Mr Hussain's behaviour, the PCC failed to conduct the exercise described at (a) above; the PCC focused on Mr Hussain's remediation. It failed to address the limbs of the overarching objective, and did not consider how the restoration of Mr Hussain to the register would achieve that objective.

The GDC

- 46. The GDC supports the Authority's appeal and submits that the PCC's decision should be quashed because the 2017 judgment was wrongly not placed before it, and that if it had considered it then it would (or alternatively could) have resulted in the PCC reaching a conclusion adverse to Mr Hussain on the central issues of whether he was fit to practise and/or of good character, and hence dismissing his application for his name to be restored to the Register. In any event, the PSA's appeal should succeed on the basis that the PCC failed properly to appreciate and characterise the seriousness of Mr Hussain's criminal conduct and the ongoing impact of that conduct on the public interest, and to address (adequately or at all) whether public confidence and the maintenance of professional standards would be damaged by restoring Mr Hussain to the Register.
- 47. It draws specific attention to s 1 of the DA 1984, which provides that the GDC's overarching objective is the protection of the public, and the pursuit thereof involves the pursuit of the following objectives:
 - “(a) to protect, promote and maintain the health, safety and well-being of the public;
 - (b) to promote and maintain public confidence in the professions regulated under this Act; and
 - (c) to promote and maintain proper professional standards and conduct for members of those professions”.
- 48. Further, s 28(5) of the DA 1984 provides that an application for restoration of a name to the Register shall not be granted unless the applicant satisfies the PCC that (amongst other things) he is fit to practise as a dentist and that he meets the requirements of s 15(3)(a) to (c). The latter requirements include at s 15(3)(b) that he is of good character.
- 49. The GDC's Skeleton Argument sets out why it is that the 2017 judgment was not put before the PCC. This is also explained in the witness statement of Laura Thompson, a lawyer who works for the GDC. The facts are not disputed. The GDC accepts that

the judgment was in its possession but was not deployed at the hearing because of errors on its part. I quote from its Skeleton Argument:

“10. The circumstances in which this situation arose were as follows:

(1) A copy of the Second Judgment was forwarded to the GDC by NHS England on 8 November 2017. It was omitted in error from the papers served on Mr Hussain’s solicitors in advance of the PCC hearing scheduled for 27 June 2018.

(2) On 18 June 2018, the proposed hearing bundle was updated to include the Second Judgment and a copy was served on Mr Hussain’s solicitors.

(3) On 19 June 2018, the hearing bundle was further updated to include the judgment in the first set of civil proceedings against Mr Hussain (‘the First Judgment’) ... Although it predated the original PCC decision to erase Mr Hussain’s name from the Register by about eleven months, the First Judgment had not been before the PCC when it took that decision.

(4) On 27 June 2018, prior to the commencement of the hearing, there was a discussion between Counsel for the GDC, Counsel for Mr Hussain and the Legal Assessor to the PCC. Counsel for Mr Hussain objected to either of the Judgments being put before the PCC on the basis that the GDC had only very recently indicated that it intended to rely upon them, and further that the Second Judgment was at that stage subject to an appeal.

(5) By way of compromise and with a view to the hearing not being delayed by procedural objections (including the possibility of an adjournment), it was agreed between the GDC and Mr Hussain that the First Judgment, but not the Second Judgment, would go before the PCC.

11. In deciding to proceed in the manner set out above, the GDC took the view at the time that the First Judgment alone (taken together with Mr Hussain’s criminal conviction for conspiracy to defraud and other fitness to practise history) provided a sufficient basis for resisting Mr Hussain’s application for restoration, in circumstances where the findings made in the First Judgment were very serious.

12. With hindsight, and having regard to the manner in which the PCC approached the issues in its decision dated 27 June 2018, the GDC recognises that it should have invited the PCC to

consider the Second Judgment, notwithstanding the possibility that Mr Hussain might raise a procedural objection.

13. The better course would have been to leave it to the PCC to determine the admissibility of the Second Judgment and the significance and weight to be attached to it (for example if Mr Hussain was pursuing an appeal in relation to the Judge's findings that he had given evidence that was untrue). “

50. Ms Thompson explains in her witness statement that she received the 2017 judgment in November 2017 and briefly reviewed it and logged it onto the GDC's case management system. She intended to carry out a full review later but did not do so: she says the judgment was 'overlooked' and so not included in the draft hearing bundle which she prepared in late April and early May 2018
51. I should make clear that Mr Steele, who argued the appeal before me on behalf of the GDC, was not the counsel below who agreed the compromise I have referred to.
52. The GDC submits that the key issues for the PCC were whether Mr Hussain was fit to practise and of good character, within the meaning of the legislation. It says that the 2017 judgment is evidence that even then Mr Hussain was behaving dishonestly to the extent of lying on oath in Court about his conduct in the period leading up to his conviction. It says this plainly casts considerable doubt on the evidence he gave before the PCC about the degree of insight he has into his previous dishonest conduct and about the risk of repetition. It wholly undermines the notion that he had 'reflected extensively over the last seven years' or that his release from prison had been 'the turning point of that change'. If the PCC had had sight of the 2017 judgment, it would (or alternatively could) have resulted in the PCC reaching a conclusion adverse to Mr Hussain on the central issues of whether he was fit to practise and/or of good character, and hence dismissing his application for his name to be restored to the Register.
53. In any event, even leaving aside the 2017 judgment, the GDC says that the Authority's appeal should succeed on Ground 5. The PCC failed properly to appreciate and characterise the seriousness of Mr Hussain's criminal conduct and the ongoing impact of that conduct on the public interest, and to address (adequately or at all) whether public confidence and the maintenance of professional standards would be damaged by restoring Mr Hussain to the Register.

Mr Hussain's submissions

54. Mr Hussain submits that the Authority should not be permitted to amend its Appellant's Notice to add Ground 5. He points out that by CPR r 52.17 and CPR r 52.21(5), the Court's permission is required and that I should not grant permission because there is no evidence in support of the application and no explanation for its lateness.
55. On the principal issues, he says that the 2017 judgment did not go into evidence because of a perfectly proper course agreed between counsel and there was no serious procedural irregularity and the PCC decision was not rendered 'unjust' by the omission complained of. He says that although it is now said that with hindsight the better course would have been to seek to have the 2017 judgment in evidence that does not support the argument that this was a serious procedural irregularity: it shows

that as a matter of fact there was no such irregularity, but rather a decision that – with hindsight – the GDC says might have been made differently. Further, he says that although there is no closed definition of ‘serious procedural irregularity’, it is clear that it must amount to an irregularity: ie, it does not fall within the range of acceptable courses of conduct and that it must be serious. He also submits that as a matter of legal principle, a civil judgment is of limited evidential effect.

56. Further, he says that on 13 August 2018, the Authority determined that the decision was not one which no reasonable panel could have made, and it was not insufficient for public protection. It did not therefore exercise its statutory power to refer the case to court. He therefore says that the PCC decision was not ‘wrong’: it was a carefully considered one which it was entitled to reach. In circumstances in which the PCC had before it a wealth of information about his dishonesty and misconduct in the relevant period, it is submitted it is highly unlikely that knowledge of another event during this period would have added anything of material weight. He says there was plentiful evidence before the PCC to support his remediation and that there is no basis on which this court can intervene.

Discussion

Grounds 1 – 4

57. On behalf of Mr Hussain, Ms Neale accepts there is no closed definition of ‘serious procedural or other irregularity’ in CPR r 52.21(3)(b). It seems to me inescapable that what happened here can properly be so classified. I essentially agree with the submissions on behalf of the Authority, supported by the GDC, which I summarised earlier.
58. The starting point is that the 2017 judgment was plainly of relevance to the issue which the PCC had to decide, namely, whether Mr Hussain had remediated his dishonesty in the way that he claimed. On its face, it showed that he had not, because a judge sitting in the High Court found that in September 2017 he had given false evidence on oath during a trial in which he stood accused of fraudulent misrepresentation. That was a finding of dishonesty. In my opinion it is obvious that the judgment should have been deployed by the GDC before the PCC.
59. The first procedural irregularity was the failure by GDC to serve the 2017 judgment on those acting for Mr Hussain well in advance of the June 2018 hearing, when the initial hearing bundle was served. The matter was not rectified until 18 June 2018, when the bundle was updated. Ms Thompson’s evidence makes clear that this occurred because of a failure by the GDC to fully review the 2017 judgement when the case was being prepared for hearing. That was an error. It is plain that had the judgment been reviewed then it would have been served and relied upon. There was no considered tactical decision at that stage not to rely upon the judgment.
60. The second error was made by the counsel for the GDC at the hearing when he agreed a compromise whereby the 2017 judgment was not placed before the PCC. That was a serious error of judgment by him which cannot be justified, and no degree of hindsight is required for that conclusion. Ms Thompson’s witness statement states that counsel for Mr Hussain objected to the 2017 judgment because (a) the GDC had only recently indicated that two judgments were to be relied upon; (b) it was subject to an

appeal. (I note that Mr Hussain's Skeleton Argument at [4.7] says these were not the only objections, but no further detail is given). Neither reason bears scrutiny, and they should have been rejected out of hand by the GDC's counsel as reasons not to rely on the 2017 judgment.

61. As to the first reason, the restoration hearing began on 25 June 2018. By then, Mr Hussain and his legal team had had the 2017 judgment for around seven days. That was ample time for his instructions to be taken on it. He himself was, of course, fully familiar with it having been one of the parties to the litigation. If further time were needed then the proper course would have been for the matter to be raised before the PCC and for an application for an adjournment to be made by Mr Hussain.
62. As to the second reason, it is trite that a judgment has effect unless and until it is overturned on appeal (or if it is stayed pending an appeal). Hence, the fact that there was an appeal outstanding was neither here nor there. That is all the more so because the finding that Mr Hussain had given untrue evidence was one of fact made by the judge who heard the evidence, and so was unlikely to be overturned on appeal: see eg *Watson Farley and Williams (a firm) v Ostrovizky* [2015] EWCA Civ 457, [8], citing *McGraddie v McGraddie* [2013] 1 WLR 2477:

“It was a long settled principle, stated and restated in domestic and wider common law jurisprudence, that an appellate court should not interfere with the trial judge's conclusions on primary facts unless satisfied that he was plainly wrong.”
63. In short, it was not properly open to counsel for the GDC to take the course that he took, given the obvious relevance of the 2017 judgment. He should not have agreed not to rely on the 2017 judgment. The matter should have been raised before the PCC for a decision to be taken on the correct way forward, either by a decision on the admissibility of the 2017 judgment, or on an adjournment application, or both.
64. I have not overlooked the fact that ordinarily in civil litigation if a party at trial decides deliberately not to rely on a piece of evidence then an appeal court will be unsympathetic to an appeal based upon it. However, as I have noted, in *Ruscillo*, supra, the Court of Appeal said that on an appeal in medical regulatory proceedings the court should not apply the principles in *Ladd v Marshall*, supra, because they have no, or least a limited, application to a reference under s 29 because of the public interest. In this case I am satisfied that the introduction of the 2017 judgment is truly in the public interest given its direct bearing on the issues in this case. The passages I have referred to in *Ruscillo* specifically contemplate an appeal being brought by the Authority on the basis of evidence that was not adduced by the GDC at a disciplinary hearing.
65. In her Skeleton Argument at [4.10] Ms Neale contends that in order to be a serious procedural irregularity what occurred must be serious and be such as to not fall within the range of 'acceptable courses of conduct'. No authority is cited in support of this proposition. I need not decide whether Ms Neale's formulation is correct, but even if it is, I consider what happened here can be so classified, for the reasons that I have given. The error in failing to serve the judgment well before the hearing and the inappropriate compromise agreement, taken together, were serious irregularities in the

procedure which the GDC adopted for this restoration hearing. They were wholly unreasonable because they had the effect of depriving the PCC of important evidence.

66. Was there injustice as a consequence ? In my judgment, there was. The agreement that was reached had the effect of depriving the PCC of the most recent evidence of Mr Hussain's dishonesty. That, in turn, meant that the PCC judged the evidence he called about his supposedly reformed character – in other words, his remediation – on a false and misleading basis.
67. The stark fact is that despite all the work Mr Hussain said he had done which was evidenced not just by him but also by his witnesses, in 2017 he was found by a judge sitting in the High Court to have given untrue evidence on oath.
68. There are a number of findings in the PCC's determination which are at least arguably wrong in light of the 2017 judgment. In my assessment, these show the outcome was unjust. These findings include at p5 where the Committee said it considered Mr Hussain had demonstrated his 'shame and remorse which led to [his] erasure in 2011 and the misrepresentations that [he] made to the Claimant in the sale of the Practice in 2018'. It undermines the point at p6 that his release from prison had been the turning point of his change. It counts against the finding (at p6) that he had 'demonstrated insight' into his dishonesty and 'learned his lesson'. It shows that the Committee's conclusion that his dishonesty only spanned the period from 2002 to 2010 was not correct: in fact, it went much further, into 2017.
69. If the 2017 judgment had been deployed in evidence then the witnesses called by Mr Hussain, namely Professor S and Dr B, would have been cross-examined about it and would have been required to justify, if they could, their conclusions about Mr Hussain's reformation in light of the judge's finding of recent dishonesty. Their evidence on this point would have been highly material to the issue the PCC had to determine.
70. Ms Neale argued that a judgment is of limited evidential effect as to the facts found, and cited *Phipson on Evidence*, Chapter 43, in support. That proposition may be true where the strict rules of evidence apply. But they do not apply before a PCC of the GDC. Restoration hearings are governed by Part 6 of the General Dental Council (Fitness to Practise) Rules Order in Council 2006 (SI 2006/1663). Rule 57(1) provides that a PCC may in the course of the proceedings receive oral, documentary or other evidence that is admissible in civil proceedings in the appropriate court in that part of the UK in which the hearing takes place. Importantly, however, Rule 57(2) provides that a PCC may also, at their discretion, treat other evidence as admissible if, after consultation with the legal adviser, they consider that it would be helpful to it, and in the interests of justice, for that evidence to be heard. The 2017 judgment would therefore have been potentially admissible.
71. She also argued that because the PCC had before it what she called 'a wealth of information about [Mr Hussain's] dishonesty and misconduct in the relevant period' it was 'highly unlikely that knowledge of another event during this period would have added anything of material weight'. I disagree. This submission misses the point. The point is not that the 2017 judgment concerned events a decade before, and so did not add much to what was known about Mr Hussain's behaviour around that time. What it showed was that in 2017, when Mr Hussain had supposedly reformed, he was

still capable of giving untrue evidence on oath, and so had not remediated his dishonest character in the way he claimed.

72. Overall, I am satisfied that in this case there was a serious procedural irregularity which produced an unjust result. Also, although the appeal was not argued on this basis, I am also satisfied that the PCC's decision was wrong within the meaning of CPR 52.21(3)(a) because it involved a number of findings of fact which the 2017 judgment undermines and therefore its evaluation was wrong, that is to say, it fell outside the bounds of what it could properly and reasonably have decided: *Bawa-Gaba*, supra, [67].
73. I therefore allow the Authority's appeal and, pursuant to s 29(8)(d) of the 2002 Act, I remit Mr Hussain's application for restoration under s 28 of the DA 1984 to a differently constituted PCC for a fresh determination in line with this judgment.

Ground 5

74. This conclusion makes it unnecessary for me to determine the application to amend the Appellant's Notice to add Ground 5, or its merits.