

Appeals Circular A01/20

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Re: R (Kuzmin) v General Medical Council (GMC) [2019] EWHC 2129 (Admin)

Learning Points

- Unless it would be unfair to do so, Tribunals are entitled to draw an adverse inference when a practitioner does not give evidence at their MPT hearing.
- Whether an adverse inference should be drawn will be highly fact dependent and the Tribunal will need to ensure that the [relevant criteria](#) are met before doing so.

Background

Dr Kuzmin ('K') sought judicial review of a decision by a Medical Practitioners Tribunal ('MPT') that it had the power to draw an adverse inference from K not giving evidence during his MPT hearing. The MPT did not go to determine whether to exercise the power, as a result of the application for judicial review.

On day one of the MPT hearing K provided a signed witness statement, detailing his response to the allegations and denying that he had acted dishonestly. At the conclusion of the GMC's case, K's representatives made an application of 'no case to answer'¹. The MPT rejected this application and K's representatives subsequently indicated that he would not give evidence and applied to withdraw his witness statement. The GMC argued that, in such circumstances, the MPT had the power to draw an adverse inference from K's refusal to give evidence. K's representatives submitted that there was no right to draw an adverse inference from his silence.

¹ Rule 17(2)(g) General Medical Council (Fitness to Practise) Rules 2004 (as amended).

The MPT determined that, although there was no specific precedent on the point, an adverse inference from silence is permissible in principle. In reaching this view, the MPT noted that, having regard to the overarching objective and the requirement of *Good Medical Practice* that doctors co-operate with inquiries, it was in the public interest for doctors to provide responses to serious allegations made against them. The MPT also made clear that it was not indicating that an adverse inference *would* be drawn in K's case, as this could only be decided after hearing substantive submissions on the point. K sought and was granted an adjournment to seek judicial review of the MPT's decision.

Application

K made a number of submissions before the Divisional Court, including:

1. Disciplinary proceedings are to be regarded as quasi-criminal in nature and the common law position (i.e. that adverse inferences are generally not permitted to be drawn from exercising the right to silence) ought to apply. Case law indicating that a civil court is entitled to draw adverse inferences from the silence or absence of a party who might be expected to have material evidence to give is of no assistance, as disciplinary proceedings are not simple civil claims;
2. If adverse inferences from silence were to be permitted in disciplinary proceedings, then this could only be achieved via statute, statutory instrument or appropriate policy or guidance issued by the GMC. K drew a comparison with the Rule 16A power to draw adverse inferences, which was added by statutory instrument in December 2015;
3. Drawing an adverse inference from silence effectively reverses the burden of proof.

Judgment

The application was heard by Hickinbottom LJ, giving the lead judgment, and Butcher J. The Divisional Court reiterated that disciplinary matters are civil and not criminal proceedings [para 34 and para 38]. Hickinbottom LJ also held that this position is not affected by the extension of Article 6² rights to disciplinary proceedings: *'It is true that, because they concern important rights and may result in severe consequences for an individual, disciplinary proceedings often demand strong procedural safeguards including some safeguards regarded as essential in criminal proceedings. But that does not mean that disciplinary proceedings are criminal, or even a criminal/civil hybrid...'* [para 38].

Hickinbottom LJ noted authorities involving other regulators which indicated that they were entitled to draw adverse inferences from the non-attendance³ or failure to give evidence⁴ by a registrant, even if the regulator had not done so previously as a

² The judgment refers to authorities which make clear that aspects of Article 6 of the European Convention on Human Rights apply equally to professional disciplinary proceedings [para 36-38].

³ *Kearsey v Nursing and Midwifery Council* [2016] EWHC 1603 (Admin)

⁴ *Iqbal v Solicitors Regulatory Authority* [2012] EWHC 3251 (Admin)

matter of practice [paras 44-47], and concluded that it was unnecessary for these powers to be enacted in primary or secondary legislation. Hickinbottom LJ rejected the argument that adverse inferences from silence reverse the burden of proof, and distinguished them from the separate power to draw appropriate adverse inferences from procedural defaults, as provided in Rule 16A [para 50].

The Divisional Court concluded that a MPT has the power to draw inferences from silence and it is in the public interest that Tribunals have that power [para 56]. Whether to exercise the power to draw an adverse inference from silence in disciplinary proceedings will be highly fact dependent and an inference should not be drawn unless the following **relevant criteria** are met [para 61]:

- A *prima facie* case to answer has been established;
- The practitioner has been given appropriate notice and warning that, if they do not give evidence, then such an inference may be drawn. The practitioner must be given an opportunity to explain why it would not be reasonable for them to give evidence and, if it is found that there is no reasonable explanation, be given an opportunity to give evidence;
- There was no reasonable explanation for the practitioner not giving evidence; and
- There were no other circumstances which would make it unfair to draw an adverse inference.

Hickinbottom LJ noted that it is likely to be unfair to draw an adverse inference if, for example, a practitioner is not given prior notice that an adverse inference may be drawn should they not give evidence or fail to answer particular question [para 58].

Hickinbottom LJ concluded by noting that it may be useful for regulators to provide guidance confirming the existence of the power to draw adverse inferences and how it may be used [para 63].

Kind regards
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