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**General Medical Council v Chandra [2018] EWCA Civ 1898 and
[2019] EWCA Civ 236 (addendum to judgment)**

Learning Points

- Tribunals should apply the same test when considering the question of sanction or restoration to the register: against the backdrop of the overarching objective, is the doctor in question fit to practise?
- 'Exceptional circumstances' do not have to be present to allow a doctor who was erased as a result of disciplinary proceedings, to be restored to the register: the above test applies.
- The principles set out in *Bolton v Law Society* [1994] 1 WLR 512 apply equally to the medical profession as to solicitors.
- When considering whether to restore a doctor to the register, the tribunal should:
 - first consider the evidence of insight, remorse and remediation against the backdrop of the matters which led to erasure and make findings about those matters;
 - then, once positive findings are made with regard to the above, step back and balance those findings against each of the three limbs of the

overarching objective in order to satisfy themselves, when considering the case overall, including the length of time which had elapsed since the erasure, that the restoration of the doctor would promote and maintain public confidence and proper professional standards so that, notwithstanding the serious nature of the original matters which led to erasure, the overarching objective to protect the public would be achieved.

Background

This was an appeal brought by the General Medical Council ('the GMC') against the decision of the High Court to uphold a Medical Practitioners Tribunal's ('the Tribunal's') decision dated March 2017 to restore Dr Chandra to the medical register, pursuant to section 41 of the Medical Act 1983 (as amended) ('the Act').

Erasure from Medical Register - 2008

In June 2005, Dr Chandra, was working as a psychiatrist on the Isle of Wight and consulted with a vulnerable patient ('Patient A') in a clinic. Following a second consultation with Patient A, on 1 July 2005, Dr Chandra went back to Patient A's house, put his hand on her leg, stroked her hand and kissed her. Dr Chandra then returned to work but later that night returned to Patient A's house, when they engaged in oral sex and other sexual activity.

On 3 July 2005, Patient A was admitted to hospital following an overdose but Dr Chandra failed to disclose his contact with Patient A to her treating clinicians. He also failed to record his discussions or visits with Patient A. In September 2005, Dr Chandra met Patient A in his car, having been approached by her in the car park of the hospital.

In 2007 and 2008 a (then) Fitness to Practise Panel found that Dr Chandra's conduct had been inappropriate and unprofessional and his name was erased from the medical register. During the course of that hearing, Dr Chandra had denied the sexual misconduct and accused Patient A of being a stalker. In 2009 Dr Chandra then made an unsuccessful appeal of the decision to erase him, to the High Court.

Restoration

In August 2016, Dr Chandra applied to the GMC to have his name restored to the medical register.

A restoration hearing was held from 20-24 March 2017. The Tribunal determined to restore Dr Chandra to the medical register noting that they had accepted the clinical evidence presented by Dr Chandra (assessing risk and the progress of his rehabilitation) and Dr Chandra's own evidence, and concluded that it was "*highly*

unlikely that he would repeat the sexual misconduct and that he had developed "*considerable insight*" into the gravity of his denials and dishonesty.

The Tribunal concluded that the overarching objective (and in particular the public interest) would not be compromised if Dr Chandra's name was restored to the medical register.

High Court Appeal

The GMC appealed the Tribunal's decision pursuant to section 40A of the Act. Mrs Justice Moulder rejected the GMC's appeal holding that there was no basis to find that the Tribunal had failed to give proper regard to the overarching objective¹. Mrs Justice Moulder held that:

- the test to be applied when considering applications for restoration to the medical register was **not** one of 'exceptional circumstances' in the case of a doctor who was erased for matters relating to sexual misconduct and/or dishonesty ie when considering whether it is in the public interest to restore such a doctor. The GMC sought to rely on the principles developed in the context of solicitors' misconduct (in terms of striking off and restoration) and submitted that these principles established the threshold before an application for restoration to the medical register should be successful;
- the Act provides a broad discretion to a Tribunal to restore a doctor, subject to the qualification that it must have regard to the overarching objective. The Act provides a framework for restoration (including a minimum period before an application for restoration to the register could be made) and does not give greater weight to any of the factors within the overarching objective;
- there is a significant difference between deciding to impose the sanction of erasure and a decision about whether to restore a doctor to the register; at that point, a different balancing exercise may be appropriate;
- the GMC's own guidance on restoration² made no reference to the need for 'exceptional circumstances' and the focus of that guidance is on the circumstances that led to erasure and the steps the doctor has taken to demonstrate insight into and remediation of those matters. It did not state that restoration would be permitted in exceptional circumstances only or that an appeal could be brought if the overarching objective was not given greater weight.

¹ General Medical Council v Dr Shekhar Chandra [2017] EWHC 2556 (Admin)

² *Guidance for Doctors on Restoration following Erasure by a Medical Practitioners Tribunal*

Appeal to the Court of Appeal

The GMC appealed against the High Court's decision on the grounds that the Judge:

1. had erred in rejecting the parallel between the restoration of doctors to the medical register and the test applicable to the restoration of solicitors to the roll. (However, at the appeal hearing the GMC said it was not necessary to go so far as to say restoration of doctors should only be directed in 'exceptional circumstances' [paras 49 and 65-67]);
2. failed to give proper weight to the interests of maintaining public confidence in the profession and the maintenance of proper professional standards and conduct.

Judgment

The appeal was heard by Lord Justice McCombe, Lady Justice King and Lord Justice Flaux.

Prior to giving the Court's reasoning on the grounds of appeal, Lady Justice King referred to the GMC's guidance document on restoration. She noted that the guidance:

- made no mention of or reference to the overarching objective and only sets out the "practical issues which need to be addressed evidentially" by doctors [para 34];
- made no reference to parallels with applications by solicitors to be restored to the roll [para 37]; and
- was accepted by the GMC as being inadequate and requiring urgent and extensive revision [para 38].

1. Ground One - The Court of Appeal held that:

- a. not only do the principles set out in *Bolton v Law Society [1994] 1 WLR 512* (ie the need to maintain public confidence in the profession and that the reputation of the profession as a whole is of greater significance than that of an individual member of that profession) apply equally to doctors as solicitors, "but the same principles and approach apply equally to both sanctions and restoration....The question in each case is the same namely, having regard to the overarching objective, is the doctor/applicant fit to practice?" [para 59];
- b. the emphasis when taking sanction and restoration decisions may be different, the factors "may be weighed up with differing emphasis" and there may be different approaches in clinical cases as opposed to matters involving sexual misconduct or dishonesty [para 60]. However, the requirement of 'exceptional

circumstances' does not apply in cases involving doctors applying to be restored to the register [para 68] because:

- i. "The use of the expression 'exceptional circumstances' may give the impression that it is a test to be applied by the MPT before an applicant be restored to the register. That would be incorrect, the test is whether, having regard to the overarching objective, the applicant is now fit to practice [sic]";
- ii. There is a distinction to be drawn between the solicitor and medical professions. The difference is not in respect of their obligations to the public or as to the level of integrity required by either type of practitioner, but because of "certain important regulatory differences": The Solicitors Act 1974 has no equivalent requirement as that contained in s41(12) of the Act requiring a tribunal to consider an overarching objective to protect the public and there is no minimum period before a solicitor can apply for restoration to the register, unlike doctors who must wait at least 5 years;
- c. the same approach applies to deciding which sanction is appropriate and to restoration cases:

"...the tribunal must consider the matters in the guidelines including 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 MPT must then stand back and have proper regard to the overarching objective" [para 70].

2. Ground Two - The Court of Appeal held that:

- a. whilst the passage of time between considering sanction and restoration "is a matter of considerable importance and must properly be weighed in the balance by the MPT on an application to restore, there is a striking difference between cases involving clinical errors or incompetence and matters of dishonesty and sexual misconduct which applies equally at both the sanctions and restoration stage" [para 77] and, in relation to those cases where the conduct undermined public confidence in the medical profession, "remediation is essential but not, when coupled with the passage of time, the complete answer to the question the MPT has to ask itself which is: is the applicant now fit to practise having regard to the overarching objective?" [para 78];
- b. the High Court had been incorrect to find that a different balancing act may be required, due to the passage of time, when considering sanction and restoration. Although certain features may carry different weight, the

balancing act itself is the same namely “against the backdrop of the overarching objective, is the doctor concerned fit to practice [sic]” [para 89];

- c. the Tribunal made an “error of principle” in considering whether the overarching objective was compromised rather than actively pursuing the objectives specified in the overarching objective. The Court said that the Tribunal did not address, or did not adequately address, “the issue of whether public confidence and professional standards would be damaged by restoring [Dr Chandra] to the register, an applicant who had fundamentally fallen short of the necessary standards of probity and good conduct, by his sexual misconduct and dishonesty, albeit many years ago” [para 90];
- d. instead, the Tribunal ought to “first have considered with care all of the evidence of remediation against the backdrop of the matters which had led to erasure and made findings in that respect. Having made positive findings....they would then have...stepped back and balanced those findings against each of the three limbs of the overarching objective” to satisfy themselves that when considering the case overall, including the length of time which had elapsed, that the restoration of Dr Chandra would “promote and maintain public confidence and proper professional standards so that, notwithstanding the serious nature of the original misconduct, the overarching objective would be achieved” [para 92];
- e. the Tribunal’s reasons for allowing restoration, as set out in its determination, did not demonstrate the appropriate balancing exercise had been undertaken and “absent an understanding of the proper approach as set out in *Bolton*, relied almost exclusively on the issues of remediation and failed properly to understand the central importance of the overarching objective to their ultimate decision” [para 93].

Although the Court of Appeal said its intention was to allow the GMC’s appeal and for the matter to be remitted back to a tribunal, it said that there were a number of consequential matters which required further consideration and another hearing. The Court said until they were resolved, no order would be made and Dr Chandra would remain on the register until that time [para 94].

Addendum to Judgment dated 26 February 2019.

In its Addendum to Judgment, Lady Justice King on behalf of the Court of Appeal said:

- the order of Mrs Justice Moulder, at the conclusion of the first appeal, should be quashed [para 7];

- this would leave the order of the Tribunal properly in place, but subject to the direction of the Court pursuant to s40A(6)(d) of the Medical Act, that the matter be remitted to the (same) Tribunal in accordance with the directions found within the accompanying order, including that there be reconsideration of the case in light of the judgment of Court [paras 5 and 7];
- Dr Chandra will remain on the Register pending the remitted hearing [para 8].

Kind regards

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