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Dr Bawa-Garba v The General Medical Council (and The British Medical Association (1) The Professional Standards Authority for Health and Social Care (2) The British Association of Physicians of Indian Origin (3) – Interveners) [2018] EWCA Civ 1879

Learning Points

- A tribunal cannot go behind a criminal conviction and substitute its own view of the seriousness of the individual's personal culpability. However, when determining the appropriate sanction:
 - the task of the Tribunal is, looking to the future, to decide in all of the circumstances of the particular case, what sanction would be most appropriate and proportionate to meet the overarching objective, whereas the task of the criminal court/jury was to decide on the guilt or absence of guilt having regard to past conduct;
 - a tribunal is making an evaluative decision based on many factors which can include taking into account systemic failures, the failures of others and personal mitigation, even if they formed part of the evidence before the criminal court/jury;
- If any of the factors in paragraph 103 of the Sanctions Guidance are present, it does not automatically mean erasure is required; the appropriate sanction will depend on the facts and circumstances of the case, considered individually. However, where a particular sanction is indicated in the Sanctions Guidance, a tribunal should provide reasons if it makes a decision not to impose that sanction.

Background

This was an appeal brought by Dr Bawa-Garba against the decision of the Divisional Court dated 25 January 2018 allowing an appeal brought by the General Medical Council ('the GMC') against a Medical Practitioners Tribunal ('the Tribunal') decision dated 13 June 2017 to suspend Dr Bawa-Garba from the medical register for 12 months. The Divisional Court had substituted the sanction of suspension with one of erasure.

Tribunal hearing

The allegation against Dr Bawa-Garba at the Tribunal hearing was that on 4 November 2015 at Nottingham Crown Court, before Nicol J and a jury, she had been convicted of manslaughter by gross negligence of a 6 year old boy. The offence related to her work as a junior doctor specialising in paediatrics in February 2011. She was sentenced to two years imprisonment, suspended for two years. On 29 November 2016, the Court of Appeal Criminal Division, refused her leave to appeal against her conviction.

In February 2017, Dr Bawa-Garba admitted the conviction and sentence, which was the allegation against her at the Tribunal hearing. The Tribunal then heard oral evidence from two consultants on behalf of Dr Bawa-Garba, but not from Dr Bawa-Garba herself. The Tribunal found that "*her clinical failings, serious as they were, had been remedied, leaving a low risk of future harm*" but concluded that a finding of impairment was required to maintain public confidence in the profession and to promote proper professional standards and conduct.

In June 2017, the same Tribunal heard further oral evidence, but not from Dr Bawa-Garba. The Tribunal took account of its impairment finding, rightly noted that sanctions were not to punish the doctor but were to be protective of patients and public confidence in the profession, and set out mitigating and aggravating factors in the case. It rejected the GMC's contention that Dr Bawa-Garba's name should be erased from the register, as a disproportionate sanction, as it found that Dr Bawa-Garba's actions and subsequent conviction were not fundamentally incompatible with continued registration, that public confidence in the profession would not be undermined by a lesser sanction (as her actions were neither deliberate nor reckless), she did not present as a continuing risk to patients and her failings were remediable (and had been remedied).

On 13 June 2017, the Tribunal instead directed to suspend Dr Bawa-Garba's registration for 12 months, subject to a review (as a result of its conclusions that Dr Bawa-Garba did not have complete insight and had been out of practice for a significant period of time (since 2015)).

High Court appeal

The GMC appealed the Tribunal's decision dated 13 June 2017 to suspend Dr Bawa-Garba's registration for 12 months, pursuant to section 40A of the Medical Act 1983, (and asked that if that decision was found to be wrong, that the sanction of erasure should be substituted) on the following grounds:

1. the Tribunal had, in effect, allowed evidence of systemic failings to undermine Dr Bawa-Garba's personal culpability, and to do so even though those failings had been before the Crown Court which convicted her; and
2. the remediation and personal mitigation were of too limited weight to satisfy the requirements of the public interest in upholding confidence in the profession.

Judgment

Mr Justice Ouseley (with whom Lord Justice Gross agreed) handed down the Divisional Court's judgment on 25 January 2018¹. He accepted that the approach to adopt was that set out in *Jagjivan*², which is: was the Tribunal decision wrong? He said that he had come "firmly to the conclusion that the decision of the Tribunal on sanction was wrong, that the GMC appeal must be allowed, and that this Court must substitute the sanction of erasure for the sanction of suspension" [para 37].

Although the Judge indicated that the Tribunal had correctly identified the two central issues for its decision, referred to the relevant passages in the Sanctions Guidance and constructed its analysis in a logical and conventional manner [para 39] he came to that decision on the basis that the Tribunal's approach:

1. did not respect, as it should have, the "true force of the jury's verdict" that Dr Bawa-Garba's "failures that day were not simply honest errors or mere negligence, but were truly exceptionally bad....The degree of error, applying the legal test, was that her own failings were, in the circumstances, "truly exceptionally bad" failings" [para 38]. He went on to say that:
 - a. "[The Tribunal] reached its own and less severe view of the degree of Dr Bawa-Garba's personal culpability"³ as a result of considering the

¹ GMC v Dr Bawa-Garba [2018] EWHC 76 (Admin)

² GMC v Jagjivan and PSA [2017] EWHC 1247 (Admin)

³ See para 2 which quotes from the Court of Appeal Criminal Division decision dated 29 November 2016 and sets out Dr Bawa-Garba's actions/failings at paragraphs 12-14

systemic failings or failings of others and personal mitigation⁴ which had already been considered by the jury [para 41];

- b. the correct approach, as set out in Rule 34⁵, is that “the certificate of conviction is conclusive not just of the fact of conviction (disputed identity apart); it is the basis of the jury’s conviction which must also be treated as conclusive, in line with what the Rule states about Tribunal findings” [para 41];
- c. although systemic failings or the failings of others may reduce Dr Bawa-Garba’s culpability, they could not reduce it below a level of personal culpability which was “truly exceptionally bad” [para 41] or “play the significant role the Tribunal allowed them to play in mitigation of sanction, and indeed in its prior assessment of impairment, without the Tribunal contradicting the verdict” [para 43];
- d. “[T]he Tribunal had to recognise the gravity of the nature of the failings, (not just their consequences), and that the jury convicted Dr Bawa-Garba, notwithstanding those systemic factors and the failings of others, and the personal mitigation it considered. The jury’s verdict therefore had to be the basis upon which the Tribunal reached its decision on sanction” [para 41];
- e. there were two “systemic” failings not explored at trial [see para 27], but that he accepted that Dr Bawa-Garba was convicted “notwithstanding the difficulties to which they gave rise, and that they could not have affected the verdict” [para 45];
- f. “the personal responsibility of doctors for failings of the severity found by the jury here is not diminished by a failure in safety net [which had it been working should have detected and removed any failings before any serious harm was done], nor did the jury so conclude. They were the circumstances in which her failings occurred, but they did not cause them to occur, as the jury’s verdict showed. The holes in the patient’s safety net cannot reduce her personal culpability” [para 46];
- g. in relation to the factors of personal mitigation which were also used at the criminal trial, he said that it “follows from the verdict, by which the Tribunal was bound, that the failings were indeed exactly that severe

⁴ Para 2, as above, which sets out the failures and mitigation put forward by Dr Bawa-Garba at paragraphs 17-18

⁵ Rule 34 of the General Medical Council (Fitness to Practise) Rules 2004, as amended

[truly exceptionally bad], notwithstanding those aspects of personal mitigation" [para 47];

2. did not give the jury's verdict the weight required when considering the need to maintain public confidence in the profession and proper standards [para 38]. He went on to say that:
 - a. "[T]he crucial issue on sanction, in such a case, is whether any sanction short of erasure can maintain public confidence in the profession and maintain its proper professional standards and conduct" [para 38];
 - b. where erasure is indicated, as on any view it was indicated here⁶ "a decision that erasure should not be imposed requires the reasons and circumstances why not, to be sufficiently significant to maintain public confidence in the profession and its professional standards" [para 49];
 - c. he accepted the Tribunal's conclusion on remediation, with its reservation about the completeness of insight, that there was personal mitigation, and that other things went wrong that day. However he said "where a patient dies sooner than he would have done because of a series of failings over the course of some hours for which the registrant has to take personal responsibility, and these are failings which the Tribunal had to treat as truly exceptionally bad, it would require rather stronger circumstances than those present for suspension to be sufficient to maintain public confidence in that profession, and its procedures for maintaining its professional standards" [para 50];
 - d. the fact that Dr Bawa-Garba had addressed the specific failings which arose "suddenly and unexpectedly on that day", and had practised safely and competently for many years afterwards, is a factor which would weigh with "a fully informed and reasonable member of the public" [para 52];
 - e. "the Tribunal did not give the weight required to the verdict of the jury, and was simply wrong to conclude that, in all the circumstances, public

⁶ Sanctions Guidance, paragraph 103:

Any of the following factors being present may indicate erasure is appropriate (this list is not exhaustive).....

(c) doing serious harm to others (patient or otherwise), either deliberately or through incompetence and particularly where there is a continuing risk to patients.

The Court noted that the above paragraph "is not diminished by an absence of continuing risk, it is merely not made more emphatic" [para 49].

confidence in the profession and in its professional standards could be maintained by any sanction short of the erasure indicated by the Sanction Guidance at [paragraphs 103a and c]. This misconduct by manslaughter by gross negligence involved a particularly serious departure from the principles of "Good Medical Practice", and the behaviour was fundamentally incompatible with being a doctor. It involved truly exceptionally bad failings, causing very serious harm to a patient" [para 53].

3. The Judge did not accept the GMC's submission that there is a presumption that a conviction for manslaughter by gross negligence should lead to erasure in the absence of exceptional or truly exceptional circumstances. He said that "the issue depends on the facts and circumstance of each case, considered individually and "it is unwise to circumscribe the [exceptional] factors required or alternatively of little weight" [para 40].

Grounds of Appeal to the Court of Appeal

Dr Bawa-Garba appealed the Divisional Court's decision dated 25 January 2018 on the grounds that the Divisional Court erred:

1. by applying a presumption that a conviction of manslaughter by gross negligence should lead to erasure from the Medical Register save in exceptional circumstances.
2. by failing to appreciate the distinct roles of the jury in a criminal trial, on the one hand, and the MPT, on the other.
3. by unlawfully substituting its own judgment for that of the Tribunal, that the circumstances of the case were not sufficiently strong for suspension to be sufficient to maintain public confidence in the profession and its procedures for maintaining its professional standards.
4. in concluding that the Tribunal was precluded from taking into account the evidence of systemic failures occurring in the Hospital on 18 February 2011, as to do so would constitute a lack of respect for the jury's decision.
5. by reaching an irrational conclusion: no reasonable court could have concluded that erasure was the only sanction open to the Tribunal in the circumstances in order to maintain public confidence in the profession and in its procedures for maintaining proper professional standards.

Judgment of the Court of Appeal

The Court of Appeal comprised of Lord Burnett of Maldon (The Lord Chief Justice of England and Wales), Sir Terence Etherton (The Master of the Rolls) and Lady Justice Rafferty.

In considering Grounds 2 and 4 (which related to the GMC's submissions that the Tribunal went behind the jury's verdict and reduced the level of Dr Bawa-Garba's culpability as found by the conviction), the Court of Appeal said:

1. the decision of a Tribunal about the appropriate sanction is "an evaluative decision based on many factors, a type of decision sometimes referred to as "a multi-factorial decision". This type of decision, a mixture of fact and law, has been described as "a kind of jury question" about which reasonable people may reasonably disagree" and that "there is limited scope for an appellate court to overturn such a decision"[para 61];
2. where an appeal is to proceed by way of a review of the judgment/decision rather than a re-hearing (which is the case with appeals brought by the GMC pursuant to section 40A of the Medical Act [para 60]), the general caution in reviewing the decision "applies with particular force in the case of a specialist adjudicative body, such as the Tribunal in the present case, which (depending on the matter in issue) usually has greater experience in the field in which it operates than the courts" and "an appeal court should only interfere with such a decision if:
 - (1) there was an error of principle in carrying out the evaluation, or
 - (2) for any other reason, the evaluation was wrong, that is to say ... fell outside the bounds of what the adjudicative body could properly and reasonably decide" [para 67];
3. the Tribunal did not make an error of principle when taking into account systemic failings and personal mitigation, even if they formed part of the evidence before the jury. The Court of Appeal said that, as had been made clear by the judge in the criminal trial, "systemic failures on the part of the Trust were only ever of peripheral relevance to the guilt or absence of guilt of Dr Bawa-Garba for gross negligence manslaughter. That issue turned on whether her own failings in the care and treatment of [the patient] were truly exceptionally bad, that is to say fell far below the standard expected of a reasonable doctor, and caused or contributed significantly to [the patient's] death" [para 74]. However, in determining the appropriate sentence, the judge had also taken into account the circumstances in which the offence had taken place [para 75];

4. there is a fundamental difference between the task and necessary approach of the jury and that of the Tribunal: "The task of the jury was to decide on the guilt or absence of guilt...having regard to...past conduct. The task of the Tribunal, looking to the future, was to decide what sanction would most appropriately meet the statutory objectives set out in s.1(1A) and 1(B) of the Medical Act 1983" [para 76];
5. "Different degrees of culpability are capable of satisfying the requirements of gross negligence manslaughter....That is reflected in the different sentences available for a conviction". The Court of Appeal said that, in Dr Bawa-Garba's case, the sentence passed by Nicol J of two years imprisonment, suspended for two years, was "conspicuously light" [para 77];
6. in his sentencing remarks the trial judge said that he passed sentence on the basis that the failures of Dr Bawa-Garba led the patient to die significantly sooner than he would otherwise have done, rather than significantly contributed to his death; and he took into account all the circumstances in which the offence took place. "The Tribunal was just as much entitled to take into account, in determining the appropriate sanction, systemic failings on the part of the Trust...as well as matters of personal mitigation" [para 77] as was the judge when sentencing;
7. in taking those matters into account, "the Tribunal was not disrespecting the verdict of the jury...The Tribunal was not deciding that the failings of Dr Bawa-Garba were other than truly exceptionally bad. The Tribunal was conducting an evaluative exercise to determine what sanction was most appropriate to satisfy the statutory objective" [para 78];
8. the Tribunal's decision on sanction was not contrary to Rule 34(3) of the Fitness to Practise Rules "as the matters taken into account by the Tribunal in determining the sanction did not contradict any necessary findings of fact underpinning Dr Bawa-Garba's conviction" [para 78].

In considering Grounds 1, 3 and 5 (which related to whether the sanction of suspension for 12 months, subject to review, was a sanction properly and reasonably open to the Tribunal (rather than erasure being the only sanction properly and reasonably open to the Tribunal) the Court of Appeal said:

1. the Sanctions Guidance does not have statutory force as guidance published pursuant to section 35 of the Medical Act 1983; "it is no more than non-statutory guidance, the relevance and application of which will always depend on the precise circumstances of the particular case" [paras 82-83];
2. the Sanctions Guidance (in particular paragraph 103) did not necessarily 'require' erasure in the present case; the language used in that section

(including 'may' and 'indicate') is "permissive, not mandatory.....[W]hat is an appropriate and proportionate sanction always depends on the facts of the particular case in question" [paras 84-85];

3. The remarks of the trial judge when sentencing, that the medical career of Dr Bawa-Garba was over, provided no indication that this assumption led him to impose an unusually lenient sentence, and it "would be quite wrong to suggest that his assumption should in some way have influenced the Tribunal to give effect to it through the sanction it ordered" [para 86];
4. once it is understood that it was permissible for the Tribunal to take into account the full context of the patient's death, including the range of persons bearing responsibility for that tragedy and the systemic failings of the Trust, as well as the other matters relied upon by Dr Bawa-Garba, and that the Tribunal plainly had in mind the overarching objective "it is impossible to say that the suspension sanction imposed by the Tribunal was not one properly open to it and that the only sanction properly and reasonably available was erasure" [para 87];
5. in reaching its conclusion to the contrary, "the Divisional Court appears to have adopted an impermissible approach.....that erasure should be imposed if the medical practitioner has caused serious harm to a patient through incompetence, despite there being no continuing risk to patients, unless there are sufficiently significant reasons and circumstances for a lesser sanction consistent with the maintenance of public confidence in the profession and its professional standards." The Court of Appeal said that the Divisional Court's approach:
 - a. was on the basis that (1) the gross negligence manslaughter verdict meant that the Tribunal had to accept that Dr Bawa-Garba's failings had been truly exceptionally bad and had caused him very serious harm, (2) such culpability would require a sanction of erasure in order to maintain public confidence in the medical profession and its procedures for maintaining its professional standards unless there were sufficiently significant reasons for imposing a lesser sanction [para 91];
 - b. amounts to a presumption of erasure in the case of such harm [para 88 and 91];
 - c. was one which it had already "expressly disclaimed" [para 88], rejected as "illegitimate" [para 90] and "not correct" [para 91];
6. the Court of Appeal confirmed that "the issue depends on the facts and circumstances of each case, considered individually" [para 89];

7. the Tribunal was satisfied that Dr Bawa-Garba had remedied the deficiencies in her clinical skills, that the risk of her putting a patient at unwarranted risk of harm in the future was low (and no higher than for any other reasonably competent doctor), accepted that she was honest and reliable and had reflected deeply and demonstrated significant and substantial insight, even though it was unable to conclude that she had complete insight into her actions as it did not hear from her directly, that her deficient conduct was neither deliberate nor reckless and that she did not present a continuing risk to patients [para 92]. The Court of Appeal said that “[T]he Tribunal was an expert body entitled to reach all those conclusions” and that none of them had in fact been challenged by the GMC. The Court of Appeal said that the Tribunal was entitled to take into account, consistently with *Bijl v General Medical Council*⁷, “that an important factor weighing in favour of Dr Bawa-Garba is that she is a competent and useful doctor, who presents no material danger to the public, and can provide considerable useful future service to society” [para 93];
8. “the Tribunal was, in relation to all those matters and the carrying out of an evaluative judgement as to the appropriate sanction for maintaining public confidence in the profession, an expert panel, familiar with this type of adjudication” and that the Tribunal is best qualified to judge what measures are required to maintain the standards and reputation of the profession, particularly “where the MPT’s assessment of the effect on public confidence of misconduct relates to professional performance” [paras 94 and 95].

The Court of Appeal concluded that there were no grounds for allowing the appeal on the basis that the sanction decision was wrong because the only sanction properly and reasonably open to the Tribunal was erasure.

Therefore the appeal was allowed and the decision of the Divisional Court was set aside and the decision of the Tribunal restored. The matter will be referred to the Medical Practitioners Tribunal Service for review of Dr Bawa-Garba’s suspension.

Kind regards

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⁷ [2001] UKPC 42, [2002] Lloyd’s Rep Med 60 at [13].

See also *GMC v Dr Bawa-Garba* [2018] EWHC 76 (Admin) paragraphs 22-23 and 39 for further details of the Tribunal’s and Divisional Court’s discussion of this case.