

18 September 2014

To: Fitness to Practise Panel Panellists
Legal Assessors

Copy: Investigation Committee Panellists
Interim Orders Panel Panellists
Panel Secretaries
Medical Defence Organisations
Employer Liaison Advisers

Medical Practitioners Tribunal Service
Seventh floor, St James's Buildings
79 Oxford Street
Manchester M1 6FQ

Tel: 0161 923 6263

Fax: 0161 240 7199

Email: enquiries@mpts-uk.org

Re: Angamuthu Arunkalaivanan v General Medical Council [2014] EWHC 873 Admin

Background

Mr Angamuthu Arunkalaivanan (known as 'Mr Arun') appeared before a Fitness to Practise Panel ('Panel') in December 2013 in relation to charges in respect of a consultation with a female patient ('Patient A') on 28 October 2010. The Panel heard evidence and submissions over six days before determining that Mr Arun had conducted a breast examination in the absence of a chaperone and in an inappropriate manner and that the conduct was sexually motivated. As a result of the factual findings the Panel concluded that Mr Arun's fitness to practise was impaired and imposed a period of 12 months suspension on his registration.

Mr Arun appealed on the facts under Section 40 of the Medical Act 1983 (as amended).

Appeal

Mr Arun's appeal was considered by Amanda Yip QC on 6 March 2014 (judgment being given on 2 April 2014).

Although Mr Arun brought the appeal on the facts he accepted that if the Judge upheld the findings of the Panel including that of sexual motivation there could be no complaint about the determinations on misconduct, impairment and sanction. Equally, the GMC confirmed that if the Judge was to quash the finding that the conduct was sexually motivated the GMC would not seek to uphold the decisions on impairment and sanction, even if all the other factual findings were upheld.

In the circumstances, the challenge to the finding that Mr Arun's conduct was sexually motivated was the most significant aspect of the appeal.

Amanda Yip QC sets the Court's approach to appeals under Section 40 (paragraphs 4-8) and thereafter, in detail, the background facts (paragraphs 9-38).

In summary, the allegations and areas of dispute are set out in paragraph 30. Amanda Yip QC noted that the hearing was vigorously contested with both Patient A and Mr Arun being subjected to lengthy cross-examination (paragraph 31)

The disputed allegations turned on the evidence of Patient A who consistently maintained her version of events. Mr Arun denied the allegation and claimed that he had conducted a proper clinical breast examination in accordance with his usual practice. Expert evidence produced on both sides confirmed that if Mr Arun had handled the breasts as described by Patient A he could not be considered to have carried out an appropriate clinical examination. However, if he had examined her as he described it would be appropriate and best practice (paragraph 34).

In the circumstances, therefore, the issue of the appropriateness of Mr Arun's handling of Patient A's breasts was a straight forward factual one to be determined having considered the evidence of the only two people who were present when it happened, Patient A and Mr Arun (paragraph 35).

The Panel heard and saw those two witnesses give evidence and concluded that Patient A's account was to be preferred. The allegation in relation to the breast examination was accordingly found proved (paragraph 36).

The next question for the Panel was to determine whether Mr Arun's conduct was sexually motivated.

The Panel decided that Mr Arun's conduct was sexually motivated. The challenge to this finding, on appeal, is that it was made on *'an insubstantial and unsatisfactory evidential basis'* (paragraph 38).

The Appeal Against the Primary Factual Findings (paragraphs 39 -45)

Amanda Yip QC confirmed that this was a *'classic case for the tribunal to hear oral evidence and, having done so, to decide which version of events it preferred'* (paragraph 42). She also confirmed that what was called for was a *'comparative evaluation of each party's evidence'*. It is clear that the Panel undertook that exercise before reaching their conclusion. They found Patient A to be more credible than Mr Arun. They set out their reasons sufficiently for Mr Arun, and indeed for this Court, to know why they had reached the findings they did.

The Judge noted that whilst they did not deal with each and every point raised in submissions this was not required (paragraph 43). In relation to this issue Amanda Yip QC concludes (paragraph 45):

'As Leveson LJ said in Southall (above), 'findings of fact, particularly if founded upon an assessment of the credibility of witness, are virtually unassailable'. The findings in relation to the manner in which the breast examination was performed fall squarely into this category. There is no basis for saying that the Panel got it 'wrong'. The primary findings are unassailable in this case and I wholly accept the Panel's determination that Patient A's factual description of the breast examination was correct'.

The Appeal in Relation to the Finding of Sexual Motivation (paragraphs 46-66)

Amanda Yip confirms (paragraph 46):

'The position is somewhat different in relation to the finding that Mr Arun's actions were sexually motivated. Although, this is a finding of fact, it depends not on direct evidence but on the inference to be drawn from the primary facts as found by the Panel and the surrounding circumstances'.

While she acknowledged that she must accord the Panel's decision appropriate respect, as far as the issue of sexual motivation was concerned this was akin to a jury question to which there may reasonably be different answers and therefore she must be particularly careful (paragraph 49).

The Judge acknowledged that the Legal Assessor's advice to the Panel as to how to approach the question was appropriate (paragraph 50) and further that the advice given by the Legal Assessor including specific reference to character evidence was appropriate (paragraph 52).

She noted that the Panel made no reference to that aspect in their reasoning on the issue of sexual motivation. Having considered their reasons Amanda Yip QC confirmed that the Panel appeared to have taken the character evidence into account in the first stage when determining the factual dispute between Mr Arun and Patient A, however, having decided that Patient A was a more credible and reliable witness they apparently did not weigh up the extent to which the evidence of Mr Arun's character might be relevant to the final issue of whether his conduct was sexually motivated. In her judgment this was a material omission (paragraph 52).

The Judge notes that the Panel's reasoning as to sexual motivation was very closely tied up with their decision that Patient A was more credible and reliable witness. Despite the Legal Assessor's advice it was not clear from their reasons that they approached this decision on the basis that the fact that the breast examination was inappropriate would not necessarily mean that it was sexually motivated (paragraph 53).

She goes on (paragraph 55):

'From their reasons, it does seem to me that, despite being advised not to, the Panel has equated "inappropriate" with "sexually motivated". They have not dealt with the important question as to whether there could be any other explanation for an inappropriate examination. They do not seem to have considered the alternative explanation now suggested... that Mr Arun may "have performed a clumsy and inappropriate breast examination, as described by the complainant, without any sexual motive".

However, the Judge states (paragraph 56):

'To be fair to the Panel, they were grappling with two very different versions of events and submissions that urged acceptance of one account or the other. It is often difficult for tribunals and courts at first instance to consider all possible permutations that might follow from their findings as to the primary facts. There were in reality three scenarios for them to consider:

- (i) This was an appropriate breast examination as contended by Mr Arun.*
- (ii) This was not a medical examination but was a sexually motivated touching of the breasts as contended by the GMC.*

(iii) A medically indicated breast examination was performed so poorly and inappropriately that it led Patient A to believe it was a sexual touching although in fact there was no sexual motivation on Mr Arun's part'.

The Judge goes on to say that once the Panel had made their primary findings of fact option (i) fell away so that the Panel then needed only to balance the evidence to decide whether (ii) or (iii) was more likely. Once it was appreciated that, after making their findings of fact that they did, the choice for the Panel was effectively between a clumsy, inappropriate (and the Judge added) insensitive examination or a sexual assault, there was no real justification within their reasons for finding one rather than the other (paragraph 58).

She goes on to say it was implicit that the Panel regarded the failure to have a chaperone as supporting the case that this was sexual motivation (paragraph 59). Further, regarding the evidence of sexual intent, the Panel did not seem to have given sufficient weight to the fact that a chaperone was not present during the vaginal examination which was conducted appropriately. Neither did they weigh the fact that a clinical need for a breast examination arose during the consultation (paragraph 60).

Amanda Yip QC confirmed that when the arguments about credibility and the inappropriate nature of the examination were stripped away the GMC's submissions contained little basis for supporting the finding of sexual motivation (paragraph 61). She sets out (paragraphs 63 and 64) the matters to be put in the balance in support of the finding of sexual motivation against those suggesting an absence of sexual intent. She concludes (paragraph 66):

'In the end, it is not a case of numeric assessment of the factors on each side. Rather, a broad view must be taken in putting all the circumstances into the balance and coming to a conclusion on the balance of probabilities. When that analysis is done, I conclude that the determination of the Panel on this issue was plainly wrong. It is unlikely that Mr Arun's actions were sexually motivated and far more likely that he carried out an inappropriate examination because he was rushing, probably distracted and so clumsy and insensitive to Patient A. As a result, he left her feeling violated even though he did not intend to touch her sexually.'

The Judge concluded that whilst she declined to interfere with the Panel's primary findings of fact as to how Patient A's breasts were handled by Mr Arun, it was appropriate to reverse the finding that his conduct was sexually motivated. That part was, in her judgment, plainly wrong and could not be supported by the evidence (paragraph 67).

In the circumstances she quashed that part of the determination and therefore the decision that Mr Arun's fitness to practise was impaired and the sanction imposed must also be quashed. The GMC confirmed, at the hearing, that it would not contend that Mr Arun's fitness to practise was impaired on the basis of the remaining findings. However, as a warning may be appropriate, the Judge confirmed that the matter should be remitted to a differently appointed Panel to consider whether or not a warning should be issued.

Salient Points

- Panels must, where they have made a finding that an action was not clinically indicated, remember that this does not necessarily mean that the action was sexually motivated (paragraph 56).

- In such circumstances there must be a separate and careful consideration, which includes a number of factors being brought into the balance, including good character (paragraph 66)

Panel Development Team
0161 240 7292
pandevteam@mpts-uk.org