Appeals Circular A24/12

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Re: Dr Anantha Kumar v General Medical Council [2012] EWHC 2688 Admin

Background

Dr Kumar, a Consultant Psychiatrist, appeared before a Fitness to Practise Panel ('Panel') in May 2011. His registration was directed to be suspended for a period of four months following the Panel's finding that his fitness to practise was impaired by misconduct relating to evidence he gave as an expert witness for the defence in a murder trial in 2009.

Dr Kumar appealed pursuant of Section 40 of the Medical Act 1983 contending that the Panel's decision was wrong: it ought not to have proved one of the charges, namely that he had failed to disclose that he had no previous experience of acting as an expert witness in a homicide case; and it had wrongly found that he had been reckless in a number of respects in his work as an expert. The Panel also ought not to have found that his fitness to practise was impaired nor imposed a sanction of suspension, let alone a requirement for a review at the end of the period of suspension.

Appeal

The appeal came before Mr Justice Ouseley on 19 and 20 June 2012 (judgment was handed down on 10 October 2012).

The Judge sets out the facts in outline (paragraph 2) with details of the charges thereafter (paragraphs 3 – 10).

He then goes on to consider the legal framework for the Court's consideration of a appeal under Section 40 of the Medical Act 1983 (paragraphs 11 – 13).

Mr Justice Ouseley then considers each of the matters raised by the doctor on appeal.

Ground 1: Charge 3 (b) (paragraphs 14 – 25)

This ground relates to the only finding of fact by the Panel as to what Dr Kumar actually did, as opposed to his state of mind or the effect of standard of his actions, which was challenged in the appeal. The Judge sets out matters in some detail.

He confirms (paragraph 22) that paragraph 3(b) actually contained two allegations, each of which had to be proved: that Dr Kumar had no previous experience of acting as an expert witness in a case of homicide, and that he did not disclose that to the defence solicitors. That is clear from paragraph 3(a), and the Panel's conclusions from this paragraph and on recklessness in relation to the paragraph confirm its understanding of this charge. The Panel found that Dr Kumar had no expertise in preparing reports on the state of the mind of the accused in a homicide case or of criminal procedures.

The Judge does not accept Counsel for Dr Kumar's submissions as he considers it is perfectly clear the charge contemplated disclosure of the doctor's experience in performing the sort of role he was being asked to perform and went on to perform (paragraph 23).

Whilst he considers that the Panel's reasoning may be open to some criticism in that it implies that on the issue of what Dr Kumar disclosed to the solicitors about his previous experience as a witness in criminal cases, the solicitor gave evidence which was different from that of Dr Kumar, he confirms the conclusion on recklessness makes the position clear and he would not therefore send the matter back for the Panel to make further findings since he is clear on the evidence before the Panel charge 3(b) was rightly proved against Dr Kumar.

Ground 2: recklessness (paragraphs 26 – 59)

He notes that the framing of charges against Dr Kumar as *'reckless'* came from how the General Medical Council ('GMC') understood what the Court of Appeal had said in GMC v Meadow [2006] EWCA Civ 1390 which concerned what was required for *'misconduct'* in respect of a doctor giving expert evidence.

The Judge considers the meaning of *'reckless'* before the Panel was derived from R v G and Another [2003] UKHL 50 and the statement of Lord Bingham.

The Judge notes that this was the test which the Panel expressly applied, emphasising that it was a subjective not objective test (paragraph 29). The charges in paragraph 10(a) related directly to the acts and omissions charged or referred to in the other paragraphs and he thereafter sets out each of the particular charges and the Panel's findings (paragraphs 30 - 43).

Counsel for the doctor was critical of the way in which the GMC developed it's questions and submissions on recklessness before the Panel, although by the conclusion of the hearing, all parties were agreed on what was meant by recklessness, at least for the purposes of the case (paragraph 44).

Mr Justice Ouseley does not consider there is anything of substance in Counsel for the doctor's complaints that the GMC developed what it meant by 'reckless' late in the day, and that it's questioning of the witnesses was not directed to that test (paragraph 45).

He confirms that:

> *"The real question is whether the conclusions of the Panel are wrong, which could be shown if it misdirected itself on the test or went wrong in its application to the facts it found. As Mr Peacock [Counsel for the doctor] said, the question of whether the conclusions on recklessness are wrong is a matter on which, since the findings are largely inferences from facts found, this Court is well placed to see if the conclusions are wrong.*

Counsel for the doctor then submitted that the Panel had failed to consider the context in which Dr Kumar had prepared his reports and evidence. He considered this was important in the light of what Auld LJ said in ***Meadow***. The Judge sets out the paragraphs relied on by Counsel for the doctor. He thereafter sets out the Panel's specific findings (paragraph 51). He concludes that in reality, contextual points discussed by Auld LJ did not bear on the gravamen of the case against Dr Kumar at all (paragraph 52):

> *'He was not lured beyond his purported expertise by his own side or in cross-examination, the latter being designed instead to show how limited his expertise was. Rather he lacked the basic expertise to do the task upon which, on the facts found, he had knowingly embarked. His evidence was not flawed by reason of the pressure of events at the trial, or the atmosphere, or the awkwardness of the questions. It was flawed because he did not acquire relevant information which he knew existed, failed to qualify his report accordingly, did not state that IED was a controversial diagnosis, and misapplied it in a number of serious*

respects, all on his own in whatever peace and quiet he chose to prepare his reports. He was not charged with any matter to which the isolation of a witness or the hurly-burly nature of the trial could be relevant'.

The Judge accepts that on a number of occasions afterwards Dr Kumar referred to the trial atmosphere as being intimidating and hostile, and that his answers were on occasion flawed or delivered without the fluency he would have wished, but the charge of recklessness did not relate to matters of that kind nor did any of the factual charges. They were more fundamental than that.

Counsel for the doctor submitted that the findings of reckless were more generally flawed since the Panel found in reality no more than that Dr Kumar had been incompetent or negligent, even if to a serious or gross degree. Mr Justice Ouseley disagrees (paragraph 56). He said:

'That is simply wrong. I have considered whether the facts found and the evidence warrant the findings of recklessness or whether they are wrong. They are not wrong. They are wholly justified'.

In the circumstances he rejects the doctor's submission on the findings as to recklessness.

Before going on to deal with the issues of misconduct and impairment of fitness to practise, the judge deals with a point raised by Counsel for the GMC that he considered warranted comment. He confirms it was clear, from *Meadow* paragraphs 201 (Auld LJ) and 279 (Thorpe LJ), that the Court of Appeal was not departing from the analysis of '*serious professional misconduct*' in paragraph 28 of *Preiss v General Dental Council* [2001] 1 WLR 1926 which he then sets out (paragraph 58).

He confirms (paragraph 59):

'First, the comment of the Court of Appeal in Meadow to the effect that rarely, absent bad faith or recklessness, will the giving of honest albeit mistaken expert evidence amount to misconduct, does not mean that misconduct can only arise in cases where recklessness or bad faith are proven. The overriding test remains that in Preiss. Second, the actual giving of evidence in court, oral or written, or the preparation and content of a report for the use in court, may be of such a nature or degree of incompetence or negligence, that it amounts to misconduct without bad faith or recklessness, as the Court of Appeal itself recognises. There may be circumstances surrounding the acceptance of

instructions, the making of a diagnosis, or the content of an expert for use in preparing a case in which it is clear that, even if recklessness or bad faith is not proved, misconduct can be charged because of the degree and nature of any negligence and risks created by it. A person, honestly and without recklessness, may fail to appreciate his limitations or other failings, and the serious consequences which his actions could create, even where he obviously ought to have been aware of them. An instance could be the acceptance of instructions and preparation of a report by someone whose failings were such that he was unaware of his serious limitations as an expert. It is not incumbent on the FTP Panel to assess whether a case is a rare one or not, or only to find misconduct proven on a few occasions out of those in which such a finding is warranted. Rather the concept of rarity here reflects the degree to which a medical practitioner must fall short of the standard expected before his acts amount to misconduct in those circumstances. This is because of the awareness of the Court of the context in which such reports are prepared and evidence is given; but the more remote the failings from actual evidence in court, the less important are those factors'.

Misconduct and impairment of fitness to practise (paragraphs 60 – 75)

Mr Justice Ouseley reminds himself of the fact that misconduct having been found, did not in itself mean that Dr Kumar's fitness to practise was impaired. Unless his fitness to practise was impaired, no sanction could be imposed. His fitness to practise had to be judged as at the time when the Panel was considering the issue, looking to the future, rather than as at the time of failings which they had found. However past misconduct is of course relevant to the judgment as to current failings, if any.

He further confirms it is relevant to the judgment as to impairment whether the failings are or have been remedied, or are easily remediable, or are unlikely to be repeated. Evidence of steps taken by the doctor after misconduct, and of his current skills are relevant (paragraph 61).

He then sets out the submissions of Counsel for the doctor both at the fitness to practise hearing and before him as well as setting out the significant part of the findings of misconduct by the Panel. In particular, the Panel's reference to *Yeong v GMC* [2009] EWHC 1923 Admin as the correctness of the case became a controversy before the Judge (paragraphs 68 -71).

The Judge agrees with the Panel's reasoning that it was dealing with an *'outstandingly bad'* case of misconduct. It did not express a view on whether his failings were remediable by his not giving evidence in the future in criminal cases, and by taking courses on giving evidence as an expert in other cases but if what Sales J said in *Yeong* was correct as a matter of approach, the Panel's conclusions are unassailable and obviously not wrong (paragraph 72).

Mr Justice Ouseley goes on (paragraph 73) to say:

> *'I think that Sales J is right there are cases in which remediability or the fact that the particular error is unlikely to be repeated cannot mean that fitness to practise is unimpaired. The need to uphold public confidence in the profession, and declaring an upholding standards of behaviour, may mean that a doctor's fitness to practise is impaired by reason of certain acts of misconduct of themselves: the public simply would not have confidence in him or in the profession's standards if the Panel regarded that sort of conduct as leaving fitness unimpaired. Such a finding is necessary to re-affirm to the public and practitioners the standards of conduct expected of them. If that approach is right, this is just such a case. The criminal justice system must have confidence in the expertise and qualities of those members of the medical profession who give expert evidence in court. And on that basis, the weight given to the Panel's conclusions on his impairment is in any event entitled to considerable respect'.*

He goes on to say that even if the approach is not right, the Panel should still have found his fitness to practise impaired, notwithstanding his intention not to act as an expert witness in criminal cases again, and the remedial courses he had undertaken and then sets out the particular findings of fact which would of lead to that finding (paragraph 74).

In all the circumstances, Mr Justice Ouseley rejects the contention that Dr Kumar's fitness to practise was wrongly found to be impaired.

Sanction (paragraphs 76 – 86)

The Judge considers the submissions by both Counsel for the GMC and the doctor and refers in detail to the Panel's determination. He concludes that the Panel's conclusion on sanction was entitled to considerable respect. It does not seem to him that a lesser sanction, such as conditions, were appropriate. He thinks it would not be adequate for this case, where the most important part of the sanction is the message it must send to the profession and the public about what are proper

standards and how they will be upheld so to maintain public confidence in the medical profession (paragraph 83).

The Judge also confirms that it is vital to uphold the confidence of the criminal justice system, indeed of any area of the justice system, that medical witnesses will have the requisite expertise and provide balance and accurate expert reports (paragraph 80).

He also confirms that the requirement for a review was justified (paragraph 85):

> *'There is an obvious justification for Dr Kumar showing how he has gained insight into his misconduct, has undertaken further study and has learned something from his serious departures from what is expected of an expert witness. He has only himself to blame, and he has to learn that too'.*

Mr Justice Ouseley concludes (paragraph 86):

> *'Far from the Panel's judgment being wrong, it could also be justified on the further basis that Dr Kumar may well be producing reports on those involved in serious crime, even in a family context, whether or not as an expert witness, and on others whose diagnosis may involve controversial thinking. The deficiencies in the report itself went beyond failings that only arose because it was a report for a criminal trial, but which would have left it fit for use for some other purpose. It would have been a seriously deficient diagnostic report for whatever purpose it was to be put'.*

In the circumstances the Judge dismissed the appeal.

Salient Points

- Confirmation that the overriding test for "serious professional misconduct" is as set out in *Preiss v General Dental Council* (paragraph 58)
- Confirmation that the comment in *Meadow* that rarely, absent bad faith or recklessness, will the giving of honest albeit mistaken expert evidence amount to misconduct, does not mean that misconduct can only arise in cases where recklessness or bad faith are proven. Misconduct can be charged because of the degree and nature of the negligence and the risks created by it (paragraph 59)
- Re-affirmation of the position in *Yeong* whereby remediability may be outweighed by the need to maintain public confidence in the medical profession and/or the justice system (paragraph 73)

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