

16 October 2014

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

To: Interim Order Panellists  
Fitness to Practise Panellists  
Legal Assessors

Tel: 0161 923 6263

Fax: 0161 240 7199

Email: [enquiries@mpts-uk.org](mailto:enquiries@mpts-uk.org)

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

**Re: Dr Fernando Hidalgo Martin v GMC [2014] EWHC 1269 Admin**

***Background***

Dr Fernando Hidalgo Martin appeared before an Interim Orders Panel (IOP) on 7 October 2013 when the IOP determined to impose an interim order of suspension on his registration.

Dr Martin, by a CPR Part 8 claim, seeks an order from the Court terminating the order or alternatively substituting a shorter period of suspension.

***Application***

This matter was considered by Mr Michael Fordham QC (sitting as a Deputy Judge of the High Court) on 20 March 2014.

Mr Fordham QC set out in his introduction (paragraphs 1-5) the IOP's power to impose an order, the matters which the court considers when an application in relation to termination is made together with details of the five legal authorities additionally cited by the parties at the hearing.

The Judge went onto consider the factual context of the matter (paragraphs 6-20) including a summary of the circumstances which led to a referral to the IOP and the order made by the IOP together with the issues raised by Dr Martin as to why the order should be terminated. Dr Martin was present and represented when the IOP determined that an order was both necessary as there was a real risk to members of the public and secondly an adverse effect on the public interest.

The IOP decided it was insufficient to make an order imposing conditions on his registration and were satisfied that it was necessary and proportionate to impose an order of suspension and that it should be for 18 months (paragraph 15).

Dr Martin's claim raised three grounds to support his application set out as follows (paragraph 17):

*(a) There is no evidence of risk to patients or risk to the public confidence which would have justified an order of suspension*

*(b) It was unnecessary and disproportionate to suspend the claimant for the protection of members of the public or on the public interest grounds*

*(c) The period of 18 months suspension was disproportionate.*

Mr Fordham QC considered grounds (a) and (b) together, given several shared features (paragraph 18).

Counsel for the doctor emphasised a number of features in relation to grounds (a) and (b). However, amongst them and, in Mr Fordham QC's judgment, of 'greatest prominence and significance' (paragraph 20) were four topics:

- the evidence said to implicate the doctor in relation to fraud;
- the evidence relied on in relation to risk;
- the impact and implications of interim suspension for the doctor; and
- the adequacy or inadequacy of the IOP's reasons.

The Judge then went on to consider each of the matters under the four headings as follows:

***Evidence said to implicate the doctor (paragraphs 21-27)***

The Judge had been reminded that the IOP was not making findings of fact when making an interim order nor was the Court. However, Counsel for the doctor submitted it was relevant and appropriate to have regard to the nature and cogency of the evidence as it stood. Counsel for the doctor also submitted that in this case there was a lack of cogency in the evidence implicating the doctor in relation to what were accepted to be forged documents (paragraph 22).

Mr Fordham QC confirmed that notwithstanding the force with which those matters were advanced by Counsel for the doctor that there was sufficient cogency in the evidence implicating the doctor in the forged references to justify an interim order of suspension (paragraph 23).

As far as the IOP's reasons were concerned Mr Fordham QC considered that it was clear that they did have regard to, and did consider, the evidence that was before them on the point and therefore this indicated that the Panel could not be said not to have had well in mind the material and the submissions that it had heard (paragraph 24). He also confirmed that he would have reached the same conclusion as the IOP in relation to this issue (paragraph 25).

The Judge confirmed that, in considering the cogency of the evidence (paragraph 26), he accepted the submission of Counsel for the GMC in relation to the particular features of the case, which included:

- the fact that the principal beneficiary of the post which was being sought with Morecambe Bay was the doctor;
- the letter of reference was written on the Mid Cheshire headed paper and the doctor would have known that Mid Cheshire would not, on the bases of its evaluation of him, have been in a position to support him for the post;
- the evidence in the case indicated that the doctor was known to have some difficulties in terms of English language and expression; and
- it had struck those at Morecambe Bay who received the letter of reference, as it struck the IOP and the Judge, that the letter was one with clear deficiencies as to the use of English (paragraph 26).

***Evidence relied on in relation to risk (paragraphs 28-63)***

Mr Fordham QC considered this issue to be the heart of the case. Counsel for the doctor submitted that there was no evidence of 'real, current and ongoing risk, whether viewed in terms of the first limb, protection of members of the public or the second limb, otherwise in the public interest'.

Counsel for the GMC submitted that the allegation was one of dishonesty and probity and it was not possible to say that the doctor was not liable to act dishonestly in the future during the period of the interim suspension still less that he was not liable to do so to jeopardise the safety of any patient (paragraph 28).

Counsel for the doctor relied on various passages in the imposing interim orders panel guidance (paragraphs 29-31).

Having indicated that he considered this to be the central issue in the case Mr Fordham QC used as his starting point the true testimonials from Leighton Hospital (paragraph 33). He specifically referred to a letter from Dr Matthews dated 21 January 2013 of his assessment of Dr Martin towards the end of his work at the Leighton Hospital and then went on to consider other documents from Leighton Hospital signed by the Consultant Mr

Knowles (paragraphs 35-36). The Judge considered that viewed in isolation those authentic references and assessments from the Leighton Hospital could be relied on to support the position that, as at January 2013, the doctor did not pose a risk to patients, provided he was appointed at the appropriate level and with the appropriate degree of supervision.

The Judge then went on however to state (paragraph 37):

*'However, in my judgment, crucial to this case is to see that evidence and the position that it describes in the context of the allegations which are then made against the claimant. These materials demonstrate on their face that those who had observed and supervised the claimant over a sustained and extended period of time had reached the clear conclusion that he was not suitable for a middle grade post in A & E, nor close to being suitable for such a post. These documents also indicate clearly that the claimant was well aware that that was the view that had been formed of him, because of the various review meetings and conclusions that had been communicated, leading to his own resignation in the light of those suitability concerns'.*

In the circumstances, he considered that the central difficulty was Counsel for the doctor's submissions. If the doctor was involved in the production of the two documents which were accepted to be fraudulent, he would have been deliberately putting himself forward as a competent and suitable for a middle grade level post within an A & E department. He would have been putting himself forward, by reference to views that he was fabricating, and attributing to those whose considered view was precisely the opposite. Further he would have been putting forward a glowing positive picture emanating from sources that he knew would not have supported it and who would have said something very different (paragraph 38).

Mr Fordham QC confirmed that a doctor who acted in this way, which is the premise for examining the potential relevance and cogency of all of this material, is not simply securing a position by telling an untruth, as might be the case where a post is achieved by reference to a CV which in some respect is materially false but would be engaging in the kind of fraudulent activity which would directly place the public at a real tangible, identifiable and present risk.

He confirmed that securing a medium grade post, on the basis of that picture of reassurance would mean knowingly and from the day the doctor walked into the A & E department, discharging functions when the assessment was known to have been that the doctor lacked the competence to be entrusted to do so (paragraph 39).

The Judge went on to say that there is a wider problem which is not undermined by reason of any generality or vagueness (paragraph 40):

*'A doctor prepared to act in that way which is the premise for considering the material, would be exhibiting one of two things. Either a reckless self-confidence in their own competence, that is to say: 'Whatever anyone else might think or say about whether or not I am competent to do this job, I am satisfied that I am and that overrides other considerations', or a reckless indifference, that is to say: 'I may not be competent to discharge such functions but nevertheless I am going to go on and secure a post and perform them'. In my judgment, each of these two constitutes 'real, tangible, identifiable and present risks', which, on the face of it, can properly be regarded as arising from this evidence'.*

The Judge confirmed that he did not accept the submission that it was necessary for the IOP to give concrete examples of the sorts of concerns to which all of that will give rise. The IOP perfectly and properly encapsulated the concern in their determination (paragraph 41).

The Judge acknowledged that although it was appropriate for him to give considerable weight to the IOP's appraisal of the risks which it plainly felt arose from the nature of the material the Judge confirmed that if he looked into the matter independently he would have arrived at the same conclusion (paragraph 44).

The Judge then turned to the other materials upon which Counsel for the doctor relied (paragraphs 45 - 48).

Finally, in relation to this issue the Judge dealt with the evidence in relation to Dudley which was submitted late but could have been raised at the time of the IOP hearing. The Judge was not prepared to put it to one side and give it 'no weight' on the basis of timing. He considered it appropriate and important for the Court to have before it rather than ignore relevant and available evidence (paragraphs 50-55).

Having considered all the material before him the Judge was satisfied that the concerns that arose were of sufficient gravity and the evidence relating to them and their implications were a matter which gave rise to sufficient risk that the Panel's conclusion – notwithstanding the new material- was one in which the Judge's view was and remained fully justified and in his judgment the correct conclusion (paragraph 58).

The Judge went on to consider the impact and consequences on the doctor. He confirmed (paragraph 62):

*'It is plainly a highly material feature of the case such as the present that a doctor, who is on the face of it committed and hardworking, is effectively deprived, through the suspension of his registration, of his ability to work. It is unsurprising to find in the authorities there is a strong emphasis placed on*

*such consequences.... the Houshian case (at paragraph 13), where King J set out three very important consequences for a practitioner that arise in examining proportionality where there is an interim order for suspension in relation to what are, as they are in this case, 'as yet unproven allegation'. King J observed that those consequences cannot be overstated. I agree. The three that King J identified were these. First, the impact upon the person's right to earn a living. Secondly, the obvious detriment in terms of reputation. Thirdly, the deprivation of the practitioner being able to show that during the relevant period he has conducted himself well and competently. King J went onto to quote Nicol J from Sandler, describing the need for the Panel to weight very carefully the proportionality of the measure, weighing the significance of any harm to the public interest in not suspending the doctor against the damage to him by preventing him from practising.'*

The Judge confirmed that he was satisfied that the IOP weighed these matters carefully in terms of the question of proportionality and impact. He concluded that having regard to the first limb of the test ie for the protection of members of the public, this was a case on which on all the evidence and balancing the various relevant considerations including the important and very serious consequences for the doctor it was both necessary and proportionate to make an interim order (paragraph 63).

***Conditions: the 'Less intrusive alternative' (paragraphs 64-70)***

It is a key feature of proportionality that, in many contexts, makes it necessary to examine whether there was some middle way or 'less intrusive measure' that could be properly adopted. It had been noted that this had been recognised by Parliament in the present context, as the legislation recognised the option of imposing conditions.

On the face of it, Dr Martin's case could be a candidate for the less intrusive measure. He had in mind not only the assessment by those at the Leighton Hospital but also the specific position at Dudley and the assessment of the supervising consultant (paragraph 65). On the face of the statutory scheme, the Court has no jurisdiction on a statutory application to consider whether an interim order of suspension ought instead only to have been an order for interim conditional registration. The Court's function in such circumstances as arise in this case, is limited to whether it was satisfied that no suspension is warranted, alternatively the Court can impose a reduced period of suspension (paragraph 67).

***Limb 2: Otherwise in the public interest (paragraphs 71-83)***

The Judge noted that there is no 'necessity' test on the face of the statute in relation to this limb. He also noted the cases and the anticipated relative rarity with which the second limb would justifiably be relied upon.

He confirmed that there was a special need for caution in relation to relying on the second limb, in the circumstances where it is accepted that there was a need to make an order for the protection of the public or where it is accepted that it would be disproportionate to make an order for that reason. He went on to say (paragraph 73):

*'That caution, in my judgment, is especially appropriate, remembering that a case is concerned with allegations, and having regard to the question whether there is already reliable factual platform for consideration of the interim position. In some cases there is a reliable factual platform, in the sense that the facts may be admitted or may have been proven in other proceedings'.*

He confirms that if limb 2 stood alone then he would be anxious that it could justify the interim suspension in the circumstances of Dr Martin's case (paragraph 77). In the circumstances of Dr Martin's case he concluded that the interim suspension was justified by reference to the first limb and was not prepared to go further in relation to limb 2 because it was not a case in which limb 2 stood alone. He concluded that in relation to this issue (paragraph 79):

*'Given the risks that I have identified as being present in this case, and lest the view were taken that those were not properly risks which were to be characterised as risks to members of the public against which they need to be protected (limb 1), I can quite see why it was considered important and appropriate to rely on the alternative on the second limb (otherwise in the public interest). To that extent, I would certainly agree with the assessment which the Panel arrived at in this case, as to the second limb'.*

### ***Duration of suspension (paragraphs 80-83)***

Mr Fordham QC confirmed it was appropriate to give the IOP's informed assessment on that question appropriate weight. On that basis he agreed with Counsel for the GMC's submission that the assessment was one which was fully justified in a case which clearly, raised many serious questions both as to the precise factual picture of what has happened but also the implications, conclusions and steps would be appropriate depending on that the factual evaluation. He concluded that this was the case, unlike some others, in which the matter of interim suspension had been dealt with promptly, and therefore the investigation was necessarily only at an early stage (paragraph 82).

In the circumstances Mr Fordham QC dismissed the claim.

***Salient point***

- Where dishonesty is alleged against a doctor in relation to the provision of a qualification or an assessment of ability, this is likely to be a matter of clinical concern in that it reveals either reckless self-confidence or reckless indifference on the part of the doctor.

Panel Development Team

0161 240 7292

[PanelDevelopmentTeam@mpts-uk.org](mailto:PanelDevelopmentTeam@mpts-uk.org)