General Medical Council

Appeals by the GMC pursuant to s.40A of the Medical Act 1983 ("s.40A appeals") – Guidance for Decision-makers

Introduction

1 Section 40A of the Medical Act 1983 (as amended by Article 17 of The General Medical Council (Fitness to Practise and Over-arching Objective) and the Professional Standards Authority for Health and Social Care (References to Court) Order 2015) empowers the GMC to appeal a "relevant decision" by a Medical Practitioners Tribunal ("MPT") if it considers that the decision is not sufficient (whether as to a finding or a penalty or both) for the protection of the public.

2 "Relevant decisions" are defined at s.40A(1) to include:

Decisions (following the determination of the question of a doctor's fitness to practice) under s.35D to make:

a No direction;

b A direction for the imposition, extension or termination of an order of suspension;

c A direction for the imposition, extension, variation or revocation of an order for conditional registration.

Decisions (following the determination of an application by an erased doctor) under s.41 to make

d A direction restoring a doctor's name to the Register;

Decisions (where doctor has been found to have failed to comply with an order than he undergo an assessment) under Sch.4 para.5A(3D) or 5C(4) to make:

e A direction for the imposition of an order for suspension;

f A direction for the imposition of an order for conditional registration

3 Section 40A gives the GMC a discretionary power to appeal such decisions. Accordingly, the GMC must consider in each case:

a whether there are grounds to consider that the decision is not sufficient for the protection of the public; and, if so,

b whether it should exercise its right of appeal in respect of that decision.

4 This document is intended to provide guidance as to how and in what circumstances the GMC's power to appeal such decisions should be exercised.

5 This Guidance is a living document which will be revised periodically.

The decision whether to appeal

6 Bringing a s.40A appeal and thereby continuing to question a doctor's fitness to practise, either without further restriction or at all, notwithstanding the conclusions of an MPT which has already considered the matter, is not a decision which the GMC will take lightly; particularly having regard to the following factors:

a The GMC recognises and respects that the MPT is a specialist tribunal with particular experience and expertise. The MPT as an institution is an important part of the statutory scheme in which the GMC operates. It would be improper to bring an appeal simply to invite the court to substitute one reasonable view of the merits for another.

b Any decision to exercise the right to appeal under s.40A and thereby reopen the question of the doctor's fitness to practice and/or the appropriate sanction will undoubtedly place strain upon a doctor, whose case would otherwise be closed. (However, it is important to qualify this consideration with the following point: the GMC may only bring an appeal where it is felt necessary to do so in order to protect the public and considerations of pressure on the doctor must necessarily be a secondary consideration to public protection.)

7 Whilst considering the above factors, the GMC must also have regard to its over-arching objective of protecting the public. The right to appeal pursuant to s.40A is an important mechanism by which the GMC can ensure that it meets this objective.

8 The GMC has a power to bring a s.40A appeal where it considers that the decision of the MPT in the particular case is not sufficient for the protection of the public. The proper purpose of the appeal is not to seek to punish the doctor but rather to pursue

the over-arching objective set out in s.1(1A) of the Act (as inserted by Article 21 of the 2015 Rules): *the protection of the public*.

9 As s.40A(4) of the Medical Act 1983 makes clear, when considering whether a decision is sufficient for the protection of the public, the GMC will need to consider whether the decision is sufficient—

a to protect the health, safety and well-being of the public;

b to maintain public confidence in the medical profession; and/or

c to maintain proper professional standards and conduct for members of that profession.

10 However, as a statutory body, the GMC is required to act reasonably in the exercise of its statutory powers, including the power to bring a s.40A appeal. It would not be acting reasonably if it were routinely to bring appeals which were likely to fail.

11 It will therefore need to consider, as one of the factors in reaching a decision, the likely merits of any appeal (the prospects for success of any such appeal before the court) before making a decision to bring a s.40A appeal even when, in principle, there may be grounds for the GMC to consider that the decision of the MPT in the particular case is not sufficient for the protection of the public.

The questions which the GMC will need to address in deciding whether or not to bring a s.40A appeal

12 When considering whether to bring a s.40A appeal in a particular case, it will be necessary to consider the following questions:

a Based on his assessment of all of the information held, and in the particular circumstances of the case, and having regard to the factors set out in paragraph 9 of this Guidance, does the decision maker consider that the MPT's decision is not sufficient to protect the public?

Only if the decision maker is of the view, on his assessment of all the information held, in the particular circumstances of the case, in the context of paragraph 9, that there are grounds to consider that the MPT's decision is not sufficient, does he go on to consider:

b In all of the circumstances, would exercising the power of appeal further, rather than undermine, the achievement of the over-arching objective?

If the answer is yes, then the GMC may exercise its power of appeal

13 In considering (b) above, it may be that the decision maker will be required to consider and weigh a number of competing factors (including his assessment of the prospects of success of the appeal, and the nature and importance of the issues which would be aired).

The assessment of whether the decision is "not sufficient" for the protection of the public

14 Unless the GMC concludes that there are grounds for considering that the decision which has been reached by the MPT is not sufficient for the protection of the public, the power to appeal pursuant to s.40A of the Medical Act will not arise and the GMC will not need to proceed to consider whether it should exercise the power to bring a s.40A appeal.

15 Whilst regard will be had to decisions of the MPT relating to other issues and earlier stages in the hearing, the question as to whether the decision of the MPT is not sufficient for the protection of the public will turn in most cases upon the ultimate outcome (if any) in relation to sanction.

16 Whilst the GMC may conclude that there are grounds for considering that one or more of the other decisions (for example as to fact or impairment) has been wrong, it will be the effect (if any) of such decisions on the ultimate outcome in terms of their finding of impairment and, in particular, the determination as to sanction which will determine whether this threshold for the s.40A appeal is met.

17 If, notwithstanding errors in the MPT's reasoning and conclusions leading up to their determination on sanction, the sanction is ultimately considered to be an appropriate sanction, then it is unlikely that the GMC will consider that decision which has been reached by the MPT is not sufficient for the protection of the public.

18 When considering whether the decision which has been reached by the MPT is not sufficient for the protection of the public, the GMC will need to have regard to such factors as whether:

a the MPT has made an error of fact; and/or

b the MPT has made an error in its application of the relevant legal principles; and/or

c the MPT has failed adequately to apply the relevant guidance published by the GMC and the MPTS, whether as to Standards or as to Sanctions, when reaching its decision as to impairment and/or sanction in a given case; and/or

d the MPT has failed adequately to set out the reasons for the decision made.

19 When considering the matters referred to at paragraph 18 above, the GMC will be mindful that the MPT:

a is itself a specialist, quasi-judicial tribunal with particular expertise in relation to the determination of such issues in the exercise of its statutory function under the Medical Act 1983, and

b plays a central role in the statutory scheme under which the GMC fulfils its statutory functions and meets its statutory objectives.

20 In line with the decision of the Court of Appeal in the case of Fatnani and Raschid v General Medical Council [2007] EWCA Civ 46 (as to which see further below), the GMC accepts that "particular force [should be] given to the need to accord special respect to the judgment of the professional decision-making body", here the MPT, in view of its acknowledged expertise in determining "the measures necessary to maintain professional standards and provide adequate protection to the public".

21 However, this does not mean that the GMC must accept the conclusions of the MPT in this regard in all cases. This is clear from decisions of the High Court in cases subsequent to Fatnani and Rashid. In his judgment in the case of Naheed v GMC [2011] EWHC 702 (Admin) [20], Parker J sets out a helpful summary of the correct approach :

> *The principal purpose of the panel in relation to sanction is the preservation and maintenance of public confidence in the profession rather than the dispensing of retributive justice. The court must accord, therefore, a certain degree of respect or deference to the judgment of the professional panel when it comes to the imposition of sanctions: see Raschid v GMC [2007] 1 WLR 1470 at paragraph 19 by Laws LJ. The exercise of professional judgment is especially important when it comes to sanction -- see Cheatle v GMC [2009] EWHC 645 (Admin) at paragraph 15 by Cranston J. However, if this court despite paying such respect is satisfied that the sanction is clearly inappropriate, then this court must interfere -- see Salsbury v Law Society [2009] 1 WLR 1286 at paragraph 30 by Jackson LJ.*

The assessment of prospects and the legal framework governing the determination of s.40A appeals

22 When considering whether a proposed appeal may have reasonable prospects of success, the GMC will need to have regard to the approach which the court is likely to take in determining the appeal in accordance with the provisions of the Medical Act itself, any relevant case law and the relevant Rules of Court.

23 This is because, when assessing whether a s.40A appeal has reasonable prospects of success, the GMC is assessing whether a judge hearing the appeal, acting in accordance with the law, is more likely than not to allow the appeal.

24 A s.40A appeal is governed by the same court rules which govern other statutory appeals, including appeals brought by doctors pursuant to s.40 of the Medical Act 1983 ("s.40 appeals") and references to court by the Professional Standards Authority for Health and Social Care ("PSA") made pursuant to s.29 of the National Health Service Reform and Health Care Professions Act 2002 ("s.29 references").

25 The legal framework in place will vary depending on which jurisdiction the appeal is to be heard in, whether that be Northern Ireland, Scotland, or England and Wales. For example, where the relevant court before whom the appeal is brought is the Administrative Court of England and Wales, the appeal will be governed by the provisions of Part 52 of the Civil Procedure Rules.

26 CPR 52.11(3) provides as follows:

> The appeal court will allow an appeal where the decision of the lower court was —
>
> **a** (a) wrong; or
>
> **b** (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

27 Judgments of the Court of Appeal will be binding only in England and Wales but nonetheless provide useful guidance in all jurisdictions. Of course, the over-arching objective has now changed and as a result the principles distilled in case law dealing with the old objective will need to be reviewed. However, the case law handed down pertaining to general principles, unrelated to the over-arching objective (such as the nature and status of regulatory bodies and decisions made by them), still stands.

28 In the case of Fatnani and Raschid, the Court of Appeal gave further guidance on the approach which the courts should take in applying the test under CPR Part 52.11(3) when considering appeals against decisions of the MPT. Although this guidance was given in the context of an appeal brought by a doctor pursuant to s.40 of the Medical

Act 1983, in view of the points made in paragraph 27 of this Guidance (above), the GMC considers that it should and will apply equally in the case of a s.40A appeal.

29 These principles were usefully summarised by Mostyn J in his judgment in the recent case of Khan v General Medical Council [2015] EWHC 301 (Admin), when he said the following:

> "Taking the reasoning of [the Court of Appeal in Fatnani and Raschid] in combination with CPR 52.11(3), the governing principles are:
>
> **i** I can only overturn the decision of the FTPP if I am satisfied that it was either wrong or unjust because of a serious procedural or other irregularity in its proceedings.
>
> **ii** In determining whether the decision was wrong, I must pay close regard to the special expertise of the FTPP to make the required judgment.
>
> **iii** Equally, I must have in mind that the exercise is centrally concerned with the reputation and standards of the profession and the protection of the public rather than the punishment of the doctor.
>
> **iv** The High Court will correct material errors of fact and of law and it will exercise a judgment, although distinctly and firmly a secondary judgment, as to the application of the principles to the facts of the case.
>
> **v** Where the appeal is against a sanction, my decision must not constitute an exercise in resentencing or the substitution of one view of the merits for another."

30 When assessing whether a proposed appeal has reasonable prospects of success, the GMC will therefore need to consider:

a Whether there is a reasonable prospect that the court will conclude that the decision of the MPT was unjust because of a serious procedural or other irregularity in its conduct of the hearing before it: e.g.

i that it improperly excluded or otherwise failed to have regard to evidence upon which the GMC sought to rely at the hearing;

ii that the unreasonable exercise, or failure to exercise, Case Management powers by the MPT, had the effect of rendering the hearing before it unjust;

iii that it failed to give adequate reasons to explain the decision which it reached;

and/or

b Whether there is a reasonable prospect that, having paid due regard to both:

i the specialist expertise of the MPT on matters of judgment, and particularly in relation to the application of the Sanctions Guidance, and

ii the MPT's particular advantages in evaluating the evidence as the Tribunal which has heard the live evidence,

the court will be satisfied that the decision of the MPT was wrong.

Errors of Fact

31 Section 40A gives a power to appeal against the "relevant decision": namely a decision as to sanction.

32 Due to the fact that the MPT is a specialist body with the advantage of relevant experience and expertise, the court is unlikely to interfere with a finding of fact unless it was manifestly wrong. It is now firmly established[1] that findings of primary fact are "virtually unassailable", particularly where those findings are founded upon an assessment of the credibility of live witnesses. Though the High Court has jurisdiction to reopen questions of fact, it very rarely recalls witnesses and recognises that where a tribunal has had the benefit of live evidence, its decisions on matters relating to that evidence are more likely to be sound than a substitute decision made without the advantage of seeing witnesses.

[1] Southall v GMC [2010] EWCA Civ 407 [47]; Dr Luise Schodlok v GMC [2015] EWCA Civ 769 [71].

ANNEX A

Appeal under s.40A: The role of the Professional Standards Authority for Health and Social Care ("the PSA")

33 The GMC's right to appeal exists concurrently with the PSA's power to refer a case the court under section 29 of the National Health Service Reform and Health Care Professions Act 2002 ("s.29"). Once one party has brought an appeal/referred the case, the other party is precluded from bringing separate, like proceedings.

34 Where the GMC decides to exercise the power of appeal, the Registrar must notify the PSA without delay. While the PSA will not be able to take separate proceedings once the GMC has commenced an appeal, it can become a party and make representations in a GMC appeal in cases where it considers that there is insufficient protection of the public. If the GMC withdraws an appeal, the PSA can continue the proceedings.

35 If the GMC wishes to withdraw the appeal or agrees terms of a settlement with the respondent, then they must communicate this to the PSA, whether or not the PSA is a party to the appeal. The PSA may then take over conduct of the appeal, which from that time would be treated as a s.29 reference.

ANNEX B

References under s.29 of the National Health Service Reform and Health Care Professions Act 2002 ("s.29"):the role of the GMC

36 Where the PSA refers a case under s.29 the PSA must notify the GMC without delay.

37 Where the GMC is the respondent in a case referred under s.29, and the PSA wishes to withdraw the reference (or has agreed a settlement with the practitioner and wishes for the case to be resolved on those terms) the PSA must notify the GMC. In those circumstances the GMC may take over conduct of the proceedings, which from that time would be treated as a S40A appeal.

38 When determining its view on whether the proceedings should continue, the GMC will review any information held as to why the PSA no longer wishes to proceed with the s.29 reference. It will also be necessary to review why it was the GMC did not bring

an appeal following the tribunal decision (for example, this may be because the PSA referred the case before the GMC brought an appeal and so precluded the GMC from bringing an appeal). The GMC will consider whether the tests set out in paragraph 12 above are met, in light of all of the information held.