

PUBLIC RECORD

Dates: 17/02/2022
09/03/2022 - 10/03/2022

Medical Practitioner's name: Dr Anatta NERGUI

GMC reference number: 5206692

Primary medical qualification: MB BS 1995 Punjabi University

| Type of case | Outcome on facts | Outcome on impairment |
|---------------------|------------------|-----------------------|
| Review - Misconduct | | Impaired |

Summary of outcome

Conditions, 4 months.
Review hearing directed

Tribunal:

| | |
|--------------------------|-----------------------------------------|
| Legally Qualified Chair | Mr Jetinder Shergill |
| Medical Tribunal Member: | Dr Gabrielle Downey, Dr Candida Borsada |

| | |
|-----------------|--------------------|
| Tribunal Clerk: | Miss Jennifer Lane |
|-----------------|--------------------|

Attendance and Representation:

| | |
|----------------------------------------|-------------------------------------------------------------------------------------------|
| Medical Practitioner: | Present and not represented |
| Medical Practitioner's Representative: | N/A |
| GMC Representative: | Ms Anam Khan, Counsel (17/02/2022) Ms Emma Gilsonan, Counsel (09/03/2022 – 10/03/2022) |

Attendance of Press / Public

In accordance with Rule 41 of the General Medical Council (Fitness to Practise) Rules 2004 the hearing was held in public.

Overarching Objective

Throughout the decision making process the tribunal has borne in mind the statutory overarching objective as set out in s1 Medical Act 1983 (the 1983 Act) to protect, promote and maintain the health, safety and well-being of the public, to promote and maintain public confidence in the medical profession, and to promote and maintain proper professional standards and conduct for members of that profession.

Determination on Impairment - 09/03/2022

1. At this review hearing the Tribunal now has to decide in accordance with Rule 22(1)(f) of the General Medical Council (GMC) (Fitness to Practise) Rules 2004, as amended ('the Rules') whether Dr Nergui's fitness to practise is impaired by reason of misconduct.

The Outcome of Applications Made during the Impairment Stage

2. On the second day of the hearing, the Tribunal granted the GMC's application, made pursuant to Rule 34 of the General Medical Council (Fitness to Practise Rules) 2004 as amended ('the Rules'), to admit further documents into evidence. The Tribunal's full decision on the application is included at Annex A.

Background

3. The Tribunal has been informed of the background to Dr Nergui's case, which was first considered by an MPTS Fitness to Practise Panel in September 2013 ('the 2013 Panel'). There is a convoluted history to the case, starting with the 2013 Panel's decision that there was no '*misconduct*' being overturned by the High Court and a finding of misconduct being substituted by the High Court. The 2013 Panel's determination was therefore overruled, with only the fact finding preserved. A proper understanding of the case requires the 2013 Panel determination and High Court decision to be read alongside determination from 2014.

The 2013 Panel

4. Between January and June 2012 Dr Nergui owned and maintained a website called XXX ('the website'). One of the services Dr Nergui provided on the website was an '*Online Psychiatrist Blog*' ('the blog'), to which users of the website could upload questions they wished to ask of an online psychiatrist. Alternatively, users of the website could also use the blog to view entries made by other users of the website as well as the replies made by the online psychiatrist to those entries. On 22 January 2012 and 3 February 2012 Dr Nergui

composed replies to requests for advice from Patient A, a user of the website. The 2013 Panel found that Dr Nergui's responses to Patient A's requests for advice were in '*a philosophical style which risked misinterpretation*'. Of the entries made by Dr Nergui on the website's blog between 17 February 2012 and 14 April 2012, he failed to recommend that the user see a doctor/psychiatrist in 20 out of 22 cases. In one case out of a possible 29, Dr Nergui did not address the user's particular needs. In 30 cases Dr Nergui failed to recommend that the user attend a course of counselling/psychotherapy and in seven out of a possible 12 cases, he failed to request further information from the user with a view to determining a diagnosis.

5. Having considered all of the evidence presented to it, the 2013 Panel determined that the website's blog was not a '*medical practice*' and it was therefore of the view that the guidance in Good Medical Practice ('GMP') did not directly impact the governance of the blog. Accordingly, the 2013 Panel determined that it could not be said that Dr Nergui had breached the guidance set out in GMP. The 2013 Panel determined that whilst Dr Nergui's actions in developing and operating the website and blog without advice from other medical professionals were '*unwise*', his actions did not amount to misconduct. Having determined that Dr Nergui's actions did not amount to misconduct, the 2013 Panel did not proceed to consider whether or not Dr Nergui's fitness to practise was impaired.

Appeal by The Professional Standards Authority for Health and Social Care

6. The Professional Standards Authority for Health and Social Care ('the PSA') subsequently reviewed the determinations made by the 2013 Panel and lodged an appeal to the High Court under Section 29 of the National Health Service Reform and Health Professions Act, 2002.

7. In his Judgment, Mr Justice Ouseley found that the 2013 Panel had erred in three respects. First, in relation to the term '*medical practice*' Mr Justice Ouseley stated that what Dr Nergui was doing on the blog '*showed quite clearly*' that he was '*engaged in medical practice*' and that even if not, he was '*clearly engaged in the exercise of a doctor's calling*'. Secondly, in relation to the term '*failed*', Mr Justice Ouseley stated that 2013 Panel had adopted an '*overly technical approach*' and, thirdly, that the 2013 Panel's finding in relation to Dr Nergui not addressing the particular needs of the website's users '*ought to have involved considerations of culpability*'.

8. Further to the Order of the High Court, dated 22 May 2014, the 2013 Panel's finding that Dr Nergui's actions did not amount to misconduct was quashed and was replaced by a finding of misconduct. As a result, Dr Nergui's case was remitted back to the MPTS for a freshly constituted Fitness to Practise Panel to determine whether, on the basis of his misconduct, Dr Nergui's fitness to practise was impaired and, if appropriate, any sanction which should be imposed on his registration.

The 2014 Panel

9. Accordingly, Dr Nergui's case was considered by another MPTS Fitness to Practise Panel in November 2014 ('the 2014 Panel'). As per the Order of the High Court referred to above, the 2014 Panel first considered whether Dr Nergui's fitness to practise was impaired by reason of his misconduct.

10. The 2014 Panel considered that Dr Nergui had created a situation which exposed vulnerable patients to significant risk of harm. It was satisfied that Dr Nergui's misconduct had damaged the public interest, in that his work purported to offer the services of a psychiatrist without appropriate safeguards to patients. The 2014 Panel considered that Dr Nergui had not shown any convincing evidence of remediation. It considered that there was an ongoing risk to patient safety which required a finding of impaired fitness to practise and that public confidence in the profession, as well as in the regulatory process, would be undermined if a finding of impaired fitness to practise were not made.

11. Having determined that Dr Nergui's fitness to practise was impaired by reason of his misconduct, the 2014 Panel determined that it was sufficient, appropriate, and proportionate to impose conditions on Dr Nergui's registration for a period of 36 months.

The 2017 Tribunal

12. Dr Nergui's case was subsequently reviewed by a Medical Practitioners Tribunal on 4 December 2017 ('the 2017 Tribunal'). Dr Nergui was neither present nor represented at that hearing.

13. The 2017 Tribunal noted that Dr Nergui had complied with the conditions imposed on his registration by the 2014 Panel and that he had provided positive evidence about his clinical practice through workplace reports and his 360-degree feedback. However, the 2017

Tribunal noted that Dr Nergui had not provided any evidence that he had reflected on or had developed further insight into the seriousness of his misconduct. The 2017 Tribunal therefore determined that Dr Nergui's fitness to practise remained impaired by reason of his misconduct. It determined that it would be sufficient, appropriate, and proportionate to impose a further order of conditions on Dr Nergui's registration for a period of nine months. The 2017 Tribunal was of the view that this would allow Dr Nergui sufficient time to provide documentary evidence of how he has reflected on and has developed further insight into the seriousness of his misconduct.

14. The 2017 Tribunal varied the conditions imposed by the 2014 Panel so that they were in line with the then current conditions bank, although they were similar in form to those imposed by the 2014 Panel.

The 2018 Tribunal

15. Dr Nergui's case was again reviewed by a Medical Practitioners Tribunal on 11 September 2018 ('the 2018 Tribunal'). Dr Nergui was neither present nor represented at that hearing.

16. The 2018 Tribunal was not satisfied that Dr Nergui fully appreciated the gravity and seriousness of his misconduct. It considered that in his written representations, dated 4 September 2018, Dr Nergui did not appear to accept that his actions as found proved by the 2013 Panel amounted to misconduct. It therefore determined that a finding of impaired fitness to practise should be made.

17. In light of the positive workplace reports and confirmation that Dr Nergui was complying with his conditions, in particular the condition stipulating that he should not provide online psychiatric services to the public, the 2018 Tribunal was satisfied that a further nine-month period of conditional registration would be an appropriate and proportionate sanction.

The 2019 Tribunal

18. Dr Nergui's case was next reviewed by a Medical Practitioners Tribunal on 6 - 7 June 2019 ('the 2019 Tribunal'). Dr Nergui was neither present nor represented at the hearing.

19. The 2019 Tribunal considered that Dr Nergui had not provided it with evidence of insight or remediation suggested by the 2018 Tribunal. It found that Dr Nergui had not demonstrated sufficient, if any, insight into the seriousness of his misconduct and consequent risks to the public and that he had not discharged the persuasive burden on him to show that he was no longer impaired by reason of misconduct.

20. The 2019 Tribunal found that Dr Nergui's response to his regulator's concerns about a potential breach of conditions with regard to providing online medical advice was inadequate. It considered that a finding of impairment was necessary to promote and maintain public confidence in the medical profession and to uphold professional standards, as well as to protect the public.

21. With regard to its consideration of the appropriate sanction to impose, the 2019 Tribunal considered that the imposition of conditions had not fully addressed concerns expressed by previous Tribunals. It noted that Dr Nergui had not expressed remorse or acceptance of the seriousness of the potential consequences to the public. The 2019 Tribunal considered that conditions of practise were neither workable nor sufficient to protect the public.

22. The 2019 Tribunal was not provided by the GMC with evidence of Dr Nergui providing online '*medical advice*'. It considered this to be a neutral factor, neither supporting nor undermining any claim that Dr Nergui had breached one of the conditions. In the absence of a clear statement of intent from the doctor, the 2019 Tribunal was not satisfied that there was a low risk of repetition. In all the circumstances, the 2019 Tribunal determined to impose a period of suspension in order to protect the public, declare and uphold standards and maintain confidence in the medical profession.

23. The 2019 Tribunal determined that a suspension of nine months in duration was the appropriate sanction. It was satisfied that this would satisfy the requirements of the statutory overarching objective and allow Dr Nergui time to develop insight and engage positively with the regulatory process. Further, it considered that this period of suspension would send out a clear signal to Dr Nergui, the profession and the wider public, as to the unacceptability of his misconduct.

24. The 2019 Tribunal directed a review hearing, stating that the onus would be on Dr Nergui to demonstrate that he had sufficiently reflected on and remediated his misconduct and that he had developed sufficient insight. It considered that a reviewing Tribunal may be assisted by receiving:

- a written reflection showing that Dr Nergui fully appreciates the gravity of his misconduct and its consequences; in particular he should explain any background factors, context and/or health issues at the time of his misconduct and subsequently;
- evidence that Dr Nergui has maintained his medical skills and knowledge;
- evidence that patients will not be placed at risk by Dr Nergui returning to unrestricted practice;
- any clinical or any other evidence Dr Nergui considers helpful.

Applications for permission for judicial review

25. In a Judicial Review Claim Form received by the Administrative Court on 28 June 2019, Dr Nergui made an application for permission for judicial review of the decision of the 2019 Tribunal's decision to suspend his registration. His application was opposed by the GMC. In a decision dated 4 October 2019, Ms Helen Mountfield QC, sitting as a Deputy High Court Judge, refused permission for a judicial review to take place. In a form dated 3 November 2019, Dr Nergui renewed his application for judicial review, once more opposed by the GMC. This application was refused by Mr Justice Swift in an oral hearing at the High Court, Birmingham, which took place on 6 February 2020.

The March 2020 Tribunal

26. The March 2020 Tribunal was of the view that Dr Nergui had clearly made progress in his approach to the case. It found that it was to his credit that he had engaged with the regulatory process since the 2019 hearing. He provided written and oral evidence to the effect that he accepted that his actions in 2012 were inappropriate. The March 2020 Tribunal found this to have been a positive step and indicative of an increased level of insight on Dr Nergui's part.

27. However, the March 2020 Tribunal considered that Dr Nergui had further progress to make with regard to his insight. It found it to be significant that, when answering questions about whether he would engage in similar online activity again, his responses as to why he would not do so were centred on him having no further interest in doing so, and that

engaging in such online work again would be costly. The March 2020 Tribunal attached some significance to the fact that he did not mention the potential risks to vulnerable patients involved if he were to engage in such an activity again. The March 2020 Tribunal was of the view that this demonstrated that Dr Nergui did not appear to place the interests of patients at the centre of his thinking on the matter and had not fully appreciated the gravity of his misconduct which is to be judged in terms of the risks to patients.

28. With regard to the risk of repetition, the March 2020 Tribunal noted that Dr Nergui had continued to write online about psychiatry and psychology, although not under his own name. Although he had clearly stated that he would not act in the same manner again, the March 2020 Tribunal considered that he clearly had a continuing interest in this area and so some repetition of inappropriate activity or crossing of boundaries online could not be ruled out.

29. The March 2020 Tribunal considered that, although it accepted that Dr Nergui has completed some reading and research activity, there was a lack of any documentary evidence of CPD activities. The March 2020 Tribunal did not accept his contention that this was not required. The March 2020 Tribunal was aware that Dr Nergui had been out of practice since December 2018 and it considered that evidence that he had kept his knowledge and skills up to date was required before it could be satisfied that he was able to practise unrestricted once more.

30. The March 2020 Tribunal was of the view that a finding of impairment was necessary to protect the public, to promote and maintain public confidence in the medical profession, and to promote and maintain proper professional standards and conduct for members of the profession.

31. The March 2020 Tribunal was of the view that, although Dr Nergui did not have full insight, he had demonstrated some progress since the 2019 hearing. It was satisfied that Dr Nergui's insight had developed to the extent that he would comply with conditions and that it was able to formulate conditions which would allow him to return to practice whilst being supported by a framework of support which included the requirement for a workplace reporter.

32. The March 2020 Tribunal were told by Dr Nergui that his previous employer was keeping a post open for him in the hope that he would be able to return. It considered that Dr Nergui returning to work with the appropriate restrictions and support in place would be the most appropriate and proportionate sanction.

33. The March 2020 Tribunal determined to impose conditions for a period of six months to allow Dr Nergui the opportunity to demonstrate that he has fully remediated his misconduct. The March 2020 Tribunal considered six months should provide ample time for Dr Nergui to return to practice, and to compile any information and documentation to demonstrate that he had addressed the concerns that had arisen in this case. The March 2020 Tribunal considered that a reviewing Tribunal may be assisted by receiving:

- a written reflective piece concentrating in particular upon the risks to patients occasioned by online psychiatric advice;
- evidence that he had maintained his medical skills and knowledge;
- any other information that Dr Nergui considered will assist.

The September 2020 Tribunal

34. Dr Nergui's case was most recently reviewed by a Medical Practitioners Tribunal which began on 17 September 2020 and concluded on 5 October 2020 ('the September 2020 Tribunal'). Dr Nergui was not present nor represented at that hearing.

35. The September 2020 Tribunal accepted that Dr Nergui had complied with the conditions on his registration imposed in March 2020 and completed several online CPD courses in August 2020. It also noted that Dr Nergui had provided a reflective statement, as suggested by the previous reviewing Tribunal, but noted several concerning statements within the document which appeared to reject key concerns of previous Tribunals. There was no evidence before the September 2020 Tribunal that Dr Nergui had identified risks posed by his original misconduct or how to avoid them.

36. The September 2020 Tribunal considered that Dr Nergui had not demonstrated insight into his original misconduct in his statement. It noted, in particular, that Dr Nergui expressed no awareness of the potential risk to online users of his website and rejected the conclusions of previous Tribunals even more strongly than at previous review hearings.

37. The September 2020 Tribunal formed the view that Dr Nergui had not provided it with evidence of insight as suggested by the March 2020 Tribunal. It found that Dr Nergui had still not demonstrated sufficient, if any, insight into the seriousness of his misconduct and consequent risks to the public. Therefore, the Tribunal determined that his fitness to practice remained impaired by reason of misconduct.

38. The September 2020 Tribunal took into account that Dr Nergui had continued to engage with his regulator and had done some Continuing Professional Development (CPD), taking courses in August 2020. However, the September 2020 Tribunal also took account of the fact that Dr Nergui had had several years to develop insight into the risks posed by his original misconduct but had not done so.

39. The September 2020 Tribunal noted that Dr Nergui had been subject to various restrictions since November 2014 but had not developed insight. The September 2020 Tribunal determined that imposing conditions on Dr Nergui's registration was not sufficient to protect the public, to promote and maintain public confidence in the medical profession, and to promote and maintain proper professional standards and conduct for members of the profession.

40. Whilst the September 2020 Tribunal took account of the fact that Dr Nergui had complied with the conditions on his registration, continued to engage with his regulator and undertaken recent CPD, he had not demonstrated insight into the potential risk to vulnerable users of his website. Despite the length of time Dr Nergui had had to reflect on his behaviour he still appeared to lack awareness of risk to the public, some of whom are vulnerable, posed by his original actions. In the absence of a clear statement of intent from the doctor, the September 2020 Tribunal was not satisfied that there was a low risk of repetition.

41. The September 2020 Tribunal determined to suspend Dr Nergui's registration for a period of 12 months to allow Dr Nergui the opportunity to demonstrate that he has developed sufficient insight and show that he has continued to keep his medical knowledge and skills up to date. It also imposed an immediate order of suspension on Dr Nergui's registration.

42. The September 2020 Tribunal considered that a reviewing Tribunal may be assisted by receiving:

- a written reflective piece concentrating in particular upon the risks to patients occasioned by online psychiatric advice;
- evidence that he has continued to maintain his medical skills and knowledge;
- any other information that he considers will assist.

Appeal to the High Court

43. Dr Nergui subsequently submitted an appeal for the decision of the September 2020 Tribunal, in a document dated 27 October 2020. Dr Nergui's appeal was dismissed by the High Court on 29 October 2020. The substantive sanction of suspension took effect on 18 March 2021.

Today's Hearing

44. At this review hearing the Tribunal now has to decide in accordance with Rule 22(1)(f) of the Rules whether Dr Nergui's fitness to practise is impaired by reason of misconduct.

The Evidence

45. The Tribunal has taken into account all the evidence received, both oral and documentary.

46. Dr Nergui provided his own statement dated 18 January 2022 and also gave oral evidence at the hearing.

47. The Tribunal received documentary evidence including, but not limited to:

- The Private Records of Determination from the 2013, 2014, 2017, 2018, 2019, March 2020 and September 2020 hearings;
- Decision of the High Court
- Written reflective document dated 18 January 2022;
- Dr Nergui's Ground of Appeal to the High Court, dated 27 October 2020;
- Dr Nergui's written representations and reflections for the September 2020 Tribunal, dated 18 August 2020;
- CPD Certificates dated November 2021 to January 2022.

Submissions

48. On behalf of the GMC, Ms Gilsean invited the Tribunal to consider that Dr Nergui's fitness to practise remains impaired by reason of his misconduct. Throughout her submissions, she referred the Tribunal to relevant caselaw to the matter of impairment.

49. Ms Gilsean submitted that there were two aspects to her submissions for the Tribunal to consider when making its determination on impairment. The first aspect is that when considering the doctors evidence as a whole, it is evident that Dr Nergui has not discharged the burden placed upon him to demonstrate he is no longer impaired. She acknowledged that Dr Nergui has completed a large number of CPD online courses, notably in November 2021 and January 2022, totalling 50 hours, which the GMC accepted. Ms Gilsean submitted that it was notable that there was not sufficient evidence before this Tribunal that Dr Nergui fully accepts the conclusions of previous tribunals. She further submitted that there is no evidence that Dr Nergui has identified the specific risks posed by his original misconduct and how to avoid them or that he is fully aware of the potential risk to online users of his website and that he fully accepts the seriousness of his misconduct and the consequent risks to the public.

50. Ms Gilsean submitted that the second aspect of her submissions is the issue of insight. She submitted that while Dr Nergui had provided reflective documents to past reviewing Tribunals and to this Tribunal, the contents of those documents suggested that he did not yet have full insight. She submitted that Dr Nergui has not clearly demonstrated that he appreciates that his online activities created a risk of harm to the users of his services and the specifics of that risk of harm. Moreover, he has not identified those specific risks posed by his original misconduct or how to avoid them. It was Ms Gilsean's submission that any insight and or reflection is not yet fully developed and has not developed to such an extent to have fully removed the risk of repetition and as such the risk of repetition does remain highly likely.

51. Dr Nergui submitted that the contradictions in his evidence might be due to '*double think*' and '*double bind*', the simultaneous belief in two contradictory ideas, either knowingly or unknowingly, due to the '*Orwellian nature*' of these proceedings. He submitted that he did not know how he could show that his insight is complete as he is being asked to selectively reject parts of older tribunals, and selectively accept other parts.

52. Dr Nergui submitted that he believes this case is exceptional, as there has been a passage of 10 years since proceedings began, and he believed that the Tribunal's own processes had led to this situation. He reminded the Tribunal that he had been practicing in clinical psychiatry successfully without any problems for a number of years, and wished now to return to practice.

The Relevant Legal Principles

53. The Tribunal reminded itself that the decision of impairment is a matter for the Tribunal's judgment alone. As noted above, the previous Tribunal set out the matters that a future Tribunal may be assisted by. This Tribunal is aware that it is for the doctor to satisfy it that he would be safe to return to unrestricted practise.

54. This Tribunal must determine whether Dr Nergui's fitness to practise is impaired today, taking into account Dr Nergui's conduct at the time of the events and any relevant factors since then such as whether the matters are remediable, have been remedied and any likelihood of repetition.

55. The Tribunal accepted the legal advice from the Legally Qualified Chair, who advised in particular:

'I usually refer to proportionality at the sanction stage but that is not to say this concept is confined to sanctions only. I refer to this concept now given that the doctor is unrepresented and also the length of time these proceedings have subsisted. Proportionality is a requirement during the totality of disciplinary proceedings, from whether an investigation is opened, to case examiners deciding to refer to a tribunal, the ongoing duty to consider charges, how we conduct hearings and through to the weighing up of any sanction. Proportionality is therefore something I advise we should consider carefully in this case, alongside the overarching objective.'

The Tribunal's Determination on Impairment

56. The Tribunal noted that previous Tribunals had suggested that Dr Nergui provide a written reflective piece, concentrating in particular upon the risks to patients occasioned by online psychiatric advice. The Tribunal has received a reflective piece from Dr Nergui, dated 18 January 2022, and the reflective document provided to the September 2020 Tribunal. It

noted that Dr Nergui acknowledges that there was a risk of harm but the evidence relating to the specific issue of potential harm to users of his service was not fully addressed.

57. The Tribunal went on to consider the risk of repetition. The Tribunal noted that Dr Nergui appreciated that his actions which led to the misconduct in 2012 were naïve, and the service was inappropriately established. He also stated that he has no plans to ever attempt set up such a service again. The Tribunal was of the view that he has learnt from this experience and that there was a low risk of repetition that Dr Nergui would start a blog or any other online advice service in the future.

58. The Tribunal had concerns about proportionality in this case, due to the length of time since the misconduct took place, how long these proceedings have lasted, the narrow issues that led to the finding of misconduct, and the fact Dr Nergui had practised as a psychiatrist in the interim period with positive workplace reports. All of these aspects pointed towards the Tribunal having to be particularly careful in concluding current impairment.

59. The Tribunal considered that Dr Nergui had made some positive steps up until early 2020, and then the second tribunal hearing later in 2020 led to further setbacks. It may well be that Dr Nergui's non-attendance at the second hearing did not assist his position, particularly given the limited steps that had been taken to complete remediation at that point.

60. In evidence before this Tribunal, Dr Nergui has concentrated more on the 2013 Panel decision as supporting his narrative, and this appears to have caused him some difficulty in expressing his position clearly and consistently as regards remediation. The Tribunal notes that the 2013 findings that there was '*no misconduct*' were substituted by the 2013 High Court appeal and could no longer stand, as a matter of law. This Tribunal has to apply the 2014 Tribunal's findings in relation to impairment based on that substituted decision of misconduct.

61. This Tribunal did not consider there was sufficiently detailed reflection relating to what the impact Dr Nergui's actions may have had on the users of the online service. The concern is by its nature rhetorical, but this Tribunal anticipated a proper understanding of the potential for harm so that it could weigh this in the balance in deciding whether there was current impairment.

62. While the Tribunal was satisfied that there is sufficient evidence Dr Nergui is a competent and safe doctor, there remains a lingering concern that he did not appreciate the findings made against him from the patient’s perspective and/or did not express this in a clear, cogent manner. The Tribunal considered that Dr Nergui might have benefitted from seeking feedback from a trusted colleague or mentor, reflecting on what went wrong and setting out his thought processes on avoiding similar risk. In short, the self-reflection has led Dr Nergui down a restricted path of understanding, leading him to focus on the legal aspects of the process and semantics rather than the primary issue which was one of patient safety. If he had sought the input of a third party, it may have led to him developing an alternative view rather than the binary approach that he has adopted. This left the Tribunal with the view that whilst there has been some insight, remediation is not yet complete.

63. The Tribunal balanced the concerns it had about remediation with the proportionality of the proceedings lasting for as long as they have done. It also took account of the overarching objective in concluding that there remain some matters to be addressed before Dr Nergui is no longer impaired.

64. The Tribunal has therefore determined that Dr Nergui’s fitness to practise is impaired by reason of misconduct, because despite there being a low risk of repetition, the remediation had not yet been completed.

Determination on Sanction - 10/03/2022

65. Having determined that Dr Nergui’s fitness to practise is impaired by reason of misconduct, the Tribunal now has to decide in accordance with Rule 22(1)(h) of the Rules what action, if any, it should take with regard to Dr Nergui’s registration.

Submissions

66. On behalf of the GMC, Ms Gilsean referred the Tribunal to the Sanctions Guidance (November 2020) (‘the SG’) and its own determination on Impairment.

67. Ms Gilsean submitted that the appropriate sanction, although a matter for the Tribunal’s own judgement, would be one of conditions. She submitted that while there was still an issue of insight, there had been some improvement since the previous review

Tribunal. Ms Gilsean submitted that there were no exceptional circumstances to justify the Tribunal taking no action. She submitted that conditions are the most appropriate and proportionate sanction in this case. She submitted that Dr Nergui has been under conditions in the past, and the Tribunal could therefore be satisfied that Dr Nergui would comply with such an order.

68. Dr Nergui submitted that he had been mainly under conditions for the last 10 years, and these have formed part of his practice. He submitted that the personal and professional impact has been substantial as having conditions drastically reduced his employability, making it difficult to find a suitable role. He stated that he did not believe there was a public interest in further sanctions at this stage, as he has to date complied with all restrictions on his registration and there has been no repetition of his misconduct. Dr Nergui submitted that he believed that conditions or any sanction would have more of a punitive effect on him at this stage due to the length of time since the case began, and therefore the Tribunal should consider this to be an exceptional circumstance and impose no order.

The Tribunal's Determination

69. The Tribunal is aware that the decision as to the appropriate sanction, if any, to impose on Dr Nergui's registration is a matter for this Tribunal alone, exercising its independent judgement. In reaching its decision, the Tribunal has taken account of the SG.

70. The Tribunal took into account its decision on impairment, the submissions of Ms Gilsean and Dr Nergui, and the documentary evidence adduced during the course of these proceedings.

71. The Tribunal recognised that the purpose of a sanction is not to be punitive, although it may have a punitive effect. The Tribunal must impose a sanction if it is required in order to protect patients, maintain public confidence in the profession, and/or meet the wider public interest. Throughout its deliberations, the Tribunal applied the principle of proportionality, balancing Dr Nergui's interests with the public interest.

72. In deciding what sanction, if any, to direct, the Tribunal reminded itself that it must consider each of the sanctions available, starting with the least restrictive, to establish which sanction is appropriate and proportionate.

Mitigating and Aggravating Factors

73. The Tribunal identified the following mitigating factors relevant in this case:
- Dr Nergui has kept up to date with his CPD;
 - Dr Nergui has developing insight but there is a narrow area of concern remaining (see below);
 - No other concerns have arisen in the recent past;
 - Dr Nergui worked for five years with positive workplace reports;
 - 10 years have now passed since the initial event;
 - Dr Nergui has apologised, and assured this Tribunal that his conduct will not be repeated;
 - Dr Nergui accepts that he should have behaved differently.
74. The Tribunal identified that there were no particular aggravating factors other than the misconduct itself, and that impairment was only found to deal with the narrow remaining area of insight.
75. Taking these factors into account, the Tribunal went on to consider what sanction if any to impose, starting with the least restrictive.

No action

76. The Tribunal took into account the length of time that proceedings have subsisted and the impact that had on proportionality, but it considered that this still did not amount to exceptional circumstances. The Tribunal determined that in view of its findings on impairment, it would be neither sufficient, proportionate nor in the public interest to conclude this case by taking no action.

Conditions

77. The Tribunal next considered whether it would be sufficient to impose conditions on Dr Nergui's registration. It has borne in mind that any conditions imposed would need to be appropriate, proportionate, workable and measurable.
78. The Tribunal had regard to the relevant paragraphs of the SG, including paragraph 82, which states:

81 *Conditions might be most appropriate in cases:*

...

c where there is evidence of shortcomings in a specific area or areas of the doctor's practice

...

82 *Conditions are likely to be workable where:*

a the doctor has insight

...

c the tribunal is satisfied the doctor will comply with them

d the doctor has the potential to respond positively to remediation...

84 *Depending on the type of case ... some or all of the following factors being present (this list is not exhaustive) would indicate that conditions may be appropriate:*

a no evidence that demonstrates remediation is unlikely to be successful, eg because of previous unsuccessful attempts or a doctor's unwillingness to engage

...

c willing to respond positively to retraining... and promoting patient safety ...'

79. The Tribunal noted that this was a case where conditions were deemed appropriate previously. The Tribunal was satisfied that Dr Nergui would comply with an order of conditions on his registration. Conditions would also be appropriate because the Tribunal was satisfied there was a low risk of repetition of the previous misconduct; and that there was a narrow area of insight that required further remediation/reflection.

80. The Tribunal noted the concerns of the 2014 Tribunal (particularly paragraph 26 of its sanctions determination). This Tribunal considered there had been progress as regards insight over the years, and also since the last review hearing. This Tribunal has set out the concerns about remediation that remained in the impairment determination as follows:

‘The Tribunal noted that previous Tribunals had suggested that Dr Nergui provide a written reflective piece, concentrating in particular upon the risks to patients occasioned by online psychiatric advice. The Tribunal has received a reflective piece from Dr Nergui, dated 18 January 2022, and the reflective document provided to the September 2020 Tribunal. It noted that Dr Nergui acknowledges that there was a risk of harm but the evidence relating to the specific issue of potential harm to users of his service was not fully addressed.

...

In evidence before this Tribunal, Dr Nergui has concentrated more on the 2013 Panel decision as supporting his narrative, and this appears to have caused him some difficulty in expressing his position clearly and consistently as regards remediation. The Tribunal notes that the 2013 findings that there was ‘no misconduct’ were substituted by the 2013 High Court appeal and could no longer stand, as a matter of law. This Tribunal has to apply the 2014 Tribunal’s findings in relation to impairment based on that substituted decision of misconduct.

...

This Tribunal did not consider there was sufficiently detailed reflection relating to what the impact Dr Nergui’s actions may have had on the users of the online service. The concern is by its nature rhetorical, but this Tribunal anticipated a proper understanding of the potential for harm so that it could weigh this in the balance in deciding whether there was current impairment.

While the Tribunal was satisfied that there is sufficient evidence Dr Nergui is a competent and safe doctor, there remains a lingering concern that he did not appreciate the findings made against him from the patient’s perspective and/or did not express this in a clear, cogent manner...’

81. The Tribunal anticipates that Dr Nergui will be able to take the necessary steps to reflect on this remaining area of concern. It was satisfied that his insight has developed to the extent that he would comply with conditions and that it was able to formulate conditions which would allow Dr Nergui to return to practise. The Tribunal has considered the range of conditions that are necessary in this case. A proportionate approach led the Tribunal to impose the least restrictive conditions it considered were appropriate, and that there was no requirement for him to be supervised.

82. In all the circumstances, the Tribunal considered that imposing conditions on Dr Nergui's registration was the appropriate sanction required to protect the public, to promote and maintain public confidence in the medical profession, and to promote and maintain proper professional standards and conduct for members of the profession.

83. The Tribunal determined to impose conditions for a period of four months to allow Dr Nergui sufficient time to address the narrow area of insight which the Tribunal has identified. This should provide sufficient time for Dr Nergui focus his reflection and compile any information or documentation to demonstrate that he has addressed the concerns that have arisen in this case. The Tribunal considered a short period of conditional registration struck a fair balance between the wider public interest and Dr Nergui's interests, in the hope that he might be able to persuade the next Tribunal that he is no longer impaired.

84. The following conditions will be published:

1. He must personally ensure the GMC is notified of the following information within seven calendar days of the date these conditions become effective:
 - a the details of his current post, including:
 - i his job title
 - ii his job location
 - iii his responsible officer (or their nominated deputy)

- b the contact details of his employer and any contracting body, including his direct line manager
 - c any organisation where he has practising privileges and/or admitting rights
 - d any training programmes he is in
 - e of the contact details of any locum agency or out of hours service he is registered with.
2. He must personally ensure the GMC is notified:
- a of any post he accepts, before starting it
 - b that all relevant people have been notified of his conditions, in accordance with condition 6.
 - c if any formal disciplinary proceedings against him are started by his employer and/or contracting body, within seven calendar days of being formally notified of such proceedings
 - d if any of his posts, practising privileges or admitting rights have been suspended or terminated by his employer before the agreed date within seven calendar days of being notified of the termination
 - e if he applies for a post outside the UK
3. He must allow the GMC to exchange information with any person involved in monitoring his compliance with his conditions.
4. a He must have a workplace reporter appointed by his responsible officer (or their nominated deputy).
- b He must not work until:

- i his responsible officer (or their nominated deputy) has appointed his workplace reporter
 - ii he has personally ensured that the GMC has been notified of the name and contact details of his workplace reporter.
- 5. He must not provide any online psychiatric services, including online therapy or online medical advice, to the public.
- 6. He must personally ensure the following persons are notified of the conditions listed at 1 to 5:
 - a his responsible officer (or their nominated deputy)
 - b the responsible officer of the following organisations:
 - i his place(s) of work, and any prospective place of work (at the time of application)
 - ii all his contracting bodies and any prospective contracting body (prior to entering a contract)
 - iii any organisation where he has, or has applied for, practising privileges and/or admitting rights (at the time of application)
 - iv any locum agency or out of hours service he is registered with.
 - v If any of the organisations listed at (i to iv) does not have a responsible officer, he must notify the person with responsibility for overall clinical governance within that organisation. If he is unable to identify this person, he must contact the GMC for advice before working for that organisation.
 - c the approval lead of his regional Section 12 approval tribunal (if applicable) - or Scottish equivalent

d his immediate line manager and senior clinician (where there is one) at his place of work, at least 24 hours before starting work (for current and new posts, including locum posts).

Review

85. The Tribunal determined to direct a review of Dr Nergui's case. A review hearing will convene shortly before the end of the period of conditional registration, unless an early review is sought. The Tribunal wishes to clarify that at the review hearing, the onus will be on Dr Nergui to demonstrate how he has developed further insight. It therefore may assist the reviewing Tribunal if Dr Nergui provides:

- A detailed written reflection on the potential impact of his failings as set out above;
- Evidence that he has maintained his medical skills and knowledge;
- any other information that he considers will assist.

86. The Tribunal has directed to impose conditions on Dr Nergui's registration for a period of four months. The MPTS will send Dr Nergui a letter informing Dr Nergui of his right of appeal and when the direction and the new sanction will come into effect. The current order of suspension will remain in place during the appeal period.

ANNEX A – 09/03/2022

Application to admit further evidence under Rule 34

87. At the outset of day two, Ms Gilesenan, on behalf of the GMC, made an application under Rule 34 of the Rules, for two additional documents to be adduced. The first document was a partial Transcript from day one of this hearing, containing Dr Nergui's oral evidence before this Tribunal. The second was a short email trail regarding the October 2020 High Court appeal made by Dr Nergui following the outcome of the September 2020 Tribunal.

Submissions

88. Ms Gilesenan submitted that the transcript had been obtained as she had not been present on day one of this hearing and had not heard first-hand the evidence Dr Nergui gave. It was her submission that, as she intended to rely on the Transcript, the Tribunal should have a copy in addition to their own notes, taken at the time.

89. Ms Gilesenan submitted that the email trail was important, as it confirmed Dr Nergui's evidence that he had chosen not to pursue the October 2020 appeal.

90. Dr Nergui confirmed he had viewed the documents and did not have any objections to the documents being admitted.

The Tribunal's decision

91. In respect of the emails, the Tribunal was of view that these emails potentially supported Dr Nergui's evidence that he had chosen not to pursue the appeal, and that admitting these emails would be fair and relevant to the hearing.

92. Regarding the transcript, the Tribunal considered that technically the Transcript itself is not evidence but a record of this hearing and therefore, it is arguable that Rule 34 does not apply. However, the Tribunal went onto consider whether it was fair and relevant. It considered that it must be relevant as it is a transcript of the oral evidence Dr Nergui gave before this Tribunal.

93. The Tribunal next considered the issue of fairness in admitting the Transcript. The Tribunal considered whether admitting this document at this stage would be fair to an

unrepresented doctor, because of the nature of the document that is sought to be admitted. It was of the opinion that while it is not inherently unfair, the Tribunal should be mindful that members of the Tribunal heard and saw Dr Nergui's evidence, took some degree of notes about that evidence, and are likely to have formed some preliminary views about it. That evidence was only heard three weeks ago and is therefore relatively fresh in the Tribunal's mind, and taking all of those factors into account, it should approach any forensic analysis of the transcript at this stage with care.

94. Therefore the Tribunal concluded that both documents are relevant, and that it would be fair to admit them into evidence and granted Ms Gilsean's application.