



## Determination on Impairment - 24/06/2022

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.

### Background

2. The Tribunal was 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 the determination from 2014.

### The 2013 Panel

3. 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.

4. 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

5. 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.

6. 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'.

7. 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

8. 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.

9. 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.

10. 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 and to direct a future review.

### The 2017 Tribunal

11. 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.

12. 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.

13. The 2017 Tribunal imposed varied the conditions on Dr Nergui's registration to those 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. It directed a future review.

### **The 2018 Tribunal**

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

15. 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.

16. 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**

17. 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.

18. 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.

19. The 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.

20. 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 Tribunal considered that conditions of practise were neither workable nor sufficient to protect the public.

21. 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 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.

22. 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.

23. 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.

#### **Applications for permission for judicial review**

24. 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

25. 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.

26. 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.

27. 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.

28. 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.

29. The March 2020 Tribunal therefore determined that a finding of impairment was necessary and in the public interest. It 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.

30. The 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 September 2020 Tribunal

31. Dr Nergui's case was 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.

32. 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.

33. 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.

34. 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.

35. 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.

36. 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.

37. 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.

38. 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 had developed sufficient insight and show that he had continued to keep his medical knowledge and skills up to date. It also imposed an immediate order of suspension on Dr Nergui's registration.

### Appeal to the High Court

39. Dr Nergui subsequently appealed 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.

### The March 2022 Tribunal

40. Dr Nergui's case was reviewed by a Medical Practitioners Tribunal on 17 February 2022. This hearing did not have sufficient time to conclude and reconvened on 9 March 2022 to 10 March 2022 ('the March 2022 Tribunal'). Dr Nergui was present and not represented at that hearing.

41. The March 2022 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.

42. The March 2022 Tribunal noted that Dr Nergui acknowledged 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. It was satisfied that, while there was sufficient evidence Dr Nergui was a competent and safe doctor, there remained a lingering concern that he had not appreciated the findings made against him from the patient's perspective and/or had not expressed that in a clear, cogent manner. That Tribunal did not consider there was sufficiently detailed reflection in relation to what impact Dr Nergui's actions may have had on the users of the online service. It determined that Dr Nergui's fitness to practise remained impaired by reason of misconduct because, despite there being a low risk of repetition, the remediation had not yet been completed.

43. The March 2022 Tribunal noted that this was a case where conditions were previously deemed appropriate. It was satisfied that Dr Nergui would comply with an order of conditions on his registration, that 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. The March 2022 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 it had identified. This should provide sufficient time for Dr Nergui focus his reflection and compile any information or documentation to demonstrate that he had addressed the concerns that had arisen in this case.

44. The March 2022 Tribunal determined to direct a review of Dr Nergui's case. It stated that it wished to clarify that, at the review hearing, the onus was on Dr Nergui to demonstrate how he had developed further insight. It noted that a reviewing Tribunal may be assisted if Dr Nergui provided the following:

- 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; and
- Any other information that he considers will assist.

### The Evidence

45. Dr Nergui was not represented and gave oral evidence to the Tribunal at the hearing.

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

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, September 2020 and March 2022 hearings;
- Request for information letter to Dr Nergui, dated 19 April 2022;
- Further written reflection from Dr Nergui, dated 9 May 2022;
- CPD Certificates, dated between 23 April 2022 to 6 May 2022.

### Submissions

48. On behalf of the GMC, Mr Lewis, counsel, submitted that the GMC is neutral on the matter of whether Dr Nergui's fitness to practise remains impaired by reason of his past misconduct, and that it is a matter for this Tribunal to consider. Mr Lewis directed the Tribunal's attention to the background of the case, decisions of previous Tribunals, Dr Nergui's new reflective statement and the list of recent CPD courses Dr Nergui has undertaken.

49. Dr Nergui gave evidence that he has embarked on considerable self-reflection and now fully appreciates the seriousness of his misconduct and the potential impact it had on the users of his website. In his reflective statement Dr Nergui observed, in the third person:

*“His adherence to the 2013 Panel’s overall determination delayed him from gaining full insight into the seriousness of his misconduct. It also deflected him from addressing the main issue in this case - which has been the primary concern of all parties - that is, the issue of patient safety.”*

*“The concept of patient safety includes the provision of appropriate safeguards such as referral to other professionals and explicit accounts of the limitations and scope of any service that is provided. Such explicit accounts were absent on his blog, and as noted in the list of failings, in many cases, he failed to refer people to other professionals.”*

50. Dr Nergui accepted that, should he return to unrestricted practice, the process of obtaining a new role as a doctor would involve some retraining with a support structure in place and supervision. Dr Nergui accepted that he would not be able to resume working in a relatively independent post but would have to return to practice at a more junior level.

51. Dr Nergui submitted that he hoped the Tribunal would consider the supporting documentary evidence he provided as sufficient evidence to substantiate that he has developed full insight, there is no risk of repetition, the misconduct has been remediated, and impairment no longer exists.

### **The Relevant Legal Principles**

52. The Tribunal reminded itself that at this stage of proceedings, there is no burden or standard of proof and the decision of impairment is a matter for the Tribunal’s judgment alone. This Tribunal is aware that there is a presumptive burden on the doctor to satisfy it that he would be safe to return to unrestricted practice.

53. The Tribunal must determine whether Dr Nergui’s fitness to practise is impaired today, taking into account any relevant factors such as whether the matters are remediable, have been remedied and any likelihood of repetition. Throughout its deliberations, the Tribunal had regard to the statutory overarching objective and the principle of proportionality.

### **The Tribunal’s Determination on Impairment**

54. The Tribunal considered all the evidence which has been presented during the course of these proceedings and the submissions from Mr Lewis and Dr Nergui.

55. The Tribunal considered whether Dr Nergui has sufficiently reflected on his actions, has demonstrated remorse and regret, whether he has remediated his misconduct and whether there is any risk of repetition.

56. The Tribunal accepted that Dr Nergui has complied with the conditions on his registration imposed in March 2022 and has since completed a comprehensive selection of online CPD courses between 23 April 2022 to 6 May 2022. This was not challenged by the GMC.

57. The Tribunal was reassured by the oral evidence of Dr Nergui, which was clear, reasonable, well considered and transparent. The Tribunal was of the view that this evidence reinforced his written reflections. It was satisfied that Dr Nergui had undertaken deep personal reflection on the findings of previous Tribunals.

58. The Tribunal was satisfied that Dr Nergui has developed full insight into his previous misconduct and now understands the impact his conduct had on the reputation of the profession, public confidence in the profession and of the potential risk to patients of his actions. The Tribunal accepted Dr Nergui's evidence that he has now finally 'learned his lesson' and taken on board the findings of the previous Tribunals and courts. Dr Nergui has demonstrated regret and remorse for his actions. The Tribunal was of the view that Dr Nergui regrets that he had previously failed to appreciate the gravity of his misconduct or its potential impacts.

59. The Tribunal was persuaded that Dr Nergui had a realistic appraisal of his future job prospects. Dr Nergui understands the limitations on his practice having experienced a period of time out of work. The Tribunal accepted the evidence that Dr Nergui has kept his skills and knowledge up to date.

60. The Tribunal accepted that Dr Nergui had worked competently in his chosen speciality for many years. It determined that because of his developed reflection, insight and remediation, the risk of Dr Nergui repeating his misconduct is low. The Tribunal has seen no evidence of any repetition since the index events.

61. The Tribunal is of the view that Dr Nergui could do no more to demonstrate his insight, remorse or remediation, and that he has done enough to satisfy any member of the public or profession that he is a safe clinician who should be allowed to return to unrestricted practise.

62. Therefore, the Tribunal concluded, having given consideration to the overarching objective, that Dr Nergui's fitness to practise is no longer impaired.

63. The Tribunal determined that it will revoke the current order of conditions on Dr Nergui's registration with immediate effect.

64. Hearing concluded.