

Dates: 08/02/2019 - 08/02/2019

Medical Practitioner's name: Dr Nihal ELAPATHA

GMC reference number: 4343080

Primary medical qualification: MB BS 1981 University of Peradeniya

Type of case

Review - Deficient professional performance

Outcome on impairment

Impaired

Summary of outcome

Conditions, 12 months.
Review hearing directed

Tribunal:

Legally Qualified Chair	Mr James Newton-Price
Lay Tribunal Member:	Mrs Rachel O'Connell
Medical Tribunal Member:	Dr Pranveer Singh
Tribunal Clerk:	Miss Jan Smith

Attendance and Representation:

Medical Practitioner:	Present and represented
Medical Practitioner's Representative:	Mr Simon Cridland, Counsel, instructed by Eastwoods Solicitors
GMC Representative:	Mr Alan Taylor, Counsel

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.

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Determination on Impairment - 08/02/2019

1. The Tribunal does not intend to rehearse the full background to Dr Elapatha's case which is already a matter of record. The Tribunal heard that Dr Elapatha's case was first considered before a Fitness to Practise Panel in January 2015 and reviewed by a Medical Practitioners Tribunal in February 2016 and January / February 2017.

Background

2015 Panel

2. Dr Elapatha's case was first heard by a Fitness to Practise Panel in January 2015 (the '2015 Panel'). In summary, he underwent an interim assessment of the standard of his professional performance in October 2013. His performance was found to be unacceptable in the following areas:

- Assessment of patients' conditions,
- Providing or arranging investigations,
- Providing or arranging treatment,
- Record keeping,
- Other good clinical care-efficacy and use of resources,
- Working with colleagues.

3. The 2015 Panel found that Dr Elapatha's professional performance was unacceptably low given the serious deficiencies found in his Performance Assessment, which had the potential to put patient safety at risk. Furthermore, there was little evidence of steps taken by Dr Elapatha to remediate those deficiencies. The 2015 Panel was also of the view that Dr Elapatha had limited insight into the concerns raised about his clinical practice. That Panel determined that Dr Elapatha's fitness to practise was impaired by reason of his deficient professional performance and suspended his registration for a period of 12 months in order to mark the seriousness of his failures and to allow him sufficient time for remediation.

2016 Tribunal

4. Dr Elapatha's case was reviewed on 4 February 2016 by a Medical Practitioners Tribunal (the 2016 Tribunal). Whilst Dr Elapatha had provided the 2016 Tribunal with a reflective statement, evidence of his continuing professional development and patient testimonials, there was no performance assessment report as XXX. The 2016 Tribunal was of the view that Dr Elapatha had developed some insight into his

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deficiencies but did not consider that the steps he had taken to remediate addressed all of the concerns raised by the 2015 Panel. The 2016 Tribunal considered that Dr Elapatha's fitness to practise remained impaired by reason of his deficient professional performance and suspended his registration for a further 12 months. It considered this period would be sufficient to allow Dr Elapatha to make suitable arrangements to shadow a GP to update his clinical skills and knowledge in order to complete a performance assessment.

2017 Tribunal

5. The 2017 Tribunal was informed that Dr Elapatha underwent a further GMC Performance Assessment on 31 October and 1 November 2016. The Assessment found that Dr Elapatha's professional performance was 'unacceptable' in the following areas:

- Maintaining Professional Performance,
- Assessment,
- Clinical Management,
- Safety and Quality,
- Relationships with Patients.

6. Dr Elapatha's professional performance was found to be a 'cause for concern' in the following area:

- Working with Colleagues

7. In the Tests of Competence, Dr Elapatha's scores were below the range of scores that would be expected to be achieved by a reference group. His score of 61.67% in the Knowledge Test was below the score of 64.91% achieved by the reference group. In the Objective Structured Clinical Examination (OSCE) Dr Elapatha's scores were below the 25th centile in 9 out of the 12 stations. The Assessment Team concluded that Dr Elapatha's performance was unacceptable overall because there were repeated and persistent failures to comply with the professional standards appropriate for a general practitioner working independently in clinical practice. The Assessment Team ('the Team') also considered that Dr Elapatha's level of knowledge was deficient, which placed patients and the public in jeopardy.

8. The Team concluded that Dr Elapatha's professional performance had been deficient but was of the opinion that he was fit to practise on a limited basis under direct supervision. The Team recommended that Dr Elapatha should work with an

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educational supervisor to produce a Personal Development Plan (PDP) to address the identified deficiencies and that he should not undertake any Out of Hours work or short-term locum posts.

9. During his oral evidence at the 2017 hearing, Dr Elapatha stated that XXX at the time of the assessment although he accepted the findings and conclusion reached by the Team that his professional performance was deficient. He told the 2017 Tribunal that he had been a General Practitioner since 1998 but, at the time of the assessment, he been out of practice for three years. Dr Elapatha was of the view that inevitable de-skilling would have affected his performance in the assessment. At that hearing, he also provided evidence of the CPD he had undertaken, as well as details of a short clinical observation.

10. The 2017 Tribunal noted that Dr Elapatha had fully accepted the conclusions and recommendations of the Assessment Team. It accepted that Dr Elapatha had made efforts to remediate and that he had maintained a positive attitude towards achieving this. The 2017 Tribunal also noted that, as recommended by the Assessment Team, Dr Elapatha had engaged with an educational supervisor and produced an educational plan detailing how he planned to improve his performance in general practice and to remedy his shortcomings.

11. The 2017 Tribunal took account of all the steps that Dr Elapatha had taken to remediate and improve his performance but concluded that, at that time, his professional performance was not of the required standard to practise safely. Accordingly, the 2017 Tribunal determined that Dr Elapatha's fitness to practise remained impaired by reason of his deficient professional performance.

12. In deciding what sanction to impose on Dr Elapatha's registration, the 2017 Tribunal had borne in mind the conclusions and recommendations of the Assessment Team, in particular that he was able to practise 'on a limited basis'. It acknowledged Dr Elapatha's developing insight and accepted that he had made efforts to remediate during a period of suspension. The 2017 Tribunal determined that it was possible to formulate appropriate, proportionate, workable and measurable conditions that would allow him to return to work whilst protecting patients and the public interest.

13. The 2017 Tribunal determined to impose conditions for a period of two years. It was of the view that this period would provide sufficient time for Dr Elapatha to address the deficiencies in his clinical practice and to demonstrate a robust reporting system and progress in his remediation.

14. The 2017 Tribunal directed a review hearing to be held before the end of the period of conditional registration. It recommended that the Tribunal reviewing Dr Elapatha's case would be assisted by the provision of:

- A report from his clinical supervisor,

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- A report from his workplace reporter,
- A report from his educational supervisor
- A copy of his PDP,
- A copy of his annual appraisals,
- Any other evidence which Dr Elapatha considers will assist a reviewing Tribunal.

This Review Hearing

15. This Tribunal has reviewed Dr Elapatha's case and has considered, in accordance with Rule 22(f) of the General Medical Council (Fitness to Practise) Rules Order of Council 2004, whether his fitness to practise is currently impaired. In so doing, it has considered the submissions made by Mr Alan Taylor, Counsel, on behalf of the GMC and those made by Mr Simon Cridland, Counsel, on behalf of Dr Elapatha.

Evidence

16. The Tribunal has taken account of all the documentary evidence adduced during the course of these proceedings, which included but was not limited to:

- Record of Determinations dated 30 January 2015; 4 February 2016; 1 February 2017
- Written submissions from Dr Elapatha to the GMC dated 24 November 2017
- Personal Development Plan dated January 2017
- Learning Diary from Dr Elapatha dated 12 March 2018 detailing the on-line learning he has undertaken since February 2017
- Training Diary from Dr Elapatha detailing the CPD activities undertaken since February 2017
- Confirmation from NHS England dated 12 December 2018 of the results of the Induction and Refresher (I & R) Assessments in relation to Multi Choice Questions (MCQs) knowledge tests and Simulated Surgery Assessments
- Revised Personal Development Plan dated January 2019
- Evidence of "shadowing" another GP in his surgery
- Letter from Dr A, dated 6 February 2019, indicating potential employment of Dr Elapatha in a locum role.

GMC Submissions

17. Mr Taylor submitted that there has been relatively little change in Dr Elapatha's situation since 2015 until November / December 2017 when he started to study in preparation for his participation in the I & R Scheme. Mr Taylor referred the Tribunal to the letter, dated 12 December 2018, from the Project Manager of the GP I & R Scheme, in which she confirmed that Dr Elapatha had passed the MCQ knowledge

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tests in May and August 2018 respectively and the Simulated Surgery Assessment in October 2018. He accepted that Dr Elapatha has made some efforts to remediate his deficient professional performance.

18. Mr Taylor referred the Tribunal to the Sanctions Guidance (SG) (6 February 2018) which states at paragraph 163:

"163. It is important that no doctor is allowed to resume unrestricted practice following a period of conditional registration or suspension unless the Tribunal considers that they are safe to do so."

19. Mr Taylor submitted that, despite Dr Elapatha's recent efforts, he has not fully remedied the serious, wide-ranging and fundamental deficiencies highlighted in his more recent Performance Assessment. Mr Taylor reminded the Tribunal that Dr Elapatha has not worked as a GP for more than four years and, therefore, has been unable to demonstrate that all the identified deficiencies have been remedied.

20. In conclusion, Mr Taylor invited the Tribunal to conclude that Dr Elapatha's fitness to practise remains impaired at this stage.

Submissions on behalf of Dr Elapatha

21. Mr Cridland referred the Tribunal to the considerable amount of CPD activity undertaken by Dr Elapatha since his previous hearing in February 2017. He told the Tribunal that this included a significant amount of e-learning and attendance at courses, as well as Dr Elapatha's participation in the I & R Assessment Scheme.

22. Mr Cridland told the Tribunal that Dr Elapatha had been under the educational supervision of Dr B and had produced a revised Personal Development Plan (PDP January 2019) which more closely targeted the areas of Dr Elapatha's clinical practice which had been found to be deficient at his most recent Performance Assessment.

23. Mr Cridland told the Tribunal that Dr Elapatha had been unable to obtain employment because of the conditions on his registration, particularly the condition which requires him to be directly supervised. He said that Dr Elapatha had participated in the I & R Assessment Scheme as a route to a return to General Practice. Mr Cridland explained that this had been self-funded as funding was not provided for doctors who had conditional registration.

24. Mr Cridland submitted that there has been a dramatic change in Dr Elapatha's situation since his previous hearing in 2017. He submitted that Dr Elapatha had made a considerable effort to address the identified deficiencies in his clinical practice although he accepted that full remediation could not be achieved until there was evidence of Dr Elapatha working in safe practice. Mr Cridland referred to a

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letter, dated 6 February 2019, from Dr A who confirmed that Dr Elapatha had been shadowing him in his GP practice for three weeks in September and October 2018. Mr Cridland told the Tribunal that Dr Elapatha would need to be included in the National Performers List before he could accept a post in GP practice.

25. On behalf of Dr Elapatha, Mr Cridland submitted that there is clear evidence of Dr Elapatha's remediation of the deficiencies in his clinical practice and improved insight, although he accepted that his efforts fall short of full remediation because he is unable to put his improved knowledge and skills into practice.

26. In these circumstances, Mr Cridland submitted that Dr Elapatha's fitness to practise remained impaired by reason of his deficient professional performance, although there was evidence of significant remediation.

Tribunal's Decision

27. The Tribunal is aware of its statutory over-arching objective which is 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 the medical profession.

28. The Tribunal has borne in mind that, in a review case, the persuasive burden falls upon the doctor to demonstrate that all the deficiencies which have been identified have been adequately addressed, and that remediation has taken place. If so, a Tribunal might then conclude that the doctor's fitness to practise is no longer impaired.

29. The Tribunal has noted the considerable amount of educational activities and re-training that Dr Elapatha has undertaken. It is impressed with the level of effort he has expended to address the identified deficiencies in his performance and the commitment he has demonstrated to returning to safe practice. The Tribunal is of the view that all this effort has clearly demonstrated Dr Elapatha's increased insight.

30. The Tribunal noted that Dr Elapatha has passed both the academic components of the I & R Assessments. He passed the Situational Judgement tests in May 2018 and the Clinical Problem Solving Test in August 2018. He also passed the Simulated Surgery Assessment in October 2018. The Tribunal concluded that passing these tests would have required significant academic revision and re-education and that this represented a substantial improvement in the doctor's performance.

31. The Tribunal acknowledges that, for a General Practitioner, direct supervision presents difficulties. However, it notes that Dr Elapatha has been shadowing another General Practitioner on at least two occasions. He appears to have made good progress and has achieved as much as he possibly can, including his participation in the I & R Assessment Scheme, whilst he has been unable to secure employment.

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32. Notwithstanding the above, the Tribunal accepts that Dr Elapatha's fitness to practise remains impaired. It cannot be satisfied that there is not a risk of repetition because he has not worked for more than four years and, therefore, he represents a risk to patient safety.

33. Accordingly, the Tribunal has determined that Dr Elapatha's fitness to practise remains impaired by reason of his deficient professional performance. This finding is also necessary to maintain public confidence in the profession and to maintain professional standards.

Determination on Sanction - 08/02/2019

1. Having determined that Dr Elapatha's fitness to practise is impaired by reason of deficient professional performance, the Tribunal now has to decide in accordance with Rule 22(1)(g) of the Rules on the appropriate sanction, if any, to impose.

The Evidence

2. The Tribunal has taken into account all the evidence received during the earlier stage of the hearing where relevant to reaching a decision on sanction.

GMC submissions

3. Mr Taylor submitted that the main reason for imposing sanctions is to protect the public and that Dr Elapatha represents a risk to patient safety, having not worked as a General Practitioner for more than four years. Mr Taylor submitted that doctors cannot be allowed to practise without appropriate safeguards in place when they represent a risk to patient safety.

4. Mr Taylor submitted that Dr Elapatha is not yet ready to return to practise without restriction and that conditions are the only appropriate sanction to protect the public and to maintain public confidence. He referred the Tribunal to the relevant paragraphs of the *Sanctions Guidance (SG)* (6 February 2018) which deal with the imposition of conditions, in particular paragraphs 81, 82 and 84.

5. Mr Taylor submitted that, although Dr Elapatha has made progress as demonstrated by his passing the I & R Assessment Scheme requirements, he is some way short of being able to practise without restriction. He submitted that a further period of conditional registration will allow Dr Elapatha the opportunity to put his educational activity into practice and to demonstrate, under supervision, that he is able to practise safely, which would be confirmed by either his clinical, educational and/or workplace supervisors.

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Submissions on behalf of Dr Elapatha

6. Mr Cridland submitted that this is a case where it is appropriate to impose conditions. He stated that the next step for Dr Elapatha is a work-based placement under supervision, with his supervisor being able to report to the GMC and to the authority who will deal with his application to be included in the Performers' List. Mr Cridland informed the Tribunal that, at present, the relevant authority would not include Dr Elapatha in the Performers' List in any capacity other than under conditional registration.

7. Mr Cridland submitted that a variation in Dr Elapatha's conditions is required and he explained that being under direct supervision renders it practically impossible for Dr Elapatha to find a post in a GP surgery. It was his contention that, if it was minded to do so, it was open to the Tribunal to impose a condition of close supervision, or supervision that is neither direct nor close. He also submitted that if the Tribunal considered that close supervision was appropriate and necessary, then a period of conditional registration under close supervision could be imposed for 12 months rather than a longer period.

Tribunal's Approach

8. The decision as to the appropriate sanction to impose, if any, in this case is a matter for this Tribunal exercising its own judgement. In reaching its decision, the Tribunal has taken account of the relevant paragraphs of the *SG*. It has borne in mind that the purpose of sanctions is not to be punitive, although a sanction may have a punitive effect, but to protect patients and the wider public interest.

9. Throughout its deliberations, the Tribunal has applied the principle of proportionality, balancing Dr Elapatha's interests with the public interest. The public interest includes, amongst other things, the protection of patients, the maintenance of public confidence in the profession, and the declaring and upholding of proper standards of conduct and behaviour.

10. The Tribunal has already given a detailed determination on impairment and it has taken those matters into account during its deliberations on sanction.

Tribunal Decision

No Action

11. In coming to its decision as to the appropriate sanction, if any, to impose on Dr Elapatha's registration, the Tribunal first considered whether to conclude the case by taking no action.

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12. The Tribunal has borne in mind that no doctor should be allowed to resume unrestricted practice following a period of conditional registration or suspension unless it considers that they are safe to do so.

13. The Tribunal considered that there are no exceptional circumstances in this case, particularly in the light of this Tribunal's finding that Dr Elapatha's fitness to practise remains impaired. The Tribunal concluded that it would be neither adequate, proportionate, nor in the public interest, to conclude Dr Elapatha's case by taking no action against his registration.

Conditions

14. The Tribunal next considered whether it would be appropriate and sufficient to impose conditions on Dr Elapatha's registration. It has borne in mind that any conditions imposed would need to be appropriate, proportionate, workable and measurable.

15. The Tribunal has considered the relevant paragraphs of the *SG* to which it has been referred and has noted paragraph 81 which suggests that conditions might be most appropriate in cases involving issues around the doctor's performance. It has also noted, in particular, paragraph 82 of the *SG* which states:

"82. Conditions are likely to be workable where:

a. the doctor has insight

b. a period of retraining and/or supervision is likely to be the most appropriate way of addressing any findings

c. the Tribunal is satisfied the doctor will comply with them

d. the doctor has the potential to respond positively to remediation, or retraining, or to their work being supervised."

The Tribunal is of the view that all of the above applies in Dr Elapatha's case.

16. The Tribunal has already found that Dr Elapatha's insight has developed since his review hearing in 2017. It is of the view that his deficiencies are capable of remediation as set out in its determination on impairment. Furthermore, the Tribunal has been provided with objective verifiable evidence that Dr Elapatha has made significant efforts to remediate his deficiencies, as demonstrated by his passing the I & R Assessment Scheme tests.

17. The Tribunal has borne in mind that Dr Elapatha has remained unemployed for more than four years and, therefore, the Tribunal has placed particular weight on his

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CPD records, training log and progress with his PDP. It acknowledges that Dr Elapatha has made substantial progress, including passing the three components of the I & R Assessment exams. The Tribunal has concluded that Dr Elapatha's situation has improved to such an extent that it would be appropriate to relax the condition relating to supervision, although only to "close" supervision. The Tribunal considers that there are residual concerns about patient safety because Dr Elapatha has been out of clinical practice for more than four years and because his improved knowledge has not yet been tested in a clinical setting.

18. The Tribunal has taken into account that the most recent Performance Assessment report is more than two years old and therefore considers that it would be appropriate to remove condition 7 requiring Dr Elapatha to disclose the contents of the report as previously stipulated.

19. In relation to condition 5(a), the Tribunal accepts that there are problems with identifying a suitable responsible officer until such time as Dr Elapatha is included on the Performers' List. It is therefore minded to vary that particular condition to allow the PDP to be approved by either a responsible officer or an educational supervisor or a workplace reporter.

20. The Tribunal considered the appropriate length of time that conditions with variations should be imposed. It has determined that a period of 12 months would give Dr Elapatha an opportunity to secure an appropriate post and to demonstrate a sustained and satisfactory standard of practice.

21. The Tribunal therefore determined to direct that Dr Elapatha's registration become subject to the following varied conditions for a period of 12 months:

1. He must notify the GMC within seven calendar days of the date these conditions become effective:
 - a. of the details of his current post, including his job title, job location and responsible officer (or their nominated deputy) information
 - b. of the contact details of his employer and/or contracting body, including his direct line manager
 - c. of any organisation where he has practising privileges and/or admitting rights
 - d. of any training programmes he is in
 - e. of the organisation on whose medical performers list he is included.
2. He must notify the GMC:

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- a. of any post he accepts, before starting it
 - b. of any formal disciplinary proceedings against him started by his employer and/or contracting body, within seven calendar days of being formally notified of such proceedings
 - c. 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 approved by his responsible officer (or their nominated deputy) and must inform the GMC of these arrangements.
- b. He must not start/restart work until his responsible officer (or their nominated deputy) has approved his workplace reporter and this approval has been forwarded to the GMC.
5. a. He must design a personal development plan (PDP), approved by either his educational supervisor or workplace reporter or his responsible officer (or their nominated deputy), with specific aims to address the deficiencies in the following areas of his practice.
- Maintaining Professional Performance
 - Assessment
 - Clinical Management
 - Safety and Quality
 - Relationships with Patients
 - Working with Colleagues
- b. He must give the GMC a copy of his approved PDP within three months of these conditions becoming effective.
- c. He must give the GMC a copy of his approved PDP on request.
- d. He must meet with his responsible officer (or their nominated deputy), as required, to discuss his achievements against the aims of his PDP.

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6. a. He must have an educational supervisor approved by his responsible officer (or their nominated deputy) and must inform the GMC of these arrangements.

b. He must not start/restart work until his responsible officer (or their nominated deputy) has approved his educational supervisor and this approval has been forwarded to the GMC.
7. He must get the approval of the GMC before starting work in a non-NHS post or setting.
8. a. He must be closely supervised in all of his posts by a clinical supervisor, as defined in the *Glossary for undertakings and conditions*. His clinical supervisor must be approved by his responsible officer (or their nominated deputy) and he must inform the GMC of these arrangements.

b. He must not start/restart work until his educational supervisor, workplace reporter or responsible officer (or their nominated deputy) has approved his clinical supervisor and this approval has been forwarded to the GMC.
9. He must inform the following persons of the conditions listed at 1 to 9:
 - a. his employer and/or contracting body
 - b. his responsible officer (or their nominated deputy)
 - c. his immediate line manager at his place of work, at least 24 hours before starting work (for current and new posts including locum posts)
 - d. any prospective employer and/or contracting body, at the time of application
 - e. the responsible officer of any organisation where he has, or has applied for, practising privileges and/or admitting rights, at the time of application
 - f. the organisation on whose medical performers list he is included or seeking inclusion, at the time of application.
22. The Tribunal has determined to direct a review of Dr Elapatha's case. A review hearing will convene shortly before the end of the period of conditions, unless an early review is sought.
23. The Tribunal wishes to emphasise that, at the review hearing, the onus will be on

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Dr Elapatha to demonstrate how he has developed his insight further and how he has progressed in fully addressing the identified deficiencies in his professional performance. Therefore, the reviewing Tribunal may be assisted by the provision of:

- A report from his clinical supervisor,
- A report from his workplace reporter and/or educational supervisor,
- A copy of his PDP,
- A copy of his annual appraisals,
- Any other evidence which Dr Elapatha considers will assist a reviewing Tribunal.

24. The effect of this direction is that, unless Dr Elapatha exercises his right of appeal, his registration will become subject to these conditions 28 days from the date when written notice is deemed to have been served upon him. A note explaining his right of appeal will be sent to him.

Confirmed

Date 08 February 2019

Mr James Newton-Price, Chair