

# Decisions on internal appeals to an MPTS Appeals Panel

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## Introduction

1. [The Anaesthesia Associates and Physician Associates Order 2024](#) ('the Order') grants a right of appeal against the following decisions\* made by a MPTS tribunal:
  - a. Review of Interim Measure<sup>†</sup>
  - b. Review of Final Measure<sup>‡</sup>
  - c. Refusal of voluntary removal<sup>§</sup>.
2. The right of internal appeal only applies to situations where the tribunal decides on review to extend, vary or replace the interim measure or final measure that is currently in effect<sup>\*\*</sup>. It does not apply where the tribunal decides to allow the existing measure to continue and makes no change to it.
3. The Appeals Rules ('Rules') set out the internal appeals process for appealing Tribunal decisions under article 16(1) of the Order, which is the first stage of the appeal processes set out in the Order. The second stage, an appeal to the relevant court, is set out at article 17(1) of the Order and is beyond the scope of this guidance.
4. Internal appeals against decisions made by an MPTS tribunal will be determined by MPTS-appointed decision makers.
5. An appeal is a safeguard allowing the appellant (person who may appeal a decision in accordance with article 16 of the Order) an opportunity to challenge Tribunal decisions. An appellant can be a physician associate (PA), anaesthesia associate (AA), or former PA or AA.
6. All decision makers, including an Appeal Panel, should have regard to our legal duty to [protect the public](#).<sup>††</sup> This is split into three distinct parts. We must act in a way that:
  - a. protects, promotes and maintains the health, safety and well-being of the public ('patient safety')

\* Article 16(1)

† Article 12(4)

‡ Article 14(3)

§ Article 9(2)

\*\* Article 12(4)

†† Section 1(1A) and (1B)(a) of the Medical Act 1983 and paragraph 3(1)(a)(i)-(ii) of the Order

- b. promotes and maintains public confidence in the profession ('public confidence'), and
  - c. promotes and maintains proper professional standards and conduct for members of those professions ('uphold professional standards').
7. Appeals may only be allowed where the decision was **wrong** or **unjust** because of a serious procedural or other irregularity in the making of the decision\*. If an MPTS Appeal Panel determines that a decision is wrong or unjust, the Panel will decide what is the fair and proportionate response.
8. The purpose of this guidance is to support the relevant decision makers (legally qualified persons (LQP), Internal Appeal Manager, Appeal Panel/Chair as appropriate) to reach fair and consistent decisions including on procedural issues and other matters that may arise.

## Being proportionate, transparent and fair

9. The decision maker(s) involved in internal appeals must be [proportionate](#), in their approach to exercising any discretion at each stage of the appeals process.
10. To ensure decisions made throughout the appeals process are [transparent](#), the decision maker(s) must give reasons for their decisions and record them clearly. This means using straightforward language, explaining technical terms wherever possible, identifying any relevant case law, and explaining how that case law, and any relevant principles arising from it, apply to their decision. This is important as it will help the PA/AA understand the decision makers' assessment of the Tribunal decision on appeal, their findings and any outcome proposed, so they are able to respond in an informed and meaningful way.
11. To ensure [fairness](#), the decision maker(s) should act reasonably, be consistent, be impartial and be aware of the risk of bias and take steps to mitigate it.
12. Differences in communication and culture can be difficult to identify from written information alone. However, where a decision maker is reviewing evidence, they should be mindful that cultural, faith or other characteristics such as those related to disability, can impact on how an individual engages with the appeals process and communicates with us. Where supported by the information available, and appropriate to do so, decision makers should take differences in communication, culture or other characteristics (if they have this information) into account when assessing and deciding what weight to attach to, written evidence.

\* Rule 5(2)

## Permission to appeal

13. For an appellant to bring an appeal they must file a Notice of Appeal\* to seek permission from the MPTS within 28 days beginning with the date on which the original appealable decision (see paragraph 1) was notified to the appellant<sup>†</sup>. If a Notice of Appeal is filed outside the 28-day deadline, it will not be considered further.
14. The permission decision will be allocated to a LQP appointed by the MPTS<sup>‡</sup> who must grant or refuse permission to appeal within 28 days from the date on which the appellant's Notice of Appeal was filed<sup>§</sup>. If the LQP refuses permission the appellant has a right of onward appeal to the court (paragraph 66).
15. The LQP will need to consider the Notice of Appeal, the reasons why the appellant is seeking to appeal the original decision and any documents provided by the appellant in support.
16. The LQP should first satisfy themselves that the Notice of Appeal meets the substantive requirements set out in Rule 3(1). If not satisfied, the LQP should refuse permission to appeal.
17. To make the permission decision, the LQP will need to decide whether, in their opinion, the appeal has a real prospect of success<sup>\*\*</sup>. This means a realistic, as opposed to fanciful, prospect of success.

### Does the appeal have a real prospect of success?

18. To determine whether an appeal against a relevant Tribunal decision<sup>††</sup> has a real prospect of success, the LQP must also have due regard to the matters at Rule 4(3):
  - a. the hearing at which the relevant Tribunal decision was made proceeded in the appellant's absence and there is compelling new evidence or evidence that could not reasonably have been provided at the time of the Tribunal decision that it was unjust to proceed in the appellant's absence;
  - b. there is any other exceptional circumstance that requires permission to be granted.

\* Rule 3

<sup>†</sup> Article 16(2)

<sup>‡</sup> Rule 2(2)(ii)

<sup>§</sup> Article 16(3)(a)&(b)

<sup>\*\*</sup> Rule 4(2)

<sup>††</sup> Rule 4(3)(a)&(b)

## Considerations where the hearing proceeded in the appellant's absence

19. Where a hearing proceeds in an appellant's absence, they lose the opportunity to present evidence and make submissions to the Tribunal. Because of this the Tribunal's decision to proceed in an appellant's absence will have been made carefully and in accordance with the [Fitness to Practise Rules](#) and any related guidance. Any challenge to the lawfulness of a decision to proceed in absence during a tribunal hearing should be done promptly by the PA or AA making a claim for judicial review.
20. Where an appellant is seeking to appeal the outcome of a relevant decision and can demonstrate there is evidence that indicates it was unjust to proceed in the appellant's absence, this may, given the impact this has on their right to a fair hearing\*, amount to a real prospect of success and permission should be granted. To meet this threshold the evidence that it was unjust to proceed in the appellant's absence must be:
- a. compelling new evidence, and/or
  - b. evidence that could not reasonably have been provided at the time of the Tribunal decision to proceed in the appellant's absence.

Then, the appeal will have a real prospect of success and permission should be granted<sup>†</sup>.

21. Each case must be assessed on its own merits and with reference to the surrounding circumstances that led the tribunal to determine to proceed in the appellant's absence. Evidence presented by an appellant will need to demonstrate that it was unjust to proceed in their absence on the basis they did not voluntarily absent themselves from attending their hearing. This might include:
- a. Independent health evidence that was not available to the tribunal at the time of the hearing which demonstrates the appellant was receiving emergency in-patient treatment at the time of the hearing;
  - b. Verifiable evidence that the appellant had made arrangements to attend the hearing but was detained by the police or other authorities without the opportunity to advise the tribunal of their situation.

\* [European Convention on Human Rights](#)

<sup>†</sup> Rule 4(3)(a)

## Other exceptional circumstances

22. Exceptional circumstances are circumstances that are unusual, special or uncommon, so such cases are likely to be very rare.
23. An appeal based on a procedural irregularity could amount to an exceptional circumstance if the procedural irregularity was sufficiently serious to have more likely than not resulted in the appellant being denied their right to a fair hearing\*. In such circumstances this would likely amount to a real prospect of success and permission should be granted.
24. Where the LQP is satisfied that there is any other exceptional circumstance which requires permission to appeal be granted, such permission should be granted.

## Considerations relevant to a refusal of permission to appeal

25. Where there is no evidence that the factors at Rule 4(3) have been met, the threshold for granting permission to appeal would ordinarily not be met. The threshold for granting permission to appeal would also ordinarily not be met if:
  - a. there is evidence that some aspect of the decision was wrong but not in a manner or to an extent which would have changed the outcome;
  - b. there may have been a procedural or other irregularity, but it was not serious and would not have changed the outcome;
  - c. the appeal is totally without merit.
26. Permission to appeal should also be refused by the LQP where the appellant has provided insufficient information in support of the appeal to enable the LQP to assess whether the appeal has a real prospect of success.

## Appeals - wrong or unjust

27. The focus of the appeal is limited to a **review** of the Tribunal decision appealed<sup>†</sup>.
28. The Appeal Panel may only allow an appeal where the decision was:
  - a. wrong; or
  - b. unjust because of a serious procedural or other irregularity in the making of the decision.

\* [European Convention on Human Rights](#)

<sup>†</sup> Rule 5(1)

29. **Wrong** may include where there has been:

- a. *an error of fact* - for example, the Tribunal didn't take into account information in their possession concerning the factual basis for the decision where that information would likely have had a material impact on the outcome.
- b. *an error of law* - for example, the Tribunal didn't make the decision in accordance with the legislation.

30. **Unjust** because of a serious procedural or other irregularity in the making of the decision may cover issues of procedural fairness and includes where the Tribunal has:

- a. failed to obtain representations where there is a duty to do so, or where there is a power to obtain representations the Tribunal didn't exercise that power in circumstances which clearly indicated they ought to have done so.
- b. failed to provide adequate reasons for their decision.

## Format of an appeal

31. The appellant has the option of a written or oral appeal\*, and their choice must be specified as part of their Notice of Appeal. If the appellant subsequently wishes to request to change the format of their appeal, they must advise the MPTS Case Management team urgently who will arrange for an Internal Appeals Manager to consider the request.

32. A written appeal is decided based on the evidence on the papers and will be conducted in private†.

33. An oral appeal hearing will be held remotely unless the appellant requests an in-person oral hearing.

34. When deciding whether parts, or all, of an oral appeal hearing should be held in private, the Internal Appeal Manager or Appeal Panel will consider the particular circumstances of the case and decide whether they outweigh the public interest in holding the hearing in public. The following factors will be relevant:

- a. the physical or mental health of the appellant

\* Rules 12&13

† Rule 12(7)(a)

- b. the interests of any other person interested in the decision being appealed
  - c. whether a public hearing would be likely to adversely affect the health of the appellant
  - d. all the circumstances of the case or appeal, and
  - e. whether the decision being appealed arose from a hearing held fully or substantially in private.
35. All hearings are held in public unless they relate to an interim measure<sup>\*</sup>, the appellant's health<sup>†</sup> or the Internal Appeal Manager or the Appeal Panel has determined that parts, or all, of the hearing should be in private following an application<sup>‡</sup>.
36. Where an Appeal Panel is considering an interim measure or the appellant's health at an oral hearing, it must do so in private, unless the Appeal Panel considers it appropriate to sit in public, having regard to:
- a. a request made by the appellant
  - b. the interests of any other person interested in the decision being appealed
  - c. whether a public hearing would be likely to adversely affect the health of the appellant, and
  - d. all of the circumstances of the case or appeal.

## Failure to comply with rules or case management directions

37. An MPTS Internal Appeal Manager will serve directions to the parties about the approach to take when getting an appeal ready for hearing. This is to support the just and expeditious management of an appeal to ensure that the hearing runs fairly and efficiently.
38. Standard practice directions will apply unless the power to vary or give new directions is exercised.
39. If a party<sup>§</sup> to the appeal i.e. the appellant or the GMC (or its representatives) fails to comply with a rule or case management direction an Appeal Panel can<sup>\*\*</sup> either:

\* Rule 13(7)

† Rule 13(6)

‡ Rules 13(5)&13(6)

§ Rule 2(1)

\*\* Rule 8(1)

- a. draw an adverse inference; or
  - b. refuse to admit evidence, where the failure relates to that evidence.
40. Before considering whether to exercise any of these powers, the Appeal Panel must first determine whether there is a rule or direction which has not been complied with.
41. In cases where it is determined that a party has failed to comply, the Appeal Panel must consider all the circumstances of the non-compliance to establish whether it amounts to a culpable failure.
42. A good reason for a party failing to comply, may include where:
- a. an appellant can provide objective evidence that their physical or mental health condition prevented compliance at the time but there is a realistic prospect of compliance within a reasonable timeframe,
  - b. they did not receive the notice served in accordance with the rule requiring them to supply information or produce a relevant document; or
  - c. in all the circumstances, it was not reasonable to expect them to comply with the Internal Appeal Manager or Appeal Panel/Chair or direction.
43. Where the Appeal Panel is satisfied there was a good reason for the party's failure to comply, the failure should not be regarded as culpable and so no action should follow.

## **Draw an adverse inference**

44. An adverse inference is where, because of the absence of requested evidence that would have been available to the Appeal Panel had the party complied with a specific rule or case management direction, it is open to the Appeal Panel to reach a conclusion which is to the detriment of, or unfavourable to, the party who did not comply.
45. It will be open to the Appeal Panel to draw an adverse inference if a party who has failed to comply with a rule or case management direction has no good reason for that failure and has been warned that an adverse inference may be drawn. In those circumstances the Appeal Panel may infer that the party did not comply for example because they:
- a. did not believe the evidence would stand up to scrutiny; or,

- b. believed the evidence that would have been available to the Appeal Panel had they complied would be unfavourable to them.
46. If the Appeal Panel does draw an adverse inference, it will form only one part of the overall evidential picture to be considered in assessing the appeal. An adverse inference should not on its own be relied on to determine the appeal.

### **Factors for an Appeal Panel to consider in terms of drawing an adverse inference**

47. In determining whether to draw an adverse inference, the Appeal Panel should consider the following questions:
- a. Has the party failed to comply with a rule or case management direction?
  - b. Has the failure disadvantaged the MPTS's ability to respond to the appeal?
  - c. Has the failure disadvantaged the appellant bringing an appeal?
  - d. Has the Appeal Panel been able to make a full assessment of the relevant issue(s) in the context of the appeal as a whole, or has the failure denied them access to potentially material evidence?
  - e. What reason(s), if any, has been given for the failure?
  - f. If a reason(s) has been given for the failure, is it a good reason such that it would be unfair to draw an adverse inference from it?
  - g. Has the party been warned that a failure to comply could result in an adverse inference being drawn?
  - h. In all the circumstances, what conclusion can reasonably be drawn about the reason(s) behind the failure?
48. Not having legal representation does not justify a failure to comply. However, if an appellant does not have the benefit of legal advice, the Appeal Panel should be satisfied that reasonable efforts have been made to explain the consequences of a failure to comply to the appellant.
49. An adverse inference should not be drawn by the Appeal Panel in cases where the party has satisfied the Appeal Panel that certain evidence that the rule or direction required them to provide is not available.
50. Where an Appeal Panel concludes that they will draw an adverse inference they should clearly state what adverse inference has been drawn and why.

## Refuse to admit evidence

51. The Appeal Panel may refuse to allow a party to rely on evidence where that party has failed to comply with a relevant rule or direction relating to the production of that evidence.

## Factors for an Appeal Panel to consider in terms of a refusal to admit evidence

52. The Appeal Panel will need to consider factors such as:

- a. the relevance of the evidence to the issues in the appeal
- b. any reasons given for the failure or delay in producing the evidence in accordance with the rule or case management direction, or
- c. whether there is any other mechanism, other than excluding the evidence, that would allow the appeal to proceed fairly.

## Admission of new evidence

53. The starting point for the admission of new evidence on appeal is the relevant legislative framework\*. In line with MPTS appeals being a review, if permission to appeal is granted, new evidence should only be admitted by the Appeal Panel where it is relevant to the issues in the appeal **and** it would be fair to do so.

54. Whether or not evidence is relevant will be fact specific and will need to be assessed against the nature and circumstances of the appeal and why the appellant says that the original decision was wrong or unjust.

55. Whether or not it would be fair to admit new evidence will require consideration of fairness to both parties and the overall fairness of the proceedings.

56. When deciding whether to admit new evidence, an Appeal Panel should have regard at all times to the specific purpose of appeal proceedings i.e. a safeguard allowing an appellant to challenge our decisions (paragraph 5). All decision makers, including an Appeal Panel, should also have regard to our legal role to protect the public (paragraph 6).

\* Articles 16(1)&(2) of the Order and Rules 4(2), 4(3)(a)&(b), 5(3),(11(2),11(3)

57. An Appeal Panel will need to consider all relevant factors when deciding whether to exercise their discretion to admit fresh evidence.

### **Factors for an Appeal Panel to consider when deciding whether the new evidence is relevant to the issues in the appeal**

58. In determining whether the new evidence is relevant to the issues in the appeal the Appeal Panel should consider:

- a. is the new evidence likely to assist the Appeal Panel in determining the appeal?
- b. is the new evidence significant and of probative value?
- c. would the new evidence have made a real difference to the original decision if it had been available?

### **Factors for an Appeal Panel to consider when deciding whether it would be fair to admit new evidence**

59. In determining whether it would be fair to admit new evidence the Appeal Panel should consider:

- a. could the evidence have been obtained prior to the original decision being made? If yes, is there a reasonable explanation why it wasn't?
- b. whether it would be in the public interest to admit the new evidence
- c. would it be unduly prejudicial to the other party to admit the new evidence?
- d. would admitting the evidence have an adverse effect on the efficient progress of the proceedings?

## **Witnesses**

60. As an appeal is a review and not a rehearing, witness evidence is unlikely to be involved.

61. When considering an oral appeal no person is to give oral evidence at the hearing unless the Appeal Panel considers such evidence is desirable to enable it to discharge its functions\*.

\* Rule 15(2)(i)

62. Where the appeal hearing is taking place in person and not remotely and the Appeal Panel has determined that it is desirable to hear oral evidence, an Internal Appeal Manager or Appeal Panel may direct that the oral evidence of a witness be given remotely by such means as they see fit.
63. An Internal Appeal Manager or Appeal Panel may direct that the identity of a witness should not be revealed in public\*.

## Appeal panel decisions

64. Where the Appeal Panel does not consider the original decision was wrong or unjust because of a serious procedural or other irregularity they should **dismiss the appeal**. The associate will have 28 days to appeal the decision of the Appeal Panel to the court.
65. Where the Appeal Panel considers the original decision was wrong or unjust because of a serious procedural or other irregularity they may:
- a. **quash the decision and take no further action** - this means that it no longer has legal effect and is effectively extinguished. For example, if a Final Measure of conditions is quashed then the appellant's registration is no longer restricted by virtue of those conditions. In terms of the courts' approach, if a decision is wrong or unjust it is quashed. In some cases you don't need a replacement decision (e.g. if it was a power which should not have been exercised), but if a replacement decision is required (because we had to make a decision) the matter may then be either remitted back to the decision-maker, or an Appeal Panel can substitute the original decision with its own decision if it feels it is in a position to do so (see paragraphs 73(b)(i) and (ii) below).
  - b. **quash the decision and substitute the decision under appeal for a decision that could have been made** - the Appeal Panel may substitute the original decision with any other decision that could have been by the original decision maker. For example, the Appeal Panel can conclude the appellant does not pose a current and ongoing risk to public protection, or they can impose a different final or interim measure.

In general terms, substitution would be appropriate where:

\* Rule 14(2)

- i. the wrong/unjust decision has been quashed but a new decision needs to be made
- ii. the Panel consider that it is in a position to make the 'right' decision based on the information they have, and this is preferable to remitting the decision back to the decision maker.

When making the substitution decision the Appeal Panel must have regard to the following guidance:

- i. Review of Interim Measure
  - ii. Review of Final Measure
  - iii. Refusal of voluntary removal
- c. ***remit the matter to be disposed of in accordance with directions*** - this will be most relevant where a serious procedural irregularity has been identified i.e. if the tribunal failed to allow the associate to make representations, then the Appeal Panel may remit the matter back to the original decision maker and direct that they allow and consider any representations from the associate. This would effectively be putting the matter back to the stage in the process where the unfairness / procedural irregularity has been identified and allowing this to be rectified.

However, this approach will usually require a fresh tribunal to be constituted and will introduce further delay to the conclusion of the substantive decision. Given the impact this will have on the parties to the appeal, remittal will only usually be proportionate if there is no other fair way to dispose of the appeal.

As the effect of remittal is to put the matter back to the stage of the process where the unfairness / procedural irregularity, this means that any decision made in the proceedings after the unfairness / procedural irregularity occurred will cease to have effect. As any interim or final measure currently imposed on the appellant's registration at the time the Internal Appeal is decided would no longer have effect, remittal could leave a public protection gap and so the Regulator would have to give urgent consideration to referring the matter to an Interim Measures Tribunal.

66. The right of onward appeal to a court is only engaged once the internal appeal has reached a conclusion. The appeal may have concluded at an early stage,

because permission to appeal was refused\* , or only after the appeal has been determined by the Appeal Panel†. However, it should be noted that if the appeal is simply withdrawn there is no onward right of appeal.

\* Article 17(4)(a)

† Article 17(4)(b)