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To:      Interim Orders Panel Panellists
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Re: Dr EY v GMC [2013] EWHC 860 Admin

Background

Dr EY appeared before the Interim Orders Panel (IOP) on 29 November 2012. The IOP made an order imposing conditions on the doctor's registration for a period of nine months.

Dr EY made an application under section 41A(10) of the Medical Act 1983 for an order terminating the order of conditions.

Appeal

Dr EY’s appeal came before HHJ Andrew Gilbart QC on 15 April 2013.

The Judge sets out a comprehensive and detailed background history to Dr EY’s case (paragraphs 3 to 14).

In summary, Dr EY had previously appeared before the Fitness to Practise Panel (FTPP) in relation to two incidents including sexually motivated and indecent behaviour towards Patient A. The FTPP found the doctor’s fitness to practise impaired by reason of misconduct and determined to erase his name from the medical register. The doctor challenged that decision and the appeal was considered by Kenneth Parker J. He allowed the appeal and quashed the finding of impairment in respect of Patient A, the erasure of his name from the medical register and remitted the matter back to the General Medical
Council (GMC) to consider whether it was appropriate to pursue the complaint of Patient A before a fresh FTPP.

The GMC decided to proceed with Patient A’s complaint and Dr EY was notified on 15 November 2012 of that decision. In the light of that decision, Dr EY was referred to the IOP which considered whether or not an order should be made at a hearing on 29 November 2012.

Dr EY laid great emphasis on Kenneth Parker J’s judgment, details of which are set in HHJ Gilbart QC’s judgment. However, he considered much of Kenneth Parker J’s judgment in relation to Dr EY’s case before him to be “quite irrelevant”. He concludes in relation to this issue (paragraph 13) that the appeal against the decision of the FTPP succeeded only as a reasons challenge. He rejected any idea that Kenneth Parker J expressed any view that the Patient A’s evidence was incapable of belief so far as the central allegations were concerned.

HHJ Gilbart QC confirms that his task in relation to Dr EY’s application before him was to determine whether the IOPs’ decision of 29 November 2012 should stand.

The Judge then reviews the events after the case examiner’s decision to refer the matter to a fresh FTPP (paragraphs 15-19).

He then considers the role of the court under section 41A (paragraph 20) specifically referencing the Court of Appeal decision in GMC v Hiew [2007] EWCA CIV 369 and referred to relevant parts of the leading judgment of Arden LJ noting that although the case related to the power to extend an order of suspension under section 41A(7) it was also of application to the exercise of jurisdiction under section 41A(10).

HHJ Gilbart QC notes that Counsel for Dr EY made various submissions about the standard of reasoning required of the IOP, citing a number of unreported first instance decisions.

The Judge stated (paragraph 21):

“It can be dangerous to argue from case specific conclusions to general principle, and in the way in which Miss O’Rourke approached it, there seemed to the court to be some considerable danger that some central principles of public law about reasoning would be overlooked. The standard of reasoning required must of course reflect the context in which the decision is taken - in this case the MPTS IOP - but that does not justify a departure from the principle that while adequate reasons are required, which deal with the principal points in issue, they can be shortly stated.”

He goes on to say (paragraph 23):
“It is also well established that, while a decision maker must have regard to all material considerations, he is not required to spell them all out in the decision letter.”

He thereafter goes onto identify a number of town planning cases and the principles in relation to the giving of reasons. The Judge considers that the same approach applies in the way in which the IOP deals with issues before it.

He confirms (paragraph 24):

“If it [the IOP] had considered them (and the transcript of the hearing sets out the submissions made to it), and dealt with the main issues in its conclusions in a way which told the parties, who were well aware of the issues raised and arguments advanced, of their conclusions, that meets the relevant tests. It follows that the IOP was not required to set out every argument in detail in its decision, provided that it is apparent on a sensible reading of the decision in question that they have been taken into account. Similarly, reasons may be shortly stated.”

HHJ Gilbart QC refers to the case of Abdullah v GMC [2012] EWHC 2506 Admin (paragraph 102) with which he respectfully agreed:

“The question of the extent of the reasoning required will vary from case to case. That some judges had thought it appropriate in some particular cases to require more reasoning does not override that general principle”.

The Judge then goes on to consider the context of the case against Dr EY which relates to allegations of serious sexual offences by Dr EY in relation to a vulnerable patient (paragraph 26). The allegations are denied and the patient has not given a consistent account. Whilst the FTPP made findings against the doctor they have been quashed because of inadequate reasoning. It therefore follows that what remains unresolved are allegations of serious sexual misconduct but which the judge on appeal ruled were not such as to be incapable of belief. Therefore, whether they are accepted in the event is a matter for the FTPP.

HHJ Gilbart QC then refers to the “Imposing Interim Orders: Guidance for the Interim Orders Panel and the Fitness to Practise Panel” (paragraph 27). He notes that it was not published as a statutory code was treated by both parties as “consonant with good practice”.

He refers to a number of passages within the guidance.

The Judge makes some preliminary observations on Dr EY’s case (paragraphs 28-31), the submissions of Dr EY (paragraphs 32-34) and Counsel for the GMC’s submissions (paragraph 35-36).
Counsel for the doctor accepted at the outset of the hearing that she could not argue against the imposition of conditions in principle as Dr EY was now the subject of an active police investigation. Her case was that condition five (that relating to the use of a chaperones) was unnecessary and disproportionate and further that the standard of reasoning given was generally deficient, both as to the justification of the imposition of conditions and for the terms of the conditions themselves.

The Judge summarised the arguments put forward (paragraph 33) and then notes the submission by Counsel for the doctor that IOP had simply “parroted” its conclusions in a form of words, which it always used as a “mantra” and pointed out that the same form of words had been used in other recent cases under section 41A.

The Judge summarised the arguments submitted on behalf of the GMC and then sets out his discussion and conclusions (paragraphs 37-54).

He confirms that he did not find that Counsel for the doctor’s approach to the questions of the principles to be applied in relation to the case to be of much assistance and preferred to adopt those of the GMC, subject to three important caveats – set out in paragraph 38 as follows:

1. The principal guide to the approach of the court must remain the clear guidance in *Hiew*;

2. None of the first instance authorities on the nature of the reasoning to be adopted should be seen as more than illustrations of how the fundamentals of decision making and reasoning have been applied in individual cases, and they should not be seen as identifying any new or different approach.

3. He did not accept that the IOP must apply a “reasonable onlooker” test. Public confidence in the profession, and the varying effect upon it of knowing the facts in issue, may be very different when the allegation is of sexual misconduct against a patient as opposed to a fraud which had nothing to do with the man’s practice as a doctor. The IOP (and the Court under section 41A) must take a view of the effect on public confidence on the information it has before it. The “reasonable onlooker” test may be one which it chooses to adopt, but it is not the only one, nor need it be deployed in any and every case.

HHJ Gilbart QC confirms (paragraph 39) that:

“It can be very dangerous to seek to establish principle of general applications from individual cases. Insofar as one can, one must winnow out such features as are case specific”.

The Judge also rejected Counsel for the doctor’s “robust and floridly expressed criticism of the IOP for using the same form of words in different cases”.
He confirms (paragraph 40):

“The question is not whether they are often used. It is whether they are aptly used in the case in question.”

The Judge then turns to the issues in the case. He rejects Counsel for the doctor’s attack on decision by the IOP that an interim order was required. In his view the terms of the reasoning for the making the order are “clear and appropriate”. Dr EY is alleged to have made serious sexual advances towards a very vulnerable patient in her own home, culminating in rape. He resisted the invitation of Counsel for the doctor to form his own views of the credibility of the patient (paragraph 42).

He goes on to say that if the allegations are true, it was quite reasonable for the IOP to conclude that his dealing with female patients would put them at risk. Counsel for the doctor’s argument that it was only a single occasion may be relevant to determine the level of risk, but it certainly does not negate it altogether. He confirms he gives weight to the IOP view on this matter. Even if its reasoning were to be criticised, he found that a risk of significance to female patients must be found to exist, on the basis of the allegations made. Even if the risk of another sexually inappropriate, unprofessional episode occurring was thought to be small; the consequences on the patient in question of it occurring would be grave.

He also considers that the IOP’s conclusion that there would be harm to the public interest by reason of the effect on public confidence is entirely correct and is properly reasoned (paragraph 44).

He goes on to say that he rejects the idea advanced by the Counsel for the doctor that the fact that Patient A’s evidence was uncorroborated should diminish the weight to be given to the fact that the allegation has been made. He confirms the need for corroboration in sexual cases was properly abolished many years ago in the criminal courts, even though the standard of proof is higher there than before the IOP or FTP.

He also rejects Counsel for the doctor’s reliance on Kenneth Parker J’s observations on credibility confirming that the arbiter of credibility in this case will be the FTPP when it hears the case.

HHJ Gilbart QC goes on to state (paragraph 47):

“I consider that no sensible complaint can be made of the reasoning deployed. The IOP had heard all the submissions made, which it set out in its decision. It had no need to go through them one by one in its reasoning, which dealt with the principal issues, and left the parties in no doubt of what had been decided and why. But even if I considered the reasoning inadequate, I consider that the case for an interim order on the material before the IOP and before this Court was and is a very powerful one indeed.”
The Judge concludes (paragraph 49):

“But in any event the judgement of this court is that it was and is essential to guard against the identified risks (both to patients and to public confidence), notwithstanding the fact that it will affect his practice, or effectively prevent him from practising at all. The hearing before the GMC is just two months away. In my judgement the potential for harm is so great that the undoubtedly serious consequences for Dr EY for that short period are not such as to justify declining to make an Order, or to justify terminating it.”

HHJ Gilbart QC dismisses Counsel for the doctor’s suggested condition as “quite impractical” (paragraph 50) as it:

“depends for its success on the optimistic idea that other persons working in the suite in question will have the time, or be in the circumstances, to be able to interfere should anything occur, even assuming that they were aware of its doing so.”

He confirms the imposition of the condition was necessary given the absence of any practical alternative which would guard against the same risks; he regards it as quite proportionate.

The Judge concludes (paragraph 52):

“I have a great deal of sympathy for Dr EY. If the allegations are found to be untrue, he will have lost the opportunity to practice as a doctor during the period of investigation and the consideration of the case by the GMC. But the court’s sympathy for him must be tempered by the need to guard against possible risks to patients, to the public interest and to the public’s confidence in the medical profession.”

In the circumstances he dismissed the application.

**Salient Points**

- The IOP is not required to set out every argument in detail, provided that it is apparent on a sensible reading of the decision that they have been taken into account (paragraph 24)
- The extent of the reasoning required in each case will vary from case to case in accordance with the principles are set out in paragraph 102 of *Abdullah v GMC [2012] EWHC 2506 Admin*
- When the same form of words is used in different cases the question to be answered is not whether they are used but whether they are ‘aptly’ used (paragraph 40)
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