Record of Determinations – Medical Practitioners Tribunal

PUBLIC RECORD

Dates: 31/05/2019 - 31/05/2019

Medical Practitioner’s name: Dr Joseph NANKHONYA

GMC reference number: 2713625

Primary medical qualification: MB ChB 1981 University of Manchester

Type of case: Outcome on impairment

Outcome on impairment: Impaired

Summary of outcome:
Erasure

Tribunal:

<table>
<thead>
<tr>
<th>Role</th>
<th>Name</th>
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<tbody>
<tr>
<td>Legally Qualified Chair</td>
<td>Mr David Urpeth</td>
</tr>
<tr>
<td>Lay Tribunal Member</td>
<td>Mrs Valerie Blessington</td>
</tr>
<tr>
<td>Medical Tribunal Member</td>
<td>Dr Josanne Holloway</td>
</tr>
<tr>
<td>Tribunal Clerk</td>
<td>Ms Chloe Ainsworth</td>
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Attendance and Representation:

<table>
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<tr>
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<tr>
<td>Medical Practitioner</td>
<td>Not present and not represented</td>
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<tr>
<td>Medical Practitioner’s Representative</td>
<td>N/A</td>
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<tr>
<td>GMC Representative</td>
<td>Mr Thomas Coke-Smyth, Counsel</td>
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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.

Determination on Facts and Impairment - 31/05/2019

Background
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1. The Tribunal has had regard to the background to Dr Nankhonya’s case, which was considered by a Medical Practitioners Tribunal which concluded in January 2016 (‘the 2016 Tribunal’). At the time of the events, Dr Nankhonya was employed as a locum consultant physician in stroke medicine. This case concerns failures in Dr Nankhonya’s treatment of two patients, Patient A and Patient B, at the Warrington and Halton Hospitals NHS Foundation Trust (‘the Trust’) in April and May 2013.

The 2016 Tribunal

2. The 2016 Tribunal found various failings in regard to the standard of treatment and care provided to both Patient A and Patient B. It concluded that Dr Nankhonya’s actions and omissions in relation to both patients demonstrated conduct that fell far below acceptable standards. It considered that Dr Nankhonya had breached various paragraphs of Good Medical Practice 2013 (‘GMP’) and that these actions and omissions amounted to misconduct.

3. The 2016 Tribunal considered that Dr Nankhonya had taken some steps towards remediation, however it was concerned that he had demonstrated little insight into his misconduct and could not exclude a risk of repetition. The 2016 Tribunal determined that Dr Nankhonya’s fitness to practise was impaired by reason of his misconduct. To address its concerns, the 2016 Tribunal imposed an order of conditions on Dr Nankhonya’s registration.

4. Following the conclusion of the hearing, Dr Nankhonya appealed the decision of the 2016 Tribunal, but was unsuccessful. As such, his substantive conditions came into effect on December 2016.

The 2018 Tribunal

5. Dr Nankhonya’s case was reviewed on 24 May 2018 (‘the 2018 Tribunal’). The 2018 Tribunal was concerned that Dr Nankhonya failed to inform the Rotherham NHS Foundation Trust (‘the Rotherham Trust’) of the conditions on his registration. It found this to be a lack of openness on his part and a breach of one of the conditions. It found that Dr Nankhonya had undertaken very limited remediation and had very limited insight into his misconduct, seeking to challenge the findings of the 2016 Tribunal through his personal development plan (‘PDP’). As such, the 2018 Tribunal concluded that it had no evidence before it to displace the findings of the 2016 Tribunal that Dr Nankhonya posed a risk of harm to patients. Accordingly the Tribunal found that Dr Nankhonya’s fitness to practise remained impaired by reason of his misconduct.
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6. In light of its findings, the 2018 Tribunal determined to impose an order of suspension on Dr Nankhonya’s registration for a period of 12 months. It determined that conditions were no longer workable, particularly since Dr Nankhonya had breached one of his conditions. The 2018 Tribunal determined that this would give Dr Nankhonya a further opportunity to demonstrate remediation and acceptance of the findings of the 2016 Tribunal with a view to resume practice.

7. The 2018 Tribunal determined that the reviewing Tribunal would be assisted by the following:

   • Evidence of a willingness to engage with the regulatory process
   • Evidence that he has kept his medical knowledge and skills up-to-date
   • A reflective statement on the failings identified by the original Tribunal and this Tribunal

Today’s Review Hearing

8. The Tribunal 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 Nankhonya’s fitness to practise is impaired by reason of misconduct.

The Outcome of Applications Made during the Impairment Stage

9. The Tribunal granted the GMC’s application, made pursuant to Rule 31 of the Rules to proceed in the absence of Dr Nankhonya. The Tribunal’s full decision on the application is included at Annex A.

The Evidence

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

11. The Tribunal received:

   • Email correspondence between the GMC and Dr Nankhonya, dated 18 September 2018 and 01 February 2019;
   • Letter from Dr Nankhonya to the GMC, dated 25 March 2019;
   • Email from the GMC to Dr Nankhonya, dated 05 April 2019;
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- Email from Dr Nankhonya, dated 17 April 2019, attaching letter dated 17 April 2019;
- Email from the GMC to Dr Nankhonya, dated 18 April 2019, attaching letter from the GMC to Dr Nankhonya dated 18 April 2019;
- Email from Dr Nankhonya to the GMC, dated 19 April 2019, attaching updated defence documents;
- Email from Dr Nankhonya to the GMC, dated 2 May 2019;
- Updated defence documents (including evidence of CPD and self-directed learning).

Submissions

12. On behalf of the GMC, Mr Coke-Smyth outlined the background to this case.

13. Mr Coke-Smyth submitted that Dr Nankhonya’s fitness to practise remains impaired. He submitted Dr Nankhonya has not submitted any evidence that the 2018 Tribunal informed him would be of assistance. He referred the Tribunal to the correspondence from Dr Nankhonya and submitted that this provides clues about his lack of insight and willingness to engage. He submitted that, in his correspondence, Dr Nankhonya accuses the GMC of lying, questions the role of the GMC and seeks to challenge the 2016 Tribunal’s findings. Further, Mr Coke-Smyth submitted that most of the materials Dr Nankhonya has submitted relates to matters which have already been decided on. Mr Coke-Smyth submitted that this demonstrates Dr Nankhonya’s persistent lack of insight.

14. Mr Coke-Smyth submitted that Dr Nankhonya has failed to remediate the 2016 Tribunal’s areas of concern and that the majority of the CPD that Dr Nankhonya has undertaken is self-directed learning, rather than targeted to the areas of concern found by the previous Tribunals. As such, Mr Coke-Smyth submitted that there is a risk of repetition of the initial conduct. Mr Coke-Smyth submitted that nothing of substance has changed since the last hearing in order to displace a finding of impairment. He submitted that the situation has now deteriorated as Dr Nankhonya has disregarded the opportunity that two Tribunals have given him to remediate.

15. Furthermore, Mr Coke-Smyth submitted that, given the lack of engagement, public confidence would be undermined if a finding of impairment were not made.

The Relevant Legal Principles
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16. The Tribunal reminded itself that the decision of impairment is a matter for the Tribunal’s judgement alone. As noted above, the previous Tribunal set out the matters that a future Tribunal may be assisted by. This Tribunal is aware that it is for the doctor to satisfy it that he would be safe to return to unrestricted practice.

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

**The Tribunal’s Determination on Impairment**

18. The Tribunal considered whether Dr Nankhonya remains impaired by reason of his misconduct.

19. The Tribunal carefully considered Dr Nankhonya’s level of insight. The Tribunal had regard to Dr Nankhonya’s email correspondence with the GMC in which he questions its function. The Tribunal considered that the GMC has tried to assist Dr Nankhonya by advising him that the documents he has submitted are not relevant to this Tribunal and by advising what this Tribunal would find useful. The Tribunal was troubled that rather than providing such evidence to address the concerns, Dr Nankhonya was challenging these findings and the authority of his regulator. Further, the Tribunal was disappointed to note that it has not been given evidence in the form of a reflective statement to demonstrate Dr Nankhonya has deliberated on the findings of the 2016 Tribunal or 2018 Tribunal. In all the circumstances, the Tribunal concluded that Dr Nankhonya has demonstrated a serious lack of insight and that he still poses a serious risk to the public.

20. The Tribunal next considered whether Dr Nankhonya has kept his clinical skills up to date. It noted that, since the 2018 Tribunal, Dr Nankhonya has mostly attempted to keep up to date through unspecified self-directed learning. The Tribunal is not satisfied that this is sufficient to suggest that Dr Nankhonya has maintained his medical skills during at least the period of suspension that he has been out of practice, and he may have become deskilled.

21. In light of the above, the Tribunal is not satisfied that Dr Nankhonya is not likely to repeat his misconduct in the future.
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22. This Tribunal has therefore determined that Dr Nankhonya’s fitness to practice is impaired by reason of misconduct.

Determination on Sanction - 31/05/2019

1. Having determined that Dr Nankhonya’s fitness to practise remains impaired by reason of his misconduct, the Tribunal has now considered what action, if any, it should take with regard to Dr Nankhonya’s registration.

The Evidence

2. The Tribunal has taken into account the background to the case and the evidence received during the earlier stage of the hearing where relevant to reaching its decision.

Submissions

3. On behalf of the GMC, Mr Coke-Smyth submitted that Dr Nankhonya’s registration has been subject to a sanction (first a period of conditions and subsequently a period of suspension) for nearly two and a half years. He submitted that given the lack of insight and remediation demonstrating by Dr Nankhonya during this period, the appropriate sanction to impose on his registration is now one of erasure.

4. Mr Coke-Smyth addressed the Tribunal on the aggravating and mitigating factors in this case. He submitted that an aggravating factor is Dr Nankhonya’s lack of insight and that a mitigating factor would be that his initial conduct was remediable. Mr Coke-Smyth submitted that it is clear when looking at the Sanctions Guidance 2018 (‘SG’) that a period of suspension is no longer an appropriate sanction. He submitted that Dr Nankhonya has failed to provide any remediation in response to the concerns of the previous two Tribunals and that this clearly represents an unwillingness to engage. Mr Coke-Smyth submitted that Dr Nankhonya still does not have insight and that this Tribunal has found that he still poses a serious risk to the public.

5. Mr Coke-Smyth referred the Tribunal to the areas of the SG focusing on erasure and the paragraphs that he submitted applied in this case (paragraphs 109i and 109j). He submitted that Dr Nankhonya is unwilling to accept responsibility for his actions. Mr Coke-Smyth accepted that a doctor has the right to maintain their innocence, but that Dr Nankhonya has not attempted to address the circumstances or reflect on his misconduct. Mr Coke-Smyth also submitted that Dr Nankhonya’s conduct is such that he is putting his own interests before that of his patients as his primary interest is not of patient safety and making sure his practice is safe but is to attack the regulatory
process. He submitted that Dr Nankhonya’s clinical conduct was remediable but his attitude is such that he remains a risk to patients.

6. In addition, Mr Coke-Smyth submitted that public confidence would be undermined if, following on-going and deliberate non-compliance, Dr Nankhonya did not face more serious consequences. He submitted that Dr Nankhonya has been given two opportunities to engage and has not taken those opportunities despite the GMC repeatedly reminding him what material would be required.

7. Finally, Mr Coke-Smyth submitted that the current suspension should run until the sanction of erasure comes into effect so that Dr Nankhonya is not permitted to practise during any appeal period.

The Tribunal’s Determination

8. The Tribunal reminded itself again that at this stage of proceedings, there is no burden or standard of proof and the decision on sanction is a matter for the Tribunal’s judgment alone.

9. In reaching its decision, the Tribunal has given careful consideration to Sanctions Guidance (SG) (February 2018) generally. It has borne in mind that the main reason for imposing sanctions is to protect the public pursuant to the overarching objective set out in section 1 of the Medical Act 1983 (as amended), already rehearsed in the determination on impairment. Sanctions are not imposed to punish or discipline doctors, but they may have a punitive effect.

10. The Tribunal has borne in mind that in deciding what sanction, if any, to impose, it should consider the sanctions available, starting with the least restrictive. In making its decision, the Tribunal also had regard to the principle of proportionality, and it weighed Dr Nankhonya’s interests with those of the public.

Aggravating and mitigating factors

11. The Tribunal carefully considered the mitigating factors in this case:

- The Tribunal noted that there has been some engagement with the process. Dr Nankhonya has corresponded with the GMC and provided it with evidence of his learning. However, the Tribunal took the view that Dr Nankhonya’s engagement with the process was limited.
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- The Tribunal noted that Dr Nankhonya’s initial conduct was remediable, but balanced this against his conduct since the 2016 Tribunal. The Tribunal was concerned by Dr Nankhonya’s persistent lack of insight.

12. The Tribunal balanced the mitigating factors against the aggravating factors in this case:

- The Tribunal found Dr Nankhonya to demonstrate a persistent and sustained lack of insight. The Tribunal considered that there were two strands to his lack of insight. First, the refusal to accept his mistake and, secondly, that he has not developed insight in a timely manner. The Tribunal noted that Dr Nankhonya has expressed concerning views about the GMC and the fitness to practise process generally.

- The Tribunal considered that there has been a considerable lapse of time since the initial incident. However, when the Tribunal considered how little progress Dr Nankhonya has made in developing his insight and remediation during this time the Tribunal determined that this became an aggravating factor.

In all the circumstances, the Tribunal attributed more weight to the aggravating factors in this case.

No action

13. In coming to its decision as to the appropriate sanction, if any, to impose in Dr Nankhonya’s case, the Tribunal first considered whether to take no action. The Tribunal considered, amongst others, paragraphs 68-70 of SG which highlights that taking no action following a finding of impaired fitness to practise would only be appropriate in exceptional circumstances.

14. The Tribunal has determined that there are no such exceptional circumstances in this case. It therefore has determined that taking no action would be neither appropriate, proportionate nor in the public interest.

Conditions

15. The Tribunal next considered whether to impose conditions on Dr Nankhonya’s registration. It bore in mind that any conditions imposed would need to be appropriate, proportionate, workable, and measurable. The Tribunal considered
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the non-exhaustive list of factors in paragraphs 81 and 82 of the Sanctions Guidance, which set out criteria for determining when imposing conditions on a doctor’s registration might be appropriate and/or workable.

16. The Tribunal determined that it would not be possible to formulate a set of appropriate or workable conditions. This was in part because of his breach of conditions thus far and his approach taken towards his regulatory body. The Tribunal could not be satisfied that Dr Nankhonya has kept his clinical skills and knowledge up to date and, additionally, the Tribunal noted that Dr Nankhonya has previously breached conditions when conditions were imposed upon his registration. The Tribunal determined, for these reasons, that a period of conditional registration would be insufficient to protect the public as well as to satisfy the public interest.

Suspension

17. The Tribunal next considered whether it would be appropriate and proportionate to suspend Dr Nankhonya’s registration.

18. The Tribunal gave careful consideration to the paragraphs of the SG concentrating on suspension. It considered Dr Coke-Smyth’s submission that in a case where a doctor has been given two opportunities to demonstrate remediation and has failed to do so, that the public would expect an escalation of sanction.

19. The Tribunal had regard to the following paragraph of the SG:

‘93 Suspension may be appropriate, for example, where there may have been acknowledgement of fault and where the tribunal is satisfied that the behaviour or incident is unlikely to be repeated. The tribunal may wish to see evidence that the doctor has taken steps to mitigate their actions (see paragraphs 24–49).’

The Tribunal noted that there has been no acknowledgement of fault and considered its findings at the impairment stage, that it was not satisfied Dr Nankhonya’s conduct is unlikely to be repeated.

20. The Tribunal also had regard to the following paragraphs of the SG:

‘97 Some or all of the following factors being present (this list is not exhaustive) would indicate suspension may be appropriate.'
a A serious breach of Good medical practice, but where the doctor’s misconduct is not fundamentally incompatible with their continued registration, therefore complete removal from the medical register would not be in the public interest. However, the breach is serious enough that any sanction lower than a suspension would not be sufficient to protect the public or maintain confidence in doctors.

... 

e No evidence that demonstrates remediation is unlikely to be successful, eg because of previous unsuccessful attempts or a doctor’s unwillingness to engage.

... 

g The tribunal is satisfied the doctor has insight and does not pose a significant risk of repeating behaviour.’

The Tribunal found, in relation to 97a above, that although the initial misconduct was not incompatible with continued registration Dr Nankhonya’s attitude towards his regulator and the fitness to practise process has made it so. In relation to 97b, Dr Nankhonya has not provided any evidence of remediation to two review hearings, other than providing limited evidence of CPD. It noted that Dr Nankhonya has had nearly 2 and a half years to remediate his conduct and has failed to so do. In relation 97g, the Tribunal was clearly not satisfied that Dr Nankhonya has insight and as previously indicated determined that he currently represents a significant risk to patients.

21. At this juncture, the Tribunal determined that suspension would not be the proportionate or appropriate sanction.

Erasure

22. The Tribunal considered the following paragraphs of the SG, which it determined applied in this case:

‘109 Any of the following factors being present may indicate erasure is appropriate (this list is not exhaustive).
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a A particularly serious departure from the principles set out in Good medical practice where the behaviour is fundamentally incompatible with being a doctor.

...

i Putting their own interests before those of their patients (see Good medical practice paragraph 1: – ‘Make the care of [your] patients [your] first concern’ and paragraphs 77–80 regarding conflicts of interest).

j Persistent lack of insight into the seriousness of their actions or the consequences.’

Regarding 109a, as set out above, Dr Nankhonya’s conduct towards the GMC and the fitness to practise process has become fundamentally incompatible with being a doctor. Regarding 109i, it has become clear that Dr Nankhonya is putting his own interests heard of those of patients. The Tribunal found this disturbing. In relation to 109j, the Tribunal reiterates its earlier view in relation to insight.

23. The Tribunal determined that there is no prospect of any change in Dr Nankhonya’s attitude or insight into his misconduct with a further period of suspension. The Tribunal noted that at Dr Nankhonya’s previous hearing, the 2018 Tribunal warned Dr Nankhonya that erasure was a potential sanction and yet he has still failed to provide any meaningful remediation. As such, the Tribunal concluded that erasure is the only appropriate and proportionate that can serve the public interest in this case.

24. The Tribunal has directed to erase Dr Nankhonya’s from the Medical Register. The MPTS will send Dr Nankhonya a letter informing Dr Nankhonya of his right of appeal and when the direction and the new sanction will come into effect. The current suspension will remain in place during the appeal period.

Confirmed
Date 31 May 2019

Mr David Urpeth, Chair
Service and Proceeding in Absence

1. Dr Nankhonya is neither present nor represented at this hearing. The Tribunal therefore first considered whether notice of this hearing had been properly served on him in accordance with Rules 15 and 40 of the GMC Fitness to Practise Rules 2004, as amended (‘the Rules’).

Documentary Evidence

2. The Tribunal was provided with a service bundle of papers which included:

- Screenshot of Dr Nankhonya’s registered address on the GMC database;
- Email from the GMC to Dr Nankhonya, dated 18 April 2019, with attached GMC information letter, also dated 18 April 2019;
- Delivery receipt for email from GMC to Dr Nankhonya, dated 18 April 2019;
- Email from Dr Nankhonya to GMC, dated 19 April 2019;
- Notice of hearing letter (‘NOH’) from MPTS to Dr Nankhonya, dated 24 April 2019;
- Proof of delivery for NOH from MPTS to Dr Nankhonya, dated 24 April 2019;
- Letter from GMC to Dr Nankhonya, dated 2 May 2019, with attached amended hearing bundle;
- Proof of delivery of letter from the GMC to Dr Nankhonya, dated 2 May 2019;
- Email from Dr Nankhonya to the GMC, dated 16 May 2019;
- Letter to Dr Nankhonya, dated 16 May 2019, attaching final hearing bundle;

Service

3. On behalf of the GMC, Mr Coke-Smyth submitted that the NOH met the Rule 20 requirements and was sent more than 28 days prior to the hearing. He submitted that the NOH has been effected in accordance with the Rules and that the Tribunal has before it the proof of postage and proof of receipt.

4. The Tribunal noted that under Rule 40, Dr Nankhonya must be properly served and can be served by email to his registered email address or the email address of his representatives.
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5. The Tribunal had sight of the screenshot of the GMC database showing Dr Nankhonya’s registered address and registered email address.

6. The Tribunal also had sight of the NOH, dated 24 April 2019, which was sent to Dr Nankhonya’s registered address by Special Delivery on 24 April 2019. The Tribunal had regard to the proof of delivery, which shows that the NOH was signed for by ‘NANKHONYA’ on 25 April 2019 at 11:44.

7. The Tribunal had regard to the email dated 18 April 2019, with an attached letter formally setting out the GMC’s evidence and a further attachment of the draft bundle in compliance with Rule 20. It also had regard to the proof of receipt received 18 April 2019, 15:18 and the reply from Dr Nankhonya to the GMC at 19 April, 15:16.

8. Having considered the evidence before it and Mr Coke-Smyth’s submissions, the Tribunal was satisfied that the Notice of Hearing had been served on Dr Nankhonya in accordance with Rules 15 and 40.

Proceeding in Dr Nankhonya’s absence

9. The Tribunal considered whether it would be appropriate to exercise its discretion to proceed with this hearing in Dr Nankhonya’s absence pursuant to Rule 31 of the Rules.

10. Mr Coke-Smyth submitted that fairness to the practitioner is the prime consideration, but that fairness to the GMC and the public should be taken into account. He submitted that the Tribunal should consider the nature and circumstances of the absence and whether these suggest Dr Nankhonya’s right to attend the hearing has been waived. He submitted that the Tribunal should also consider whether an adjournment would secure Dr Nankhonya’s attendance.

11. The Tribunal was conscious that the discretion to proceed in the absence of a doctor should be exercised with the utmost care and caution, balancing the interests of the doctor with the wider public interest.

12. In deciding whether to proceed with this hearing in Dr Nankhonya’s absence, the Tribunal carefully considered all the information before it, which included Dr Nankhonya’s email to the GMC, in which he states that he will attend the hearing and will be represented. It noted that Dr Nankhonya has not contacted the GMC by
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telephone or email to advise it of a reason why he is now unable to attend the hearing. It noted that the GMC has made efforts on the morning of the hearing to contact Dr Nankhonya by telephone. The Tribunal considered all of the above against the quality of Dr Nankhonya’s background of engagement with the GMC.

13. The Tribunal noted that the GMC has made all reasonable efforts to inform Dr Nankhonya by post and email, the date of today’s hearing. The Tribunal considered that the Allegation is serious and that there is a public interest in dealing expediently with such cases. The Tribunal has received no request for an adjournment from Dr Nankhonya to enable him to attend on a later date. Therefore there is no indication that granting an adjournment would result in Dr Nankhonya’s future attendance. The Tribunal is satisfied that Dr Nankhonya has voluntarily absented himself from these proceedings.

14. Accordingly the Tribunal determined to proceed in Dr Nankhonya’s absence.