Trinity Term

[2019] UKPC 34

Privy Council Appeal No 0022 of 2018

JUDGMENT

Schulze Allen (Appellant) v Royal College of Veterinary Surgeons (Respondent)

From the Disciplinary Committee of the Royal College of Veterinary Surgeons

before

Lord Wilson

Lord Carnwath

Lord Lloyd-Jones

JUDGMENT GIVEN ON

1 July 2019

Appellant	Respondent
Acting in Person	Ivan Hare QC
	(Instructed by Bates Wells Braithwaite LLP)

LORD WILSON:

Introduction

1.
This is an appeal by Dr Schulze Allen against a direction of the Disciplinary Committee of the Council of the Royal College of Veterinary Surgeons ("the Committee") that his name should be removed from the register of veterinary surgeons. He appeals to Her Majesty in Council under section 17(1) of the Veterinary Surgeons Act 1966 ("the Act"). Dr Schulze Allen, who is German, mainly lives in California, so the Board has acceded to the request of both parties that it should dispose of this appeal by way only of written submissions. Dr Schulze Allen is, as he was before the Committee, a litigant in person. Mr Hare QC now represents the Royal College.

2.
The Committee made its direction against Dr Schulze Allen under section 16(1)(a) and (b) of the Act, which provides as follows:

"(1) If -

(a) a person registered in the register is convicted in the United Kingdom or elsewhere of a criminal offence which, in the opinion of the disciplinary committee, renders him unfit to practise veterinary surgery; or

(b) any such person is judged by the disciplinary committee to have been guilty of disgraceful conduct in any professional respect

…

the committee may, if they think fit, direct that his name shall be removed from the register or … that his registration therein shall be suspended …"

3.
The Royal College brought four charges against Dr Schulze Allen. The first charge was that he was unfit to practise veterinary surgery because he had been "convicted … of petty theft" in California. Although it does not spell out the underlying assumption that his conviction was of a "criminal offence", this charge must have been brought under section 16(1)(a), of which it is a requirement. The second to fourth charges, brought under section 16(1)(b), were that Dr Schulze Allen had been guilty of disgraceful conduct in a professional respect because he had made three different representations to the Royal College which were dishonest or which he ought to have known were false.

4.
After a disciplinary hearing on 12 and 13 September 2017 the Committee made its Decision on Facts on 13 September, in which they found the facts underpinning all four charges to be proved. Dr Schulze Allen could not attend a further hearing on 9 January 2018 but agreed that the case should proceed in his absence. The Committee then decided, in relation to the first charge, that his conviction rendered him unfit to practise veterinary surgery. It also decided that Dr Schulze Allen's conduct identified in the second to fourth charges amounted to disgraceful conduct in a professional respect. By way of sanction in respect of all four charges, it directed the removal of his name from the register.

Background

5.
In 2010 Dr Schulze Allen first registered with the Royal College as a veterinary surgeon under section 2 of the Act. In 2011 his name was removed from the register on non-payment of his annual renewal fee, apparently after he had left the UK to go to work in California.

6.
On 25 September 2013, in the Superior Court of California, County of San Bernardino, Dr Schulze Allen pleaded guilty under a plea bargain and was convicted of "petty theft under $50 without prior". His offence was stealing a package of superglue worth $1.48. He was ordered to pay a fine of $435, plus fees. This conviction forms the basis of the first charge.

7.
By an application dated 3 December 2013 Dr Schulze Allen applied for restoration to the register of veterinary surgeons in the UK. One of the questions on the application form was: "Do you have any cautions or criminal convictions, including absolute and conditional discharges and spent convictions, or any adverse findings, including professional disciplinary proceedings against you, whether in the UK or overseas?" Dr Schulze Allen put a cross next to the word "No" beneath it. This representation is the basis of the second charge.

8.
As part of the application process, Dr Schulze Allen also swore an affidavit dated 4 December 2013 in which he stated that “at no time have I ever been convicted of any criminal offense in the UK or elsewhere”. This representation is the basis of the third charge.

9.
On 10 December 2013 Dr Schulze Allen was restored to the register.

10.
Early in 2016 Dr Schulze Allen worked for three weeks as a locum for Mr Peters, a veterinary surgeon in Horsham, West Sussex. Mr Peters took issue with Dr Schulze Allen’s claimed remuneration and with the quality of his work. In February 2016 Mr Peters telephoned the Royal College, raising concerns about Dr Schulze Allen’s performance, and informed it that his son had found a record that Dr Schulze Allen had received a conviction for petty theft.

11.
The Preliminary Investigation Committee of the Council opened an investigation into Dr Schulze Allen. On 6 June 2016 they requested his written comments on the allegation that he had failed to disclose to the Royal College convictions or adverse findings for dishonesty. He replied by email the same day criticising what he said was the Royal College’s failure correctly to interpret information provided to it in bad faith by third parties, and added: “I have no criminal record, what so ever”. This is the basis of the fourth charge.

12.
The Preliminary Investigation Committee made its own enquiries and obtained a record of Dr Schulze Allen’s conviction from the Superior Court of California, County of San Bernardino. It formed the view that on 25 September 2013 Dr Schulze Allen had there been convicted of a criminal offence. In May 2017 it referred his case to the Committee.

13.
The appeal in relation to the first, third and fourth charges revolves around whether Dr Schulze Allen was convicted of a “criminal” offence within the meaning of section 16(1)(a); whether in his affidavit sworn on 4 December 2013 he had been dishonest in denying that he had been convicted of a “criminal” offence; and whether in his email dated 6 June 2016 he was dishonest in averring that he had no “criminal” record.

14.
Dr Schulze Allen’s own position on this issue, at least in the early stages of the inquiry, was unclear. In emails to the Preliminary Investigation Committee dated 24 November 2016 and 2 and 24 May 2017 he referred to his having been convicted of a “misdemeanor”; indeed in the first email he accepted that he had been wrong to believe that he had no “criminal record or conviction”. But, by the time of the hearing on 12 September 2017, he was contending that, although he had a conviction, it was only for an “infraction”, a less serious type of offence than a “misdemeanor”. So, by that time, he was admitting that he had a conviction but not that he had been convicted of a “criminal” offence.

15.
The evidence before the Committee at the hearing included the court record which the Preliminary Investigation Committee had obtained from the court in San Bernardino. The record shows that Dr Schulze Allen was indeed the subject of a conviction. But also, under a heading which has been

cropped off but looks like the beginning of the word “Severity”, it labels the entry with the letter I, as follows:

“Charge information

…	Plea	Status	Se[verity]
PETTY THEFT UNDER $50 WITHOUT PRIOR”	G	Convict	I

It is now clear that the letter I is shorthand for “infraction”.

16.
The evidence before the Committee also included screenshots of an online consultation between Dr Schulze Allen and Mark McDonald, a criminal defence attorney in California. In the consultation Dr Schulze Allen asked “Do I have any criminal record that is, or might be considered a ‘blemish’?” Mr McDonald replied that he does not, and in a later reply added:

“Infractions are not considered ‘crime’ but rather minor transgressions that have no real significance. A traffic citation is one such example.”

Dr Schulze Allen also relied on a screenshot of a website entitled “Theft in California” which defines petty theft as

“the crime of stealing items or money that is worth less than $400.”

but also explains:

“An infraction is less serious than a misdemeanor, and does not go on your criminal record … You might receive an infraction if it is your first offense or if the value of the item is less than $50.”

17.
In their Decision on Facts the Committee did not expressly address the issue of whether Dr Schulze Allen’s infraction was a criminal conviction. But they must have decided that it was. For otherwise they would have had no power to direct the removal of his name from the register under section 16(1)(a) of the Act. Although the Decision on Facts omits the word “criminal”, saying (at para 18) that Dr Schulze Allen “gave no plausible reason … as to why this court record … did not amount to a conviction”, it is implicit in their reasoning that they found that his conviction was for a criminal offence. At para 19 they quoted from rule 23.3 of the Veterinary Surgeons and Veterinary Practitioners (Disciplinary Committee) (Procedure and Evidence) Rules Order of Council 2004 (SI 2004/1680), which identifies a manner of proving that a person has been convicted of a “criminal offence” (emphasis added). And at para 20 they in effect rejected Dr Schulze Allen’s evidence that he did not have a “criminal record” on the basis that Mr McDonald and another California attorney whom he had contacted had not been involved with the court proceedings in San Bernardino and that their comments could not be tested in evidence.

18.
Before the further hearing on 9 January 2018, Dr Schulze Allen put in further evidence. The Committee admitted the evidence as relevant to mitigation but pointed out that its Decision on Facts had already been made. The evidence included a letter to him dated 1 November 2017 from the Department of Justice, State of California, which appeared to confirm his lack of a criminal record in California:

“This is in response to your inquiry concerning the existence of a California criminal history record within the files of the Department of Justice’s Bureau of Criminal Information and Analysis. As of the date of this letter, a search of your fingerprints did not identify with any criminal history record maintained by this Bureau as provided by the California Penal Code.”

19.
Now, for this appeal, Dr Schulze Allen has adduced still further evidence, with the Royal College’s agreement. The Royal College was wise to agree. If it had resisted, the Board would have permitted him to adduce the new evidence. It would have done so pursuant to section 8 of the Judicial Committee Act 1833, which applies in relation to appeals from the Disciplinary Committee by virtue of section 17(1) of the Act and which empowers the Board to

“direct that such witnesses shall be examined or re-examined, and as to such facts as to [it] shall seem fit, notwithstanding any such witness may not have been examined, or no evidence may have been given on any such facts in a previous stage of the matter …”

20.
The most important piece of Dr Schulze Allen’s new evidence is a decision dated 16 July 2018 by Administrative Law Judge Adam L Berg, Office of Administrative Hearings, Veterinary Medical Board, Department of Consumer Affairs, State of California. He had heard Dr Schulze Allen’s appeal against the refusal by the Veterinary Medical Board in California of his application for a veterinarian licence (Case No 4602018000539). In his decision, Judge Berg stated that the question of whether in California an infraction is a crime is “open to interpretation”. He referred to section 16 of California’s Penal Code, which provides:

“Crimes and public offenses include:

1. Felonies;

2. Misdemeanors; and

3. Infractions.”

He also referred to the decision of the Californian Court of Appeal, Fourth District, in People v Sava (1987) 190 Cal App 3d 935 as “appellate authority for the proposition that infractions are not ‘crimes’”; and he concluded that Dr Schulze Allen “has at least a colorable argument that he has never been convicted of a criminal offense”.

Discussion

21.
Mr Hare accepts that whether Dr Schulze Allen has for the purposes of section 16(1)(a) of the Act been “convicted in the United Kingdom or elsewhere of a criminal offence” (emphasis added) is, in relation to a conviction in California, a question of Californian law; and he adds that questions of foreign law are questions of fact. Mr Hare also accepts, following the decision of the Board in Royal College of Veterinary Surgeons v Samuel [2014] UKPC 13, that the standard of proof to be applied is “the same standard of proof as in a criminal case”. Thus, for the first, third and fourth charges to be made out, the Committee had to be, and now the Board has to be, sure beyond a reasonable doubt that Dr Schulze Allen’s infraction for petty theft was a “criminal” offence under Californian law.

22.

Could the Committee have been sure? The Royal College argues that the evidence before the Committee on the status of Dr Schulze Allen's conviction was ambiguous. It points out that the website print-out which Dr Schulze Allen submitted as evidence refers to "the crime" of petty theft. It also points to his (subsequently retracted) admissions that he had committed a misdemeanour and had been wrong to believe that he had no criminal record, and to the fact that on any view he had suffered a conviction. But should an unambiguous statement by Californian counsel that infractions are not considered crimes in California have failed to raise a doubt in the Committee's mind?

23.
This question does not now require an answer because the decision of Judge Berg, and the decision in the Sava case, which were not before the Committee, provide further support for the view that Dr Schulze Allen's infraction was not a "criminal" offence in Californian law; or at any rate that the contrary is not clearly established.

24.
In the Sava case the court held that the legislature did not intend to classify infractions as crimes because a person charged with an infraction is not entitled to the procedural safeguards afforded to criminal defendants. The court continued at p 939:

"infractions are not crimes and the rule forbidding successive prosecutions of a defendant is not applicable when an infraction is one of the offenses involved. … Proceedings on infractions are not attended by the same constitutional safeguards as those attending felony or misdemeanor prosecutions. The limitation on an accused's right to jury trial of infractions has withstood constitutional attack upon the rationale the Legislature did not intend to classify infractions as crimes."

25.
Does the classification of infractions under "crimes and public offenses" support the view that infractions are crimes? It could equally suggest that an infraction is a "public offense". Moreover it is unlikely that both labels apply to all three grades of offence because section 17(a) of the Code goes on to distinguish between them: "A felony is a crime that is punishable with death, by imprisonment [etc] … Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions". The suggestion therefore appears to be that a felony is always a crime and that an infraction is always a public offence.

26.
The Board therefore holds on the evidence that the Royal College has not discharged the burden of proving beyond reasonable doubt that Dr Schulze Allen was convicted of a criminal offence under Californian law.

27.
The above evidence, both as it stood before the Committee and as it now stands before the Board, also disposes of Mr Hare's alternative submission that foreign law is presumed to be the same as English law. As Mr Hare accepts, this presumption only applies in the absence of evidence about the foreign law.

28.
Might Dr Schulze Allen somehow nonetheless have been convicted of a criminal offence for the purposes of section 16 of the Act, even if Californian law does not characterise his offence as criminal?

(a)
This was not argued in Mr Hare's submissions so it is unnecessary to address the question in detail.

(b)
In an exceptional case - for example, if the country of Ruritania regarded killing one's own children under the age of two as a matter for administrative sanction rather than criminal conviction - it seems unlikely that Parliament could have intended the offence to be outside the scope of section 16(1), whatever its categorisation in Ruritania. But that is not this case.

(c)
As in, for example, section 340(2)(b) of the Proceeds of Crime Act 2002, Parliament could have phrased the subsection in terms of conduct which would constitute an offence in the UK if it occurred there; this would have required the Disciplinary Committee to assess, with whatever degree of difficulty, what he or she had actually done by reference to domestic criminal law.

(d)
But Parliament chose to refer to his being convicted of a criminal offence, which focuses on how the convicting state has categorised his or her actions.

(e)
In principle, therefore, Parliament must have been willing to abide by the categorisation adopted in the foreign jurisdiction, whether similar to or different from our own.

29.
The Board therefore allows the appeal in relation to the first charge.

30.
The third and fourth charges turn on whether Dr Schulze Allen was dishonest in representing that he did not have a "criminal" conviction. One might assume that, having succeeded in persuading the Board to set aside the Committee's verdict on the first charge, Dr Schulze Allen must necessarily succeed on the third and fourth. However, the Royal College advances the submission that Dr Schulze Allen had a duty to demonstrate full openness with the Council by disclosing his infraction if he was in any doubt about its status.

31.
The proper approach to disclosure in the course of making employment-related applications has generated litigation in recent years - perhaps because many are now conducted by the use of online tick-boxes, which deprive those who complete them of the facility which a paper form provides to leave questions blank or to append an explanation.

32.
The Royal College argues that Dr Schulze Allen had a duty to make full and frank disclosure; and to err on the side of disclosure if in doubt as to whether anything had to be disclosed. It relies on the approach of the Master of the Rolls (Sir Anthony Clarke) in Afsar v Solicitors Regulation Authority [2009] EWCA Civ 842, although he was construing a disclosure question far broader than that put to Dr Schulze Allen.

33.
The appeal in the Afsar case was by a law student against cancellation of his Law Society membership. In his application for enrolment, the student had been asked to disclose "any factors which might call into question his character and suitability". The student failed to disclose that he was

charged with dangerous driving, having caused injuries to a pedestrian. Sir Anthony Clarke MR construed the application form as a whole. He noted that a separate provision required disclosure of convictions (except for motoring offences not resulting in disqualification). He inferred that the Law Society considered motoring offences that might lead to disqualification as going to character and suitability. He said at para 30:

“Any suggestion that the form is ambiguous on this point is, in my opinion, manifestly wrong and must be rejected. It should also be said that if any individual applicant is unsure as to how to answer any particular question, they should err on the side of caution. Full and frank disclosure to the [Solicitors Regulation Authority] requires it.”

34.
The Court of Appeal, however, took a different approach in R v Patel (Rupal) [2007] 1 Cr App R 12. It considered a police civilian pre-employment questionnaire which asked:

“Have you ever been convicted of an offence (including motoring but not parking offences) or is any charge or summons at present outstanding against you?”

35.
The applicant, who had previously received a conditional discharge for shoplifting, ticked “no”. She was charged with obtaining a pecuniary advantage - employment - by deception. Statute deems a conditional discharge not to be a “conviction” outside the proceedings in which the order is made (and proceedings for breach). The Crown conceded that this legislation would have allowed the applicant to answer “No” to the question “Do you have a conviction?” but not, so it averred, to the question “Have you ever been convicted …?”.

36.
In the Patel case the Court of Appeal dismissed the Crown’s appeal. Hughes LJ said at para 17:

“We entirely accept that in sensitive employment such as this the Commissioner is entitled to be interested not only in a conviction as defined by section 14 but in the antecedent offence which in this case had been committed. But the remedy for that is in the hands of those who ask questions of the applicant. There was absolutely nothing to prevent employers such as the police, who … have a legitimate interest in asking questions about criminal conduct, in asking properly framed questions. It is perfectly open to such employers to ask a question such as ‘Have you ever been found guilty of a criminal offence?’ or indeed ‘Have you ever committed a criminal offence?’ or, if necessary, ‘Have you ever appeared in court and been sentenced, including an absolute or conditional discharge, for an offence?’” (Emphasis added)

37.
There is no conflict of principle between these two authorities. The decision in each turned on the interpretation of the questionnaire at hand. Without disagreeing with the outcome of the Afsar case on its facts, the Board inclines to the view that the approach of the Court of Appeal in the Patel case is in general correct. But the line of argument of the Royal College in this respect is beside the point. The third and fourth charges did not address the general duties cast by the law upon Dr Schulze Allen. They charged him with disgraceful conduct in a professional respect and the particulars of the charges were that he had been dishonest in denying that he had been convicted of a “criminal” offence and in averring that he had no “criminal” record. Strictly speaking (for one must speak strictly in this context), those denials were not false.

38.
That leaves the second charge. When he answered “no” to the question “Do you have any … adverse findings, including professional disciplinary proceedings against you, whether in the UK or overseas?” he had been convicted of the infraction in the San Bernardino court just over two months earlier. The infraction has not been established to have been a criminal conviction. But was it an “adverse finding”?

39.
The question put to Dr Schulze Allen was not altogether happily phrased. The term “adverse findings” is vague. At first sight, it appears to be a broad catch-all term covering any findings of fact (presumably by a court or regulator) which reflect negatively on the applicant. But what would the reasonable applicant have understood the Royal College to mean by the term?

40.
The wording of the rest of the question tells him by implication that an adverse finding is not a caution or criminal conviction, since it is listed as an alternative to both. The question also gives an example of an adverse finding by referring to “professional disciplinary proceedings”. No doubt it means an adverse finding “in” professional disciplinary proceedings; but there is no reason to limit the reference to adverse findings to those made in such proceedings.

41.
In the light of the absence of legal representation of Dr Schulze Allen on this appeal (other than in drafting the initial grounds), the Board has done its best to identify some argument that his conviction for an infraction, namely for petty theft, does not amount to an “adverse finding” within the meaning of the questionnaire which he completed on 3 December 2013. But, in that quest, the Board has failed. The conviction obviously amounted to an adverse finding. His denial of the existence of any adverse findings against him was untrue; and there is no material by reference to which the Board can depart from the Committee’s conclusion that, in answering “no” to that question, he knew that his answer was untrue. In other words, his denial was dishonest.

Conclusion

42.
The Board therefore allows the appeal against the Committee’s conclusion on the first, third and fourth charges. But it dismisses the appeal against its conclusion in relation to the second charge, namely that in that regard Dr Schulze Allen had been guilty of disgraceful conduct in a professional respect. What is to be done about the sanction imposed on Dr Schulze Allen, namely of the removal of his name from the register? The Committee in part based their decision on sanction on the view that Dr Schulze Allen’s “dishonest conduct” was “repeated … on three separate occasions” and that the facts forming the basis of the third charge were “a clear attempt to deliberately misrepresent the fact that he had a conviction for a criminal offence”. But Dr Schulze Allen’s appeal is today allowed in respect of three of the four charges, including the third charge. If they had concluded that those three charges could not be upheld, the Committee might have imposed a less extreme sanction on Dr Schulze Allen than the removal of his name from the register. The Board therefore sets aside the sanction which the Committee imposed on him and remits to them the task of identifying the appropriate sanction in relation to the second charge.