



Michaelmas Term

[2016] UKSC 64

On appeal from: [2014] CSIH 61

JUDGMENT

Habib Khan (Respondent) v General Pharmaceutical Council (Appellant) (Scotland)

before

Lord Neuberger, President

Lord Wilson

Lord Reed

Lord Carnwath

Lord Hodge

JUDGMENT GIVEN ON

14 December 2016

Heard on 10 November 2016

Appellant

Tom Kark QC

Kenneth Hamer

(Instructed by General Pharmaceutical Council, Professionals
Regulation (Fitness to Practise))

Respondent

In person

(Assisted by Graham
Edwards)

First Intervener

Andrew Smith QC

Rory Holmes

(Instructed by General Medical Council Legal)

Second Intervener

Jenni Richards QC

(Instructed by Bircham Dyson Bell LLP)

Advocate to the Court

Kay Springham QC

Jillian Martin-Brown

(Directly Appointed)

LORD WILSON: (with whom Lord Neuberger, Lord Reed, Lord Carnwath and Lord Hodge agree)

A: THE ISSUE

1.

The disciplinary panels of bodies which regulate professional conduct conventionally have power to suspend a professional's right to practise for a specified period. They do so by directing that the entry of his (or her) name on the professional register be suspended for the specified period. Usually that power is accompanied by a power (but occasionally by a duty) of a panel to conduct a later review of the suspension in order to determine whether to direct its continuation beyond the specified period or to make some other direction. This appeal concerns the ambit of the inquiry which, in the case of one of these disciplinary panels, should be undertaken in the course of a review.

2.

In 2002 Mr Khan was registered as a pharmacist. He practised in Glasgow. In 2012 the General Pharmaceutical Council ("the council"), by its registrar, referred to its Fitness to Practise Committee ("the committee") an allegation that his fitness to practise as a pharmacist was impaired by reason of criminal convictions which had been recorded against him. On 27 June 2013 the committee found that the impairment of his fitness to practise was established. When it turned to identify the sanction which would properly reflect the gravity of the misconduct for which he had been convicted, the committee rejected the option of suspending his right to practise. Instead it directed that his entry in the register of pharmacists be altogether removed. On 10 July 2014 the Extra Division of the Inner House, Court of Session, allowed his appeal against the direction for removal. The court (comprising Lord Eassie, Lord Drummond Young and Lord Wheatley) quashed the direction and remitted the case to the committee for it to determine the appropriate sanction in the light of its Opinion, which was delivered by Lord Drummond Young.

3.

In the course of its Opinion the Extra Division noted that:

(a) the committee had exercised its power under article 54(2)(c) of the Pharmacy Order 2010, SI 2010 No 231, ("the Order"), which has effect in Scotland as well as in England and Wales, to direct "that the entry in the Register of the person concerned be removed";

(b) article 57(2)(a) of the Order would disable Mr Khan from applying for the restoration of his entry in the register before the expiry of five years from the date of its removal;

(c) the power under article 54(2)(d) of the Order to suspend a person's entry in the register was limited to suspension "for such period not exceeding 12 months as may be specified in the direction"; and

(d) the committee had concluded (and, so the court impliedly held, had reasonably concluded) that suspension of Mr Khan's entry for no longer than 12 months would be insufficient to mark the gravity of his misconduct.

4.

At that point, however, the Extra Division observed that, in considering and rejecting the option of suspending Mr Khan's entry in the register, the committee had made no mention of its power under article 54(3)(a)(ii) of the Order to conduct a review following a direction for suspension and thereupon to direct that "the suspension of the entry be extended for such further period not exceeding 12

months as may be specified in the direction, starting from the time when the period of suspension would otherwise expire". A review can be conducted at any time but will ordinarily take place towards the end of the period of suspension; and it is usual for a committee which imposes a period of suspension to direct that a review should take place.

5.

In relation to the power to conduct a later review, the Extra Division then proceeded to make statements of law which precipitate the council's appeal to this court. It held that:

(a)

there was "a middle way" between suspension for 12 months, which the committee had considered to be insufficient, and removal, which, as it had acknowledged, perhaps appeared harsh;

(b)

those two choices therefore represented "a false dichotomy";

(c)

in the light of the power to conduct a later review, and indeed to conduct even later reviews, it had been reasonably incidental to the original committee's power of suspension for 12 months for it "to indicate that it considered that the suspension should be extended thereafter, for a further 12 months or longer as the case might be";

(d)

although the indication of the original committee would not bind the review committee, "it must be assumed that the later Committee will act in a reasonable manner and will respect the decision and findings of the earlier Committee"; and

(e)

"the later Committee will be obliged to respect the indication and if it departs from it will be expected to give reasons for doing so".

6.

So the question raised by the appeal surrounds the ambit of a review hearing following suspension. It asks specifically: can the power of a review committee to direct suspension beyond the year of the original suspension be so exercised as to reflect a conclusion that the gravity of the registrant's misconduct demanded a longer period of suspension than that of one year which could not have been exceeded in the direction given by the original committee?

7.

To this specific question the council invites the court to answer: no.

8.

This court's conclusion will directly inform the ambit of a review following a direction of suspension only when it is conducted under article 54(3)(a) of the Order. But the regulatory systems relating to professions other than that of pharmacy make similar provisions for review following suspension. If the detail of their provisions were to disclose relevant differences from those set out in the Order, this court's judgment would not be applicable to them without adjustment. In the absence of relevant differences, however, today's judgment will carry persuasive authority in relation to them. Recognition of its potentially wider significance has prompted two interventions in the appeal to this court.

9.

The first intervener is the General Medical Council ("the GMC"). Under subsection (2)(b) of section 35D of the Medical Act 1983 the Medical Practitioners Tribunal (as it is now called), upon finding that a practitioner's fitness is impaired, may direct that his registration shall be suspended for such period not exceeding 12 months as it may specify; under subsection (4A) the tribunal may attach a direction that a review of the direction of suspension be conducted prior to its expiry; and under subsection (5) (a) the tribunal which conducts the review may direct that the period of suspension be extended, albeit not, save exceptionally, for more than 12 months at a time. The provisions for review of suspension therefore appear similar to those in the Order. The first intervener joins the council in inviting the court to answer the specific question: no.

10.

The second intervener is the Health and Care Professions Council, which regulates about 350,000 people in 16 different health and care professions, now including social workers in England. Under article 29(5)(b) of the Health and Social Work Professions Order 2001, SI 2002 No 254, its Conduct and Competence Committee, upon finding that a registrant's fitness to practise is impaired, may direct suspension of his registration for a period not exceeding one year; and under article 30(1)(a) and (5) the committee is required to review the direction prior to expiry of the suspension and can then extend it but by no more than a year at a time. Apart from its mandatory nature, the provisions for a review of suspension therefore appear similar to those in the Order. The second intervener describes its approach to the appeal as nuanced. At first it seemed almost elusive. By the end of the hearing, however, its submission became clear, namely that the Extra Division's analysis of the ambit of the power of a review committee had been essentially correct; and in this submission it was joined by the Advocate to the Court.

11.

Mr Khan appears in person albeit with the considerable assistance of Mr Edwards. He seeks to defend the Extra Division's analysis, which he himself had urged upon it; but, in case the council's appeal were to succeed, he mounts a cross-appeal to the effect that in any event the committee's direction for his removal from the register was, in the light of the nature of his misconduct to which I will now turn, disproportionate.

B: THE MISCONDUCT

12.

Mr Khan's misconduct related to the breakdown of his marriage, which has since been dissolved.

13.

On 20 July 2010 Mr Khan kicked his wife when she was lying in bed; grabbed her hair; punched her in the face; dragged her off the bed; and again struck her in the face. Mr Khan was thereupon charged with having assaulted his wife and placed on bail, conditions of which were that he should neither return to the matrimonial home nor contact her.

14.

On 8 March 2011, in breach of the conditions, he returned there and contacted her.

15.

On 13 May 2011, having pleaded guilty to the assault, Mr Khan was fined £400, ordered to compensate his wife in the sum of £500 and admonished for the breach of the conditions.

16.

On 9 March 2012 Mr Khan returned to the home; found the door locked against him; demanded entry; banged on the door; and shouted and swore at his wife so as to put her in fear.

17.

On 30 March 2012 Mr Khan's wife left their two children, aged nine and two, at home in the care of her mother and sister while she went out. He arrived with another relation. They tricked the wife's sister into opening the door, whereupon he walked in. He unhooked pictures from the wall; kicked a hole in the wall; kicked a door; kicked over a shoe rack; swore at the sister that he was going to kill her, his wife and the whole family; and, with that other relation, removed the children. The police later went to his home, arrested him, recovered the children and restored them to the care of his wife.

18.

On 8 May 2012 Mr Khan pleaded guilty to having behaved threateningly and abusively on 9 and 30 March and, on the latter occasion, to having wilfully or recklessly damaged property belonging to his wife. On 8 June 2012 he was sentenced for these offences to a community payback order, which comprised supervision for 18 months and requirements to complete 180 hours of unpaid work within six months and to attend for six months at a domestic violence programme called "Change".

C: THE COMMITTEE'S DETERMINATION

19.

Before the committee Mr Khan admitted the misconduct set out above; accepted that it had been wholly inappropriate; apologised for it; and acknowledged that the effect on public confidence of it, and of the criminal convictions referable to it, was such that his fitness to practise was impaired. The committee accepted reports that he had diligently completed the 180 hours of unpaid work and had successfully attended the "Change" programme, in which, in the course of cognitive behavioural therapy, he had learnt skills which had enabled him to communicate reasonably with his wife. The committee accepted that he had genuinely learnt the error of his past conduct; that his social worker had assessed him as at low risk of re-offending; that his misconduct had in no way affected his professional performance; that his clinical skills were not in issue; and that his patients were not at risk. It noted, however, that the period of supervision was still continuing.

20.

Under article 54(1) of the Order the committee was required first to decide for itself whether Mr Khan's fitness to practise was impaired. In this regard it recited Rule 5 of the General Pharmaceutical Council (Fitness to Practise and Disqualification etc) Rules 2010 ("the Rules"), which are scheduled to the General Pharmaceutical Council (Fitness to Practise and Disqualification etc Rules) Order of Council 2010, SI 2010 No 1615. Rule 5 required the committee to decide whether, in the light of his conduct, a registrant was fit to practise by having regard to four criteria including, at para (2)(b), whether his conduct had brought the profession of pharmacy into disrepute. The committee decided that Mr Khan's conduct had done so; that indeed it would shock the public; and that he had been right to acknowledge that it had impaired his fitness to practise because any other conclusion would undermine public confidence in the profession.

21.

The committee's determination of the impairment of Mr Khan's fitness to practise enabled it to turn, under article 54(2) of the Order, to consider the appropriate sanction. It reminded itself that the purpose was not to punish Mr Khan. It noted the council's submission that nothing less than either suspension or removal of his registration would suffice. The committee observed that:

(a)

it could not direct suspension for more than 12 months;

(b)

following a direction for removal there could be no restoration to the register within five years;

(c)

suspension for 12 months would be insufficient to mark the gravity of his conduct;

(d)

the maintenance of public confidence demanded nothing less than removal;

(e)

removal might appear harsh; and

(f)

a harsh direction might in part be a consequence of the limited choice of sanction available to it.

22.

Under article 59 of the Order a direction for removal does not take effect pending any appeal but the committee exercised its power under article 60(2) to direct that Mr Khan's entry on the register "be suspended forthwith, pending the coming into force of the direction". The direction for removal has been under appeal ever since so Mr Khan's interim suspension has also continued ever since, in other words for almost three and a half years. The period of interim suspension would not count towards the period of five years after which Mr Khan could apply for restoration to the register because the latter would begin only on the date of removal.

D: THE ALLEGED MIDDLE WAY

23.

There is, as Mr Edwards submits, a quantum leap between the original committee's power of suspension which can be for no more than one year and its power of removal which must endure for at least five years. The council suggests that the limit on the period of suspension, introduced in 2007 when the power to suspend was itself introduced, in particular reflected concern that a registrant suspended for a period longer than a year would be likely to lose his skills. It also appears that the temporal limit on the registrant's ability to apply for restoration to the register following removal, also introduced in 2007, in particular reflected concern about inappropriately early applications for restoration which were regarded as inconsistent with the imposition of the ultimate sanction of removal.

24.

The powers of the review committee following the original committee's direction for a registrant's suspension are fully set out in article 54(3)(a) of the Order. But no indication is there given about the way in which the powers should be exercised; and in that regard only limited assistance can be derived from the Rules. Rule 34(4) requires the representative of the council to inform the review committee of the background to the case and the sanction previously imposed and to direct its attention to any relevant evidence, including transcripts of previous hearings; and paras (4) and (5) permit both parties to adduce evidence "in relation to the person concerned's fitness to practise". Para (6), however, provides that, following a direction for suspension, the review committee "must receive further evidence" although the subject of it is not identified. It certainly seems that the reference to the registrant's fitness to practise relates to his fitness at the time of the review hearing.

25.

Greater assistance is, however, to be collected from the Indicative Sanctions Guidance which the Fitness to Practise Committee approved on 13 May 2011 and which was intended to explain its approach to decision-making. Although the guidance has now been replaced by other guidance, entitled "Good decision making: fitness to practise hearings and sanctions guidance" and published by the council in July 2015, it is the earlier guidance which applies to Mr Khan's case.

26.

In para 17 of the Indicative Sanctions Guidance the committee addressed reviews of suspension. It stated:

"In some cases it may be self-evident that following a short period of suspension, there will be no value in a review hearing. In most cases however, where a period of suspension is imposed the Committee will need to be reassured that the registrant is fit to resume practice either unrestricted or with conditions or further conditions.

The Committee will also need to satisfy itself that the registrant has fully appreciated the seriousness of the relevant breach(es), has not committed any further breaches of the Council's Standards of conduct, ethics and performance, has maintained his or her skills and knowledge up to date and that the public will not be placed at risk by resumption of practice or by the imposition of conditional registration."

The current guidance is in similar terms.

27.

The guidance therefore makes clear that the focus of a review is upon the current fitness of the registrant to resume practice, judged in the light of what he has, or has not, achieved since the date of the suspension. The review committee will note the particular concerns articulated by the original committee and seek to discern what steps, if any, the registrant has taken to allay them during the period of his suspension. The original committee will have found that his fitness to practise was impaired. The review committee asks: does his fitness to practise remain impaired?

28.

It is worthwhile to look across at the recent work of the three UK Law Commissions in this area. In April 2014 they published a report entitled "Regulation of Health Care Professionals, Regulation of Social Care Professionals in England", Law Com No 345, Scot Law Com No 237, NILC 18 (2014), Cm 8839, together with a draft Bill. Their work was born of public concern that professional regulation in the health care sector across the UK, and in the social care work sector in England, had grown piecemeal over more than a century and had become inconsistent, incoherent and cumbersome. Their remit was to review the rules which governed nine regulatory bodies, including the council, the GMC and the Health and Care Professions Council; and, following extensive consultation, their recommendation was to confine the regulatory functions of the nine bodies within a single legal framework, set out in the draft Bill. In January 2015 the government published a response to the report, in which it accepted most of the Commissions' recommendations and expressed a commitment to introduce legislation in due course. What is of interest for present purposes is that in para 9.123 of their report the Commissions suggest that greater consistency is appropriate in the conduct of review hearings and that, in their draft Bill, they propose the following:

"161 Review of suspension orders: disposals by fitness to practise panel

(1) ...

(2) ...

(3) If the panel determines that the registered professional's fitness to practise is no longer impaired, the panel -

(a) must revoke the suspension order ...

(4) ...

(5) If the panel determines that the registered professional's fitness to practise is impaired, the panel may dispose of the case as described in any of the following subsections ..."

So the proposal of the Commissions is that the review committee should ask whether the registrant's fitness to practise "is no longer impaired" or "is impaired". In other words it should address changes relevant to his impairment which have - or have not - occurred since the date of the original committee's direction.

29.

It is also noteworthy that in the fifth report of the Shipman Inquiry, 9 December 2004, Cm 6394, Dame Janet Smith, Chairman, when referring to reviews under section 35D(5) of the Medical Act 1983, stated at para 27.267:

"Review hearings are extremely important. They are the 'teeth' behind the sanctions other than erasure and should focus the doctor's mind on the need to undertake any necessary remediation."

30.

The Extra Division's conception is that a review committee has a role in determining the sanction appropriate to the circumstances by reference to which the original committee found that the registrant's fitness to practise was impaired; that, in particular where the original committee has directed suspension for one year, the review committee can look back at those circumstances and determine whether, although one year was the maximum period of suspension open to the original committee, its direction was insufficient to mark their gravity; that, while that determination falls to be made by the review committee, it should afford great respect to any indication by the original committee that its direction was indeed insufficient to mark their gravity; and that, if determining that the direction was insufficient, the review committee should exercise its power of extension under article 54(3)(a)(ii) of the Order.

31.

The Extra Division's conception is alien to the generally accepted conception of a review as a vehicle for monitoring the steps taken by the registrant towards securing professional rehabilitation.

32.

Indeed there is authority, unfortunately not cited to the Extra Division, which expressly holds that the conception which it favoured is misplaced. It is *Taylor v General Medical Council* [1990] 2 AC 539. Before the Judicial Committee of the Privy Council was an appeal by a medical practitioner against a direction by (as it was then called) the Professional Conduct Committee of the GMC to extend for a second time the period of one year which had been specified in its original direction for suspension. The doctor, who had previously received a suspended sentence of imprisonment for making false statements in order to enable persons to obtain passports, had been found guilty of serious professional misconduct in having irresponsibly issued prescriptions for methadone to about 70

patients. Upon directing suspension for one year, the committee had intimated the need for a later review, at which the period was extended for a year and the same intimation was given. The doctor's appeal was brought against the direction made at the second review, which was for extension for one further but final year. The submission of counsel for the GMC, set out at pp 540 and 542, was that the committee must have considered that three years was the proper period of suspension in view of the doctor's serious misconduct; that its initial direction for suspension could not have been for more than a year; and that it had not been wrong for the two years to be added at the two successive reviews.

33.

By a judgment delivered by Lord Bridge of Harwich, the committee allowed the doctor's appeal. It held at p 545:

"It can never be a proper ground for the exercise of the power to extend the period of suspension that the period originally directed was insufficient to reflect the gravity of the original offence or offences."

And it concluded at p 547:

"... the only explanation for the committee's decision ... to direct a third such period was that they regarded the original decision to direct suspension instead of erasure as having been too lenient ... the direction was wrong in principle."

34.

The decision in the Taylor case has never been questioned save now, unwittingly, by the Extra Division. Take, for example, the case of *Obukofe v General Medical Council* [\[2014\] EWHC 408 \(Admin\)](#). A medical practitioner appealed against the direction of (as it was then called) a Fitness to Practise Panel of the GMC to extend for one year the period, also of one year, for which he had originally been suspended from practice. He had received suspended sentences of imprisonment following convictions for sexual assault on two junior members of staff at the hospital where he had worked. Popplewell J dismissed his appeal. One of the grounds of appeal was that the direction for extension violated the principle of double jeopardy. The judge said:

"48. This is to misunderstand the nature and effect of a suspension which is subject to review ...

49. ... The imposition of a further sanction by way of an extension of the period of suspension depends upon an assessment of his fitness to practise at that later stage. No question of double jeopardy arises."

35.

In summary, the Extra Division was too ingenious. There was no middle way. It was wrong to remit the case to the committee for disposal on that basis. But Mr Khan had argued in the alternative that, irrespective of whether that basis for remission existed, the direction of his removal from the register was disproportionate. He now cross-appeals against the Extra Division's implicit rejection of that alternative argument.

E: THE CROSS-APPEAL

36.

An appellate court must approach a challenge to the sanction imposed by a professional disciplinary committee with diffidence. In a case such as the present, the committee's concern is for the damage already done or likely to be done to the reputation of the profession and it is best qualified to judge

the measures required to address it: *Marinovich v General Medical Council* [2002] UKPC 36, para 28. Mr Khan is, however, entitled to point out that

(a)

the exercise of appellate powers to quash a committee's direction or to substitute a different direction is somewhat less inhibited than previously: *Ghosh v General Medical Council* [2001] UKPC 29, [2001] 1 WLR 1915, para 34;

(b)

on an appeal against the sanction of removal, the question is whether it "was appropriate and necessary in the public interest or was excessive and disproportionate": the *Ghosh* case, again para 34; and

(c)

a court can more readily depart from the committee's assessment of the effect on public confidence of misconduct which does not relate to professional performance than in a case in which the misconduct relates to it: *Dad v General Dental Council* [2000] 1 WLR 1538, pp 1542-1543.

37.

Mr Khan was guilty of three incidents of domestic violence, of which the first and third were particularly serious. In the third he even involved the children of the family. His conduct betrayed a gross loss of control and his purpose was, directly and indirectly, to hurt his wife. Mitigation on his behalf in the Sheriff Court would have been hard to articulate. Inevitably the convictions attracted at first a significant fine and later a substantial community penalty. There, however, lay the punishment. The focus for the committee was different: its task, not easy, was to judge the effect of the conduct on public confidence in the profession and to identify a sanction proportionate to its judgement.

38.

Mr Khan's conduct did not relate to his professional performance. No patient had been, or was likely to be, put at risk. The committee fairly recited several further features of the case which militated against the removal of his registration, such as his genuine acknowledgement of fault and the positive reports of his response to the requirements of the community payback order, as set out in para 19 above.

39.

Rule 31(14)(a) required the committee to have regard to the Indicative Sanctions Guidance when determining sanction. It duly referred to para 14 of the guidance, entitled "Cases where removal from the Register may be appropriate", and it picked out two of the cases there described, albeit in arrestingly general terms, namely "Behaviour is fundamentally incompatible with registration" and "Public confidence in the profession demands no lesser sanction". But the committee might also usefully have referred to para 8 of the guidance, entitled "Mitigating Features - General" and, had it done so, it would have picked out

(a)

no prior disciplinary history;

(b)

genuine insight into misconduct;

(c)

open admissions at an early stage;

(d)
no actual or potential harm to patients or the public;

(e)
genuine expression of remorse to committee; and

(f)
steps taken to prevent recurrence.

40.

The committee itself acknowledged that its direction for removal might appear harsh. It was indeed harsh. It was unnecessary. It was disproportionate. The sanction proportionate to the disrepute into which Mr Khan's conduct had brought, or was likely to bring, the profession of pharmacy was suspension of his registration, which, at the time of the committee's determination, should no doubt have been for a period of a year.

F: CONCLUSION

41.

It was for the above reasons that, at the end of the hearing, Lord Neuberger, the President of the court, announced its unanimous conclusion, which was that

(a)
the council's appeal should be allowed;

(b)
the Extra Division's interlocutor should be recalled;

(c)
Mr Khan's cross-appeal should also be allowed;

(d)
instead of the committee's direction for his removal from the register, a direction for his suspension from it should be substituted;

(e)
in the light of the length of his interim suspension since the date of the committee's direction, the period of his suspension should be four months;

(f)
attached to the direction for his suspension for four months should be a direction for a review committee to conduct a review prior to its expiry; and

(g)
the review committee should be invited to have regard in particular to any report upon him by his supervisor following the expiry of his period of supervision; to any evidence relating to the risk that he has lost necessary skills since the date of the committee's determination and therefore to any efforts on his part to retain them; and, generally, to any relevant occurrence since that date.