

The sanctioning powers of regulatory bodies – when erasure is too harsh – by Kay Springham, QC

It is every professional's worst nightmare – a complaint is made and investigated by your regulatory body. What is worse is if the complaint is upheld, and a decision has to be taken on the sanction to be imposed...

Some guidance has recently been given by the Supreme Court about this, in a case involving a pharmacist. Mr Habib Khan was referred to the Fitness to Practise Committee of the General Pharmaceutical Council, following his conviction for assault (of his wife) and for having behaved threateningly and abusively (to his wife's sister and mother). The offences were committed during the breakdown of his marriage.

At the Committee hearing, Mr Khan admitted the misconduct and accepted that his fitness to practise was impaired. He had completed unpaid community work as part of his sentence, and had participated in cognitive behavioural therapy. He had learned to communicate appropriately with his ex-wife. It was accepted that he had genuinely learnt the error of his past misconduct, that his clinical skills were not in issue and that his patients were not at risk.

In spite of all of these positive factors, the Committee decided that the only appropriate order was one of erasure – as with many other regulatory bodies, this meant Mr Khan would only be able to apply to be restored to the Register after at least five years.

Mr Khan appealed the decision – but was subject to interim suspension throughout the appeal process. Initially, he had some success. The Court of Session in Edinburgh remitted the case back to the Pharmaceutical Committee, on the basis that it should have considered whether there was a 'middle way' between erasure and suspension.

The Pharmaceutical Council decided to appeal that decision to the Supreme Court. The General Medical Council and the Health and Care Professions Council intervened because of the possible significance to their decision-making processes.

Now, in its decision, the Supreme Court has disagreed with the idea that there was some 'middle way' between erasure and suspension. Delivering the unanimous decision of the court, Lord Wilson indicated that a review committee did not have the power to direct suspension beyond the year of the original suspension in order to reflect the gravity of the misconduct. The focus of a review was upon whether Mr Khan's fitness to practise remained impaired, judged in the light of what he had or had not achieved since the date of the suspension.

However, the Supreme Court also decided that the sanction imposed on Mr Khan was too harsh; it was disproportionate and unnecessary. The sanction proportionate to the disrepute into which his conduct had brought the pharmacy profession was suspension for 12 months. In view of the length of time during which Mr Khan had already been suspended (by then 3½ years had passed) the Supreme Court substituted suspension for four months from the date of its decision.

It is always difficult to assess what the appropriate sanction is. The Indicative Sanctions Guidance which most regulatory bodies have can be of some help. The Supreme Court pointed out that the Pharmaceutical Committee had not referred to a number of 'mitigating features' listed in its own Guidance, which would have applied to Mr Khan, including genuine insight into his misconduct; no

actual or potential harm to patients or the public; his genuine expression of remorse to the committee; and steps taken to prevent recurrence. Rather it had focussed on two types of cases where removal may be appropriate, namely where 'Behaviour is fundamentally incompatible with registration' and 'Public confidence in the profession demands no lesser sanction'. These were described by the Court as being 'in arrestingly general terms'. They could also be described as self-fulfilling or circuitous.

The message from this case is two-fold:-

- (1) pay close attention to the Indicative Sanctions Guidance when considering the appropriate sanction, and
- (2) regulatory bodies must give careful consideration to whether it is necessary and proportionate to make the 'quantum leap' from 12 months' suspension to erasure.

The Supreme Court's decision can be found here: <https://www.supremecourt.uk/cases/docs/uksc-2014-0214-judgment.pdf>

Three members of the Faculty of Advocates appeared in the Supreme Court. Kay Springham, QC was appointed as advocate to the Court along with Jillian Martin-Brown. Andrew Smith, QC appeared for the General Medical Council.