



Neutral Citation Number: [2017] EWCA Civ 78

Case No: C1/2015/2746

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MR JUSTICE WALKER
CO/4607/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/02/2017

Before:

SIR TERENCE ETHELTON, MR
LADY JUSTICE RAFFERTY
and
LADY JUSTICE SHARP

Between:

DR NANDINI BANERJEE **Appellant**
- and -
THE GENERAL MEDICAL COUNCIL **Respondent**

Mary O'Rourke QC (instructed by Weightmans) for the Appellant
Catherine Callaghan (instructed by GMC Legal) for the Respondent

Hearing date: 14th February 2017

Approved Judgment

Sir Terence Etherton MR:

1. This is an appeal from the order of Mr Justice Walker of 11 August 2015 dismissing the application of the appellant, Dr Nandini Banerjee, for judicial review of the refusal of the Fitness to Practise Panel (“the Panel”) of the respondent (“the GMC”) to restore her to the medical register.
2. This is a short form judgment: *Deutsche Trustee Company Ltd v Cheyne Capital Management (UK) LLP* [2016] EWCA Civ 743, *BS (Congo) SSHD* [2017] EWCA Civ 53.
3. The facts, and the issues in the court below, are fully set out in the lengthy and detailed judgment of the Judge: [2015] EWHC 2263.
4. I would dismiss this appeal.
5. There is no issue between the parties as to the applicable legal principles for determining whether a decision should be quashed because the trial or hearing was not fair. Both parties accept what was said on the issue by the Privy Council in *Demarco Almeida v Opportunity Equity Partners Ltd* [2006] UKPC 448, particularly in relation to excessive or otherwise inappropriate interventions by the judge. No allegation of bias was pursued before us.
6. I would reject the overarching submissions of Ms Mary O’Rourke QC, for Dr Banerjee, that (1) the hearing before the Panel was unfair in view of the number, nature, tone and content of questions asked by the Panel members, and (2) the Judge wrongly failed to step back from his detailed analysis of particular interventions and to consider the overall fairness of the hearing in the light of the witness statement evidence of Dr Banerjee and her solicitor James Rowley as to the conduct of the hearing.
7. So far as concerns the Judge’s detailed analysis of specific interventions in Annex 1 to his judgment, the Judge was both entitled and right to examine them, not least because paragraph 7 of Ms O’Rourke’s skeleton argument before the Judge stated that Dr Banerjee relied specifically on the passages and questions identified there.
8. So far as concerns overall fairness, at the heart of Dr Banerjee’s case lies the complaint that the Panel members wrongly persisted in repeatedly questioning Dr Banerjee in a hostile and forceful way about the circumstances in which she made her application for voluntary erasure. Dr Banerjee’s case is that her probity in making that application, supported by her repeated assurances that she no longer wished to pursue a career in medicine, while at around the same time she was apparently seeking employment as a doctor overseas and applying for registration as a doctor in the Maldives, was an issue which had been decided in her favour on the first restoration application.
9. It is said on Dr Banerjee’s behalf that that fact, combined with her understanding that the GMC did not intend to revisit the probity of her conduct in relation to the voluntary erasure application, and the number, nature, tone and content of the questions she was in fact asked about it, understandably unsettled her and led to her answering some of the questions in a way that the Panel said was “evasive” in its

determination. Her impression that the Panel was determined to find dishonesty on her part was, it is said, reinforced by questions about her command of English (even though she was born and brought up in England), her financial position in 2009-2012, and her pre and post undergraduate studies.

10. In the unusual and, it must be said, regrettable circumstances in which the hearing was conducted (which I describe below), the questioning by the Panel about the application for, and granting of, voluntary erasure was entirely understandable and appropriate. The issue of Dr Banerjee's probity in giving repeated assurances, in support of her application for voluntary erasure, that she did not intend to practise was directly raised in her own examination in chief. The Panel was not told about the representation of the GMC's solicitor having the conduct of Dr Banerjee's case to Mr Rowley that the topic was not one that was to be re-visited. Dr Banerjee was not cross-examined about the assurances given by her on the voluntary erasure application. The Panel did not have any evidential documents at the beginning of the hearing, and subsequently, until a defence bundle was handed in, only a very limited number of documents were provided. That was a deficiency of which the Panel members complained. It was not until nearly the end of her evidence that Dr Banerjee questioned why she was being asked about a subject that had been addressed on the first restoration application and Mr Rowley intervened on her behalf. Before then, Mr Somerville had asked more than once whether anyone had any objection to the questions he was asking about the voluntary erasure but no one objected to his questions or the tone or manner in which they were being asked.
11. The Panel was required to reach a decision which fulfilled the main object of the GMC to protect, promote and maintain the health and safety of the public: Medical Act 1983 s.1(1A). It is common ground that the Panel was not precluded from investigating the matters which had been considered on the first restoration application. Indeed, it would have been entitled to do so whatever the parties and their representatives had agreed between themselves about the conduct of the hearing. Rule 24 of the General Medical Council (Fitness to Practise) Rules Order of Council 2004/2608 requires the Presenting Officer at a restoration hearing to address the Fitness to Practise Panel as to the background to the case and the circumstances in which the applicant's name was erased from the register.
12. Dr Banerjee's answers to the questions in her examination in chief about the voluntary erasure raised questions which it was both understandable and legitimate for the Panel to pursue in the public interest. That was not least because, on the one hand, the effect of the voluntary erasure had been to obviate formal charges of professional misconduct before a fitness to practice panel and the sanction that would have followed, and, on the other hand, if the Panel decided to restore Dr Banerjee to the register, it would not be permitted to attach conditions to the restoration.
13. Furthermore, the decision of the panel hearing the first restoration application was non-committal on the issue of the assurances Dr Banerjee had given, in support of her voluntary erasure application, about not intending to practise. The panel merely said that there was insufficient evidence to suggest lack of probity in relation to such assurances and that it had "drawn no inference, positive or negative" from the issue of the assurance about non-practise.

14. The fact that the Panel's questions about the voluntary erasure application may have been asked in a direct, even robust, way does not undermine the fairness of the proceedings. Dr Banerjee may have perceived the questioning to be hostile, no doubt at least in part because she could not understand why the Panel was pursuing the issue, but the Panel members were entitled to ask the questions they did and to seek to obtain clear and consistent answers from Dr Banerjee against the background of their lack of documents and the absence of any cross-examination on the issue by the GMC's counsel.
15. Furthermore, as Ms Catherine Callaghan, counsel for the GMC observed, Dr Banerjee had been able to put her case, without interruption, before she was questioned by the Panel and, after the Panel members had finished their questioning, Dr Banerjee's representative, Mr Rowley, had the opportunity to re-examine her to enable her to present a clearer and more coherent account of the matters on which she had been questioned by the Panel. He did ask her a number of questions but her answers were not significantly different from those she had previously given. There was no application on her behalf for an adjournment to obtain further evidence or instructions about any matters which had not been anticipated. Mr Rowley also had (and took) the opportunity in his closing submissions to address the impact on Dr Banerjee of the questioning by the Panel and her demeanour in answering the Panel members' questions.
16. I can quite understand why Dr Banerjee was taken by surprise by the course which the hearing took and why she may have felt discomfited and unsettled by it. That was the consequence, however, of the issues raised, and answers she gave, in her own examination in chief about the erasure application and her assurances given to the GMC at the time; the fact that the Panel was not informed, until almost the end of her evidence, about the understanding of Dr Banerjee and Mr Rowley as to the restricted scope of the Panel's enquiry in respect of matters decided on the first restoration application; the fact that there was no objection until that stage about the questions that were being asked by the Panel members about the erasure application; the absence of any documents before the Panel at the beginning of the hearing even though reference was being made to documents; and the questions of the Panel members straying into areas, the relevance of which was not immediately apparent, such as her English language skills, her financial position in past years, and her pre and post undergraduate studies (save insofar as they addressed specifically the contents of her ethics studies, which was an issue relevant to standards of conduct).
17. The combination of those unfortunate factors explains why the hearing followed the course it did, leading to Dr Banerjee's state of mind and Mr Rowley's perceptions of the hearing which they described in their respective witness statements, but it does not undermine the legitimacy and appropriateness of the Panel's questioning about the erasure application in the circumstances. Insofar as the Panel asked questions about the issues I have described as not apparently relevant, the exchanges with Dr Banerjee on them were extremely brief and do not undermine the fairness of the hearing taken as a whole.
18. Finally, and for completeness, I would add that there can be no basis for challenging the Panel's reliance, in its decision to reject the application for restoration, on the seriousness of Dr Banerjee's original dishonesty and the Panel's view that her evidence that her colleagues had fabricated her lack of capabilities and had conspired

against her demonstrated a continuing lack of insight and understanding of the serious nature of her behaviour. The Panel said that, consequently, met with similar criticisms, there was a risk of repetition.

19. In those circumstances, even if I had been of the view that the number, nature, tone and content of the questions asked by the Panel had rendered the proceedings unfair insofar as they led the Panel to consider that “[Dr Banerjee] [was] evasive about how [she] had appeared to have decided to seek VE while almost simultaneously seeking registration and job opportunities in other jurisdictions”, I consider that the Panel would inevitably have refused the application for restoration even if the Panel had not found that she had been evasive in her answers. There is, however, no respondent’s notice that the Judge’s order should be upheld on that additional ground.
20. For all those reasons, I would dismiss this appeal.

Lady Justice Rafferty:

21. I agree.

Lady Justice Sharp:

22. I also agree.