

Habib Khan (Respondent) v. General Pharmaceutical Council (Appellant) (Scotland): [2016] UKSC 64

By Kenneth Hamer

On 14 December 2016, the Supreme Court gave judgement in this important case reversing the decision of the Scottish Court of Session and allowing the appeal of the General Pharmaceutical Council.

What is the significance of this case for practitioners?

1. The case focused upon the limitations of the sanction and powers available to the Fitness to Practise Committee of the General Pharmaceutical Council under the Pharmacy Order 2010, and similar legislation of other health care regulators, in relation to the significant difference between removal or erasure from the register and suspension which is limited to a maximum period of 12 months. The appeal to the Supreme Court was from the Inner House of the Court of Session, which had held that there was an intermediate sanction or middle way between 12 months' suspension and the period of 5 years which must elapse before an application for restoration to the register; and that a principal hearing committee (i.e. the original committee dealing with the case) could direct 12 months' suspension with a review at which it would be appropriate for the later review committee to extend the suspension by a further 12 months, and possibly further periods of 12 months thereafter, and that the review committee would

be expected to follow such guidance or recommendation expressed by the original committee or give a good reason why they did not do so.

What was the background to the case?

2. In March 2011 and May 2012, Mr Khan, a registered pharmacist, received convictions at Glasgow Sheriff Court of assault to cause injury, behaving in a threatening abusive manner, and wilfully or recklessly damaging property belonging to another. He was sentenced to pay a fine and costs, and to undertake 180 hours of unpaid work with a supervision order for 18 months. The offences were all of a domestic nature and involved assaults upon his wife and criminal damage to her property.

On 27 June 2013, Mr Khan appeared before the Council's Fitness to Practise Committee. In directing that his name be removed from the register of pharmacists the committee said:

“The Committee has considered whether a period of suspension would be appropriate and sufficient to restore or maintain public confidence in the profession. The Committee considers, however, that repeated domestic violence is a crime striking at the core of professional health care. Pharmacists, in common with other health care professionals, have to be understanding, sympathetic for all patients, men, women and children, and must be publicly and privately trustworthy. Domestic violence is unfortunately all too common, in all walks of life. [Mr Khan's] offending has not been shown to have affected his professional practice in any way. However, the public has higher expectations of

members of the health care professions as to the standards of conduct they must show. The Committee considers the public will be shocked by [Mr Khan’s] behaviour and will expect it to be condemned by the profession in the strongest terms.”

The committee noted the limit of its power of sanction was a period of 12 months and considered that suspension for that period would be insufficient to mark the degree of seriousness of Mr Khan’s conduct. The committee said that it considered Mr Khan’s conduct to be fundamentally incompatible with continued registration as a pharmacist, and that public confidence in the profession demands no lesser sanction than removal from the register. The committee concluded that no sanction short of removal from the register would be proportionate or sufficient to protect the public interest, including public confidence in the profession.

What issues arose for the Supreme Court’s consideration?

3. The principal issue for determination by the Supreme Court was whether an intermediate sanction was available to the original committee along the lines envisaged by the Inner House. That court had held that the original committee’s power to suspend a registrant’s registration for 12 months with a recommendation that a review committee extend the period of suspension for a further period or periods was “reasonably incidental” to the original committee’s powers, adding that:

“If an indication is given by the earlier Committee that the suspension should be extended beyond the initial 12 months, for say an additional

12 or 24 months, that will not bind the later Committee, but 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. In our view this provides an intermediate sanction but at the same time respects the freedom of the later Committee to deal with changing circumstances, if that is apparent”.

The issues before the Supreme Court were simply:

- i) what are the limits of the sanction available to the original committee in relation to suspension? and
- ii) can the original committee give a direction/advice to the review committee as to what further sanction to impose?

What did the Supreme Court decide, and why?

4. The Supreme Court held that there was no middle way and that the approach of the Court of Session was inconsistent with the decision of the Privy Council in *Taylor v. General Medical Council* [1990] 2 AC 539, which had not been cited to it. In that case the Judicial Committee held that under earlier but similar legislation under the Medical Act 1983 it would be an improper exercise of the powers of the Professional Conduct Committee of the General Medical Council (as it was then called) to extend a period of suspension merely because they regarded the original period of suspension as having been too lenient. The opinion of the Court of Session was also inconsistent with the Sanctions Guidance provided to the committee of the General

Pharmaceutical Council and the guidance provided by a number of other regulatory bodies for original and review committees.

The Supreme Court held that the focus at any review must be upon the issue of current impairment of the registrant, and that the purpose of ordering a review and providing guidance at the original committee stage is not primarily to provide guidance to the review committee as to sanction at the review stage but to provide guidance to the registrant as to what the review committee will be looking for when then assessing the question of his or her current impairment. In giving the judgment of the Supreme Court, Lord Wilson said that 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 at the time of the hearing. The review committee asks: does his fitness to practise *remain* impaired?

The Supreme Court said it was also worthwhile to note that the rules limiting suspension initially to 12 months and requiring the review committee to focus upon current impairment is reflected in the April 2014 report of the Law Commissioners into the health care sector across the UK entitled *Regulation of Health Care Professionals: Regulation of Social Care Professionals in England* and draft Bill. Under clause 161 of the draft Bill if the review committee determines that the registered professional's fitness to practise is no longer impaired, the review committee must revoke any suspension order made by the original committee.

Finally the Supreme Court allowed a cross-appeal by Mr Khan and replaced the order for removal with a suspension order of four months. Mr Khan's registration had been suspended by the original committee as an interim measure pending any appeal, and in allowing the cross-appeal against sanction the Supreme Court appear to have taken into account that he had already been the subject of an interim suspension order for over three years leading up to the appeal.

What should lawyers take away from the judgement?

5. First and foremost, ensure that you have checked for and cited relevant authorities when you appeal. Had *Taylor* been cited it is unlikely the Inner House would have made the error it did.

Secondly, remember that now all Fitness to Practise Committees whether at the original hearing or at the review hearing must focus on the issue of current impairment taking fully into account the background facts of the case which brought the registrant before the committee in the first place.

Tom Kark QC, QEB Hollis Whiteman Chambers

Kenneth Hamer, Henderson Chambers

who appeared for the successful Appellant