

First-tier Tribunal Care Standards

The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008

**NCN: [2020] UKFTT 482 (HESC)
[2020] 4080.ISO-W (VKINLY)**

Heard by Video Link on 16 & 17 November 2020

BEFORE

**Mr H Khan (Tribunal Judge)
Mrs J Cross (Specialist Member)
Mrs D Rabbetts (Specialist Member)**

BETWEEN:

Oscar Matsungu

Appellant

-v-

Social Care Wales

Respondent

DECISION

The Appeal

1. Mr Oscar Matsungu (“the Appellant”) appeals, pursuant to Section 145 of the Regulation and Inspection of Social Care (Wales) Act 2016 (“the Act”), to the Tribunal against the decision of Social Care Wales (“the Respondent”) dated 29 May 2020 (“the Decision”) imposing an interim suspension order for a period of 18 months.

The Hearing

2. The hearing took place on 16 & 17 November 2020. This was a remote hearing which has not been objected to by the parties. The form of remote hearing was by video. A face to face hearing was not held because it was not practicable, no-one requested the same and we considered that all issues could be determined in a remote hearing. The documents that we were referred to are in the electronic hearing bundle provided for the hearing along with any evidence admitted and referred to below.

3. There were some technical difficulties in accessing the video hearing by Mr Miles and Mr Hanson at the beginning of the hearing. Mr Miles confirmed that he would be content to participate by telephone although he would try and resolve his difficulties in accessing by video during any breaks. Mr Hanson had some difficulties on the morning of day one of the hearing, but these were resolved by the time he gave evidence. Mr Miles confirmed that he was content to proceed with the preliminary issues in the absence of Mr Hanson.
4. Mr Miles was unable to resolve the technical issues which prevented him from dialling in by video link and conducted the hearing by telephone. Mr Miles confirmed that he was content to proceed in this way rather than delay the hearing and we informed Mr Miles of any significant changes on the screen such as any party dropping out and invited him to inform us if there were any difficulties that he experienced.

Attendance

5. The Appellant was represented by Mr Graham Gilbert, Counsel, The Appellant attended the hearing. Mr John Oakes, Solicitor, also attended the hearing on the first day.
6. The Respondent was represented by Mr Graham Miles, Solicitor. The Respondent's sole witness was Mr John Hanson, Fitness to Practice Lead, Social Care Wales.

Preliminary Issues

Late Evidence/Application to Exclude Evidence

7. The Tribunal was asked to admit late evidence and exclude certain evidence by the Appellant.
8. The evidence that was sought to be admitted consisted of character evidence, Office and Surgery-New Business Schedule in relation to a NIG policy starting from 1 November 2019 and expiring on 6 November 2020, and an End of Room/Space Rental agreement dated 20 May 2020.
9. Mr Miles submitted that no evidence was exchanged by the Appellant pursuant to Direction 1 of the order dated 5 August 2020 and the Respondent had been provided with copies of the evidence referred to above at 9:30 AM on the first day of the hearing (16 November 2020). Mr Miles accepted, in principle that character evidence was likely to be relevant to the Tribunal's assessment and that the late submission of purely character evidence was unlikely to be prejudicial to the Respondent. The Respondent sought an opportunity to view the late evidence prior to confirming its position.

10. The Appellant also made an application to admit all of the footage and recordings relating to the BBC X-ray television programme (“the complete footage”) but to exclude the broadcast program.
11. The Respondent’s position was that it was important for the Tribunal to have the opportunity to view the complete footage. However, the Respondent submitted that the admission of the complete footage should be on the basis that the Tribunal would also view the broadcast program.
12. In considering any late evidence, the Tribunal applied rule 15 and took into account the overriding objective as set out in rule 2 of the Tribunal Procedure (First Tier Tribunal) (Health Education and Social Care Chamber) Rules 2008.
13. We considered that prior to taking any decision on any of the late evidence, we needed to consider the documents and view the broadcast footage. The links which had been provided to the broadcast program in the electronic bundles did not work. We also considered it important for the Respondent to have time to consider the additional evidence such as the character/documentary evidence which was served on both the Tribunal and the Respondent on the morning of the first day of the hearing and then to invite submissions.
14. Both Mr Miles and Mr Gilbert agreed that it would be sensible for the Tribunal to view the complete footage and the broadcast programme prior to taking a decision. There were two camera angles of the same complete footage. It was agreed that the Tribunal would view one camera angle of the complete footage and around the first 10 minutes of the broadcast program which involved the Appellant. The Tribunal would also listen to the telephone conversation which took place between the researchers from the BBC and the Appellant.
15. We adjourned in order to be provided with links to the full footage and the broadcast program. We viewed the complete and broadcast footage and following that invited submissions on the late evidence. We also have before us written submissions on those issues which were set out in the skeleton argument. Our decisions on the preliminary issues are set out below along with our reasons.

Character Evidence

16. We concluded that we would admit the late character evidence on the basis that it was relevant to the issues the Tribunal had to determine and that the late submission of purely character evidence, insurance and property related information was unlikely to be prejudicial to the Respondent. We noted the Appellants representative’s apology with regards to why it was late and which appeared to relate to confusion as to whether or not it was sent to the Respondent earlier in the proceedings.

Complete Footage

17. We admitted the complete footage. We considered that it was important to admit such evidence in order to make a decision based on the fullest possible amount of evidence available to us. There were issues raised about the context in which the broadcast program was presented and about whether or not this created an inaccurate picture of the Appellant and the manner in which he operated the clinic.

Broadcast Footage

18. We concluded that we would not exclude the broadcast program.
19. We reminded ourselves that the role of the Tribunal was to assess risk to the public and/or the public interest based on information presented and not to make findings of fact.
20. Our reasons for doing so were that the Tribunal had the complete footage and the parties were better placed to make submissions about the content of the broadcast program by reference to complete footage, where necessary.
21. The Appellant's position was that it was clear from viewing it that the context of the complete footage was edited in order to create an intentionally inaccurate picture of the Appellant and the manner in which he operated the clinic. It was submitted that this impression was capable of misleading the Tribunal and, as a result, gave rise to significant unfairness against the Appellant. We considered that viewing both the complete footage and the broadcast program would enable us to have detailed understanding of whether this was actually the case.
22. We considered, that taking into account all the circumstances of this case and the evidence before us, that fairness could be achieved by evaluating the evidence presented, inviting and having regard to any submissions presented as to the relevant weight to be attached to such evidence.

The Appellant

23. The Appellant registered with the Respondent as a Qualified Social Worker on 18 June 2005. Aside from his registered role, the Appellant was the proprietor of Wales Ozone Therapy and Wellness Centre ('the clinic').
24. He most recently worked in a registered capacity as a Locum for the Vale of Glamorgan County Council as an Independent Reviewing Officer. In this capacity the Appellant was responsible for ensuring that Care Plans for children in care were legally compliant and had been

devised in the child's best interest. He is presently unemployed although is seeking employment in England.

The Respondent

25. The Respondent is the regulator for the social care profession in Wales.

The agreed list of issues

26. The issues to be determined are reflected in the Appellant's grounds of appeal, namely:

- a) Whether an interim order should have been imposed.
- b) If some form of interim order is required, whether an interim conditional registration order should have been imposed rather than an interim suspension order. -
- c) If an interim suspension order is required, whether an order for 18 months was appropriate

Events leading up to the decision imposing an interim suspension

27. On the 7 April 2020, BBC Wales broadcast its consumer affairs television programme "X-Ray", which reported that the clinic was advertising alternative cancer therapy by making use of ozone treatments.

28. Two undercover BBC researchers attended at the clinic, using covert video recording equipment. One researcher posed as an individual with bowel cancer. The other posed as her daughter.

29. The Appellant was filmed recommending a course of ten ozone therapy sessions at a cost of £650.00. He claimed that ozone could be directed into the body through intimate parts of the body. He said on the recording:

'The tumour, cancer cells...ozone, oxygen...it interrupts the metabolism. It interrupts the growth. It interrupts the livelihood. It also destroys their structure.'

30. The Appellant also claimed that a machine used by the clinic could detect and distinguish between different types of cancer. He said, of the machine:

'It is giving you the electricity that is commensurate with cancer. So the machine will be zapping you. Zapping your body with enough electricity to deal with the cancerous cells.'

31. The Appellant also told the undercover reporters:

'I am trying to avoid advertising...I had a rollicking a year ago.'

Advertising Standards, Blah, Blah, Blah.'

32. The undercover footage was reviewed by a bowel cancer expert based at the University Hospital of Wales in Cardiff who expressed the opinion that the treatment proposed was '*dangerous beyond belief*' and of '*no benefit*'.

33. On 7 April 2020, The Respondent received an anonymous complaint by email about the Appellant. The complaint stated;

'He was on the X-ray programme on BBC1 at 3.30pm and is linked to offering bogus therapy for bowel cancer. He is also an IRO Social worker.'

34. On 29 May 2020, The Appellant was made the subject of an interim suspension order for a period of 18 months by an Interim Orders Panel ('the panel'). As at that date, the Appellant was not employed in a role for which his registration was required, but he had recently worked as a locum social worker for Vale of Glamorgan County Council in the role of Independent Reviewing Officer.

The Respondent's Case

35. The Respondent has prepared and published a Code of Professional Practice for Social Care ('the Code') under section 112(1) of the Act, the relevant version of which applied with effect from 1 July 2015.

36. The Respondent submits that the decision to impose an Interim Suspension Order for 18 months was necessary for the protection of the public (including service users) and otherwise in the public interest.

The Appellant's case

37. The Appellant appeals on the grounds that the panel erred in its decisions as to (a) the need for an interim order, (b) the form or the interim order, and/or (c) the length of the interim order.

38. The Appellant was seeking in the first instance revocation of the Interim Suspension Order; or secondly substitution for an Interim Conditions Order; or finally a reduction in the length of the Interim Suspension Order.

Legal Framework

39. There was no dispute as to the applicable law as set out in the Respondent's submissions prepared by its legal representatives. We have adopted the legal framework as set out in the Respondent's submissions.

40. The Respondent is the regulator for the social care profession in Wales. Under section 80 of the Regulation and Inspection of Social Care (Wales) Act 2016 ("the Act"). The Respondent's functions include keeping a register of social workers and other social care workers.
41. Under section 68(1) of the Act, the Respondent's main objective in carrying out its functions is to protect, promote and maintain the safety and well-being of the public in Wales.
42. Under section 112(1) of the Act, the Respondent is required to prepare and publish a code of practice setting standards of conduct and practice expected of social care workers.
43. Under section 112(5) of the Act, where a registered person is alleged to have failed to comply with any standard contained in a code of practice that failure –
- (a) is not, of itself, to be taken to constitute deficient performance as a social care worker or serious misconduct, but
 - (b) may be taken into account in proceedings under the Act which relate to the person's fitness to practise.
44. The Respondent has prepared and published a Code of Professional Practice for Social Care ('the Code') under section 112(1) of the Act, the relevant version of which applied with effect from 1 July 2015.
45. The Respondent has also prepared and published practice guidance for social workers: *The Social Worker*. This practice guidance builds on the Code and is aimed at describing what is expected of social workers and supporting social workers to deliver a good service.
46. Under section 68(2) of the Act, in pursuing that objective, the Respondent is required to exercise its functions with a view to promoting and maintaining –
- (a) high standards in the provision of care and support services,
 - (b) high standards of conduct and practice among social care workers,
 - (c) high standards in the training of social care workers, and
 - (d) public confidence in social care workers.
47. Sections 143 to 149 of the Act contain provisions relating to the imposition of an interim order by an Interim Orders Panel in relation to a registered person.
48. Under section 144(5) of the Act, an Interim Orders Panel may make an interim order only if it is satisfied that the order –
- (a) is necessary for the protection of the public,
 - (b) is otherwise in the public interest, or
 - (c) is in the interests of the registered person.

49. Under section 144(4) there are two types of interim order, namely:
- (a) an interim suspension order, which is an order suspending the registered person's registration;
 - (b) an interim conditional registration order, which is an order imposing conditions on the registered person's registration.
50. Under section 144(5), when an interim order is imposed it takes effect immediately and will have effect for the period specified by the Interim Orders Panel, which may not be for more than 18 months.
51. The powers of the Tribunal on appeal are set out in s145 of the Act.

145 Appeals against interim orders

- (1) Where a panel has made an interim order under section 144 in respect of a registered person, that person may appeal against the order to the tribunal.
 - (2) An appeal must be made before the end of the period of 28 days beginning with the day on which notice of the decision is given under section 144(7).
 - (3) But the tribunal may allow an appeal to be made to it after the end of the period mentioned in subsection (2) if it is satisfied that there is a good reason for the failure to appeal before the end of that period (and for any delay in applying for permission to appeal out of time).
 - (4) On an appeal, the tribunal may—
 - (a) revoke the interim order,
 - (b) in the case of an interim conditional registration order, revoke or vary any condition,
 - (c) replace an interim suspension order with an interim conditional registration order,
 - (d) replace an interim conditional registration order with an interim suspension order,
 - (e) vary the period for which the interim order is to have effect,
 - (f) remit the case to SCW for it to dispose of in accordance with the directions of the tribunal, or
 - (g) make no change to the interim order.
52. Under Section 146 of the Act, regardless of whether there is an appeal under Section 145, an interim order must be reviewed by an Interim Orders Panel within six months of the date on which the interim order was imposed. If, following a review under section 146, an interim order remains in place, it must be further reviewed within six months of the date of the review.
53. The Tribunal makes its decision on the basis of all the evidence available to it at the date of the hearing and is not restricted to matters

available to the Interim Orders Panel when the decision was taken.

Evidence

54. We took into account all the evidence that was presented in the hearing bundle and at the hearing.
55. Mr Hanson explained that there were a number of investigations which he was seeking to complete. The first related to obtaining a statement from Professor Torkington who had confirmed that he would be willing to cooperate and provide a statement in order to assist investigation. Initial enquiries had been made before the pandemic in May and contact was made with Professor Torkington on 25 September 2020. A full transcript of the complete footage had been made and was presently being quality assured by Mr Hanson. He was three quarters of the way through it and once it had been completed, he would be sending it to Professor Torkington and taking a statement.
56. Mr Hanson also confirmed that he was making enquiries with the Advertising Standards Authority. These enquiries focused around the nature of a previous investigation. They had confirmed to him that there had been a complaint from a member of the public in 2018 with regards to issues around advertising. The Advertising Standards Authority had asked him to provide statutory authority in order for them to disclose information.
57. Mr Hanson was also investigating some articles which had been published in lifestyle magazines in South Wales. These were advertorials and involved interviews that the Appellant had given in which he allegedly made claims that Ozone Therapy could kill cancer cells.
58. Once those investigations had been completed, the evidence bundles would be sent to the Appellant. He would have 28 days to respond and once a response had been received, the matter would be listed for a prehearing review. A final hearing would be listed 42 days after the prehearing review. The Regulator was currently listing final hearings in February 2021 due to the pandemic.
59. The Appellant explained that he had arrived from Zimbabwe in 2002. He had been registered as a Social worker with the Respondent since 2005.
60. He did not deny that the individual on the BBC x-ray program was him. However, he considered that the BBC piece had been edited and omitted important parts of his dealings with undercover persons.
61. The Appellant explained that the edited footage does not show the multiple times that he advised the people attending the clinic to discuss ozone therapy with their GP and/or Oncologist. Furthermore, the

Appellant stated that no mention in the piece was made that prior to the appointment for them to come and look at the machine in the clinic, he had on a previous call reiterated that they should seek some medical advice about the therapy before completing any sessions.

62. The clinic had seen about 10 people in the 18 months that it was open. He had paid for full insurance, including public liability. The clinic was not financially viable and he would often subsidise the running cost from his own pocket.
63. In his witness statement, the Appellant states that he “genuinely believes in the efficacy of ozone therapy as a complimentary therapy to aid mainstream medicine”. He had himself been using it for some 10 years.
64. He denied being an individual who preyed on the vulnerable. He had since closed the clinic and sold the equipment.
65. The Appellant accepted that he should not have been providing any medical advice. He did remind those who attended the clinic that they should speak to their GP/oncologist but accepted that he should not have given any medical advice. He was not medically qualified.
66. He had kept his work as a social worker separate from his work with the clinic. He had no input or involvement with anything medical in his professional life except on an administrative level by checking if a particular child, for example, is registered with a doctor as part of the Care Plan. He had never recommended ozone therapy to anybody connected with his professional life. The clinic was now closed and he had nothing to do with ozone therapy.

The Tribunal’s conclusions with reasons

67. We took into account all the evidence that was included in the hearing bundle and presented at the hearing. We also took into account the caselaw that we were referred to.
68. The powers of the Tribunal when considering an interim suspension order is that it stands in the shoes of the regulator and the question for the Tribunal is whether at the date of its decision, it reasonably believes that the order is necessary for the protection of the public; is otherwise in the public interest or is in the interests of the registered person.
69. The Tribunal is considering the appeal as at the date of its decision and makes its decision on the basis of all of the evidence available to it, including the oral evidence at the hearing and is not restricted to matters available to the interim orders panel.

70. We wish to place on record our thanks to both Mr Miles and Mr Gilbert and all the witnesses (Mr Hanson and Mr Matsungo) for their assistance with the hearing.
71. We found Mr Hanson to be a credible witness. We found him to be a careful witness whose evidence was consistent. This included very fairly recognising that whilst he could not commit to an exact date, the investigation and any potential fitness to practice hearing were likely to be completed by summer 2021.
72. We acknowledged the evidence of the Appellant. We found some of his responses to the questions put by Mr Miles to be evasive. For example, he did not wish to answer any questions as to his reasonable belief about whether or not ozone therapy would cure cancer despite his website claiming this to be the case.
73. We also found the Appellant very willing to attribute the blame on others, such as the failure to correct the website on the web designer and about the effectiveness of the ozone treatment on the manufacturer of the machine.
74. We concluded that, having carefully considered the circumstances that an interim suspension order in relation to the Appellant was necessary for the protection of the public and otherwise in the public interest. Our reasons for doing so are set out below.
75. We acknowledged that the BBC X-ray programme broadcast on 7 April 2020 contained a story about the Appellant and ran for about 10 minutes. We recognise that unlike the Interims Order Panel, we had before us the complete footage which underpinned the programme. We did not consider that the editing had the effect of giving a negative impression of the Appellant and in his evidence the Appellant did not seek to deny what was said on the complete footage.
76. We acknowledge that these are allegations and it is not our role to make any findings at this stage. We also accept that the allegations that have been made do not relate directly to the Appellant's work as a Social Worker.
77. However, the allegations are of a serious nature. The allegations include that the Appellant was offering alternative cancer therapy treatments that have no recognised or apparent benefits to individuals who are extremely vulnerable due to existing health conditions. They include that he was exploiting vulnerable individuals for financial gain, and if the allegations are proved, the Appellant's honesty, integrity and ethical values are not compatible with the Professional Code of Practice for Social Care Workers. For example, under 5.8 of the Code of Practice, the Appellant is required to avoid behaving in a way, in work or outside of work, which would call into question his suitability to work in the social care profession.

78. We also recognised that, as a Qualified Social Worker, the Appellant was involved in a multidisciplinary setting in the care of vulnerable individuals whose interests and well-being he was expected to safeguard. These interests included some oversight for health care plans. We considered it appropriate to draw a comparison with vulnerable individuals with a cancer diagnosis attending the Ozone Clinic. In our view, the *allegation* that the Appellant was offering ozone treatments for patients with cancer diagnosis, particularly where there was limited evidence supporting its effectiveness was troubling.
79. In our view, if the allegations are found to be true, they would represent a significant breach of trust. The Appellant himself acknowledged that although he did refer patients to their doctor/consultant for an opinion on ozone therapy, he should not have been providing any medical advice as he was not medically qualified. Any allegation that vulnerable individuals were being exploited is, by its nature, serious. The fact that this may involve exploitation allegedly carried out by an individual who is registered as a Qualified Social Worker is a cause for concern.
80. In addition, there are other ongoing investigations taking place at present. The Respondent is seeking a statement from Professor Torkington. Furthermore, there were also ongoing investigations with the Advertising Standards Authority in order to establish the nature of its previous involvement with the Appellant. Furthermore, new allegations have now arisen which include placing advertorials in lifestyle magazines about ozone therapy. These investigations need to be completed.
81. We acknowledge the submissions made that there have been no complaints about the Appellant's employment that the regulator is aware of. The Appellant has been working as social worker since he moved to the UK from Zimbabwe in 2002 and we acknowledged the positive character references that have been provided.
82. In reaching our decision, we also took into account a range of factors including the Appellants circumstances, how long he had been working as a social worker, the impact on his livelihood and the disputed nature of the allegations. We also considered the evidence from the Appellant that he had shut down the Ozone Clinic and had sold the machine. However, in our view, the seriousness and nature of the allegations led us to conclude that at this stage, the action taken is both proportionate and necessary.
83. We considered the circumstances of the case and concluded that in this an interim conditional registration order would not be a practicable alternative to an interim suspension order and would not protect the public. Our reasons for doing so were that given the allegations focused on the potential exploitation of vulnerable individuals including for

financial gain, we did not consider that an interim conditional registration order was appropriate.

84. We considered the length of the order. We were informed by Mr Hanson that due to the pandemic, an interim suspension order was made for a period of 18 months. However, Mr Hanson set out that it was “unlikely” that any investigation/conclusion of the fitness to practice proceedings would require as long as the time specified in the Interim Suspension Order. It was more realistic that all matters will be completed by summer 2021.

85. We took into account the circumstances of the case and on the evidence available now, we concluded that whilst we would confirm the interim suspension order as set out in the decision dated 29 May 2020, we would vary the period for which the interim order was effective so that it shall expire on 31 July 2021. We considered, based on the Respondent’s own evidence, that an order up to 31 July 2021 is likely to be sufficient for the Fitness to Practice panel to conclude its consideration of the case. This decision was made on 29 May 2020 and by the time the current order, as varied by the Tribunal expires, it will have been in place for well over 12 months.

86. By way of an observation, we acknowledge that the pandemic may have affected timescales but given that Mr Hanson has set out clearly what steps are needed to be completed prior to any fitness to practice hearing, it may well be that any fitness to practice hearing can be concluded well before 31 July 2021 if such investigations are completed relatively soon.

87. We reminded ourselves that under section 146 of the Act, an Interim Orders Panel is required to review an interim order within 6 months of the date that the order was made. A panel may also review an interim suspension order at any time if new evidence becomes available which is relevant to the case pursuant to section 146 of the Act. This may, for example, include any progress made in the ongoing investigations.

88. We therefore confirm the Respondent’s decision dated 29 May 2020 and conclude that an interim suspension order in relation to the Appellant was both necessary and proportionate for the protection of the public but vary the period for which the interim order is to have effect so that it shall expire on 31 July 2021.

Decision

89. The appeal is allowed to the extent that the Respondent’s decision dated 29 May 2020 is confirmed but the period for which the interim order is to have effect shall be varied so that it shall expire on 31 July 2021

Judge H Khan

Lead Judge

First-tier Tribunal (Health, Education and Social Care)

Date Issued: 01 December 2020