

CITATION: *Khan v Medical Board of Australia* [2011] QCAT 639

PARTIES: Dr Pervez Mahfuzur Rahman Khan
(Applicant)
v
Medical Board of Australia
(Respondent)

APPLICATION NUMBER: OCR220-10

MATTER TYPE: Occupational regulation matters

HEARING DATE: 25 July 2011 (oral) and 23 November 2011
(on the papers)

HEARD AT: Brisbane

DECISION OF: **Judge Fleur Kingham, Deputy President**
Assisted by:
Dr Harpreat Moudgil
Ms Emma Robertson
Dr John Waller

DELIVERED ON: 9 December 2011

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. Dr Khan's application to review the decision of the Board dated 27 August 2010, is adjourned for further hearing in Brisbane at 1:30pm on 18 January 2012.**
- 2. Dr Khan must provide five (5) copies to the Tribunal and one (1) copy to the Board of his written submissions (if any) about the matters raised in paragraph 46 of the Tribunal's reasons by 4.00pm on 11 January 2012.**

CATCHWORDS: PROCEDURE – OCCUPATIONAL
REGULATION – MEDICAL –
REGISTRATION – REVIEW OF BOARD
DECISION – where applicant is an overseas
trained doctor – where applicant formerly
held limited registration in an area of need –
where Board refused to renew the applicant's
registration as medical practitioner – where

the applicant seeks to review that decision – where Tribunal formerly granted stay of Board’s decision – where applicant repeatedly failed to pass clinical examination though demonstrated improvement – where applicant never subject to disciplinary investigation or complaint – where Board argues Tribunal can not renew registration – whether Tribunal can renew applicant’s limited registration – whether applicant’s limited registration should be renewed

Health Practitioner Regulation National Law, ss 5, 12, 65(1), 67, 108, 112(2)(f), 112(3), 112(6), 282, 285

Medical Practitioners Registration Act 2001, s 135

Queensland Civil and Administrative Tribunal Act 2009, s 19(c)

APPEARANCES and REPRESENTATION (if any):

APPLICANT: Mr O’Gorman SC instructed by Flower and Hart

RESPONDENT: Mr R Fryberg instructed by McInnes Wilson

REASONS FOR DECISION

- [1] Dr Khan was trained and practised as a medical doctor in Bangladesh before becoming registered in New Zealand in 1993. Since 31 May 2002, he has held limited registration for area of need positions in Queensland at Lowood until 2004, on the Gold Coast for a year and then at Kuraby since September 2007. His application to renew his registration was refused by the Medical Board of Australia on 27 August 2010.
- [2] Dr Khan’s application to review the Board’s decision came on for hearing on 25 July 2011. After the Board called for the results of an examination referred to by Dr Khan during his evidence, the hearing was adjourned and directions were made for Dr Khan to produce the document and the parties to provide further written submissions.
- [3] There has been a lengthy delay since the hearing, not attributable to the parties, due to difficulties in finding a date the panel could reconvene to consider the further material. A stay of the Board’s decision, which the Tribunal had granted before the hearing, preserved Dr Khan’s registration during that unfortunate delay.
- [4] The crux of the dispute is whether the Board can or should renew Dr Khan’s registration, given his failure to pass a Structured Clinical Interview (SCI) as required by a condition imposed on the most recent renewal of his registration. Resolving that dispute requires the Tribunal to consider the

history of Dr Khan's registration and attempts to obtain relevant qualifications and the scope of the Board's powers and discretions under the *Health Practitioner Regulation National Law*.

Dr Khan's registration and qualifications

- [5] The Board's predecessor registered Dr Khan in Queensland on 31 May 2002, under the *Medical Practitioners Registration Act 2001*. It granted him special purpose registration for an area of need.¹ This was an avenue of entry to medical practice for overseas graduates whose qualifications the Board did not accept as sufficient for general registration.
- [6] The Minister for Health could declare an area inadequately serviced by medical practitioners, as an area of need. A practitioner was qualified for special purpose registration if they had a medical qualification and experience the Board considered suitable for practising the profession in that area.
- [7] Over time, the Board became more specific with overseas graduates about the requirement to make progress towards unlimited registration and offered more pathways to achieve that.
- [8] Initially, the Board required the practitioner to pass the Australian Medical Council (AMC) exams. On the day he secured registration (31 May 2002), Dr Khan signed an acknowledgement he understood that an overseas graduate who wanted to obtain general registration had to pass exams set by the AMC. Those exams have two components: a multiple choice question exam (MCQ) and a structured clinical exam (SCI). Dr Khan had passed the MCQ exam in May 2001.
- [9] In December 2004, the Board wrote to Dr Khan advising registration in the special purpose category was only available on a temporary basis and there was an expectation that he confirm his competency by obtaining a more permanent form of registration. He could demonstrate his competency by completing the AMC exams or by obtaining Fellowship of the RACGP or Fellowship of an Australian specialist college. The Board asked Dr Khan to advise his progress.
- [10] By that time, the Royal Australian College of General Practitioners (RACGP) had assessed Dr Khan's five years of general practice in Bangladesh as equivalent to five years of general practice in Australia. However, he failed the RACGP Fellowship exam in September 2004. He also failed the AMC clinical exam in October 2004.
- [11] Between 2005 and 2009, Dr Khan did not attempt to sit either the AMC clinical exam or the RACGP Fellowship exam. He advised the Board of his progress status in 2005 and 2008, during which period it did not change.
- [12] When Dr Khan sought to renew his registration in 2008, the Board extended it until 5 January 2009 so he could advise his intentions regarding the clinical exam. On 30 December 2008, he said he had not re-sat a clinical exam since 2004 due to personal circumstances (unspecified) but intended to do so as soon as possible. He also noted that, when his registration was

¹ *Medical Practitioners Registration Act 2001*, s 135.

renewed on 9 October 2007, a condition was imposed requiring him to pass the AMC exams or obtain fellowship of the RACGP within four years. He expressed confidence he would achieve that.

[13] His registration was renewed from 10 September 2009 until 14 April 2010, subject to the requirement that he successfully undertake an SCI and provide the results to the Board by 17 March 2010.

[14] Dr Khan sat a Pre-employment Structured Clinical Interviews (PESCI) exam on 26 February 2010 offered by the Australian College of Rural and Remote Medicine (ACRRM). He was assessed as borderline in three categories and unsatisfactory in five others. The recommendation of the panel was that Dr Khan was not suitable for the position for which he sought registration. The panel also offered the following comment:

The panel believes that for Dr Khan to meet a satisfactory level for registration he needs to return to hospital practice.

[15] The Board made its decision not to renew Dr Khan's registration in August 2010, after inviting him to show cause why it should do so, given he had not fulfilled the condition imposed in 2009.

[16] Although it seems he did not provide this information to the Board before its decision not to renew his registration, Dr Khan sat the AMC clinical exam on 8 May 2010. He did not pass the exam but improved on the results from 2004. In 2004, he passed seven of 16 stations, in 2010 he passed nine.² Although he was assessed as a *clear fail* he was only one station short of receiving a grade of *marginal performance*, which would have allowed him to sit the pass/fail re-test.

[17] In February 2011, Dr Khan had an opportunity to resit the AMC clinical exam but, not unreasonably, declined the place, which was offered to him on only two days notice.

[18] At the time of the hearing, Dr Khan had completed two of the three components of the RACGP Fellowship exam: the Applied Knowledge Test and the Key Features Problem Test. He did not have the results. He had completed a three month course to prepare for the clinical component of the Fellowship exam, which he expected to undertake in the second half of 2011. The Tribunal does not know the status of that exam process.

[19] In summary, Dr Khan passed the MCQ exam of the AMC in 2001. He has failed the AMC SCI exam twice (October 2004 and May 2010). He failed the ACRRM PESCI in February 2010. He failed the Fellowship exams for the RACGP in September 2004 and was in the process of those exams when the matter went to hearing in July 2011. It is reasonable to assume that, at present, Dr Khan has not obtained Fellowship of the RACGP.

[20] Dr Khan has now practised in Australia since 2002, apparently without being the subject of any complaint. The Tribunal heard evidence from his supervisor, Dr Ali, a colleague who was helping Dr Khan prepare for the Fellowship exams, Dr Khondaker and two patients. All spoke about Dr Khan in favourable terms.

² A candidate's clinical skills are assessed at a number of stations presenting a range of medical situations.

- [21] It is evident, though, that Dr Khan has not had the benefit of structured supervision in the busy practice in which he works. Dr Ali conceded he left it to Dr Khan to raise clinical issues for his guidance. He said Dr Khan did this whenever he was not sure what to do. Given Dr Khan's performance on four clinical exams, it is unwise to leave that decision to him. Dr Ali seemed unaware that Dr Khan had failed the exams that he has. Although there are group discussions about interesting cases at the clinic, these are not structured or scheduled, but are spontaneous and sporadic.
- [22] Each party engaged an expert to give evidence to the Tribunal about Dr Khan's suitability to practise in his current position. After an expert's conclave between Dr Hambleton and Dr de Jong, they produced a joint report, which revealed no disagreement between them. Given the assessment by the ACRRM panel that assessed Dr Khan's PESCI exam in February 2010, they agreed the Board should not renew Dr Khan's registration for his current position.
- [23] They made adverse and non-specific comment about the way in which the Board had handled progressing overseas graduates to permanent registration over time. They expressed the view the Board should assist Dr Khan, and others in his position, to achieve employment in a position with an appropriate level of supervision and training, and a clear focus on successfully completing the definitive exam³ within a specified period.

Regulatory provisions

- [24] Dr Khan applied to renew his registration under the *Medical Practitioners Registration Act 2001* (s 135). The Board decided to refuse the application on 17 May 2010. On 1 July 2010, the National Law commenced. It introduced in Queensland a national system for the registration of health practitioners. The Tribunal stayed the Board's decision on 16 September 2010. The effect of the stay is Dr Khan's former registration continues, until this application is determined. The National Law governs his registration status.
- [25] The National Law provided for transition of registrations by migrating the various forms of general, special, and limited registration, however described, under the state schemes to their equivalents under the National Law. Section 272 provides that, on the participation day (1 July 2010 in Queensland) a practitioner who held a type of registration (however described) that was granted for practice for a *corresponding purpose*, is taken to hold *limited registration for that purpose* under the National Law.
- [26] Under the National Law, the corresponding purpose to special purpose registration for an area of need under the *Medical Practitioners Registration Act*, is limited registration for an area of need.⁴
- [27] Regardless of the eligibility requirements specified in s 65(1) of the National Law, the effect of section 272 is that Dr Khan is deemed to hold limited registration for an area of need under the National Law.

³ For general registration, the AMC exam; for specialist registration in General Practice in Australia, the RACGP or ACRRM Fellowship exams.

⁴ *Health Practitioner Regulation National Law*, s 67.

- [28] The transitional provisions also affect the status of his application to renew his former registration. The effect of the Tribunal staying the Board's decision to refuse Dr Khan's application to renew his registration is that the renewal application has not been finally determined and is taken to have been made under the National Law.⁵
- [29] In any case, in determining the application to review the Board's decision the Tribunal has the functions of the Board and exercises its powers⁶ and must apply the law as it exists at the time of the decision.
- [30] The Board submitted Dr Khan's registration cannot be renewed for either of two reasons. Firstly it argued the Tribunal could not renew his registration because his registration has already been renewed more than 3 times; secondly because Dr Khan failed to comply with the condition imposed in 2009.
- [31] For the former argument, the Board relied on s 72(3) of the National Law. The Board has interpreted that as a mandatory provision and, moreover, applied it retrospectively, to take account of Dr Khan's previous renewals under the former *Medical Practitioners Registration Act*.
- [32] The Tribunal does not accept that interpretation for two reasons. Firstly, there is nothing in the transitional provisions to suggest that eligibility requirements or conditions that apply to the categories of registration under the National Law are to be applied retrospectively to deemed registration on transition from state to national registration. Indeed that would seem to be inconsistent with the purpose of the transition and unworkable given the panoply of types of registration and practices under the former state schemes.
- [33] Secondly, an immutable prohibition on renewing more than three times is inconsistent with the renewal provision itself. Section 112 provides the Board *may* (not *must*) refuse the application on grounds that include, for limited registration, that it has previously been renewed three times.⁷ The Board, and therefore the Tribunal, has the discretion to refuse to renew the registration for that reason but is not required to do so.
- [34] The same applies to the second argument that the Tribunal cannot renew Dr Khan's registration because he breached the condition imposed on his registration in 2009.
- [35] The Board's submissions also relied on the provisions of the *Limited Registration for an Area of Need Regulation Standard*. This is a standard approved by the Ministerial Council,⁸ comprised of Ministers of the governments of the participating jurisdictions and the Commonwealth with portfolio responsibility for health.⁹
- [36] The Board asserted nobody could challenge the standard in the present jurisdiction. If that argument is intended to mean the Tribunal cannot

⁵ *Health Practitioner Regulation National Law*, ss 108, 285.

⁶ *Queensland Civil and Administrative Tribunal Act 2009*, s 19(c).

⁷ *Health Practitioner Regulation National Law*, s 112(2)(f).

⁸ *Health Practitioner Regulation National Law*, s 12.

⁹ *Health Practitioner Regulation National Law*, s 5, definition of **Ministerial Council**.

determine the validity of the standard, that may well be true, it is not necessary to determine that point. However, the question is not whether a party may challenge the standard in the Tribunal but what status it has within the legislative scheme that applies to the decision the Tribunal must make.

- [37] The registration standard, a form of statutory instrument provided for by the National Law, is necessarily subordinate to the provisions of the National Law itself. The National Law delineates the function and status of the registration standard. By reference in the National Law, a registration standard might apply but unless expressly stated in the National Law, it cannot otherwise curtail or proscribe the functions, powers and discretions conferred by the National Law on entities such as the Board.
- [38] There is no reference to a registration standard in s 112, which governs renewal of registration. Section 112 expressly confers discretion on the Board to decide not to renew registration in certain circumstances. Those circumstances do not include a failure to fulfil the requirements of a registration standard.
- [39] Granted, for new applications under the National Law, different considerations might apply. Their entry point requires them to fulfil the eligibility requirements before securing initial registration.¹⁰ However, practitioners who enter the national scheme by transition of their former registration do not enter through the same gateway. They are not new applicants to whom the new eligibility requirements apply. Their former registration provides a deemed registration under the National Law, a concession which recognises the myriad forms of registration and requirements under the former state schemes and the potential injustice to those who obtained registration on rules which are different or less onerous than those that will apply to new applicants.
- [40] The evident purpose of the transitional provisions is to move those under the old schemes to the new scheme without immediately subjecting them to the new requirements. That is consistent with the power to renew the deemed registrations for up to two years on the first renewal, instead of the 12 months that usually applies, thus allowing them a longer period to comply with new requirements.¹¹
- [41] The Tribunal does not accept the Board's submission that it cannot exercise the discretion to renew Dr Khan's registration, whether because his special purpose registration has already been renewed three times or because he has failed to comply with the condition imposed on his registration when it was renewed in 2009.
- [42] The Tribunal is also satisfied that it has the power to impose a condition that formerly applied to Dr Khan's registration and any further condition it considers necessary or desirable in the circumstances.¹² There seems to be no reason why there could not be a requirement that Dr Khan practise in a different position to the one that he now holds.

¹⁰ *Health Practitioner Regulation National Law*, s 65(1).

¹¹ *Health Practitioner Regulation National Law*, ss 112(6), 282.

¹² *Health Practitioner Regulation National Law*, s 112(3).

Conclusion

- [43] The Tribunal accepts the ACRRM panel's assessment that Dr Khan's registration should not be renewed for his current position.
- [44] It is clear enough from the evidence led at the hearing that Dr Khan is not effectively supervised in the position he currently holds. The Tribunal is concerned that Dr Khan has repeatedly failed clinical examinations, albeit there is evidence of improvement. The parties' experts in their joint report concurred with the assessment of the ACRRM panel that Dr Khan should return to hospital practice where he will be better supervised and can develop his clinical practice.
- [45] Although Dr Khan has had many years to demonstrate his clinical competence through examination, the Tribunal cannot ignore the circumstances in which he worked in his current position. He was not effectively supervised and, it seems, little was done within that position to assist him to prepare for further assessment, until recently. The Tribunal has also taken into account that Dr Khan has not been the subject of disciplinary investigation or complaint in more than nine years of general practice in Australia.
- [46] It seems appropriate to afford Dr Khan an opportunity to investigate whether he can secure an appropriate position at a hospital in an area of need so that his limited registration might be renewed, but for a different position, with a strict and final timetable for Dr Khan to demonstrate his competence for unrestricted registration.
- [47] The further hearing of Dr Khan's application is adjourned to 18 January 2012 to enable him to do so.