

# EASTWOODS

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SOLICITORS

## **Ensuring Interim Orders Are Warranted**

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## Legal Framework - Doctors

### Section 41A Medical Act 1983

- Interim order is:
  1. Necessary for the protection of members of the public
  2. Otherwise in the public interest
  3. In the interests of the practitioner
- Conditions or suspension (conditions bank)
- Up to 18 months
- Imposing Interim Orders Guidance
- Appeal Circulars

### Other Professions

- As per Medical Act 1983:
  - Dentists – Section 32(4) Dentists Act 1984
  - HCPC – Article 31(2) Health & Social Work Professions Order 2001
  - Opticians – Section 13L Opticians Act 1989
  - Pharmacists – Article 56(1) Pharmacy Order 2010
  - Nurses – Article 31(2) Nursing & Midwifery 2001
- Slightly different framework:
  - Osteopaths – Sections 21 and 24(2) Osteopaths Act 1993
  - Chiropractors – Sections 21(2) and 24(2) Chiropractors Act 1994
  - Teachers – Regulation 14(1) Teachers' Disciplinary (England) Regulations 2012

## Context of Reported Cases

1. Practitioner application to terminate the Order  
(S.41A(10) Medical Act 1983)

*“Where an order has effect under any provision of this section, the relevant Court may:*

*(a) in the case of an interim suspension order, terminate the suspension*

*(b) in the case of an order for interim conditional registration, revoke or vary any condition imposed by the order*

*(c) in either case, substitute for the period specified in the order (or in the order extending it) some other period which could have been specified in the order when it was made...”*

## Context of Reported Cases

2. GMC application to extend the Order  
(S.41A(6) and (7) Medical Act 1983)

*“The General Council may apply to the relevant court for an order made by an Interim Orders Tribunal or a Medical Practitioners Tribunal under subsection (1) or (3) above to be extended, and may apply again for further extensions.”*

*“On such an application the relevant court may extend (or further extend) for up to 12 months the period for which the order has effect.”*

## Factors to be Considered

- GMC v Hiew [2007] EWCA Civ 369:
  - Gravity of the allegations
  - Nature of the evidence
  - Seriousness of the risk of harm to patients
  - Reasons why the case has not been concluded
  - Prejudice to the practitioner if an interim order is continued

## R (Shiekh) v GDC [2007]

EWHC 2972 (Admin)

- Conspiracy to defraud – expenses claims – guilty plea
- 18 month interim suspension – public interest
- Necessity/desirability of an interim suspension order in the public interest
  - *“Necessity is an appropriate yardstick”*
- Proportionality
  - The seriousness of suspension
  - Interim suspension for public interest *“a relatively rare case”*
- Interim suspension v suspension at final hearing

## **Houshian v GMC [2012]**

**EWHC 3458 (QB)**

- Consultant orthopaedic surgeon dismissed by Trust – poor relations with colleagues, no clinical concerns
- ET claim for unfair dismissal – judgment found Mr H made unsubstantiated allegations against colleagues and fabricated documents
- No appeal, no investigation of these findings which Mr H denied
- 18 month interim suspension – public interest only



## Houshian v GMC [2012]

- Mr H successfully applied to terminate suspension
- Must be proper consideration of the degree of risk and likelihood of serious damage to public confidence
- Insufficient simply to reiterate the seriousness of allegations
- Cannot balance risks if degree of risk not identified

## Houshian v GMC [2012]

- Proportionality – significant where allegations unproven
- Three very important consequences of suspension:
  - Impact on right to earn a living
  - Reputational detriment
  - Deprive of opportunity to maintain good conduct (and thus enhance prospects at final hearing)
- Impact on Mr H would be profound on all three grounds

## Houshian v GMC [2012]

- No concerns re Mr H probity over previous four years
- Imminent final hearing to consider the facts
- Fair minded member of public would not be offended
- Probity concerns did not justify interim suspension with unproven allegations “*where no risk to the patients or public has been identified*” (para 38)

## **Bradshaw v GMC [2010]**

**EWHC 1296 (Admin)**

- Medical Officer within the CAA, alleged affair with colleague, Dr B denied
- Alleged fabrication of documents, false allegations and lies to CAA investigator
- Court considered Dr B's case much closer to doctor/patient relationship than money laundering (Sosanya) and false expenses claims (Shiekh)
- Risk if a patient were to complain

## Houshian v Bradshaw

- Nexus to doctor/patient relationship considered differently:
  - No investigation of probity allegations in Houshian
  - *“Nor has the IOP in terms sought to identify any risk to patients as such or to suggest...that the findings call into question the relationship between the Applicant and his patients”* (Para 35, Houshian)

## **Harry v GMC [2012]**

**EWHC 2762 (QB)**

- Senior NHS Consultant with a small private practice
- Transported HIV infected blood sample from Nigeria in hand luggage and opened it at home
- Breach of regulations though not a criminal offence
- Request to colleague to amend records – quickly reversed
- 18 month interim suspension – public safety risk and probity concerns

## Harry v GMC [2012]

- A realistic and continuing risk
- As a result of being allowed to continue in clinical practice
- Protection of members of the public can extend beyond patients
- Public interest – “reasonable onlooker” test not met

## Harry v GMC [2012]

- Suspension would have been disproportionate:
  - Unblemished record
  - Dr H had left his Trust – suspension would prevent him finding alternative employment
  - Financial consequences
- “Inability to practise medicine” inherent with all suspensions – need to address wider factors
- *“18 months should not become a default position”*



## **GMC v Dr E [2014]**

**EWHC 1620**

- Sexual allegations, including rape of a vulnerable patient
- Dr E admitted consensual sexual relationship, denied rape
- NFA following criminal investigation
- Interim conditions

## GMC v Dr E [2014]

- Previous High Court extension of 6 months, when some of complainant's evidence deemed unreliable
- Complainant then ceased cooperation with the GMC
- GMC dropped allegation of rape and inappropriate relationship whilst a patient and alleged only inappropriate relationship after being a patient
- GMC application for a further extension

## GMC v Dr E [2014]

- Assessment of the risk - *Hiew* factors had not been addressed:
  - Unreliability of complainant's evidence
  - New evidential landscape
  - Varied allegations – “*a significant reduction in the seriousness of the allegations*” (para 19)
  - 30 years of practice, no other suggestion of impropriety
  - Eight months lack of progress without explanation

## **GMC v Dr E [2014]**

- Proportionality – no balancing exercise performed:
  - Dr E not worked for two years
  - Lost significant amount of income
  - Becoming deskilled
  - Remortgaged his home
  - In debt
  - Mental stress/insomnia

## GMC v Dr E [2014]

- Risk was theoretical
- Conditions not necessary to protect patients or in wider public interest
- Importance of the *Hiew* factors:
  - On applications to extend
  - At all interim order hearings
- Need to ask what really is the risk here?
- What is proportionate at an earlier stage may become disproportionate with time or a shift in allegations/evidence

## **Bawa-Garba v GMC [2015]**

**EWHC 1277 (QB)**

- Manslaughter charge – SpR in paediatrics. Death of six year old boy after failure to spot streptococcal infection and confusion re a DNR order
- Trust had moved her onto non-patient duties
- Full reflection and steps taken as required by Trust
- Supervising consultant had no outstanding concerns
- Argued for interim conditions, but 18 month interim suspension imposed on grounds of risk to patients and public interest

## **Bawa-Garba v GMC [2015]**

- No reason why conditions would not suffice to protect the public
- Public confidence:
  - Mere fact of criminal charge not automatically lead to suspension
  - Distinguished from eg's in guidance
  - Allegation from a particular point in time
  - Evidence of later work without negligence
  - Applied reasonable onlooker test
- Interim suspension terminated

## **Bawa-Garba v GMC [2015]**

- Importance of evidence re subsequent practice/risk
- Time elapsed (4 years)
- One-off or not
- May be different with multiple manslaughter charges
- May be different following criminal verdict or final GMC determination



## **GMC v Chopra [2017]**

**EWHC 819 (Admin)**

- Initial concerns:
  - Number of emergency drugs bags used
  - Probity concerns - alleged tampering with records
  - Other serious allegations subsequently withdrawn by the GMC as without foundation
- Initial IOT – conditions (supervision)
- IOT review, 17 Feb 2017 – conditions maintained

## GMC v Chopra [2017]

- “New” allegations:
  - Pressure on a colleague to tamper with documents re drugs bags
  - Asked staff to amend medical records
  - Safety concern re patient treated at home – risk of adverse reaction to medication
- All “new” allegations denied
- Probity concerns and alleged record tampering all “part and parcel” of original allegations
- Early IOT review at request of GMC – 9 Mar 2017

## GMC v Chopra [2017]

### Early IOT Review

- Dr C argued:
  - With probity allegations, unless necessary to protect public, interim suspension often disproportionate – suspension better left to an MPT if/when probity allegations proved
  - Submissions on proportionality and the impact on the doctor, family and patients
- IOT replaced conditions with suspension on basis of public confidence and the number of concerns
- *“While a high level of supervision may address the performance concerns, no conditions could be formulated to address the wider probity issues”*

## **GMC v Chopra [2017]**

- GMC application to extend interim suspension
- IOT had misunderstood Dr C's submission re MPT/suspension
- IOT's real concern had been probity
- GMC argued a link between probity concerns and patient safety (tampering with records), but IOT had specifically found performance concerns could be addressed by conditions

### **GMC v Chopra [2017]**

- Failure to conduct the required proportionality balancing exercise:
    - Dishonesty said to impact on patient safety
    - Existing conditions had failed to deter further allegations
- BUT
- Allegations not yet proved
  - Other allegations dropped as without foundation
  - Financial impact on doctor and his family
  - No financial gain
  - No clinical competence concerns
  - Early stage investigation
  - Would deprive patients in a rural area (for at least 9 months)

## GMC v Chopra [2017]

- Two sides of the “reasonable onlooker” approach
- Conditions (audit, tighter supervision) were capable of dealing with the probity concerns
- Balance “*just about*” in favour of no suspension
- No extension granted. Order expired that day. Court would have terminated under s.41A(10)

## Conclusions

- Consider *Hiew* factors each time a case is considered at an interim orders hearing
- Regulator's witness statement should address each of the *Hiew* factors on application for extension
- Consider if there has been a shift in the evidential landscape (eg. a key witness no longer involved)

## Conclusions

- Consider if there has been a shift in the allegations being pursued as part of the Regulator's substantive investigation
- Nexus to clinical practice
- Ask "what really is the risk here?"
- Identify the risk and the degree of risk



### Conclusions

- Proportionality crucial – balance the identified risk against impact on the practitioner
- With allegations of dishonesty which have not been proved, in the absence of risk to patient safety, suspension may be better considered after a final hearing, in the event the allegations are proved (ie. interim suspension in the public interest will be rare (*Shiekh*))
- Well elucidated reasons protect panels from challenge - Scrutinise reasons given