



MEDICAL TRIBUNAL OF NSW

**Deputy Chairperson:** Judge A. Balla

**Members** Dr Esther Kok  
Dr Melanie Wroth  
Dr Arthur Glass, PhD

**Matter no:** 40008 of 2008

**Appellant:** Dr Ashish Dhar Diwan

**Respondent:** NSW Medical Board

**Counsel for the Appellant:** Mr J Stoljar, SC with  
Mr A Friedgut

**Counsel for the Respondent:** Mr P Sternberg

**Judgment Date:** 20 March 2009



Dr Diwan was born in India and is now aged 46. He completed his training as an orthopaedic surgeon in India. Since moving to Australia he has been permitted to work under section 7 (1) C of the Medical Practice Act 1992 with conditions on his registration intended to restrict his practice to work connected with his academic appointment.

Dr Diwan unsuccessfully applied to the NSW Medical Board to be registered as a general orthopaedic surgeon or alternatively have the conditions on his registration varied. He sought to achieve this in one of two ways:

1. to be registered pursuant to section 7 (1) E instead of 7 (1) C of the Medical Practice Act 1992; or
2. to have all of the conditions on his current registration removed.

The NSW Medical Board refused his applications. It is from these decisions that Dr Diwan appeals to this Tribunal. In these proceedings he sought a third alternative – removal of any of the conditions on his registration so that his practice not be limited to work connected with his academic appointment and/or limited to nominated hospitals and/or not expire on 1 July 2009.

### **Background**

Dr Diwan migrated to Australia in 1993. On 8 November 1993 he was granted limited registration as a postgraduate trainee in Australia subject to the following conditions:

1. to work as a fellow in orthopaedic surgery at St George Hospital under the supervision of Dr Sekel;
2. not claim rebates or remuneration through the HIC;
3. not levy any fee for service;
4. not undertake any medical work outside the nominated hospital including locum positions.

In 1994 and 1995 Dr Diwan trained in joint replacement and trauma and undertook some general orthopaedic surgery.

In December 1995 Dr Diwan obtained a position as a University Lecturer in Orthopaedic Surgery at the University of NSW and St George Hospital. In April 1996 the Board resolved to amend Dr Diwan's registration to allow him to work as a senior lecturer in orthopaedics under the supervision of Professor Murrell with his registration continuing under the Board's Postgraduate Training policy.

In January 1998 Dr Diwan's registration lapsed as he had completed the maximum period of registration allowed under the Board's policy.

In April 1998 Dr Diwan applied to be registered under the Board's academic registration policy. Section 7 (1) C permits the limited registration of medical practitioners for the purpose of enabling them to fill a medical teaching or research position.

On 2 September 1998 the application was refused. The Board noted that it had previously been advised by the Royal Australasian College of Surgeons (RACS) that it would support Dr Diwan holding an academic position but he was not suitable for the particular position.

Dr Diwan appealed the Board's decision. That appeal was settled on the basis that Dr Diwan was granted registration under section 7 (1) C of the Medical Practice Act 1992 on conditions. The conditions on his registration set out in the certificate in evidence pursuant to section 192A of the Medical Practice Act 1992 are:

1. to work as an academic appointment in position/s approved by the Board:
  - a) POSITION: Lecturer
  - b) FIELD: Orthopaedic Surgery
  - c) LOCATIONS: St George Hospital, St George Private Hospital, St Lukes Hospital;
2. may not undertake any work as a medical practitioner outside the approved position/s;
3. to demonstrate Medicare benefits may only be claimed in relation to services provided with in scope of his academic appointment.

The registration is in effect to 1 July 2009.

## Facts

### Relevantly:

1. by letter dated 9 February 1996 RACS informed the Board it had studied the training, qualifications and experience of Dr Diwan and concluded that the College would support Dr Diwan being given an academic position;
2. by letter dated 17 August 1998 RACS informed the Board that Dr Diwan did not possess equal qualifications to Fellowship of RACS in orthopaedic surgery;
3. in April 2001 the Health Insurance Commission, after noting the conditions on his registration, recognised Dr Diwan as a specialist in orthopaedic surgery for the purpose of the Medicare scheme;
4. at some stage Dr Diwan applied to RACS for admission to the College. There is an incomplete record as to the progress of the application. By letter dated 8 September 2003 RACS invited Dr Diwan to an interview on 16 October 2003 so that the panel could decide on the necessary requirements. Letters dated 6 July 2004 and 25 October 2004 set out those requirements. After a period of assessment under the oversight of other orthopaedic surgeons RACS would decide whether he would need to undergo an examination or invite him to apply for admission under Article 21. By letter dated 14 December 2005 RACS confirmed that the assessment period had ended and advised Dr Diwan that he would need to undertake the examination. By letter dated 13 March 2008 RACS told Dr Diwan that a 3 year time limit applied and he would need to complete the examination by 31 December 2009. Two months later by letter dated 27 May 2008 they agreed to Dr Diwan's request for a re-assessment and asked for further documents. He was then invited to an interview on 5 December 2008. He has attended at that appointment. The letter says that after the interview the interviewing panel would decide whether Dr Diwan would need to complete any further requirements for the College to be able to support his application. Dr Diwan is not aware of the outcome of the interview;
5. as conceded by counsel for the Board, Dr Diwan has very impressive qualifications. There are in evidence references from a number of orthopaedic surgeons who were very supportive of Dr Diwan's application for registration as an orthopaedic surgeon without conditions.

## Section 7(1) E of the Medical Practice Act 1992

While there was lengthy legal argument about various issues, the threshold issue which will impact on the scope of the decision which this Tribunal will need to make is the proper construction of section 7 (1) E of the Medical Practice Act 1992 which is in the following terms:

*E A person may be registered if the Board is satisfied that he or she has specialist qualifications and experience in medicine recognised by the relevant Australian specialist college or institution and registration is for the purpose of enabling him or her to practise within that specialty.*

The NSW Medical Board took the view that the words "*the Board is satisfied that he or she has specialist qualifications and experience in medicine recognised by the relevant Australian specialist college or institution*" meant that either Dr Diwan had to obtain a Fellowship from Royal Australian College of Surgeons (RACS) or be recognised by the Australian Medical Council or RACS as a specialist in Australia. It is common ground that Dr Diwan has applied to RACS for admission to the college and that the application has not been finally determined.

Accordingly by letter dated 17 October 2007 the Board informed Dr Diwan that his request to be registered under section 7 (1) was declined.

Counsel for Dr Diwan submitted that this approach was an error of law. He expressed the proper meaning of the words in the following terms:

*"One looks at RACS's requirements for admission and what other fellows of RACS have said - that the type of qualifications and experience that Dr Diwan has are ones that would be recognised by RACS. He doesn't need in order to fall within 7(1)E to go the extra step and actually have sat the exams and been admitted as a fellow." (Transcript Day 1 page 13).*

*"I'm not asking you to find that you would admit him as a fellow if you were RACS. I'm merely saying that you would recognise his qualifications and experience. You wouldn't shut your eyes to his qualifications and experience. You may well say, if you were RACS, that he would need to take further steps before he got admitted as a fellow. For example he might have to sit an exam; he might have to pay whatever the filing fee is and he might*

*have to fill out the requisite forms. But those are rather different questions from whether his qualifications and experience would be recognised by RACS". (Transcript Day 1 page 13)*

*"The question for the Board ... was not whether the appellant himself had been recognised by RACS. Nor was the question whether the appellant is a fellow of RACS. The question was simply whether the appellant has specialist qualifications and experience recognised (in truth and substance) by RACS". (submissions paragraph 88)*

In support of this construction the following matters were put by counsel for Dr Diwan:

1. if the legislature had intended section 7(1) E to be restricted to a circumstance in which a person had actually passed the set exams and been admitted as a fellowship it could have said so;
2. section 4(2) defines "*recognised medical qualifications*" as a person who is a graduate of a medical school or has completed defined examinations. Section 7(1) E does not have similar stipulations or limitations;
3. the Act provides that the object of the legislation is to protect the health and safety of the public and that in the exercise of functions under the Act the protection of the health and safety of the public is to be the paramount consideration. This is promoted by having a doctor of Dr Diwan's calibre attending to members of the public.

The Tribunal finds that the Board properly applied section 7(1) E for the following reasons:

1. it is the clear meaning of the words used in the section. Neither the context, the purpose of the provision nor the purpose of the Act is inconsistent with that meaning;
2. if the construction suggested by counsel for Dr Diwan was adopted, the outcome would be absurd.

The Tribunal was given information about Dr Diwan's past experience and training (being both evidence from Dr Diwan and in documents) and a number of very supportive testimonials and then asked to find that this showed specialist qualifications and experience recognised (in truth and substance) by RACS.

However other documents which are in evidence show that the process undertaken by RACS is lengthy, detailed and specialised. The process of recognition is much more than simply a decision made after receiving the curriculum vitae of the applicant and character references. There is no one path applied to all applicants and throughout the process the requirements are tailored to adapt to the qualifications, training and experience of an individual applicant. The process can involve elements such as performance at interviews, a period of assessment under the oversight of other orthopaedic surgeons, the assessing of the weight to be given to any documents (such as qualifications from other countries and character references) by other orthopaedic surgeons and an examination.

The submission made on behalf of Dr Diwan characterises the examination as merely a formality. It was equated with the payment of a fee. This is not accepted by the Tribunal. It is part of the process used to assess specialist qualifications and experience.

It is accordingly unlikely to have been the intention of the legislature that the complex decision making process of the specialist organisation, RACS, be replaced by the assessment of the NSW Medical Board itself or through its Registration Committee simply based on representations made by an applicant doctor.

3. the Tribunal did not find the comparison to section 4 (2) helpful. The word "recognised" is also used in section 7 (1) F in which, the Tribunal is satisfied, it has the opposite meaning;
4. the protection of the health and safety of the public is best promoted by ensuring that doctors have appropriate qualifications, training and experience in their field of practice. Delegating the function of deciding whether a doctor should be allowed to practise as a general orthopaedic surgeon from the organisation which has, as its primary role, the maintaining of surgical standards to the NSW Medical Board does not of itself protect of the health and safety of the public.

Counsel for Dr Diwan submitted that allowing Dr Diwan to practice as a general orthopaedic surgeon would best protect the health and safety of the public because the public would otherwise be deprived of one of the best spine surgeons in the world. The Tribunal found this submission unhelpful. It is predicated on the assumption that he has the qualifications, training and experience to work safely as a general orthopaedic surgeon. Before widening Dr Diwan's area of practice the protection of the public requires a thorough assessment of his qualifications training and experience.

Accordingly the Tribunal dismisses that part of Dr Diwan's appeal which arises from the Board's decision declining Dr Diwan's application to be registered pursuant to section 7 (1) E of the Medical Practice Act 1992.

### **Section 7 (1) C of the Medical Practice Act 1992**

After the Board informed Dr Diwan by letter dated 17 October 2007 that his request to be registered under section 7 (1) E was declined, the Board received a letter from Dr Diwan's solicitor dated 7 November 2007.

In that letter the solicitor applied to the Board for the removal of the restrictions associated with his current conditional registration which, he said, had become unreasonable and/or redundant with the passage of time.

The solicitor identified the following restrictions:

1. expires July 2009;
2. ongoing employment with the university. The solicitor informed the Board that academics had been retrenched and it was not reasonable to link Dr Diwan registration to employment by a particular university as he was an extremely skilled spinal surgeon with seniority;
3. not outside of St George Hospital. The solicitor informed the Board that due to restructures imposed by the Department of Health surgeons may have to move from hospital to hospital. Dr Diwan believed that the geographical restriction was detrimental to his providing medical care over a wide geographic area and "may" be in conflict with directives from the Department of Health.

The solicitor advised that unless the restrictions were removed, Dr Diwan would appeal both that decision and the decision set out in the letter dated 17 October 2007.

By letter dated 3 March 2008 the Board again informed Dr Diwan that his request to be registered under section 7 (1) E was declined because his qualifications and experience had not been assessed by RACS.

The solicitor then asked the Board to consider Dr Diwan's request for the variation of the existing conditions on his registration.

By letter dated 31 March 2008 the Board informed Dr Diwan that it had not separated out the two issues concerned. The conditions were the standard conditions for all academic appointments. The pathway for registration for international medical graduates with specialist qualifications was section 7 (1) E of the Act. The Board was required to apply its legislation and policies consistently and to act otherwise in relation to Dr Diwan would be contrary to this requirement.

Dr Diwan also appeals from this decision pursuant to section 17 of the Medical Practice Act 1992.

The appeal raises a number of issues:

1. Is there a right of appeal?
2. If there is, has the time for the lodging of the Appeal expired?
3. If it has not expired, is the Tribunal reviewing the Board's decision or is this a hearing de novo?
4. Should the Board have varied or removed the conditions or alternatively should the Tribunal do so?

1. Is there a right of appeal?

Section 17 relevantly provides:

(1) A person may appeal to the Tribunal against any of the following determinations of the Board:

(a) a determination because of which the person's application for registration has been refused or a condition has been imposed on the person's registration.

Initially conditions were imposed in 1999. That decision is not the subject of the Appeal. While there may have been a later variation adding St Lukes Hospital to the geographical area of permitted practice, this variation is also not the decision which is the subject of the appeal.

This is an Appeal from the decision of the Board in 2008 refusing Dr Diwan's application to vary or remove the conditions already placed on his registration. Varying and/or removing a condition, if submitted by counsel for the Board, is not the same as imposing a condition.

Counsel for Dr Diwan submitted the determination of the Board means that the conditions have remained on his registration. There is, accordingly, a causal link between that determination and the conditions. The Tribunal accepts that there is a causal link however this does not mean that a condition was imposed on his registration, it simply continued to remain on his registration.

In the view of the Tribunal the section only applies where a condition has been imposed on the person's registration. This is not ambiguous and the meaning is clear. The Board did not impose a condition in 2008 and there is no right of Appeal pursuant to section 17.

It may be that conditions are imposed by the Board that over time become inappropriate or unreasonable. If an application to the Board to alter these conditions is refused it is a consequence of our reading of section 17(1)(a) that there is no right of review for this type of Board determination. It could be said of our understanding of section 17(1)(a) that it discloses a gap in the appeal rights given by section 17. But if this is a problem it is not a problem that this Tribunal can remedy. We cannot for this reason interpret section 17(1)(a) to extend to matters beyond its clear terms.

### **Sections 18 and 159 of the Medical Practice Act 1992**

Section 18 provides:

*An appeal must be lodged with the Registrar who is to refer it to the Tribunal.*

Section 159 provides:

*The members of the Tribunal are to conduct an inquiry into any complaint, matter or application and are to hear any appeal referred to it. No inquiry need be conducted into a complaint if the registered medical practitioner who is the subject of the complaint admits the subject-matter of the complaint in writing to the Tribunal.*

Counsel for Dr Diwan submitted that the effect of these two sections was to give the Tribunal jurisdiction to hear any appeal referred to it by the Registrar.

The Tribunal does not accept this submission. These are sections addressed to the mechanism pursuant to which applications are referred to the Tribunal for hearing and the procedures available to the Tribunal. They do not define the jurisdiction of the Tribunal.

In view of the Tribunal's findings it is not necessary to determine the other legal issues raised on the Appeal.

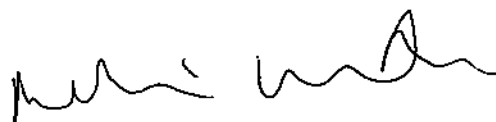
### **Orders**

Appeal dismissed.



Dr Esther Kok

Member



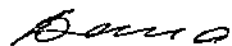
Dr Melanie Wroth

Member



Dr Arthur Glass, PhD

Member



A Balla J.

Deputy Chair

