

IN THE MEDICAL TRIBUNAL OF NEW SOUTH WALES

THE MEDICAL PRACTICE ACT 1992

DEPUTY CHAIRPERSON:

HIS HONOUR JUDGE PUCKERIDGE QC

TRIBUNAL MEMBERS:

DR D CHILD

DR G ABOUYANNI

MS H KIEL

NO: 40024/09

DR MONTASER MEKHA v THE MEDICAL BOARD OF NSW

REASONS FOR DETERMINATION

1. Section 13(a) of the Medical Practice Act provides that the Board must not register a person as a medical practitioner unless satisfied that that person is competent to practice medicine, which competence according to the subparagraph (a) includes an adequate command of the English language.
2. Section 7(1) provides for conditional registration under certain provisions. Provision (A) states that a person who is a graduate of medicine from an institution which is not accredited by the Australian Medical Council may be registered on a temporary basis to enable the person to undertake a period of post graduate training in medicine approved by the Board. Provision (G) provides that a person may be registered on a temporary basis if the Board is satisfied that it is in the public interest to do so.
3. Section 7(2) states that despite section 13, a person may be registered under that section even though he or she does not have a command of the English

language that is adequate for the practice of medicine, but only if the Board thinks that registration is appropriate in the circumstances.

4. On 05/02/07, Dr Mekha applied to the NSW Medical Board for International Medical Graduate (IMG) registration. Dr Mekha (D.O.B. 08/04/1962) obtained a Bachelor of Medicine and Bachelor of Surgery from the University of Baghdad, Iraq 1986. The s192(A) certificate shows that from 08/02/07 until 08/02/08 Dr Mekha was first registered as a medical practitioner in NSW, on 08/02/07 in the post graduate trainee category of registration subject to the following conditions:
 - 1) May not undertake any work as a medical practitioner outside the approved position/s.
 - 2) To demonstrate satisfactory performance in accordance with the Board's requirements.
 - 3) That you are only permitted to work with on-site direct supervision and are not permitted to undertake out of hours work or on-call duties until you have achieved the required standard in an IELTS examination.
5. The certificate also shows that from 09/02/08 until 03/02/09 Dr Mekha was not registered in NSW and that from 04/02/09 Dr Mekha had been registered in the public interest standard pathway category of registration, subject to the following conditions:
 - 1) To work under supervision in position/s approved by the Board-
 - i. Position: REGISTRAR
 - ii. Field: CARDIOTHORACIC SURGERY
 - iii. Locations: LIVERPOOL PUBLIC HOSPITAL
 - 2) May not undertake any work as a medical practitioner outside the approved position/s.
 - 3) To demonstrate satisfactory performance in accordance with the Board's requirements.
 - 4) Must work under direct on-site supervision at all times.
 - 5) Must not work out of hours, night, on-call or on overtime.
6. The Liverpool Hospital was advised of the conditions of his registration from 04/02/09 until 04/02/10 by letter dated 04/02/09. According to the affidavit of Dr Alison Reid of 26/08/09, for that period Dr Mekha had s7(1)(G) conditional registration.
7. On 14/04/09 Dr Mekha wrote to the Medical Board of NSW indicating that his employment with Liverpool Hospital was to be terminated as a consequence of the conditions that had been placed on his registration. On 22/05/09 Liverpool Hospital wrote to the Medical Board of NSW confirming that due to the conditions of his NSW Medical Board registration restricting his capacity to entirely fulfil the role of Cardiothoracic Surgery Registrar (after hours and on-call responsibility), Dr Mekha's contract period was revised to conclude on 08/05/09. The Board was further advised that his contract period had been extended to 10/07/09 in order for him to progress the removal of his restrictions on his registration.

8. The conditions on Dr Mekha's registration imposed by the NSW Board took into account his command of the English language. In her affidavit of 26/08/09, Dr Reid states that there is a national policy applicable to all jurisdictions including NSW relating to the national English language proficiency requirements for IMGs. She states that the NSW Medical Board has accepted and applied the policy. According to the national English language proficiency requirement, the policy was to take effect from 01/07/05. According to the policy statement, a high level of English language proficiency was essential to enable practitioners to communicate with patients, other doctors and health professionals, and for maintenance of professional standards. It states that the International English Language Testing System (IELTS) was an appropriate language testing model for IMGs seeking registration. It is necessary for applicants seeking registration to submit evidence to the relevant registration authority of competency in speaking and communicating in English as demonstrated by having completed the examination to the standard that the applicant has achieved a minimum score of 7 in each of the 4 components of the English language test.
9. Dr Mekha first commenced work in 2003 at the Monash Medical Centre in Melbourne in the Cardiothoracic Surgical Department. There were no restrictions on his registration whilst he was at the medical centre. He also has worked in the ACT, and at Geelong Hospital VIC. According to the referees report from the Monash Medical Centre Dr Mekha's procedural skills and diagnostic skills and clinical judgment were better than expected. His medical knowledge was consistent with his level of experience. In a letter from the Senior Medical Advisor at the Canberra Hospital dated 24/03/09, it was stated that during the period from 29/01/08 until 24/09/08 when Dr Mekha was attached to the Cardiothoracic Surgery Unit at the Hospital and held conditional registration with the ACT Medical Board, it was stated that he always found that Dr Mekha could communicate easily and effectively in the English language. He stated that in conversation he could listen and speak on various technical and non-technical subjects without difficulty.
10. On 05/04/07 Dr Phillip Spratt Director of Cardiothoracic Surgery and Heart and Lung Transplantation at St Vincent's Hospital wrote to the Medical Board in relation to certain English examination tests of Dr Mekha in 2007. Those test results showed that Dr Mekha did not meet the pass levels in the IELTS for registration purposes. Dr Spratt stated that he understood that there were limitations placed on Dr Mekha's role at St Vincent's Hospital. He stated that he stressed that at all times Dr Mekha was supervised by a consultant both in the operating room and outside the operating room. He stated further that it was important for Dr Mekha to obtain ongoing registration and training in the Cardiothoracic Surgery in the country, that he be allowed to work under supervision without restrictions on his interaction with patients. Dr Spratt sought the approval of the Board that the limitation placed on Dr Mekha's registration be reconsidered, and certainly he could sit for the English test again later in the year, to achieve the required level. The Board advised Dr Spratt that it would not permit an exemption from English language requirements of post-graduate training registration for Dr Mekha as his results were not of the required standard and were more than 2 years old.

11. On 19/05/09 the Medical Board met to consider Dr Mekha's circumstances. According to the minutes of the minutes of the Registration Committee, Dr Mekha's background was noted, and it was also noted that Dr Mekha had been working as a medical practitioner in Australia (VIC, ACT, NSW) since 2003 to the present. It was also noted that in 2001 and 2007 Dr Mekha did not make pass levels in English language tests for registration purposes. The following comments appear in the minutes of the meeting of 19/05/09:-

The conditions of registration on Dr Mekha's registration are not unusual and are used in circumstances where the applicant would otherwise not be granted registration because of non-compliance with the English language proficiency standard requirements. There are currently 12 International Medical Graduates (IMGs) with ELP conditions including Dr Mekha who are working in public hospitals subject to similar conditions and would usually be lifted by meeting these English language requirements. This is the course generally followed by doctors in this position.

A review of the 12 registrants indicates that some IMGs have requested the ELP conditions to be removed although they have not yet successfully completed the English language test. These requests have been consistently declined. The Board is not aware that any of these IMGs have been given notice of termination of employment due to the ELP conditions.

12. The Medical Board Committee noted that the conditions applied in Dr Mekha's case were consistent with the Board's approach with practitioners in similar situations and resolved that the matter was essentially one for resolution between Dr Mekha and his employer in the terms of the scope of his employment contract.
13. Dr Mekha has appealed to the Tribunal for an exemption of the English language test requirements. He was unrepresented at the hearing. According to the national English language proficiency policy, at the Board's discretion an exemption may be approved in special circumstances for applicants applying for registration. Some of the examples listed in the policy statement is a demonstration in medical techniques. On the evidence before the Medical Board Committee on 19/05/09, the committee had before it the letter from the Senior Medical Advisor at Canberra Hospital and other references testifying to Dr Mekha's medical proficiency. As noted in their comments and referred to above, once Dr Mekha met a pass for registration purposes in the English language test the conditions imposed on his registration would be removed. It was the submission of the Board that in view of the national policy requirements which the Board applies it would be inappropriate for the Board in the circumstances to exercise its discretion and exempt Dr Mekha from the need to meet the necessary requirements in the English test for registration purposes.
14. In view of the resolution of the Committee on 19/05/09, The Tribunal required that evidence be called from the Liverpool Hospital. Dr Deanne Turner gave evidence by way of a telephone link-up. She stated that the hospital was

aware of the conditions placed on Dr Mekha's registration and that those conditions restricted Dr Mekha's ability to fulfil all the requirements of the position of a Registrar and the expectation of the position of the Registrar. She further stated that in discussion with the Head of the Department and the Supervisor of Training, it was felt that the Department of Cardiothoracic Surgery would be able to accommodate those restrictions for a period of time and his continued employment would then be contingent upon him fulfilling the English language requirement so that he could take up the full spectrum of duties of the position of Registrar. She also stated that another Registrar had left to go to the Royal North Shore Hospital and that an unfair burden was then placed on the remaining Registrar in that that Registrar had to do the burden of the on-call and night work.

15. Dr Mekha again sat for an English language test in July 2009. His overall band score for that test was 5.5 which again did not meet the pass for registration purposes. On behalf of the Board, it is submitted that the test again shows that the appellant does not have command of the English language adequate for the practice of Medicine in accordance with the policy requirements of the IELTS and that in the public interest, the conditions imposed on his registration are to remain.
16. The Tribunal members considered all the circumstances of Dr Mekha. They also called for Dr Bruce French who was the Head of the Cardiothoracic Unit at Liverpool Hospital and who testified to the adequate communication skills of Dr Mekha so far as he was concerned. Dr French also stated that Dr Mekha has remained under supervision but that after hours duty at the hospital would not allow him to be directly supervised on-site. It was his opinion that Dr Mekha would be capable of competently working after hours including being on-call as a Registrar at Liverpool Hospital. He stated that his opinion was based on his observations whilst he was employed at Liverpool Hospital in the supervision capacity.
17. The Tribunal did state to the Medical Board's legal representatives that it did consider whether or not it was appropriate to remove the condition on Dr Mekha's registration that he must not work out of hours, nights, on-call or on overtime. The Medical Board submitted that that condition could be considered as redundant in view of the condition that he must work under direct on-site supervision at all times. The Tribunal members stated that it would be inappropriate to remove such a condition and that unfortunately on the evidence of Dr French, Dr Mekha could not work under direct on-site supervision out of hours, nights, on-call or on overtime.
18. On the evidence before the Tribunal it cannot be found that the Medical Board of NSW failed to consider the circumstances of Dr Mekha, or failed to consider his ability as a medical practitioner in the exercise of its discretion. In this instance, the Tribunal does not consider that it is for the Tribunal to substitute its determination for the determination by the Medical Board that it was inappropriate in the circumstances that he be exempted from the English language proficiency requirements for IMGs.

19. The Tribunal refuses the application by Dr Mekha that he be exempted from the English language proficiency requirements. The conditions on his registration as imposed by the Medical Board to remain.

Dated: 14 September 2009

Judge A.F. Puckeridge QC
Deputy Chairperson

Dr Donald Child
Member

Dr George Abouyanni
Member

Ms Helen Kiel
Member