

Private and Confidential

Mr Mark Russell
c/o Garden Flat
17 York Road
Lytham St Annes
FY8 1HP

Your
ref:
Our ref: 00090/2018

28 February 2019

Dear Mr Russell,

Statement of Reasons letter - decision NOT to refer conviction

On 24 January 2018 you applied to the CCRC for a review of your conviction. The CCRC has now reached a decision **not** to refer your conviction to the appeal court. Our reasons are set out below.

Your first trial

On 11 November 2013, you pleaded guilty at City of London Magistrates' Court, to an offence under Article 39(1)(b) of the Health and Social Work Professions Order 2001, namely that you:

with intent to deceive (whether expressly or by implication), used a protected title that you were not entitled to use.

The relevant protected titles were "Podiatrist" and/or "Chiropodist".

You then made an application to vacate your guilty plea. You argued that your plea was equivocal, as you had been misled by the Prosecution as to the precise scope of the offence, and thus wrongly believed that you were guilty.

At the Central Criminal Court, on 25 February 2014, this application was granted, HHJ Pontius stating¹:

"My finding is that the legislation is clear and that the legislation was drawn to his attention on repeated

¹ *R v Mark Russell*, transcript of proceedings 25 February 2014, from page 102D.

occasions in the weeks and months leading up to the trial. But I have also found on a balance of probabilities that he had an idea in his head, mistaken that [sic] well have been, that the element of intent would not form part of the charge against him at court and that that view, albeit mistaken up until that time, was reinforced by the way in which the charge was put to him by the clerk immediately before he entered his plea..."

Your second trial

On 26 January 2015 at Hammersmith Magistrates Court, you pleaded not guilty to the same offence, and were convicted following a hearing. You were fined £200 and ordered to pay £1000 costs.

You had been a qualified Chiropodist and Podiatrist for many years at the time of the offence. You then failed to renew your registration with the Health and Care Professional Council (HCPC). Use of the terms "Chiropodist" and "Podiatrist" are designated titles, controlled by the HCPC by means of registration.

The HCPC contacted you on a number of occasions between December 2009 and July 2012, advising you that you risked a criminal conviction if you failed to comply with requests to remove all reference to designated titles from your advertising literature and stationery.

Initially, you advised the HCPC that you intended to comply, but failed to do so. In later correspondence, you suggested that it was your intention to continue using the terms 'Chiropodist' and 'Podiatrist', although you would cease to refer to yourself as being "HCPC registered". You were doing this because you were fully qualified, and also because you had unrelated issues with the regulatory framework in place for your profession.

Your appeal

You applied for leave to appeal against your conviction, and the case was reheard at Preston Crown Court, before HHJ Beech. You argued that:

- You were summonsed under the wrong section of the 2001 Order, and thus your conviction was invalid; and

- There was no evidence before the court upon which, if properly directed, it could have found you guilty.

As your appeal was a re-hearing of the case, the CCRC has relied upon the Judge's written findings in order to provide the following summary.

The HCPC adduced evidence of correspondence with you, beginning some years before the time period covered by the information that was laid. In this correspondence, you were warned that you risked a criminal conviction by your continued use of designated titles, and any claim to be HCPC registered. These warnings included an outline of the potential offence, including the element that required an intention to deceive on your part.

Initially, you advised the HCPC that you intended to comply, and would remove all offending references from your stationery and advertising material. In later correspondence, you stated your intention to continue to use the terms 'Podiatrist' and 'Chiropodist', since you were qualified to use both terms. You also argued that you had not intentionally deceived anyone, and welcomed a court hearing in order to clarify your argument.

Evidence was adduced that you wrote a number of letters to GPs, at times when you were not HCPC registered, in which you signed yourself as being a Podiatrist. In one of these letters, you requested that the GP prescribe antibiotics to one of your patients. The Prosecution argued that these were intentional and implicit deceptions.

An online advert, on the website of a running club, described you as a "Podiatrist" and "HCPC registered Chiropodist", at a time when you were neither:

During the period when you were not HCPC registered, you replied to a complaint from the mother of one of your patients. The complainant indicated that she had been told at some point that you were not HCPC registered, as you had claimed to be when treating her son. You replied to the complainant on headed notepaper, which referred to "Mark Russell Podiatry", and you signed off as a "Specialist in Podiatric Medicine".

Although you informed the complainant that you were not at that time registered, you suggested that she make a formal complaint to the HCPC, stating that you would be happy for the body to adjudicate between you. It was argued by the Prosecution that you must have known that such a

referral was pointless, since you were not registered. It was further argued that this correspondence illustrated that the complainant had not been aware of your unregistered status at the time she had engaged your services.

Although outside the time span of the summons, the Prosecution relied upon a blog you had written, which outlined your concerns about the regulatory framework in your profession, and the stance you had taken. It was clear from this that you understood the implications of your actions with regard to issues of registration. You accepted in your blog that the continued use of designated titles whilst unregistered was a “blatant breach of the legislation”.

The Prosecution argued that, despite your assertions that you were motivated by a sense that the regulatory regime was unfair, you also had a financial motive for your deceit. You received GP referrals via health insurance companies; it was argued that you must have been aware that it would be unlikely that you would receive such work if it became known that you were unregistered.

Under cross-examination, you:

- accepted wanting to continue to make a living while protesting. You were not, therefore, prepared to stop calling yourself a Podiatrist;
- accepted giving evidence at your Magistrates’ Court hearing that there was a “small risk” of patients thinking that you were registered with the HCPC, since you continued to use designated titles;
- agreed receiving a letter from the HCPC on 4 December 2009 which warned that you risked a criminal offence if you – with intent to deceive – falsely represented yourself as being HCPC registered. While you had received the warning, you had not appreciated the implications of the prohibition; and
- stated that the company that provided your Professional Indemnity Insurance had been unconcerned that you were operating as an unregistered practitioner.

In your Defence, you argued that your actions stemmed from a concern that the newly-implemented legislative framework failed to safeguard patients from those who were neither qualified nor entitled to use designated titles.

You told the Court that you had contacted most of your patients, in order to inform them of your deregistration. You had not told 2 or 3 patients, but did not withhold the information with any intent to deceive. You had informed GPs and insurance companies of the change, and had lost work as a result.

You produced a letter template dated September 2008, which notified GPs and patients of the changes. You did not provide any copy letters to demonstrate that any letters were sent out.

You provided explanations as to why adverts and stationery still bore designated titles. Some of these issues occurred because the matter was out of your control, others because you had forgotten on occasion to amend your pre-printed letterheads by hand.

You accepted that you had deliberately continued to use the titles 'Chiropodist' and 'Podiatrist', but you had done so without any intention to deceive.

Findings of the Appeal Court

The Court found that you had been charged under the correct section of the 2011 Order.

The Court dismissed your argument that you were entitled to use designated titles without registration. Your reasons for doing so were misconceived, since they failed to highlight the deficiencies in the system that you complained of. In addition, your account was inconsistent; on the one hand you accepted that you were in breach of legislation in using the designated titles, whilst on the other you claimed that you had a right to use the titles. On this issue, HHJ Beech concluded²:

“He has not impressed us as a witness. We regret to say that we have concluded that his answers to difficult questions have been unbelievable”.

² Judgment of HHJ Beech, at page 25.

With regard to whether or not you understood that the offence included an intention to deceive, the Court noted that you were intelligent, and had a great deal of interest in the regulatory regime of your profession. The HCPC had sent you numerous letters, setting out in full the criminal offence created by the Order³:

“He has been disingenuous to say the least in the course of his evidence in stating that he did not appreciate the true import of the criminal offence and that it involved an intention to deceive. His written responses to the HCPC are self-explanatory. We find that his evidence on this point is incredible and not worthy of belief.”

The Court accepted that you were motivated, in part, to act as you did because of your “campaign” against the HCPC. However, the Court was also satisfied that your continued use of the designated titles was intended to ensure that you could continue to earn a living as a Podiatrist, with an intent to deceive those who were unaware of your true position at that time.

Your application to the CCRC

You have provided the CCRC with a large quantity of material in support of your application, all of which has been considered.

In addition to the specific issues that you have raised, you have forwarded on to us correspondence with the police, your MP, the HCPC and relevant governmental departments. This information highlights your concerns on safeguarding within the profession. In particular, you refer to the case of Philip Batten, who was working as an unregistered Chiropodist – despite being on the Sex Offenders’ Register - when he was arrested for a large number of historical sex offences.

You have not raised a specific ground with us in relation to Mr Batten – or in relation to a Northamptonshire Police article you have provided, which concerns a bogus Chiropodist – but the CCRC has considered this material when dealing with your second point, below.

The points that you raise in relation to you conviction are summarised below, in bold type. In each instance, your issue is followed by the CCRC’s response.

³ Judgment of HHJ Beech, at page 26.

1. The HCPC concealed the fact that the relevant offence required an intent to deceive.

You tell us that you have fresh evidence. There is a clause in the legislation which states that a defendant must act with ‘an intent to deceive’, in conjunction with the misuse of a designated title. This ingredient of the offence was not disclosed to you at any time. Similarly, since the legislation came into force in 2003, this element of the offence has not been disclosed to professions, registrants or the public by the regulator or the Department of Health.

The ‘intention to deceive’ clause creates a lacuna which defeats the intent behind the offence. It permits a person lawfully to use a ‘designated’ title without registration if there is no intent to deceive. Thus, a person who has been struck off can still lawfully continue in practice with the designated title, as long as they make clear that they are no longer registered.

On appeal, you raised the point that the HCPC deliberately concealed the above information. The Prosecution argued that this was nonsense, and that you must have known about it. This was material to the deliberations at your appeal. However, there have never been any advisory notes, guidance or policy orders from the HCPC to that effect. You have provided the CCRC with documents which prove that the HCPC and Department of Health remained silent on the impact of ‘intention to deceive’, whilst promoting a public position of absolute closure of title. The documents you have provided include two versions of the HCPC prosecution policy, and you invite the CCRC to contrast the number of times an ‘intention to deceive’ is mentioned in both documents. Although the position has been clarified, it should have been revealed to you at the outset of your trial.

In a document entitled “HCPC v Russell: Defence submissions”, you argue that this non-disclosure and misrepresentation by the HCPC and their Prosecution team was deliberate. You have made Freedom of Information requests and contacted your MP about this matter, but your requests for clarification have been unsuccessful.

The issue of ‘intention to deceive’ was central to your trial and appeal. The CCRC does not consider this to be a new issue. Given the remit of our statutory function, as outlined at the end of this letter, this issue

cannot therefore provide a reason for referring your case for a fresh appeal.

Notwithstanding this, the CCRC considers it appropriate to comment further on this issue, in order that you are clear as to our view on the point you raise.

You complain that the HCPC did not advertise, or give guidance about, the full meaning of the 'intent to deceive' element of the offence. The CCRC does not consider that – even if true - this was necessary. It would clearly be sufficient for a regulatory body, when seeking to advise and educate, to highlight the fact that failing to register would prevent the use of a designated title, and further that unregistered use of same would potentially be a criminal offence.

Use of the term 'intention to deceive' as an element of the offence is a burden on the prosecutor, rather than a burden on the defendant. It would be for the prosecutor to prove such intent existed. Intent could be discerned, as it was in your case, by evidence as to the information that an unregistered person provided to prospective patients and other healthcare professionals, and whether this was intended to mislead.

Thus, it cannot be argued that any lack of knowledge of this element of the offence would be a valid defence.

In any event, the point you make about non-disclosure of this information is a hypothetical one. The CCRC agrees with the appeal court, who found that the many letters sent to you by the HCPC explained fully the terms of the offence that you risked committing, including 'intention to deceive'. Your argument that you were unaware of the nature of the offence that you committed is, therefore, without merit.

2. You were a qualified Podiatrist of good character, who had simply tried to raise issues about an unsatisfactory regulatory regime.

This argument was a central theme in proceedings against you. The appeal court found that, despite your ongoing, and genuine, concerns about the regulatory framework in your profession, *in addition* your actions were intended to deceive others (be they patients, GPs or insurance companies), so that you could continue to make a living from your profession.

3. Your legal representation.

In “HCPC v Russell: Defence submissions”, you take issue with the legal representation that you received. You had encountered difficulty in explaining to your solicitor your concerns regarding the misrepresentations about the case by the HCPC prosecutors. When new counsel was instructed for the appeal, you raised your concerns with him. He asked you to provide a written summary explaining the contrasting positions between you and the regulator. You sent this to your solicitor, but only discovered at the appeal hearing that he had not passed this on to counsel.

You argue that your legal representation was inadequate. Following the Court of Appeal decision in *R v Day*⁴, an appeal court will only quash a conviction if it can be shown that any legal incompetence led to identifiable errors or irregularities in the trial, which themselves rendered the process unfair or unsafe.

The CCRC has therefore looked behind your complaint about your Defence team, and considered the detail of the summary document that you produced, and that you have supplied to us. Having done so, the CCRC has seen nothing to suggest that this summary contains any new information that might have an impact upon the safety of your conviction.

4. The appeal Judge

HHJ Beech dismissed the statement of Ralph Graham as “completely irrelevant”, and stated that a large quantity of supportive correspondence, written by your colleagues, would not be considered during the appeal.

Again, the CCRC has looked beyond your suggestion that the Judge erred when presiding over your appeal, and considered the potential impact of the evidence referred to upon the safety of your conviction. The CCRC has considered Mr Graham’s statement, and has concluded that none of the issues it contains raise a real possibility that the Crown Court would quash your conviction after a rehearing if we were to refer it on that basis. The CCRC agrees with the Judge’s view that the statement has no relevance to the central issues of your case; namely whether you used a designated title when unregistered, and whether you did so with the intention to deceive anyone.

⁴ [2003] EWCA Civ 1060.

Similarly, supportive correspondence from colleagues does not have any impact upon those central issues, and cannot have an effect upon the safety of your conviction.

Our consideration of the issues

We have now considered all the issues you raised in your application (see 'The documents we have looked at' attached). As a result, we have decided that there is no real possibility that your conviction would not be upheld if referred to the appeal court. (See 'The law the CCRC has to follow when looking at your case' attached).

What happens next?

If we have got something wrong in this letter, you must tell us by **29 March 2019**. If we do not hear from you before **29 March 2019**, this decision will become final and we will not write to you again.

Our decision NOT to refer

The decision not to refer your conviction for an appeal has been made by a Commissioner on behalf of the CCRC. This letter sets out the reasons for that decision.

Return of material you sent us

If there are any documents or letters you have sent to us that you would like us to return to you, you must contact us within 3 months.

The CCRC will destroy any paper files 3 months after case closure. Electronic files are retained for a minimum of 5 years in accordance with the published retention schedule, available on our website.

Yours sincerely,



J Gramann
Commissioner

Need some support? You can talk to the Samaritans FREE on 116 123

The papers we have looked at

- The court papers relating to your Magistrates' Court trial and subsequent appeal hearing. These papers included a detailed written judgment from your appeal hearing.
- Your application to the CCRC, including the large volume of supporting material that you have provided, both with the original application form and in subsequent correspondence.

Note

1. The CCRC has a legal duty to disclose any new material it has obtained during its review which would help the applicant make their best case for a reference to the appeal court. The CCRC may, in its discretion, provide other material where it considers it appropriate.
2. The material may be sent to the applicant in its original form, or as an extract or it may be summarised.
3. In this case, the CCRC has not sent you any material other than this letter because the information is adequately summarised in this letter, or in material already available to you.

Your papers

If there are any documents or letters you have sent to us that you would like us to return to you, you must contact us within **3 months**.

If you do not contact us within the next **3 months** your documents will be destroyed.

The law the CCRC has to follow when looking at your case

Criminal Appeal Act 1995

This notice sets out the CCRC's decision and reasons in accordance with section 14(6) of the Criminal Appeal Act 1995.

The CCRC's powers to refer

The CCRC may refer **your conviction** to the court if:

1. there is a **real possibility** that your conviction would be overturned if it were referred; and
2. this real possibility arises from evidence or argument which was **not put forward at your trial or appeal** (or there are exceptional circumstances⁵); and
3. you have already appealed or applied for leave to appeal against conviction (or there are **exceptional circumstances**⁶).

⁵ "Exceptional circumstances" to allow us to refer a case without something 'new' are extremely rare.

⁶ "Exceptional circumstances" to allow us to refer a case where there has not been an earlier appeal are very rare. There has to be a good reason why there has been no appeal and why there cannot be an appeal now without the CCRC's help.