

Private and Confidential

Mr Mark Russell
Via e-mail

Your ref:
Our ref: 00090/2018

8 May 2019

Dear Mr Russell,

Statement of Reasons letter – FINAL decision NOT to refer conviction.

You applied to the CCRC and asked us to look at your conviction. We wrote to you on 28 February 2019 setting out the CCRC's decision.

This letter contains only our response to the further submissions that you have made since we wrote to you. It should be read alongside our earlier letter (copy attached).

The CCRC has considered the further information you sent to us on 2 April and 16 April 2019, via e-mail. We have not changed our decision. We will not send your conviction for an appeal.

Your further comments

The points that you make are summarised below in bold type, and are followed in each instance by the view of the CCRC.

You have provided the CCRC with a summary of the legislative framework underpinning the issues in your case. You tell us that none of the guidance produced by the regulator made reference to the 'intention to deceive' element of the offence. You quote from a document entitled "Protection of Title", which appeared on the HCPC website in 2005¹, and point out that there is no mention in this of "intention to deceive".

¹ The CCRC assumes this document to have been created some time before 2005, since it makes reference to the HPC, which was replaced by the HCPC in 2003.

You argue, therefore, that the regulator sought to create the impression that this was a strict liability offence, where the use of a protected title was unequivocally unlawful.

The CCRC disagrees with your assertion that the regulator did not publicise the fact that deception was a necessary part of any offence. This is, in fact, illustrated by the regulatory advice that you have quoted in your further submissions.

The "Protection of Title" document states, "Now both the public and your profession are protected from unscrupulous practitioners fraudulently using your title".

The term "fraudulently" is defined as, "in a way that intends to deceive by doing something dishonest and illegal"². The CCRC considers that the regulator made clear that the *deceitful* use of titles was behind the legislation.

You refer again to Ralph Graham's statement. The need for an "intention to deceive" was not publicised because this would have led to thousands of professionals choosing not to register.

The CCRC has already considered this statement, as did the appeal court. There is nothing in your further submissions that would cause us to revise our view on this point.

You tell us that, during your appeal, the Prosecution agreed that no offence would be committed if a deregistered professional continued to use the term "chiroprapist", but made it clear to the public that they were no longer registered. You ask the CCRC to obtain transcripts from your appeal hearing, in order to confirm this. The appeal Judge contradicted her own findings on this point, when giving her verdict on the case.

The CCRC does not intend to obtain transcripts from your appeal. While we have the statutory power to do so, we must exercise this power in a reasonable manner. The appeal judgment clearly summarises both the regulatory framework and the factual basis on which you were convicted.

² www.dictionary.cambridge.org/dictionary/english/fraudulently

When doing so, the Judge referred to your cross-examination by the Prosecution on this issue³:

“Now in cross examination, Mr Russell accepted that on his own case, if he was to properly use the title "podiatrist" as he claimed he was entitled to do, the fair use would be "unregistered podiatrist". The court should state as a result of Mr Russell subsequently referring to this appeal on his blog, that in asking this question the HCPC was not making any concession that this approach would be lawful. The purpose of the question was to test Mr Russell's explanation for his conduct.”

Notwithstanding this clear view, even if we were to accept the point that you make, it would not assist you. The hypothetical legal argument that you propose, namely that there would be, effectively, a loophole in the law that would allow someone to continue to describe themselves by a protected title without registration, does not reflect the facts of your case.

The factual basis on which you were convicted included the findings that you had failed to inform all of your patients that you were no longer registered, had failed to amend all of your correspondence and advertising in order to remove reference to registration, and had sought to gain a financial advantage in your dealings with insurance companies.

You disagree with our view that any lack of knowledge on your part of the “intention to deceive” element of the offence would not constitute a valid defence, since this was essential to any conviction.

You gave formal notice to the regulator of your plan to cease registration, and to continue to practice using the protected title. Had you been advised that the offence required an “intention to deceive”, and that in order to comply with the legislation you could have displayed a notice advising that you were no longer registered, you would have taken these steps. You accept that you were advised in writing of the requirements of the legislation, but it was your understanding that there were no exceptions to the use of the protected title.

You took the decision to deregister after much consideration, having identified weaknesses in the new law. In doing so, you

³ Appeal hearing judgment, at page 14.

assumed that you were breaking the law. After notifying the regulator, you made the necessary changes to your stationery, and informed your patients. You accept that you did not inform everyone on your patient list, “but the majority who had the capacity to understand...”.

No witnesses were called to support the Prosecution allegation that you had the necessary intent to deceive. No patients or members of the public gave evidence that they were misled or deceived at any time. Instead, the Defence provided witness statements from patients, GPs and colleagues that you had made your registration status clear.

These matters are not new. The factual basis of your dispute with the HCPC was covered in detail at your trial, and on appeal. You made formal admissions that you had continued to use protected titles after de-registration, via the internet, on invoices, correspondence and referral letters. It is not correct that you amended your stationery on all subsequent occasions. In addition, you 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.

An application to the CCRC is not an opportunity to re-run your proceedings.

The Prosecution contended that the HCPC did not mislead, or were not silent, with regard to the importance of “intention to deceive”. This is not true. No evidence was adduced to illustrate the prior disclosure of this information. Instead, the only evidence provided was the inclusion of “intention to deceive” in final correspondence from the HCPC’s solicitors, and two cease and desist notices.

The CCRC again points to your reference to the “Protection of Title” document you quote from the HCPC website, as well as the lengthy correspondence between you and the regulator which was adduced as evidence in proceedings, as proof that you were made aware of “intention to deceive” as a necessary element of any offence.

You ask the CCRC to consider the guidance notes issued by the Nursing and Midwifery Council (NMC), on 4 September 2013. This was shortly after your prosecution began. The NMC is governed by similar legislation to that of the HCPC. NMC guidance illustrates

clearly the difference between professional qualifications and registration. You ask the CCRC to request from the HCPC evidence that they have published similar clear guidance. If they can satisfy this simple request, you say that your argument is without foundation. If they cannot do so, your argument is irrefutable.

The CCRC has considered the guidance you have provided, as well as the factual basis of your conviction. It is undoubtedly the case that you have the necessary professional qualifications that would allow you to practice, and that there is a difference between such qualifications and registration status. It is also undoubtedly the case that “chiropracist” and “podiatrist” are designated titles, and that one of the requirements to allow their use is registration. This requirement was made clear to you and other members of your profession. You took a stance against this new regulatory regime, and wrote to the regulator inviting prosecution.

Even from the advisory material that you have provided in support of your application to us, it is clear that the requirement for dishonesty was advertised by the regulator⁴. In addition, evidence was adduced that you were personally advised of this requirement, over an extended period of time, before action was taken against you.

In reaching this view, the CCRC notes that there is a copy of the NMC advice in the Magistrates’ Court file that we have obtained, annotated at the section relevant to this matter. Therefore, the specific issue is not a new one, having previously been considered during proceedings against you.

You have provided us with copies of your correspondence with the Society of Chiropracists and Podiatrists, with regard to the ‘intention to deceive’ element of the offence.

The CCRC does not consider that this exchange provides any new insight or argument regarding this issue. This element of the offence was fully considered during proceedings against you, and we have not changed our view.

You tell us that there are a number of factual errors in our analysis of your appeal. For example, at page 2 of our previous letter, we incorrectly stated your point regarding the summons. In fact, you made an application regarding whether the summons was correctly laid at the Magistrates’ Court by the Prosecution. The summons was

⁴ See, above, your reference to the document entitled “Protection of Title”, from the HCPC website.

presented by an office junior, not a qualified solicitor or proper person, as per court guidelines. There was never a contention that section 39(1)(b) was inapplicable.

This point runs contrary to your appeal judgment, at page 24:

“Our starting point is the submission made on behalf of Mr Russell that he was in fact entitled to use the designated titles irrespective of his failure to be registered. It was submitted on his behalf that he has in fact been prosecuted under the incorrect sub-paragraph of paragraph 39(1) of the 2001 Order. The summons should have been in respect of paragraph 39(1)(a) as he is not registered.”

You have indicated that the issue regarding laying of the information was dealt with in earlier proceedings. Since it is not new, and therefore cannot have any impact upon the safety of your conviction, the CCRC has not investigated this issue further.

The errors and contradictions in our review of the appeal also appear in HHJ Beech’s written verdict. This is why you have asked for the hearing transcript to be reviewed, in conjunction with the papers that you have supplied.

It is almost three years since your appeal. During this period, despite engaging in extensive correspondence with the regulatory body, healthcare professionals and politicians, you have not suggested previously that there were material errors in the appeal judgment. You did not raise this point in your original application to the CCRC.

In our view, the appeal judgment is correct in its legal and factual analysis of your case. Seeking trial or appeal transcripts would not be a reasonable use of CCRC resources.

Our consideration of the issues

We have now considered all the issues you have raised in your application, and your further comments. We have decided that there is no real possibility that your conviction would not be upheld if referred to the appeal court.

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.

Closure of your file


Your file has now been closed. However, if new information about your case comes to light in future, you may re-apply to the CCRC at that time.

Return of materials 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,

A handwritten signature in black ink, appearing to read 'J Gramann', with a vertical line extending upwards from the start of the signature.

**J Gramann
Commissioner**

Enc. Copy of our letter to you, dated 28 February 2019

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

The papers we have looked at

- The 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 a large volume of supporting material, provided both with the original application form and in subsequent correspondence.
- Your comments (dated 4 March 2019, and received via e-mail on 2 April 2019, and later comments received on 16 April) on our provisional decision not to refer your case.

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.