BEFORE THE REGISTRATION APPEALS COMMITTEE
OF THE GENERAL OPTICAL COUNCIL

JIGNESH PATEL (01- 27035)

AND

GENERAL OPTICAL COUNCIL

DECISION OF THE REGISTRATION APPEALS COMMITTEE
29 MAY 2019

Committee Members: Mr J Kellock (Chair/Lay)
                  Mr I Crookall (Lay)
                  Ms K King (Lay)
                  Ms L Troy (Optometrist)
                  Ms L Gerson (Optometrist)

Legal adviser: Mr I Ashford-Thom

GOC Presenting Officer: Mr R Price

Appellant present/represented: Yes (via skype) and represented

Appellant representative: Mr S Thomas and Ms L Shah (AOP)

Hearings Officer: Ms B Kayode

Outcome: Appeal allowed
Determination

The Committee heard submissions from Mr Price, on behalf of the Council, and from Mr Thomas, on behalf of the Appellant. It accepted the advice of the Legal Adviser.

This is an appeal by the Appellant to the Registration Appeal Committee against a decision of the Registrar by letter dated 5 March 2019 to remove the Appellant from the Register on the grounds that he had failed fully to meet his CET requirements for the three year period 2016 - 2018. The letter states that the removal from the register will have effect at the conclusion of a fitness to practise referral to which he is currently subject. The substantive hearing of the allegation involved in that referral is scheduled for September 2019.

In the decision letter the Registrar informed the Appellant that his application that there were exceptional circumstances justifying the exercise of a discretion not to remove his name from the register (namely that he is serving a prison sentence) had not been approved.

The Committee was informed that the Council operates a policy whereby the name of registrants who are subject to ongoing fitness to practise referrals are retained on the register until the conclusion of those proceedings, to ensure that the Council retains jurisdiction over such registrants until the conclusion of the fitness to practise proceedings, with the overarching principle of public protection and maintaining the public interest.

Mr Thomas, in his written submissions dated 27 March 2019, submits that the Registrar's discretion under rule 24 of the General Optical Council (Continuing Education and Training Rules) Order of Council 2005 (the Rules) to “remove from or refuse to retain in the register” does not extend to the removal of a registrant at an unspecified time in the future and that a decision cannot be postponed or suspended until after a fitness to practise process. Mr Thomas relied on the use of the word “immediately” in rule 24 of the Rules. Mr Thomas further submitted that it would be unfair if the Appellant’s fitness to practise was found to be unreasonable in those proceedings and he was nonetheless removed from the register for his failure to meet his CET requirements. Mr Thomas invited the Committee to quash the decision of the Registrar and allow the fitness to practise proceedings to continue.

For the Council, Mr Price submitted that the Registrar’s discretion was wide enough to cover the decision taken. Mr Price submitted that the Council’s registration and fitness to practise processes were entirely separate.

The Committee heard and accepted the Legal Adviser’s advice.

The Committee first considered whether it had jurisdiction to hear the appeal. This depended on whether the Registrar’s decision under section 11B of the Opticians Act 1989 (the Act) was an “appealable decision”. Under Schedule 1 paragraph 2(1)(g) of the Act an appealable registration decision includes “a decision of the registrar removing the registrant’s name from, or refusing to retain the registrant’s name in, the appropriate register …”.

The Committee noted that the decision letter dated 5 March 2019 expresses a decision that the Appellant’s application for exceptional circumstances to be taken into account has been rejected. It also states in terms that the Appellant’s name will be removed from the register, albeit it that the timing of his removal is deferred until the conclusion of the fitness to practise proceedings.

The Committee was satisfied that, on its face, the letter of 5 March 2019, whatever the merits or demerits may be, constituted a decision to remove the Appellant from the register. Accordingly, the Committee concluded that it had jurisdiction to hear the appeal. The Committee noted that both Mr Thomas and Mr Price agreed that this was the case.

The Committee next considered whether the Registrar had acted outside her powers in deciding to remove the Appellant from the register but deferring the implementation of that decision until the conclusion of the fitness to practise proceedings.

The Committee noted that section 11B (1) of the Act provides:

“If it appears to the registrar that a person has failed to satisfy requirements for continuing education and training imposed upon him … the registrar may:—
remove from the appropriate register or refuse to retain in the appropriate register, the registrant’s name …”

Paragraph 24(1) of the Rules (which were made under powers conferred by the Act), provides that where in any relevant 3 year period a registrant has a shortfall in CET requirements the registrar may:

“… on or after 1st January in the year immediately after that relevant period remove from or refuse to retain in the register (a) the name of the registrant”.

The Committee did not accept Mr Thomas’s submission that the use of the word “immediately” in this context supported his contention that any such decision by the Registrar must have immediate effect. The Committee was satisfied that the rule merely expressed the commencement of the period and the timescale for achieving the decision making process.

The Committee did not consider that there was anything in section 11B of the Act or paragraph 24 of the Rules which, expressly or impliedly, restricted the Registrar’s discretion so as to prevent her from taking a decision which would have effect in the future, rather than immediately.

The Committee also took into account the statutory and procedural framework applying to registration appeals and to fitness to practise proceedings in the overall context of the Council’s overarching objective, namely the protection of the public. The Council’s policy of retaining on the register the names of those who are subject to fitness to practise proceedings was self-evidently directed to this end by preventing such registrants from removing (by whatever means) their names from
the register and thereby depriving the Council of jurisdiction to complete any such process.

The Committee also considered Mr Thomas’s submission that it would be unfair if the Appellant’s fitness to practise was found to be unimpaired in those proceedings and he was nonetheless removed from the register for his failure to meet his CET requirements. However, the Committee did not accept this submission. The Committee accepted that the registration and fitness to practise procedures are separate. There is no reason to believe that the exercise of any discretion pursuant to either procedure will be prejudiced by the other, although both procedures contribute to achieving the statutory objectives of the General Optical Council.

For these reasons, the Committee concluded that the Registrar did have the power to make her decision expressed in the letter of 5 March 2019.

Accordingly, the Committee will now proceed to hear further submissions.

Committee determination

The Committee heard oral evidence from the Appellant via internet link. The Committee also considered all the documentary evidence contained in the parties’ respective bundles.

The Committee considered the submissions of Mr Price and Mr Thomas.

The Committee accepted the advice of the Legal Adviser.

The issue in this case is whether the Appellant has shown that there were exceptional circumstances justifying his failure fully to meet his CET requirements for the three year period 2016 – 2018. There was a shortfall of 7 points from interactive training from the 36 points required at the expiry of the 3 year period. The Registrar in her decision letter dated 5 March 2019 concluded that the Appellant’s case did not meet the criteria for exceptional circumstances.

The circumstances on which the Appellant relies may be summarised as follows.

The Appellant was the driver of a car involved in an accident on 23 April 2016 in which his passenger was killed. Following police investigations, including a voluntary interview at a police station in May 2016, the Appellant was charged with causing death by dangerous driving. There were subsequent appearances at the Magistrates’ Court and then the Crown Court before a judge and jury in September and October 2017 respectively. The Appellant was legally represented then and at his trial in the Crown Court in March 2018. On 23 March 2018 the Appellant was convicted of the offence charged and on 26 March 2018 he was sentenced to 3 years imprisonment, half of which is to be served in custody.

The Appellant in his evidence described the efforts which he undertook whilst in prison to complete his CET requirements and the obstacles which he claims frustrated his attempts. These included a complete lack of access to the internet, a prohibition on the importation into the prison by his visitors of documentary material to assist him, and the late cancellation of an interactive meeting which he had
arranged to take place on 20 November 2018. The reason for its effective cancellation was that the Appellant was transferred to another prison on 13 November 2018. In the new prison, the Appellant attempted to achieve the interactive points on 27 December 2018, but due to prison regulations this did not happen.

“Exceptional circumstances” are defined in the Council’s policy on exceptional circumstances in completing CET requirements as “exceptional circumstances that are unforeseen and are over and above the course of everyday experience if they have resulted in a registrant being unable to practise and unable to undertake CET.”

There follows in the policy a list of examples of the kinds of circumstances which are, and which are not, likely to qualify under the policy. The Appellant’s case does not fit neatly within any of these examples. However, the Committee did consider that there were examples of circumstances which are likely to qualify which were of relevance, such as “late cancellation by a CET provider of planned CET events”. The Committee also considered that there were examples which are likely to qualify which appeared, on their face, to be less compelling than the Appellant’s circumstances, such as “absence caused by maternity, paternity or jury service”.

For the Council, it was put to the Appellant that he must have been advised that he faced a possible prison sentence if convicted of such a serious offence, and the Appellant, candidly accepted that this was the case, although he said that he had not anticipated such an unfavourable outcome. It was accordingly submitted by Mr Price that the Appellant’s circumstances were not “unforeseen” and that he had had ample time to plan and complete his CET requirements in the months leading up to his trial and imprisonment.

Whilst this may be right, the Committee was satisfied that the Appellant did not foresee the nature and magnitude of the impediments to completing his CET requirements which he in fact encountered during his imprisonment. The Appellant had never previously been the subject of a sentence of imprisonment nor had he received any insight into the likely extent of curtailment of the activities associated with achieving the shortfall in his CET requirements. The Committee accepted that the Appellant had nevertheless made every effort to undertake the necessary activities for completing this requirement within the period. These included applying for day release, arranging for printed CET materials to be provided to him, arranging with the prison authorities for peer reviews to take place in prison (which had never happened at this prison before) and seeking assistance from the appropriate staff in prison. Indeed, the Committee was satisfied that he could not reasonably be expected to have done more than he in fact did.

In addition, the Committee noted that the Appellant had obtained a total of 40 points for the relevant period and had demonstrated to the Committee his desire and commitment to maintain his skills.
Accordingly, the Committee concluded that the Appellant’s inability to complete his CET requirements was caused by exceptional circumstances that were unforeseen and were over and above the course of everyday experience.

The Committee therefore allows the appeal and quashes the Registrar’s decision, pursuant to Schedule 1(A) paragraph 4(7)(b) of the Act.

Chairman of the Committee: Mr James Kellock

Signed ________________________________ 29 May 2019

Appellant: Mr Jignesh Patel

Signed ___________N/A____________________ 29 May 2019