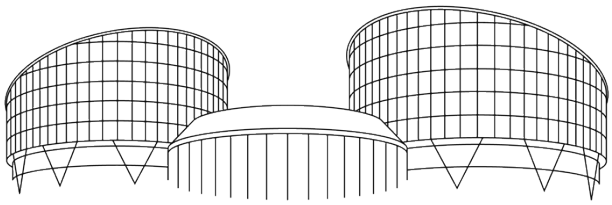

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF MALIK v. THE UNITED KINGDOM

(Application no. 23780/08)

JUDGMENT

STRASBOURG

13 March 2012

FINAL

24/09/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Malik v. the United Kingdom**,**

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Lech Garlicki, *President,*
Nicolas Bratza,
Päivi Hirvelä,
George Nicolaou,
Zdravka Kalaydjieva,
Nebojša Vučinić,
Vincent A. De Gaetano, *judges,*
and Lawrence Early, *Section Registrar,*

Having deliberated in private on 21 February 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 23780/08) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a British national, Mr Zafar Iqbal Malik ("the applicant"), on 28 April 2008.

2. The applicant was represented by Mr S. Murphy, a solicitor practising in London, assisted by Mr P. Engelman, counsel. The United Kingdom Government ("the Government") were represented by their Agent, Ms L. Dauban, of the Foreign and Commonwealth Office.

3. The applicant alleged that his suspension from the list of those authorised to practise as doctors for the National Health Service constituted a violation of Article 1 of Protocol No. 1.

4. On 20 January 2010 the Vice-President of the Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. The applicant requested an oral hearing but the Chamber decided not to hold a hearing in the case.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1943 and lives in London.

7. In 1978 the applicant began practising as a general medical practitioner from premises which he owned. He was a sole practitioner and at the time of the events to which this application pertains he had a patient list of around 1,400 patients, many of whom were from the local Bangladeshi population.

8. On 30 March 2004, he entered into a contract with the Waltham Forest Primary Care Trust ("the PCT") in accordance with the National Health Service (General Medical Services Contracts) Regulations 2004 (see paragraph 64 below). Under the terms of the contract, the applicant was obliged to ensure the provision of medical services to NHS patients registered with his medical practice. He could ensure this provision either by performing services himself or by employing another doctor to do so. The applicant was entitled, under the contract, to receive quarterly payments from the PCT based on the number of patients registered with his practice. The PCT also paid him notional rent for his premises as they were used for NHS purposes. This was a discretionary payment, rather than an entitlement.

9. On 20 January 2005 a monitoring visit by the PCT took place at the applicant's medical practice premises. On 21 January 2005 the medical director of the PCT wrote to the applicant informing him that the visit had demonstrated "the serious risk you pose to patients under your care". The applicant was advised that he had been suspended "to protect the interests of patients while a more detailed investigation into the issues of concern take place".

10. The applicant challenged the suspension and a hearing before the PCT was arranged for 31 January 2005. In the meantime the applicant's insurers wrote to the PCT expressing the view that the suspension was unlawful. They made an offer to the PCT that the applicant would voluntarily absent himself from practice for four weeks to enable him to deal properly with the matters relied on against him. The offer was not accepted.

11. The PCT arranged for locum cover for the applicant's patients. These services were not provided at his surgery premises because it was not possible to find a locum prepared to work from the premises owing to their unsatisfactory condition.

12. On 28 January 2005 the PCT sent a letter to the applicant setting out the matters to be relied on in support of the suspension and referring specifically to regulation 13(1)(a) of the National Health Service (Performers Lists) Regulations 2004 ("the Performers List Regulations" – see paragraph 65 below). The letter identified a number of defects, namely: inadequate disease registers and patient records; lack of clinical knowledge in relation to bipolar disorder, emergency contraception and smoking cessation; inadequate maternity services; lack of proper sterilising equipment and the discovery of a bottle of orange juice in a fridge

containing flu vaccine; and inadequate arrangements for out-of-hours cover and opening hours.

13. Prior to the hearing scheduled for 31 January 2005, the applicant sent a medical certificate notifying the PCT that he was suffering from flu. He repeated his offer to abstain from practice pending a hearing at a later date. However, the PCT went ahead with the hearing in his absence. On 3 February 2005 the PCT wrote to the applicant informing him that the suspension was to continue.

14. On 27 February 2005 the applicant's solicitors wrote to the PCT alleging that its actions were unlawful. On 2 March 2005 the PCT's solicitors responded stating:

> "The PCT considers that there were procedural irregularities surrounding decisions taken on the 21 January 2005 and 31 January 2005. Consequently, the PCT considers that those decisions should now be treated as nullities and/or revoked."

15. They indicated that a hearing would be held to decide whether suspension should take place after giving proper notice. A new hearing was arranged for 16 March 2005.

16. At the hearing on 16 March 2005, it was decided to suspend the applicant for six months.

17. The applicant subsequently commenced civil proceedings seeking a declaration that the suspensions were unlawful and that any subsequent hearing must be by a freshly appointed panel and must have a legally qualified chairman. The legal action proceeded as a claim for judicial review of the suspension.

18. By letter dated 18 March 2005 the applicant was advised that, pursuant to regulation 13(17) of the Performers List Regulations (see paragraph 72 below), payments could continue to be made to him under the PCT contract in accordance with a determination by the Secretary of State. The entitlement was to be based on a reasonable approximation of what amounted to ninety percent of his normal monthly profits under the PCT contract (see paragraph 73 below).

19. The applicant's solicitors replied on 30 March 2005 that they were considering whether the payment offered was correct and would respond in due course. In the meantime, they requested confirmation that the suspension payments were to commence only as of March 2005, and not January 2005.

20. By letter dated 7 April 2005 the applicant's solicitors raised two further matters for the PCT's consideration, namely whether the applicant should continue to be paid rent and whether his staff costs should be paid by the PCT.

21. By letter dated 16 May 2005 the PCT explained to the applicant that the reason he had not received any rent for the months of March and April was that the premises were no longer being used for NHS purposes.

22. On 9 June 2005 the PCT offered the applicant a fresh hearing regarding his suspension. It refused him a legally qualified chair and legal representation, but had no objection to his adviser attending.

23. By letter dated 9 June 2005 the applicant's solicitors indicated that he would be willing to settle the judicial review proceedings if his suspension was quashed; his costs were paid; and losses incurred as a consequence of the reduced payments under the PCT contract were compensated.

24. On 20 June 2005 the PCT notified the applicant that prior to the fresh hearing, it would revoke the existing suspension.

25. On 21 June 2005 a fresh statement of case was served by the PCT setting out the matters to be relied on at the hearing. This covered all matters which had given rise to concern since the summer of 2004.

26. On 25 July 2005 the judicial review proceedings were adjourned pending the fresh hearing, which was to take place on 3 August 2005. Although the PCT had previously said it would revoke the suspension imposed at the hearing on 16 March, this was not done.

27. Following the hearing on 3 August 2005, the applicant was suspended for two months under regulation 13(1)(a) of the Performers List Regulations (see paragraph 65 below).

28. On 17 March 2006 the High Court handed down its judgment in the applicant's claim for judicial review.

29. As regards the purported suspension of 21 January 2005, Mr Justice Collins found:

> "It was apparent that this was a purported exercise of the power conferred by regulation 13(1)(a). It was unlawful. It breached regulation 13(11) in that the claimant was neither told of the allegations against him nor given any opportunity to deal with them. It was also manifestly unfair. I can only express surprise that a PCT should so blatantly disregard not only the clear terms of the regulations but also the guidance given by the Department and act in such an unfair manner."

30. As to the hearing in the applicant's absence on 31 January 2005, the judge considered that:

> "Again, [the PCT] clearly acted in a manner which was unfair since the agreement to maintain a voluntary suspension meant that patients could not have been at risk if the hearing had been delayed. In fact, if they had taken advice, they would have been informed that the whole procedure was unlawful since they should not have suspended the claimant on 21 January and so the hearing could not properly have considered representations against the decision to suspend. Rather, the PCT had to decide whether suspension was required and the burden was on them to justify suspension."

31. He found that the decision following that hearing to continue the applicant's suspension was also unlawful, commenting:

> "In yet further breach of the regulations, this time regulation 13(2), the defendants failed to specify the period for which the suspension was to last. They gave as their reason for not accepting the offer of voluntary suspension that that 'would not prevent

you from working as a locum at another practice'. I am singularly unimpressed with that reasoning. The undertaking could easily have been extended to cover that if the defendants had bothered to raise it with the claimant and his advisers."

32. Regarding the hearing of 16 March 2005, the judge concluded:

"Unfortunately, there were serious flaws at the hearing of 16 March which in my judgment rendered it unfair and so unlawful. The presenting officer was not content to rely on the matters of which notice had been given but proceeded to refer to a number of other matters against the claimant none of which had been put to him. This was a breach of regulation 13(11). The chairman failed to stop him doing this, but contented herself, according to the notes provided subsequently, with instructing her colleagues on the panel after they had retired that 'a lot of unnecessary information had been presented' and advising them 'to confine their discussion to the issues which had been considered by the previous panel and those which Dr Malik had been notified of'. The notes show that this did not happen since during the discussion reference was made to Dr Malik being 'unclear about the prescribing of colostomy bags and food supplements'. Those related to matters not the subject of prior information. In any event, the matters raised must inevitably have prejudiced the claimant and the failure to exclude them at the hearing was itself unfair. Added to this, there was the failure to have [a relevant witness] attend despite the promise that he would and the observations of the presenting officer, compounded by the chairman, that the meeting was to review the decision to suspend the claimant. That has not been pursued by [counsel for the applicant], but it is symptomatic of the failure by the PCT to follow the proper procedures."

33. As to the decision to suspend the applicant following that hearing, he said:

"That [decision] was, quite apart from the unfairness of the hearing, unlawful since he had already been suspended on 21 January 2005 and so could not be suspended beyond 21 July 2005."

34. Finally, in respect of the 3 August 2005 hearing, the judge concluded that, in light of the fact that the PCT had failed to revoke the previous suspension:

"... the hearing on 3 August was clearly unlawful since there was already an existing suspension in being (assuming that that imposed on 16 March was lawfully imposed) and further the claimant had already been suspended (whether lawfully or not being irrelevant) for more than six months."

35. Having concluded that the applicant's suspension was unlawful, the question then arose whether there had been a breach of Article 1 of Protocol No. 1. The relevance of the question was that only a breach of the applicant's human rights would have entitled him to damages under the Human Rights Act 1998.

36. Noting that under the terms of domestic legislation (see paragraph 78 below) a doctor was prohibited from selling the goodwill in his practice, the judge found:

"In this case, inclusion in the list is akin to the possession of a licence. While the goodwill of the practice is not marketable, the inclusion has an intrinsic value in that it enables the doctor to practise. Since the amount of his remuneration will be affected

> by his patient numbers, suspension may well affect the economic value to him of his practice. Thus inclusion in the list has a present value apart from the right to future income and, as it seems to me, the decision in *Van Marle v The Netherlands* supports the view that it can and does amount to a possession ..."

37. He was therefore persuaded that inclusion in the list was a "possession" for the purposes of Article 1 of Protocol No. 1. Had the suspension been properly and lawfully imposed, he indicated that he would have had no doubt that the interference would have been proportionate and so justified. However, as it was unlawful for the reasons given, the interference was not justified. He concluded:

> "... Thus if the claimant can establish that he has suffered recoverable damage he may be entitled to some sums to recompense him for such loss. Since he should have been receiving payment which should have maintained his income, he may have difficulty in establishing any loss. However, I am not in a position to decide that issue."

38. The PCT and the Secretary of State appealed against the finding that there had been a violation of Article 1 of Protocol No. 1. No appeal was lodged against the finding that the suspensions had been unlawful.

39. On 21 March 2006 the applicant's solicitors wrote to the PCT referring to the High Court declaration that the suspension of the applicant from the Performers List was unlawful. They indicated that the applicant wished to return to practice as soon as practicable. By letter dated 29 March 2006 the PCT agreed that the applicant could return to practice. However, given previous concerns regarding the medical practice premises, the PCT wished to arrange a site inspection as soon as possible.

40. By letter dated 11 April 2006 the applicant's solicitors confirmed that he consented to the site inspection and reiterated that he was anxious to return to practice as soon as possible. However, they explained that in order to ensure an orderly and organised return, he favoured a gradual reintroduction to work, with part-time work alongside another general practitioner.

41. On 16 May 2006 the applicant's solicitors requested from the PCT information concerning the size of the applicant's patient list immediately before the purported suspension in January 2005 and as it currently stood.

42. By letter dated 26 May 2006 the applicant's solicitors informed the PCT that his health had deteriorated and that he was suffering from a stress-related illness. Accordingly, they requested that plans for the applicant's return to practice be held in abeyance.

43. On 14 July 2006 the PCT's solicitors confirmed that the applicant's patient list size was 1,380 patients on 1 January 2005 and 1,013 patients on 23 May 2006.

44. On 28 March 2007 the Court of Appeal handed down its judgment. Lord Justice Auld identified two questions for the court's consideration. The first question was in what respect future income could be an Article 1

"possession". He considered it well established that Article 1 protected a right to existing possessions but not a future right to receive possessions. He continued:

> "... [G]oodwill in the sense of an established client-base with its own inherent market value along with other existing assets of a business, may often not be readily distinguishable from future earning prospects from existing trading circumstances, since the existence or valuation of goodwill will turn at least in part on projected future earnings. However, no such blurring of the line can occur here, since Dr Malik's clientele in the form of the patients registered with him has no economic value and so cannot constitute a 'possession' because of statutory denial to him of any marketable goodwill in his patients list ..."

45. As to the approach of this Court to the question, the judge noted:

> "*Wendenburg*, unlike *Van Marle* and other such cases, did not, on its facts, turn on loss of goodwill and/or diminution in value of physical assets, but on what the Court appears to have regarded as a sort of acceptable middle position, one of a legitimate expectation of future earnings ...
>
> However, and with respect to the European Court, the shadowy nature of such possessory entitlement is evident from the way in which it disposed of the case against the applicants. It held – assuming without deciding that the German Court's decision had the effect of interfering with that entitlement – that the interference would have been justified under the second paragraph of the Article as being in the general interest ...
>
> In my view and with respect, the Divisional Court and the Court of Appeal in *Countryside* displayed a surer touch, both of principle and practicality in rejecting the possibility of any such middle position between goodwill as a possession and future income which is not ..."

46. Thus on the question whether future income could be a "possession", the judge concluded:

> "In summary on the issues of goodwill and legitimate expectation, there is clear Strasbourg authority, in *Wendenburg* and other cases, and domestic authority, in *Countryside*, that the assets of a business may include possessions for the purpose of Article 1 in the form of 'clientele' or goodwill of the business. Where such clientele/goodwill exists, measures that diminish its value, as, for example in *Van Marle*, interference with professional practice, may engage Article 1. But where it does not exist, as it does not here, the Court of Appeal's decision in *Countryside* ... is also clear authority for the proposition that, without it, mere prospective loss of future income cannot amount to a possession for the purpose. Equally, any consideration of a further category of Article 1 possession based on a notion of legitimate expectation in this context would unacceptably blur that distinction of principle. It would also, as I have indicated, lead to great difficulties of practical application in the next stages of the Article 1 exercise of identifying precisely what legitimately expected 'possession' had been interfered with and to what extent, and in considering the 'legitimacy' of the expectation against considerations of the general interest on the issue of justification."

47. On the second question – whether a personal permission, in the form of inclusion on a professional list, or a licence was a possession – he noted:

"...Something may have value to a person though it may have no value in the market. One cannot comprehensively define possession for this purpose by reference to a person's ability or wish to sell it ... objects that may be of no economic value to their possessors – wholly unmarketable – may have a sentimental or other personal value to them for the protection of their enjoyment of which Article 1 should, if necessary, provide.

...

Where ... the possessory right claimed is, as here, to some intangible entitlement conferred by a licence or other form of permission to the grantee to continue to follow an activity to his advantage, it seems to me that some additional factor is necessary to render it a 'possessory' entitlement as distinct from the broader concept of a legal right to do so. In many or most cases, such identification is likely to depend on the existence of some present economic value of the entitlement to the individual claiming it conferred by a licence or other form of permission.

The questions of principle in this case – which is concerned with potential loss of livelihood – is, therefore, whether economic value is a distinguishing feature of a possessory right and whether it can only be identified in the sense of marketability. If it is not so confined, where, in any given case is the boundary between an Article 1 possession and some other and broader Convention right not amounting to such a possession?"

48. He considered that it was necessary to distinguish between claimed future monetary entitlements derived from an instrument such as a licence or permit and a claimed future entitlement based on a personal interest in enjoyment of it but not involving any monetary claim. He concluded:

"The matter has, in any event, been put beyond doubt in my view by the ruling of this Court in *Countryside*, which binds us, upholding the reasoning of the Divisional Court that an individual's monetary loss, in the sense of loss of future livelihood, unless based on loss of some professional or business goodwill or other present legal entitlement, cannot constitute a possession attracting the protection of Article 1."

49. Notwithstanding his conclusion that there was no possession in the applicant's case, the judge went on to consider whether, if inclusion on the performers list had been a possession, the actions of the PCT would have deprived him of it. On this matter, he found:

"If inclusion in a performers list is, contrary to my view, an Article 1 'possession', it would follow that suspension from it under the Performers Lists Regulations is an interference with that 'possession'. But ... the Judge did not reason the matter in that way ... [H]e recognised the need to examine the impact of suspension on Dr Malik's practice, and concluded that there was such interference because his inclusion in the list had 'a present value apart from the right to future income' in that the amount of his remuneration was affected by his patient numbers and suspension might well affect the economic value to him of his practice. However, there was no evidence before the Judge to support such finding of interference, in particular, no effective loss of remuneration or of actual or prospective loss of patients, since he continued to receive 90% of his National Health Service remuneration by reference to his patient list, pursuant to regulation 13(17) of the 2004 Performers Lists Regulations ... and his

practice was preserved by the PCT arranging and paying for his patients to be seen by a locum ...

I should add that there is nothing in the further point ... that interference could be established in the PCT's cessation of payment, following Dr Malik's suspension, ... of notional rent for the use of his premises ... During the period of his suspension Dr Malik's practice continued to provide services to patients on his list, but did so, as I have said, through a locum engaged by the PCT to perform those services. Because of the unsatisfactory condition of Dr Malik's surgery premises, the PCT was obliged to refer his NHS patients to a locum at another nearby practice. However, his premises were still available for his use, for example, for the purpose of seeing private patients. More importantly, such notional rent as he might have continued to receive but for the suspension would not have constituted a possession for the purpose."

50. On the question whether goodwill could constitute a "possession" in the present case, Lord Justice Rix noted:

"The distinction between marketable goodwill, or at any rate that goodwill which it is acknowledged is a vested possession, and what the European Court describes as being merely a present-day reflection of anticipated future income, has never had to be determined on the facts ... One solution may be ... looking only to marketability. I am not sure of that, however, for two reasons: one is the substantive distinction drawn by *Denimark*; the other is the emphasis placed by the Strasbourg jurisprudence on goodwill as a possession in the case of professionals with respect to their clientele. I suspect that such goodwill is not readily marketable: on the other hand, I can conceive that a professional practice can perhaps only or best be thought of as involving a vested possession in terms of the goodwill consisting in its clientele.

In the present case, however, this difficulty does not need resolving, for, as Auld LJ has pointed out ..., regulation 3 of the Primary Medical Services (Sales of Goodwill and Restrictions on Sub-Contracting) Regulations 2004 ... effectively means that an NHS doctor's goodwill has no economic value. As such, I do not see how it can be regarded as an asset or, therefore, a possession for the purposes of [Article 1]. It is neither a physical thing (land or chattels) nor a right or other chose in action, nor an asset of any kind ..."

51. As regards the applicant's inclusion in the Performers List, he considered the analogy between inclusion on the list and the grant of a licence to be unhelpful. He continued:

"... licences come in all forms. Some licences are valuable assets in their own right .... Other licences are valuable only in the sense that they give value or greater value to some other asset. In such a case, the jurisprudence considered above, such as *Tre Traktörer* itself in the case of a liquor licence, shows that the possessions in question which need to be considered are the underlying assets, not the licence. So also in *Karni*, which in its way is the closest authority to the facts of the instant case, it was not the affiliation to Sweden's social security system which was regarded as the possession with which there had been interference by reason of its withdrawal, but the doctor's 'vested interests' in his practice which had had to be closed down ..."

52. He considered that in the applicant's case, inclusion on the list was not a licence in itself but a condition precedent to a doctor being able to perform services himself in the NHS. Once on the list, a doctor was

qualified to obtain a contract to provide medical services himself. If he was subsequently suspended from the list, he did not thereby lose his contract but lost only his ability to provide services under it by his own personal performance. He noted:

> "So in Dr Malik's case, his suspension from the performers list did not prevent his contract continuing, only his personal performance as a sole practitioner under it. Even so, because his contract remained in force, the PCT continued to pay him his NHS remuneration, subject only to a 10% deduction to take account of expenses that he would otherwise have incurred. ... Dr Malik's patients continued to receive medical services through a locum for whom the PCT paid. He continued to be entitled to practise as a doctor privately, from his surgery.
>
> ... It seems to me that inclusion on the performers list is a matter of regulation, a condition or qualification for performing NHS services, rather than a possession or property right in itself ...[O]ne cannot readily speak of the inclusion on the list as an economic interest. It is not an asset. It has no monetary value. If one was looking for a possession in this context, one would look naturally to the NHS contract, but that remained on foot, and is not the subject matter of Dr Malik's ... claim ..."

53. The judge considered whether there was some other possession which the applicant could rely upon, and concluded:

> "... For reasons discussed above, it is not possible for Dr Malik to show that his practice had any asset in the nature of goodwill separate from his anticipation of future income under his NHS contract. Reference to his patient list ... is in one sense somewhat more to the point, because at least it can be said that the numbers on his list had a direct bearing, as I understand the matter, on his NHS remuneration, since that had to be recalculated every three months in accordance with those numbers. However, even so, his patient list remained in place, continued to earn him remuneration under his contract, and even if those numbers fell somewhat during the period of his suspension, as to which there was no evidence before the judge and no findings, that seems to me to be simply a matter relating to future income rather than an interference with vested rights in possession. The judge said that inclusion on the list had 'an intrinsic value' in that it enabled the doctor to practise and he went on immediately to explain that because the amount of remuneration would be affected by patient numbers, 'suspension may well affect the economic value of his practice' ... Although the judge then said that that reflected a present value apart from the right to future income, it seems to me that it plainly did not. The only way to measure any loss is by reference to future income."

54. On the question whether, had there been a possession, there would have been an interference, he said:

> "There has been no separate ground of appeal in relation to the separate question of whether, assuming that a relevant possession had been involved, there had been an interference with it ... It seems to me that it is strongly arguable that, if a relevant possession had been involved, then there would only have been an interference for the purposes of [Article 1] if there had been material economic consequences: see *Van Marle*, *Karni*, and *Tre Traktörer* above. It is not as though any case of deprivation has been made. But it has not been found that there were any material economic consequences. As stated above, the purpose of the regulations was to ensure that during a period of temporary suspension the financial consequences for the doctor

concerned were intended to be neutral; and there were mechanisms in place to resolve any disputes in that context."

55. Finally, on the question whether there was a "possession" in the present case, Lord Justice Moses noted:

"My concern, and, I suspect, that of the judge, for any unjustified damage to the doctor's reputation ... brings me to an essential issue relating to goodwill, which has arisen in the instant appeal. This court has had to grapple with the need to maintain a clear and workable distinction between goodwill which is a possession within the meaning of [Article 1], and a right to future income, which is not.

Goodwill which is marketable is undoubtedly a possession, notwithstanding that its present-day value reflects a capacity to earn profits in the future. But does goodwill have to be marketable in order to be identified as a possession within the meaning of [Article 1]? Goodwill is composed of a variety of elements, which differs in different businesses and professions ..."

56. He considered that reputation was undoubtedly an element of goodwill, although it was not marketable. However, he concluded

"... I agree, on the basis of the reasoning of Rix LJ ... and of Auld LJ ... that that element of goodwill ... which is founded on the doctor's reputation, is not a possession within [the meaning of Article 1]. It cannot be sold, it has no economic value other than being that which a professional man may exploit in order to earn or increase his earnings for the future. If the principle that the ability to earn future income is not a possession within [the meaning of Article 1] is to be maintained, it must follow that if the element of goodwill which has or may be damaged is reputation, or the loyalty of past clients, that element is not to be identified as a possession. In *Denimark* terms, the doctor's complaint is as to an unjustified loss of reputation, caused by unlawful acts. But, in economic terms, that is no more than a complaint of a risk of loss of future income. It is not possible to distinguish his claim that his goodwill has been damaged from a claim to loss of future income."

57. The applicant subsequently sought permission to appeal to the House of Lords. Consideration of his petition for leave was deferred pending the outcome of an appeal in *Countryside Alliance*, a case also concerning the applicability of Article 1 of Protocol No. 1, in which the applicant was given leave to intervene in writing. On 28 November 2007, the House of Lords handed down its judgment in *Countryside Alliance* (2007 UKHL 52). In the course of the judgment, Lord Bingham of Cornhill noted:

"Strasbourg jurisprudence has drawn a distinction between goodwill which may be a possession for purposes of article 1 of the first protocol and future income, not yet earned and to which no enforceable claim exists, which may not ... The distinction was less clearly applied in *Karni v Sweden* (1988) 55 DR 157 where a doctor's vested interest in his medical practice was regarded as a possession, *Van Marle v Netherlands* (1986) 8 EHRR 483 where an accountant's clientele was held to be an asset and hence a possession, and *Wendenburg*, above, at CD 170, where the same rule was applied to law practices: in these cases no finding was made that the assets were saleable, although this may have been assumed. In *R (Malik) v Waltham Forest NHS Primary Care Trust* ... the Court of Appeal held that the inclusion of Dr Malik's name on a list of those qualified to work locally for the NHS was in effect a licence to render services to the public and, being non-transferable and non-marketable, not a

possession for purposes of article 1. While I do not find the jurisprudence on this subject very clear, I consider that the Court of Appeal reached a correct conclusion in that case ..."

58. On 4 December 2007, the applicant's petition for leave to appeal was refused.

59. The applicant never returned to practice as a result of his health problems, which he attributed to his unlawful suspension.

60. Proceedings by the General Medical Council ("GMC") were commenced against the applicant. However, no formal decision was ever taken by the GMC as the applicant subsequently voluntarily resigned on grounds of his ill-health.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Maintenance of a Performers List

61. At the relevant time, the position was governed by the National Health Service Act 1977 ("the 1977 Act"). Pursuant to section 28X(1) of the 1977 Act:

"Regulations may provide that a health care professional of a prescribed description may not perform any primary medical service for which a Primary Care Trust or Local Health Board is responsible unless he is included in a list maintained under the regulations by a Primary Care Trust or Local Health Board."

62. Under section 25(3) of the National Health Service Reform and Health Care Professions Act 2002, general practitioners were health care professionals for the purposes of the 1977 Act.

63. The relevant regulations were set out in the National Health Service (Performers Lists) Regulations 2004 ("the Performers List Regulations"). Regulation 3 imposed a duty on PCTs to prepare and publish a medical performers list. Regulation 22 provided that a medical practitioner could not perform any primary medical services unless his name was included on a medical performers list. Regulation 24(2) provided that a PCT was required to refuse to admit a medical practitioner to its medical performers list if he was included in the medical performers list of another PCT, unless he had given notice to that PCT that he wished to withdraw from that list.

64. Once on a list, a general practitioner could enter into a contract to provide services for the National Health Service. The National Health Service (General Medical Services Contracts) Regulations 2004 ("the Contracts Regulations") set out in detail the nature of such contracts. Paragraph 53 of Schedule 6 to the Contracts Regulations provided that:

"... no medical practitioner shall perform medical services under the contract unless he is–

(a) included in a medical performers list for a Primary Care Trust in England;

(b) not suspended from that list or from the Medical Register; and

(c) not subject to interim suspension under section 41A of the Medical Act 1983 (interim orders)."

B. Suspension from a Performers List

65. Under the Performers List Regulations, an individual could be suspended or removed from the list. Regulation 13 provided for the power to suspend:

"(1) If a Primary Care Trust is satisfied that it is necessary to do so for the protection of members of the public or is otherwise in the public interest, it may suspend a performer from its performers list, in accordance with the provisions of this regulation–

(a) while it decides whether or not to exercise its powers to remove him ... or contingently remove him ...;

(b) while it waits for a decision affecting him of ... a licensing or regulatory body;

..."

66. Regulation 13(2) stipulated that the PCT had to specify a period, not exceeding six months, as the period of suspension. This initial period could subsequently be extended, pursuant to regulation 13(8), provided that the aggregate period of suspension did not exceed six months. Regulation 13(4) provided that the period of suspension could extend beyond six months in limited circumstances which were not relevant to the present case.

67. Regulation 13(9) explained that the effect of a suspension was that, while a performer was suspended, he was to be treated as not being included in the Performers List, even though his name appeared in it.

68. Regulation 13(10) allowed the PCT to revoke the suspension at any time and notify the performer of its decision.

69. Regulation 13(11) set out the applicable procedure to be followed by the PCT prior to suspending an individual from the Performers List:

"Where a Primary Care Trust is considering suspending a performer or varying the period of suspension under this regulation, it shall give him–

(a) notice of any allegation against him;

(b) notice of what action it is considering and on what grounds; and

(c) the opportunity to put his case at an oral hearing before it, on a specified day, provided that at least 24 hours notice of the hearing is given."

70. Regulation 13(12) clarified that if the performer did not wish to have an oral hearing or did not attend the oral hearing, the PCT could suspend him with immediate effect. Pursuant to regulation 13(13), if an oral hearing did take place, the PCT had to take into account any representations made before it reached its decision. Regulation 13(14) and (15) provided that the PCT could suspend the performer with immediate effect following the hearing and that it had to notify the performer of its decision and the reasons for it (including any facts relied upon) within seven days of making that decision.

71. Regulation 18 of the Performers List Regulations prohibited a practitioner who was suspended from a list under regulation 13(1)(a) from withdrawing from a list without the consent of the Secretary of State until the question of his removal or contingent removal has been decided. Thus suspension had the effect of preventing the practitioner from engaging in NHS practice so long as the suspension continued.

C. Payment during suspension

72. As to payments during suspension, regulation 13(17) of the Performers List Regulations provided:

> "During a period of suspension payments may be made to or in respect of the performer in accordance with a determination by the Secretary of State."

73. The general rule was to pay ninety per cent of the practitioner's net income under his contract with the PCT. The deduction of ten per cent was to reflect the fact that a practising practitioner would have incidental expenses connected to his practice which would be met from his income.

74. A right to a review and to appeal of the determination was permitted under regulation 13(19) and (20):

> (19) If a performer is dissatisfied with a decision of a Primary Care Trust ('the original decision')–
>
> (a) to refuse to make a payment to or in respect of him pursuant to a determination under paragraph (17);
>
> (b) to make a payment to or in respect of him pursuant to a determination under paragraph (17), but at a lower level than the level to which he considers to be correct;
>
> ...
>
> he may ask the Primary Care Trust to review the original decision and, if he does so, it shall reconsider that decision, and once it has done so, it must notify the performer in writing of the decision that is the outcome of its reconsideration of its original decision ('the reconsidered decision') and give him notice of the reasons for its reconsidered decision.

> (20) If the performer remains dissatisfied (whether on the same or different grounds), he may appeal to the Secretary of State by giving him a notice of appeal within a period of 28 days beginning on the day that the Primary Care Trust notified him of the reconsidered decision."

75. Regulation 13(21) to 13(24) set out the procedure for an appeal to the Secretary of State.

D. The General Medical Council

76. General practitioners are regulated by the GMC, which maintains a register of those individuals who are considered fit to practise as doctors. A doctor can be suspended from the register by decision of the GMC on grounds, for example, of misconduct.

77. Subsequent to the facts of the present case, the Medical Act 1983 was amended to introduce a requirement that doctors have a licence to practice which is conferred and may be withdrawn by the GMC.

E. Goodwill in a medical practice

78. Since the creation of the National Health Service in 1948, practitioners have been prevented from selling the goodwill of their medical practices. That rule is currently set out in Regulation 3 of the Primary Medical Services (Sale of Goodwill and Restrictions on Sub-Contracting) Regulations 2004, which provides that a person with whom a PCT has entered into a general medical services contract may not sell the goodwill of his medical practice in any circumstances and that no other person may sell that goodwill in his stead.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

79. The applicant complained that his right to peaceful enjoyment of his possessions had been violated as a result of his suspension from the Performers List. He relied on Article 1 of Protocol No. 1 to the Convention, which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

80. The Government contested that argument.

A. Admissibility

1. *The objection of incompatibility* ratione materiae

a. The Government

81. The Government argued that there was no "possession" in the present case such as to attract the guarantees of Article 1 of Protocol No. 1. Two principles could be discerned from the Court's case-law. First, Article 1 protected the right to existing possessions only, and did not confer any right to receive a possession in the future. Future income which was not yet earned or subject to an enforceable legal claim could therefore not qualify as a "possession". Second, the goodwill of a professional practice could, in certain circumstances, have an intrinsic value which could be protected as a possession.

82. In the Government's view, the effect of these principles in the present case was that neither the position of the applicant on the Performers List nor any underlying interest in his NHS Practice constituted a possession, for a number of reasons. First, his position on the Performers List was not an "asset" in any sense. It was personal and non-transferable, and had been obtained after he had satisfied the PCT of his suitability to perform medical services. Second, his inclusion on the list was not akin to a licence to perform an economic activity: he remained entitled to practise as a doctor in NHS and private hospitals, and as a general practitioner to private patients by virtue of his registration with the GMC. Third, he could not rely on an underlying interest in the value of his NHS practice as the rule which prevented him from disposing of any goodwill in the practice deprived it of a value which would have the nature of private right. As a consequence of the above, the value of the applicant's NHS practice lay only in its capacity to generate future income for him, a matter which fell outside the scope of Article 1.

83. The Government accordingly invited the Court to find that there was no "possession" in the present case and to declare the application inadmissible as incompatible *ratione materiae* with the provisions of the Convention.

b. The applicant

84. The applicant accepted that the word "possession" in Article 1 of Protocol No. 1 did not extend to future possessions. However, he argued that this restriction was subject to the concept of legitimate expectation of receiving future possessions as income, relying on the Court's decision in *Wendenburg and Others v. Germany* (dec.), no. 71630/01, ECHR 2003-II (extracts) to support his argument.

85. He further argued that marketability was not a necessary element of goodwill in order to render the latter a "possession" within the meaning of Article 1. He considered that the jurisprudence of the Court protected the physical elements of a doctor's practice, including his premises and equipment; the contractual rights bound up in the practice, such as the right to receive rent or to perform a contract personally; and the established goodwill in the sense of his client base/patient list. All of these elements were given value by the doctor's right to perform services, which flowed from his inclusion on the Performers List. According to the applicant, inclusion was either a licence or akin to a licence.

86. As to transferability, the applicant considered that this was not crucial to establishing the existence of a possession. He pointed out that the accountant's licence to practise in *Van Marle and Others v. the Netherlands*, 26 June 1986, Series A no. 101, and the advocate's licence in *Wendenburg* were unlikely to have been transferable and yet both cases were found to fall within the scope of Article 1 of Protocol No. 1.

87. Finally, as to the need for the asset in question to have "a certain worth", the applicant indicated that the Court's case-law had thus far failed to clarify the person from whose perspective the worth should be valued. Only if worth to a third party was required would the matter of the marketability of goodwill become relevant. However, if the worth was to be assessed by reference to the applicant, then it was clear that the practice had significant worth.

2. The Court's assessment

a. General principles

88. The Court reiterates at the outset that Article 1 of Protocol No. 1 applies only to a person's existing possessions; it does not guarantee the right to acquire possessions (see *Marckx v. Belgium*, 13 June 1979, § 50, Series A no. 31; and *Slivenko v. Latvia* (dec.) [GC], no. 48321/99, § 121, ECHR 2002-II (extracts)).

89. The Court has previously considered that rights akin to property rights existed in cases concerning professional practices where by dint of their own work, the applicants concerned had built up a clientele. It explained that this clientele had, in many respects, the nature of a private

right and constituted an asset and, hence, a possession within the meaning of the first sentence of Article 1 (see *Van Marle and Others*, cited above, § 41). In a case involving an alleged interference with an applicant's medical practice, the Commission noted that the "vested interests" in the applicant's medical practice could be regarded as "possessions" (see *Karni v. Sweden*, no. 11540/85, Commission decision of 8 March 1988, Decisions and Reports 55, p. 157). In later cases, the Court explained that law practices and their clientele were entities of a certain worth that had in many respects the nature of a private right and thus constituted assets and therefore possessions within the meaning of the first sentence of Article 1 (see *Olbertz v. Germany* (dec.), no. 37592/97, 25 May 1999; *Döring v. Germany* (dec.), no. 37595/97, 9 November 1999; and *Wendenburg v. Germany*, cited above). The Court has also indicated that it did not matter whether the applicants acquired the possessions by taking advantage of a favourable position, or solely through their own activities. It found that when dealing with the protection of privileges accorded by law, Article 1 of Protocol No. 1 was applicable where such privileges led to a legitimate expectation of acquiring certain possessions (see *Wendenburg*, cited above).

90. In previous cases involving professional practices, the Court has taken the view that a restriction on applicants' right to practise the profession concerned, such as a refusal to register an applicant on a professional list, significantly affected the conditions of their professional activities and reduced the scope of those activities. Where, as a consequence of the restrictions, the applicant's income and the value of his clientele and, more generally, his business, fell, the Court has held that there was interference with the right to peaceful enjoyment of possessions (see *Van Marle*, cited above, § 42).

91. In cases concerning the grants of licences or permits to carry out a business, the Court has indicated that the revocation or withdrawal of a permit or licence interfered with the applicants' right to the peaceful enjoyment of their possessions, including the economic interests connected with the underlying business (see *Fredin v. Sweden (no. 1)*, 18 February 1991, § 40, Series A no. 192, in respect of an exploitation permit for a gravel pit; and *mutatis mutandis*, *Tre Traktörer AB v. Sweden*, 7 July 1989, § 53, Series A no. 159, concerning a licence to serve alcoholic beverages in a restaurant. See also *Rosenzweig and Bonded Warehouses Ltd. v. Poland*, no. 51728/99, § 49, 28 July 2005, which involved a licence to run a bonded warehouse). In this regard, the Court observed in particular in *Tre Traktörer AB* that the maintenance of the licence was one of the principal conditions for the carrying on of the applicant company's business, and that its withdrawal had had adverse effects on the goodwill and value of the restaurant (at §§ 43 and 53 of the Court's judgment).

92. While the Court has appeared to accept on some occasions that the licence itself constituted a "possession" for the purposes of Article 1 of

Protocol No. 1 to the Convention, it is significant that on these occasions the question was not in dispute between the parties so the Court was not required to engage in an extensive analysis of the nature of the possession in the case. In any event, it went on to explain that, according to its case-law, the termination of a valid licence to run a business amounted to an interference with the right to the peaceful enjoyment of possessions (see *Bimer S.A. v. Moldova*, no. 15084/03, § 49, 10 July 2007; and *Megadat.com SRL v. Moldova*, no. 21151/04, §§ 62-63, 8 April 2008). It is clear that in both cases, the licences were connected to the carrying out of an underlying business.

93. The Court recalls that goodwill may be an element in the valuation of a professional practice or business engaged in commerce. Future income, on the other hand, is only a "possession" once it has been earned, or an enforceable claim to it exists (see *Ian Edgar [Liverpool] Ltd. v. the United Kingdom* (dec.), no. 37683/97, 25 January 2000; and *Denimark Limited and 11 Others v. the United Kingdom* (dec.), no. 37660/97, 26 September 2000). Where an applicant refers to the value of his business based upon the profits generated by the business, or the means of earning an income from the business, as "goodwill", the Court has indicated that this reference is to be understood as a complaint in substance of loss of future income. The Court has previously found that this element of the complaint falls outside the scope of Article 1 of Protocol No. 1 (see *Ian Edgar [Liverpool] Ltd.*; and *Denimark Limited and 11 Others*, both cited above).

b. Application of the general principles to the facts of the case

94. The above review of the general principles which emerge from an examination of the Court's case-law demonstrates that, in cases involving the suspension or revocation of licences and permits or the refusal to enrol a person on a list of individuals entitled to practise a particular profession, the Court has tended to regard as a "possession" the underlying business or professional practice in question. Restrictions placed on registration, licences or permits connected to the work carried out by the business or the practice of the profession are generally viewed by the Court as the means by which the interference with a business or professional practice has taken place.

95. The Court emphasises at the outset that the present application concerns a medical practice operating within the context of the NHS in the United Kingdom and it is within this limited context that the following observations and conclusions must be understood.

96. In view of its review of the case-law, the Court does not consider that the applicant's inclusion in the Performers List in England constituted a "possession" for the purposes of Article 1 of Protocol No. 1. In order for that Article to apply, it must be established that there was an underlying professional practice of a certain worth that had, in many respects, the

nature of a private right and thus constituted an asset and therefore a "possession" within the meaning of the first sentence of Article 1 (see paragraph 89 above). The Court makes the following observations.

97. First, it is not disputed that the applicant had practised as a sole practitioner in the same medical practice for almost thirty years. By the time his name was suspended from the Performers List, he had built up a clientele in the form of his patient list of around 1,400 patients (see paragraph 7 above).

98. Second, the medical practice was the vehicle through which the applicant earned his income. The income received by way of monies paid to him under the PCT contract was moreover directly linked to the size of his patient list (see paragraph 8 above). It is therefore clear that the applicant had a vested interest both in his medical practice generally and in ensuring that the number of patients registered with his practice did not fall. This interest was of an economic nature.

99. Third, the applicant enjoyed "goodwill" in his practice, namely the advantage which had arisen over thirty years of practice from his own reputation and connections. As noted above, the applicant had a vested interest in his practice and his patient list, and the goodwill he had established was relevant to the decision of patients to remain registered or to choose to register with him. This consideration is not affected by the fact that under the terms of the Primary Medical Services (Sale of Goodwill and Restrictions on Sub-Contracting) Regulations 2004 (see paragraph 78 above) he was precluded from selling the goodwill in his practice.

100. Having regard to the above considerations, the Court is of the view that the question whether there is a possession in the present case is inextricably linked to the question whether there has been an interference, a matter to be examined in the context of the Court's consideration of the merits of the case. It therefore joins the question to the merits. The Court further considers that the application raises complex issues of fact and law which cannot be resolved at this stage in the examination of the application. It follows that the application cannot be declared manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

a. The applicant

101. The applicant emphasised that the High Court had found that an interference with his right to peaceful enjoyment of possessions had occurred (see paragraphs 36-37 above). Although the judgment of the High

Court on the issue under Article 1 of Protocol No. 1 had been reversed on appeal, Auld LJ had accepted that if he had found the applicant's inclusion on the Performers List to be a possession, then the suspension would have amounted to an interference with that possession (see paragraph 49 above).

102. The applicant maintained that he had suffered loss as a result of the suspension. He pointed out that the issue of loss had been reserved to a further hearing by Collins J, and in light of the decision of the Court of Appeal, had never been addressed (see paragraph 37 above). He insisted that he had suffered loss as a result of the suspension because his monthly payments were reduced; the PCT stopped paying rent for the premises; and his patient numbers had dropped from 1,380 to 1,013 (see paragraph 43 above).

b. The Government

103. The Government argued that there had been no interference with the peaceful enjoyment of the applicant's possessions. First, they pointed out that he had not been deprived of his practice as a result of the suspension; indeed the PCT had taken active steps to preserve it during his suspension. In this regard they emphasised that the Court of Appeal had found that there was no evidence of actual or prospective loss of patients (see paragraph 53 above). Second, they emphasised that the PCT contract had remained in operation throughout the applicant's suspension and that he had continued to receive remuneration. Third, they highlighted that the suspension had had no material economic consequences: the Performers List Regulations were intended to ensure that the financial consequences of suspension were neutral, and this was the case as far as the applicant was concerned (see paragraph 54 above).

104. The Government further emphasised that in so far as the applicant sought to establish economic loss as a result of the reduced payments in respect of his remuneration and rent, he had failed to exhaust remedies available to him to challenge the level of the payments (see paragraph 74 above). As regards the patient numbers, the Government argued that patient numbers could fluctuate in the normal course of events, even where that had been no interruption in the service provided by a particular doctor. They concluded that there was no evidence of any interference in the present case.

2. The Court's assessment

105. The Court reiterates that in cases involving professional practices, it has viewed restrictions on applicants' rights to practise the profession concerned as an interference where the restriction significantly affected the conditions of their professional activities and reduced the scope of those activities and where, as a consequence of the restriction, the applicant's income and the value of his clientele and business fell (see paragraph 90 above).

106. In the present case, the applicant argued that his suspension from the Performers List amounted to an interference with his property rights. In this regard, the Court notes, first, that throughout the period of the suspension, the applicant continued to be paid under the PCT contract, at a rate of ninety percent of his normal remuneration. As the Court of Appeal noted in its judgment, he has therefore failed to produce evidence to support any effective loss of remuneration (see paragraphs 49 and 53-54 above). In so far as he complains about loss suffered as a consequence of the reduction in the amount paid or the failure of the PCT to continue to pay rent, the Court observes that he has failed to avail himself of the procedure set out in regulation 13(19) and (20) of the Performers List Regulations to challenge the determination of the sums due (see paragraph 74 above).

107. Second, the Court observes that although the applicant alleges that his patient numbers fell during the period of his suspension, he has failed to produce concrete evidence establishing that there was a significant reduction in numbers as a consequence of his suspension. In particular, it is not evident from the data submitted that the fluctuation in numbers between January 2005 and May 2006 was unusual and could be attributed to his suspension. In this regard, the Court notes that the PCT took steps to preserve the applicant's medical practice and engaged a locum doctor to provide medical services in the applicant's stead to patients on his list instead of distributing them among other doctors, a matter to which the Court of Appeal also referred in its judgment (see paragraphs 11 and 49 above).

108. Third, even if there was a significant reduction of numbers as a result of the applicant's suspension, he has failed to demonstrate that such reduction had any direct impact on him or on his financial situation. He has not shown that the reduction led to a decrease in his income under the PCT contract during the suspension and following the High Court declaration that the suspension was unlawful he never returned to practice.

109. Finally, although the Court accepts that a reduction in patient numbers could have an impact on the value of the goodwill in a medical practice, the issue does not arise here given that the applicant was prevented from selling the goodwill in his practice and that any decrease in its marketable value was therefore of no consequence to him.

110. In light of the above, the Court concludes that since the applicant has failed to show that he has been affected by his suspension from the Performers List, there has been no interference with his right to peaceful enjoyment of his possessions. Accordingly, there has been no violation of Article 1 of Protocol No. 1 in the applicant's case and it is not necessary, on that account, to determine whether the applicant had a possession, within the meaning of that Article.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Joins* to the merits the Government's objection based on incompatibility *ratione materiae* and *declares* the application admissible;

2. *Holds* that there has been no violation of Article 1 of Protocol No. 1 to the Convention and *decides* in consequence that there is no need to examine the Government's above-mentioned objection.

Done in English, and notified in writing on 13 March 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Lech Garlicki
President