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The mediation issue

Role of the Working Group

The JFSA takes the view that a positive recommendation by Second Sight that a case should go to Mediation is binding on the WG. The WG only has a role to play, so it is submitted, if SS does not recommend mediation or makes no recommendation. JFSA submits that the WG should not have exercised the role which it has so far exercised in relation to the mediation decision and, in particular, in the flow charts and in relation to M54.

Resolution of the issue raised by the JFSA requires, in my view, an examination of the document entitled Overview of the Initial Complaint Review and Mediation Scheme, the document which sets out the terms of the Scheme for all those who agreed to participate in the Scheme including the JFSA and applicants.

In my view this document makes it clear in a passage under the heading "Will my case definitely be referred to mediation?" that the decision as to whether a case should go forward to mediation is entrusted to the WG.

The JFSA stresses the need for independence and the role of SS. In my view, the necessary independence is achieved by giving to the Chair of the WG the casting vote.

I exercise my casting vote in favour of the proposition that the WG decides whether a case is suitable for mediation.

The test

At a meeting to discuss M54 the WG unanimously decided to apply the following test which I formulated during the break for lunch.

"On the assumption that both parties will approach mediation in a genuine attempt to reconcile their differences, is it reasonably likely that mediation will lead to an agreed resolution of the issues."

Whilst the PO supports the application of this test, JFSA does not. To put the decision of the WG in context, the JFSA did not have as much time as was desirable when the decision was made. Furthermore the JFSA had argued during the long discussions for a test which can be described as the "day in court" test, i.e. mediation gives an applicant the opportunity to state his or her case before an independent person.

Resolution of this issue requires, in my view, an examination of the document entitled Overview of the Initial Complaint Review and Mediation Scheme. In the passage to which I have already referred it is stated:

"If your case is suitable and you provide accurate, detailed information to Second Sight,then this [mediation] is likely in most circumstances."

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Although this sentence is not as clear as it could be with the reference to "suitable", the reader is left with the clear impression that mediation is likely "in most circumstances". That impression is confirmed by the next sentence, in which examples of cases which the WG may consider not suitable for mediation are given: "if there is insufficient information about the case or the case is not one requiring resolution."

In my view the test adopted by the WG at my suggestion during the M54 discussions, does not adequately reflect the Overview document. It will lead, in my view, to many cases being decided by, the exercise of my casting vote, not to be suitable for mediation. Mediation will not then take place "in most circumstances."

The fault with the present test is that it overlooks the fact that the decision that a case is not suitable for mediation, will often turn on a disputed fact. For example a decisive factor in the application of the present test is likely to be the PO's position that the applicant had admitted wrongdoing and therefore it is not reasonably likely that mediation will lead to resolution. Where, however, the applicant denies the wrongdoing which led to a "loss" and claims that any admission as to wrongdoing was either not made or made in circumstances where the admission was not made voluntarily, then, in my view, the WG should decide that the case is suitable for mediation. Such an approach is, in my view, more in accordance with the Overview document and the purposes of the Scheme.

I exercise my casting vote in favour of widening the test in the way described.