

# Section 40B Case Meeting

17 March 2022

157-197 Buckingham Palace Road, London SW1W 9SP



## *Members present*

Alan Clamp (in the Chair), Chief Executive, Professional Standards Authority

Christine Braithwaite, Director of Standards and Policy, Professional Standards Authority

Kisha Punchihewa, Head of Legal (Senior Solicitor), Professional Standards Authority

## *In attendance*

Fenella Morris QC of counsel of 39 Essex Chambers

## *Observers*

Briony Alcraft, Team Co-ordinator, Professional Standards Authority

Richard West, Scrutiny Officer, Professional Standards Authority

Georgina Devoy, Senior Scrutiny Officer, Professional Standards Authority

## **1. Definitions**

1.1 In this meeting note, standard abbreviations have been used. Definitions of the standard abbreviations used by the Authority, together with any abbreviations used specifically for this case are set out in the table at Annex A.

## **2. Purpose of this note**

2.1 This meeting note records a summary of the Members' consideration of the relevant decision about the Registrant made by the regulator's panel, and the Authority's decision whether or not to become a party to the GMC's appeal under Section 40B(2) of the Medical Act.

## **3. The Authority's power to become a party to the GMC's appeal under Section 40B(2) of the Medical Act**

3.1 Section 40A of the Medical Act provides the GMC with the power to appeal against a decision of a Medical Practitioners Tribunal of the MPTS. Section 40B of the Medical Act provides the Authority with the power to become a party to such an appeal by the GMC.

3.2 The GMC may appeal against a decision of a Medical Practitioners Tribunal of the MPTS if it considers that the relevant decision (a finding, a penalty or both) is not sufficient for the protection of the public.

- 3.3 Consideration of whether a decision is sufficient for the protection of the public involves consideration of whether it is sufficient:
- to protect the health, safety and well-being of the public
  - to maintain public confidence in the profession concerned, and
  - to maintain proper professional standards and conduct for members of that profession.
- 3.4 This will also involve consideration of whether the Panel's decision was one that a disciplinary tribunal, having regard to the relevant facts and to the object of the disciplinary proceedings, could not reasonably have reached; or was otherwise manifestly inappropriate having regard to the safety of the public and the reputation of the profession (applying *Ruscillo*<sup>1</sup>).

#### **4. Conflicts of interest**

- 4.1 The Members did not have any conflicts of interest.

#### **5. Jurisdiction**

- 5.1 The Members considered the statutory framework under which they were able to consider this decision. The Legal Advisor confirmed (i) that, on 17 January 2022, the GMC lodged an appeal against the decision by a Medical Practitioners Tribunal concerning the Registrant (ii) the Authority may become a party to the GMC's appeal by giving notice under section 40B(2) of the Medical Act and (iii) this is not a decision that can be referred under the Authority's S29 powers.

#### **6. The relevant decision**

- 6.1 The relevant decision is the Determination of the Panel following a hearing which concluded on [REDACTED].
- 6.2 The Panel's Determination which includes the charges and findings is set out at Annex B.

#### **7. Documents before the meeting**

- 7.1 The following documents were available to the Members:
- Determination of the Panel dated [REDACTED]
  - Transcripts of the hearing
  - Counsel's Note dated 16 March 2022
  - The Authority's Detailed Case Review

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<sup>1</sup> CRHP v Ruscillo [2004] EWCA Civ 1356

- GMC response dated 30 March 2022
- The GMC's Sanctions Guidance
- The Authority's Case Meeting Manual

7.2 The Authority and the Legal Advisor were provided with a copy of the GMC's Application Notice and Grounds of Appeal. The Members considered the GMC's Grounds of Appeal after reaching a conclusion on the sufficiency of the outcome.

## 8. Background

8.1 The Registrant, a [REDACTED] was represented by Counsel and gave evidence before the Panel.

8.2 The allegations and Panel's findings:

1. *On or around [REDACTED], you penetrated the anus of Person A with your penis, and:*

a. *Person A did not consent to the penetration; **Found proved***

b. *you did not reasonably believe that Person A consented to the penetration.*

**Found proved**

2. *Your actions at paragraph 1 were sexually motivated. **Found proved***

8.3 At the material time, the Registrant and Person A were in a relationship. Whilst on holiday in [REDACTED] in [REDACTED], Person A and the Registrant attended a wine tasting event and then shared a bottle of wine over dinner before returning to their accommodation. Person A took some Diazepam (prescribed to him by his GP following a physical assault in [REDACTED]) and had gone to sleep. Person A's evidence was that he woke up later that night and found himself on his stomach, the Registrant having initiated sex while he was asleep.

8.4 Shortly after their return from [REDACTED], in [REDACTED], the Registrant and Person A moved into together. On [REDACTED], the couple had an argument resulting in the discussions around ending the relationship. On [REDACTED] Person A made a video recording of part of their discussion about the possible future of the relationship during which Person A raised the issue of what had occurred in [REDACTED]. After this discussion, the relationship continued until [REDACTED] when the relationship came to end, the Registrant having moved out of the flat while Person A was at work.

8.5 Upon learning from the Landlord that the Registrant had moved out, Person A reported the incident in [REDACTED] to the police in the UK, the Registrant's employers and the GMC and travelled to [REDACTED] in [REDACTED] to report the matter although no criminal investigation was commenced in [REDACTED] or the UK.

8.6 The Registrant confirmed the account of the wine tasting and dinner with Person A but gave evidence that he had no recollection of having any sexual contact with Person A on that night and denied engaging in sexual activity as alleged. The Registrant gave evidence that his relationship with Person A was

abusive, controlling, and coercive. Person A had threatened to post the video of the alleged confession to ruin his career if he were to leave him. In [REDACTED] [REDACTED] Person A had been aggressive towards him, pinning him down whilst shouting at him and had smashed his mobile phone. His evidence was that he had become afraid of Person A and would try always to defuse any difficult situation, including becoming very submissive and saying and doing anything to prevent Person A from losing his temper. Person A had made the complaint to the GMC on the day that he had moved out of the flat following advice from the Police that he should go to a safe house for his own safety.

- 8.7 The Registrant's evidence regarding the recording was that because of Person A's aggressive behaviour, he had adopted an approach of doing what would placate him and would do anything to avoid an outburst of anger. As a result, during the conversation he had gone along with what Person A had said and provided a reason for what he claimed had happened. He said that he had been scared and had wanted to defuse the situation and maintained that he had not had sex with Person A while he was asleep. Person A had used the video to blackmail him and had said that if he were to leave him, he would use the video to end his career.
- 8.8 All charges against the Registrant were found proved.
- 8.9 The Panel determined that the Registrant had not demonstrated adequate insight. They stated that the evidence of reflection was focused on his professional practice rather than the proven allegation. They concluded that there was insufficient remediation.
- 8.10 The Panel considered that the Registrant's conduct undermined public confidence in the profession and failed to maintain standards in the profession. It considered that reasonable and well-informed members of the public would expect a finding of impairment.
- 8.11 At the sanction stage, the Panel were taken to the relevant sections of the Sanctions Guidance by the GMC's Case Presenter who submitted that the appropriate sanction was erasure and the Registrant's misconduct was fundamentally incompatible with continued registration. It was submitted that the Registrant had not demonstrated any insight into the seriousness of his actions and that, in presenting himself as the victim who was taken advantage of, had demonstrated an inability to reflect on his actions.
- 8.12 In considering the available sanctions in ascending order of severity, the Panel considered the guidance in relation to suspension (paragraphs 91-92) and erasure (paragraph 150). It noted the deterrent effect of a suspension order and that it sends out a signal to the profession and public about what is regarded as conduct unbecoming as a doctor. It noted also that suspension can be an appropriate response to misconduct which is so serious that action must be taken to protect members of the public and maintain public confidence, but which falls short of being fundamentally incompatible with continued registration.
- 8.13 The Panel's view having balanced all the factors in the case was that neither of the factors expressly referred to paragraph 150 in the SG applied; that erasure

would be disproportionate in all the circumstances; and this case fell just short of being fundamentally incompatible with continued registration.

- 8.14 It considered that the sanction of suspension would sufficiently mark the seriousness of the misconduct, protect public confidence in the profession, send a message to members of the profession of the unacceptability of the Registrant's conduct and send a message to the Registrant of how far below the standards of behaviour expected of a doctor his conduct fell.
- 8.15 In determining that the period of suspension should be 12 months, the Panel considered that this marked the seriousness of the misconduct and upheld the overarching objective, would provide the Registrant with the opportunity to develop insight and remediate appropriately.

## **9. Consideration of sufficiency**

- 9.1 The Members considered all the documents before them and received legal advice.
- 9.2 The Members discussed the following concerns about the decision:

### ***Failure by the panel to provide sufficient reasons***

- 9.3 The Members were concerned that the Panel had failed to provide sufficient reasons for its decision so that those reading the document could understand how and why the panel had reached the conclusion that suspension was the appropriate outcome. The Members noted that this was a case that involved a serious sexual assault that took place when the victim was asleep. It was clear that this was a case that engaged public confidence in the profession at the highest level and that it came about from an unusual set of facts. It was therefore necessary for the Panel to provide carefully articulated reasons, with due regard to the Sanctions Guidance, including an analysis of its view of the seriousness of the behaviour, how the aggravating and mitigating factors were weighed in the balance when considering sanction and how this outcome upholds public confidence. This reasoning was not available from reading the decision as a whole or scrutinising the transcripts.
- 9.4 In relation to the Sanctions Guidance, the Members noted that the Panel had failed to consider and analyse each of the factors identified in relevant paragraphs of the sanctions guidance and explain how the mitigating and aggravating factors that they had identified were relevant. Further, the Members were concerned that the Panel failed to identify that there were a number of factors in this case that could have indicated that erasure was the most appropriate sanction. The Members noted that it was the job of the Panel to ensure that sufficient reasons were given in the light of the seriousness of the case and to have done more than merely assert that 'erasure would be disproportionate.' The Members agreed that if the Panel were going to conclude that the Registrant's conduct was not fundamentally incompatible with continued registration, then it was necessary for it to provide clear reasons, paying due regard to the Sanctions Guidance.

- 9.5 The Members considered that the flaws in the reasoning meant that it was not possible to reach a view as to whether the outcome was one that was sufficient to protect the public.

***Objective seriousness of the conduct***

- 9.6 The Members considered the Panel's assessment of the objective seriousness of the conduct. While the Members noted that the Panel had not provided a clear analysis of its view as to the seriousness of the conduct, it did reach the conclusion that this conduct was not fundamentally incompatible with continued registration. The Members considered the evidence available to the Panel, which was not straightforward, the approach to charging by the GMC (they decided that this was not flawed) and noted the deference afforded to decisions of the expert tribunal. The Members were also mindful of victims of sexual misconduct and the impact that the outcome in this case could have generally on public confidence. The Members concluded that reasonable people could reasonably reach different views about this conduct and that this did not necessarily mean that the Panel was wrong in this case to conclude that this was not behaviour that was fundamentally incompatible with registration.

***Conclusion on sufficiency***

- 9.7 The Members concluded that the flaws in the Panel's reasoning were sufficiently problematic that it meant that it was not possible to reach a view as to whether the outcome was one that was sufficient to protect the public. In those circumstances, the decision is insufficient.

**10. Becoming a party to the GMC appeal under section 40B of the Medical Act**

- 10.1 Prior to reaching a decision on whether to become a party to the GMC appeal, the Members agreed to adjourn the meeting to write to the GMC voicing their concerns with the decision and asking whether the GMC would be content to ensure that these concerns were incorporated into their High Court appeal.
- 10.2 Meeting adjourned.

**Section 40B case meeting resumed on 8 April 2022.**

***Members present***

Alan Clamp (in the Chair), Chief Executive, Professional Standards Authority  
Christine Braithwaite, Director of Standards and Policy, Professional Standards Authority  
Kisha PUNCHIHEWA, Head of Legal (Senior Solicitor), Professional Standards Authority

***In attendance***

Fenella Morris of counsel of 39 Essex Chambers  
Georgina Devoy, Senior Scrutiny Officer, Professional Standards Authority

This meeting took place virtually.

- 10.3 Having concluded that the Panel's Determination was insufficient for public protection, the Members considered the response from the GMC dated 30 March 2022 and whether they should exercise the Authority's power under section 40B of the Medical Act and become a party to the GMC's appeal.
- 10.4 The Members were encouraged by the response of the GMC and were satisfied that the GMC's Grounds of Appeal would fully incorporate all the Members concerns.
- 10.5 The Members agreed that the Authority would not join the GMC's appeal as a party.



**Alan Clamp (Chair)**

**03/05/22**

**Dated**

**11. Annex A – Definitions**

11.1 In this note the following definitions and abbreviations will apply:

<b>The Authority</b>	The Professional Standards Authority for Health and Social Care
<b>The Panel</b>	A Medical Practitioners Tribunal of the MPTS
<b>The Registrant</b>	██████████
<b>The GMC</b>	The General Medical Council
<b>The MPTS</b>	The Medical Practitioners Tribunal Service
<b>The Act</b>	The National Health Service Reform and Health Care Professions Act 2002 as amended
<b>The Medical Act</b>	The Medical Act 1983 as amended
<b>The Members</b>	The Authority as constituted for this Section 40B case meeting
<b>The Determination</b>	The Determination of the Panel sitting on ██████████
<b>The Court</b>	The High Court of Justice of England and Wales
<b>The SG</b>	Regulator’s Sanctions Guidance in force at sanction stage