

# Section 40B Case Meeting

13 January 2022

157-197 Buckingham Palace Road, London SW1W 9SP



## *Members present*

Alan Clamp (in the Chair), Chief Executive, Professional Standards Authority  
Mark Stobbs, Director of Scrutiny and Quality, Professional Standards Authority  
Simon Wiklund, Head of Legal (Senior Solicitor), Professional Standards Authority

## *In attendance*

David Hopkins of counsel, 39 Essex Chambers, Legal Advisor

## *Observers*

Michael Hannah, Senior Scrutiny Officer, Professional Standards Authority  
Louise Appleby, Accreditation Officer, Professional Standards Authority,  
Michael Humphreys, 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 appeals under Section 40B(2) of the Medical Act.

## **3. The Authority's power to become a party to the GMC's appeals 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.

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- 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 Legal Advisor confirmed that the GMC had appealed against the decisions by a Medical Practitioners Tribunal of the MPTS concerning the Registrants on 05 November 2021 and therefore the Authority could not refer the cases under section 29 of the Act. The Legal Advisor further confirmed that the Authority may become a party to the GMC's appeals by giving notice under section 40B(2) of the Medical Act.

**6. The relevant decision**

- 6.1 The relevant decision is the Determination of the Panel concerning nine Registrants following a hearing which concluded on 12 October 2021.
- 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 12 October 2021
  - Transcripts of the hearing dated 30 August 2021 - 12 October 2021
  - Case Examiners' Decisions
  - GMC's Hearing Bundle

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

- Registrants' Witness Statements
- Registrants' Defence Exhibit Bundles
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- Counsel's Detailed Case Review dated 15 November 2021
- The Legal Advisor's Note for the meeting dated 10 January 2020
- The GMC's Code 25 March 2013
- The MPTS' Indicative Sanctions Guidance 18 November 2019
- The Authority's Case Meeting Manual
- The GMC's appeal documents.

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 Ten doctors were members of a WhatsApp group (the "Group"). The Group also contained some members who were not doctors. There were around 15 members in total. The Group was started in early March 2014 and continued to be used by its members for over two years.

8.2 In around 2016, Leicestershire police investigated a non-doctor relative of one of the Registrants who was also member of the Group and suspected of accessing indecent images. As part of the investigation, the police seized and examined the phone of one of the Registrants. The examination revealed the existence of the Group and the messages, images and videos sent within it.

8.3 By November 2016, the police had advised Health Education England ("HEE") that they were investigating the members of the Group. The police described some of the messages sent in the Group as racist in tone and outlined that some of the messages contained illegal images. The illegal images included five images of extreme pornography and one Category A image of child abuse. In the event, the police determined to take no further action against any of the Registrants.

8.4 HEE informed the GMC of the matters and by November 2018, the GMC had obtained from the police the evidence to support the allegations which included, among other things, a spreadsheet containing the contents and some metadata for 11,203 messages sent in the Group from 28 Feb 2014 to 27 Oct 2016.

8.5 The allegations before the Panel in respect of each of the ten Registrants, which were admitted, were:

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*"1. Between 28 February 2014 and 27 October 2016 you were a member of a WhatsApp group chat (the Group).*

*2. You sent to the Group the messages and images as highlighted in red in Schedule 1 and where you are described as the 'Sender'.*

*3. You received the messages sent by other members of the Group as highlighted in red in Schedule 1 where another member of the Group is described as the 'Sender' and you failed to:*

*a. remove yourself from the Group;*

*b. report the contents of the Group messages and images and the other members of the Group to:*

*i. the GMC;*

*ii. the Police;*

*iii. your employer.*

*4. One or more of the messages/images highlighted in red in Schedule 1 were racist and /or offensive.*

*5. Your conduct in paragraphs 2 and 3 brought the profession into disrepute."*

8.6 The Panel determined that all ten Registrants were guilty of misconduct, however, it concluded that their fitness to practise was not impaired.

8.7 The Panel took submissions on whether warnings should be issued to the Registrants. It determined not to issue warnings to any of the Registrants.

## **9. Consideration of the Members**

9.1 The Members considered all the documents before them and received legal advice.

9.2 The Members were only considering the decisions in respect of the nine Registrants that were the subject of the GMC's appeal. These are the nine Registrants named on the front page of this note. The Members agreed that it was not arguable that the decision in respect of the tenth Registrant was not sufficient for the protection of the public and therefore did not need to be considered.

9.3 The Members agreed on the following approach:

1. They should first consider whether the Panel's determination was sufficient for public protection.

2. They should go on to review the GMC's grounds for appeal.
3. They should then consider whether there are reasons to become a party to the appeal.

### **Was the Panel's determination sufficient for public protection?**

- 9.4 The Members were concerned that the Panel's determination did not show consideration of the whether the Registrants' fitness to practise was impaired by reason of public interest concerns. Those concerns being: the need to maintain public confidence in the profession and the profession's regulator; and declaring and upholding proper professional standards.
- 9.5 This was a major concern given the contents and nature of the messages and images.
- 9.6 The Panel ought to have asked itself whether the public interest concerns were engaged and what was required to address them. If it had concluded that those concerns were not engaged, it should have outlined good reasons as to why not.
- 9.7 The Members were also concerned that the Panel considered the actions of the Registrants collectively, rather than assessing the actions of the Registrants individually and the seriousness of those actions.
- 9.8 As a result of this approach by the Panel and the approach taken by the GMC to charging, none of the Registrants had specific allegations against them which addressed their individual actions. For example, one of the Registrants sent an image to the Group which was described by the police as a Category A child sexual abuse image, however, no allegation was made against him in relation to the sending of that image. This was potential under-prosecution by the GMC.
- 9.9 The Members considered that the Panel ought to have outlined the details of each Registrant's misconduct, the seriousness of that misconduct and how it breached the Code. Due to the respective number and nature of the messages and images, it is likely that some of the Registrants' misconduct may have been more serious than that of others.
- 9.10 The Panel did state at the fact-finding stage of the determination that the conduct of the Registrants was "abhorrent, disgraceful and dishonourable". It was noted that this passage appeared in each of the decisions concerning the individual registrants. However, the Members would also have expected to see a discrete section at the impairment stage of the Determination dealing with the seriousness of each individual Registrant's misconduct and how it impacted on the public interest. There was effectively no difference between the decisions.
- 9.11 This "cut and paste" approach by the Panel was a major concern because it did not allow for an assessment of the culpability of each individual Registrant, or for an assessment of the insight or remediation demonstrated by each individual Registrant.

### Conclusion on sufficiency

- 9.12 The Members concluded that the Panel's decision was insufficient for public protection in the following respects:
- The lack of consideration by the Panel for public interest concerns; and,
  - The Panel's consideration of the collective actions of the Registrants, as opposed to considering the individual actions of the Registrants.

### The GMC's grounds of appeal

- 9.13 The Members reviewed the GMC's grounds of appeal and agreed with them. However, the Members did consider that additional grounds could be raised which would add value to the appeal.
- 9.14 The Members considered that although some important points which might support the GMC's appeal had not been set out, many of the Authority's concerns would be broadly covered by the GMC's grounds of appeal. However, they concluded that, if there are important additional grounds to raise, for example the potential under-prosecution in relation to the sending of illegal images, the Authority should become a party to the appeal.

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

- 10.1 Having concluded that the Panel's Determination was insufficient for public protection, the Members considered whether they should exercise the Authority's power under section 40B of the Medical Act and become a party to the GMC's appeal.
- 10.2 The Members noted that certain matters may be of relevance, including whether the GMC's Grounds of Appeal raised all of the concerns identified by the Members, whether the Authority might wish to make representations or file evidence in the appeal, and the extent to which the Court might be assisted by the Authority's engagement. Other matters that may be of relevance included the prospects of a successful outcome, or consequences of a negative outcome, and whether there were any novel issues likely to generate new case law. The Members also considered whether the objectives of the referral could be achieved through other means. The Members received further advice from the Legal Advisor.
- 10.3 The Members found that the fact that they had identified a potential under-prosecution was itself a good reason to become a party to the appeal. The Members were concerned that this may not be a ground which the GMC itself could raise with the Court.
- 10.4 The Members considered that, should any problems arise with the GMC's jurisdiction in the appeal, the Authority would be able to bring the appeal itself.
- 10.5 The Members discussed whether the case could provide an opportunity for the High Court to comment on the proper approach to weighing public interest concerns and what factors panels should consider. It was of the view that this

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would add value to the appeal but acknowledged the deference that will be shown to the expertise of regulatory body panels.

- 10.6 The Members considered whether there were any other effective ways in which the Authority could ensure that additional grounds could be raised. They concluded that becoming a party to the appeal is the appropriate method available to the Authority to enable concerns are raised. Therefore, the Authority ought to use that power accordingly.
- 10.7 Having considered these matters, the Members concluded that the Authority would become a party to the GMC's appeal.



**Alan Clamp (Chair)**

**9/2/22**

**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 Registrants</b>	[REDACTED]
<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 Tribunal of the Medical Practitioners Tribunal Service sitting on 12 October 2021
<b>The Court</b>	The High Court of Justice of England and Wales
<b>The SG</b>	The Medical Practitioners Tribunal Service’s Indicative Sanctions Guidance dated 18 November 2019
<b>.The Code</b>	The General Medical Council’s Code (“Good Medical Practice”) dated 25 March 2013