

# Virtual Section 29 Case Meeting

09 May 2023

16-18, New Bridge St, Blackfriars, London, EC4V 6AG



## ***Members present***

Alan Clamp (in the Chair), Chief Executive, Professional Standards Authority  
Graham Mockler, Director of Regulation and Accreditation, Professional Standards Authority  
Dan Scott, Accreditation Officer, Professional Standards Authority

## ***In attendance***

Alexis Hearndon, Legal Advisor, 39 Essex Chambers

## ***Observers***

Amrat Khorana, Board Member, Professional Standards Authority  
Siobhan Carson, Senior Scrutiny Officer, Professional Standards Authority  
Rebecca Senior-Carol, Lawyer, 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 refer the case to the court under Section 29 of the Act.

## **3. The Authority's powers of referral under Section 29 of the Act**

3.1 The Authority may refer a case to the relevant court if it considers that a relevant decision (a finding, a penalty or both) is not sufficient for the protection of the public.

3.2 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.

3.3 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 Authority had jurisdiction to consider the case under Section 29 of the Act. Any referral in this case would be to the High Court of Justice of England and Wales and the statutory time limit for an appeal would expire on 12 May 2023.

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

6.1 The relevant decision is the Determination of the Panel following a hearing which concluded on [REDACTED].

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

7.1 The following documents were available to the Members:

- Determination of the panel dated [REDACTED]
- The Authority's Detailed Case Review
- Transcripts of the hearing dated [REDACTED]
- DCR/Counsel's Note dated 28 April 2023
- Exhibits, Case Examiners' Decision and Investigation Report
- The GOC's Indicative Sanctions Guidance
- The Authority's Section 29 Case Meeting Manual

7.2 The Members and the Legal Advisor were provided with a copy of a response from the GOC to the Authority's Notification of s.29 Meeting. The Members considered the response having received legal advice and after they reached a conclusion on the sufficiency on the outcome.

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

## 8. Background

- 8.1 The Registrant, an optometrist, having watched a televised interview of Ms A (an MP and member of the shadow cabinet), looked her up on the internet, and finding limited information about her – and particularly her formative years – sent her an email. Ms A is a black woman; her name suggests African heritage. The email (dated [REDACTED]) said:

*Hi*

*You were quite evasive in your responses to the BBC interviewer's repeated questions at 2:14 today about where money was coming from to support your figures (30 billion). Why so? Did you just pluck a figure out of your head (like most of you do) but didn't reason logically how it could be paid for?*

*Also ... where were you born? I'd like to know if you have a UK passport, a dual passport or none.*

- 8.2 The GOC alleged this language inappropriate as:

- (i) it was capable of being understood as discriminatory and/or racist; and/or
- (ii) it was discriminatory and/or racist; and/or
- (iii) it was intended to be discriminatory and/or racist.

- 8.3 The registrant admitted (i) and (ii) and denied (iii). Having heard evidence from the Registrant, the panel found (iii) proved. The panel found misconduct and a finding of impairment was made in order to maintain confidence in the profession and in order to uphold proper professional standards. The panel assessed future risk of repetition as low (although not extinguished) and described insight as limited. It imposed a suspension of 4 months without review.

## 9. Applying Section 29 of the 2002 Act

- 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:

### *The Panel's approach to risk, public safety and impairment*

- 9.3 The Members first discussed the fact that it is not clear in the Panel's determination whether or not it relied upon public protection as a ground for finding impairment. They noted that the panel analysed the question of risk without an explicit conclusion before "next turning" to consider public interest, and that the finding of impairment was then expressly made in order to uphold

standards and maintain public confidence. However, the Members further noted that the determination on sanction describes the sanction as imposed “predominantly” to satisfy the second and third limbs of the overarching objective, suggesting that public protection was a factor in the Panel’s decision-making. The Members considered this to be confusing.

- 9.4 Further, the Members considered that in approaching risk of repetition and public protection, the Panel appeared to adopt a narrow focus on the likelihood of an exact repeat of the Registrant’s conduct rather than looking at his attitude more broadly. The Members considered that given the finding of discrimination, there was a requirement for the Panel to consider the registrant’s attitudes on race more broadly, and the extent to which these may impact his practice as an optometrist when assessing patients. The Members considered the Panel’s failure to address this aspect was unsatisfactory.
- 9.5 Further, the Members noted the Panel’s finding that the Registrant had limited insight, but that the description of insight was variable throughout the determination, often being referenced as ‘developing’. They noted that the Panel concluded there is still work for the Registrant to do in this respect in order for it to be reassured that he has remediated his misconduct. It also found his incomplete insight to be an aggravating factor. The Members found it difficult to follow how the Panel had gone from finding limited insight to there being a low risk of repetition, and questioned whether the panel was wrong in its determination on insight by failing to rely upon public protection.
- 9.6 The Members, however, noted that the Panel did go on, in its consideration of imposing an immediate order, to state that it “noted that the concerns raised in this case did not involve a risk of harm to patients or the public”. The Members considered that this partially clarified the Panel’s position. They also noted that a finding of impairment was reached in order to maintain confidence in the profession and to uphold proper professional standards.

#### ***The Panel’s failure to order a review hearing***

- 9.7 The Members discussed the Panel’s decision not to direct a review of the suspension. They noted the Registrant’s attempts at remediation, but that in his evidence it appeared he was unable to remember anything substantive about the online courses he had undertaken. The Members considered that without a review hearing there is no way to test whether the registrant’s insight has developed sufficiently so as to justify a return to unrestricted practice. Further, while the Panel had found insight to be limited, it also found there to be a low risk of repetition. The Members considered there should have been a further opportunity for the GOC to assess the level of risk at review, and any further remediation undertaken by the Registrant, together with more meaningful reflection on the courses he had undertaken and how these might reduce the likelihood of repetition. The Members also considered that the Panel’s consideration of risk of repetition was narrow, focusing primarily on a repeat of very similar conduct, and did not appear to consider the risk of this conduct arising in other circumstances.
- 9.8 Given the Panel’s finding on insight, the members found the Panel’s reasoning on risk of repetition and the decision not to order a review difficult to

comprehend. However, they considered that given the evidence of some developing insight, attempts at remediation, the isolated nature of the incident in an otherwise unblemished, long career, and the lack of evidence the Registrant poses an actual risk to the public, the decision not to order a review hearing was not enough taken individually to lead the Members to conclude that the decision is insufficient.

### Conclusion on insufficiency for public protection

- 9.9 The Members were concerned primarily with the panel's approach to whether a review hearing was required, and its ultimate decision that it was not, and how this impacted on public protection. Nevertheless, bearing in mind that a suspension was imposed and that this is a restrictive sanction, and given the isolated nature of the conduct, which fell at the lower end of seriousness, they concluded that the decision was not one which no reasonable Panel could have made. In all the circumstances, therefore, it was not insufficient for public protection.

## 10. Referral to court

- 10.1 Having concluded that the panel's Determination was not insufficient for public protection, the Members were not required to consider whether they should exercise the Authority's power under Section 29 to refer the case to the relevant court.

## 11. Learning points

- 11.1 The Members agreed that the learning points set out at Annex B should be communicated to the Regulator.



**Alan Clamp (Chair)**

**19/05/23**

**Dated**

## 12. Annex A – Definitions

12.1 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 Fitness to Practise Committee of the GOC
<b>The Registrant</b>	[REDACTED]
<b>The Regulator</b>	The General Optical Council
<b>Regulator’s abbreviation</b>	GOC
<b>The Act</b>	The National Health Service Reform and Health Care Professions Act 2002 as amended
<b>The Members</b>	The Authority as constituted for this Section 29 case meeting
<b>The Determination</b>	The Determination of the Panel sitting on [REDACTED]
<b>The Court</b>	The High Court of Justice of England and Wales