

Virtual Section 29 Case Meeting

24 November 2021

157-197 Buckingham Palace Road, London SW1W 9SP



Members present

Antony Townsend (in the Chair), Board Member, Professional Standards Authority
Mark Stobbs, Director of Scrutiny & Quality, Professional Standards Authority
Kisha PUNCHIHEWA, Senior Solicitor, Professional Standards Authority

In attendance

Dennis Hamill of Counsel, Bar Library of Northern Ireland, Legal Advisor
Michael May, Solicitor, Edwards & Co

Observers

Jane Carey, Director of Corporate Services, Professional Standards Authority
Remi Gberbo, Lawyer, Professional Standards Authority
Graham Mockler, Assistant Director of Scrutiny & Quality (Performance), Professional Standards Authority
Rebecca Senior, Senior Legal Reviewer, Professional Standards Authority
David Martin, Complaints and Appointments Officer, Professional Standards Authority
Briony Alcraft, Scrutiny Team Co-ordinator, Professional Standards Authority
Dinah Godfree, Policy Manager, Professional Standards Authority
Rebecca Moore, Senior Scrutiny Officer, Professional Standards Authority
Amanda Little, Senior Policy Adviser, Professional Standards Authority

1. Definitions

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

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

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.

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.

- 3.1 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*¹).

4. Conflicts of interest

The Members did not have any conflicts of interest.

5. Jurisdiction

The Legal Advisor confirmed that the Authority had jurisdiction to consider the case under Section 29(2)(a) of the Act. Any referral in this case would be to the High Court of Justice of Northern Ireland and the statutory time limit for an appeal would expire on 29 November 2021. The Legal Advisor drew the Members' attention to the fact that there is no precedent for the Authority to intervene following a decision to grant voluntary erasure and that, therefore, the High Court in Northern Ireland will be required to decide whether this extension of the section 29 jurisdiction is permitted.

6. The relevant decision

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

The Panel's Determination which includes the charges and findings is set out at Annex B.

7. Documents before the meeting

The following documents were available to the Members:

¹ CRHP v Ruscillo [2004] EWCA Civ 1356

- Dr [REDACTED] VE application
- Determination of the panel dated [REDACTED]
- The Authority's Detailed Case Review
- Transcripts of the hearing dated [REDACTED]
- Counsel's Note dated 21 November 2021
- Regulator's Bundle
- Registrant's Bundle, including the medical evidence
- Case Examiners' decision
- Performance Assessors' Report to the GMC
- Skeleton Argument on behalf of the GMC relating to Dr [REDACTED] application for VE
- GMC's Guidance on making decisions on VE applications and advising on administrative erasure (last updated March 2021)
- The Authority's Section 29 Case Meeting Manual

The Members and the Legal Advisor were provided with a copy of a response from the GMC to the Authority's Notification of s.29 Meeting.

8. Background

The Registrant applied for Voluntary Erasure ('VE') before the MPTS on [REDACTED]. Dr [REDACTED] had retired on health grounds on [REDACTED] [REDACTED] having previously worked as a [REDACTED], employed by an NHS Trust, and also practising privately at two clinics.

In [REDACTED] concerns were raised about multiple misdiagnoses by Dr [REDACTED] and investigations were conducted by the Trust, assisted by both private practices. The Trust also referred the matter to the GMC, which resulted in Dr [REDACTED] undergoing a Performance Assessment in [REDACTED] with a recommendation for a referral to the MPTS.

Subsequently, a report was provided by the [REDACTED] which led to the largest independent recall of patients in Northern Ireland. Concerns were such that an Independent Neurology Inquiry was established. The Inquiry was subsequently converted into a Statutory Public Inquiry on [REDACTED] [REDACTED].

Previous Applications for VE

Dr [REDACTED] initially applied for VE on [REDACTED]. Within that application he had indicated that he had retired in [REDACTED] and had not worked since [REDACTED]. He relied on the fact that any attempt to return to practice would be subject to a further Performance Review.

The issue of Dr [REDACTED] ill-health was first raised within this application and it was submitted that Dr [REDACTED] was unable to participate in proceedings due to his ongoing mental health condition. A number of medical reports were considered by the Case Examiner at this stage, namely the reports of:

- [REDACTED], Consultant Psychiatrist, dated [REDACTED]
- [REDACTED], Consultant Clinical Psychologist, dated [REDACTED]
- [REDACTED], Locum Consultant Psychiatrist, dated [REDACTED]
- [REDACTED], Consultant Forensic Psychiatrist, dated [REDACTED]

The Case Examiner refused Dr [REDACTED] VE application by way of decision dated [REDACTED].

A second application for VE was made on [REDACTED]. Further medical evidence by way of an addendum report of [REDACTED], Consultant Psychiatrist, dated [REDACTED] was provided. However, again Dr [REDACTED] VE application was refused by way of decision dated [REDACTED].

Subsequently, Dr [REDACTED] representatives sought leave to apply for judicial review of both VE decisions and on [REDACTED] leave was refused by Calver J. Of particular note to this review was the fact that Dr [REDACTED] could make a further application to the GMC and as such judicial review should be seen as a remedy of last resort.

The case was listed before the MPTS and Dr [REDACTED] made a further application for VE. The MPTS granted Dr [REDACTED] application for VE pursuant to paragraph 3(8) of the General Medical Council (Voluntary Erasure and Restoration following Voluntary Erasure) Regulations 2004 by way of determination dated 1| [REDACTED].

9. Applying Section 29 of the 2002 Act

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

The Members discussed the following concerns about the decision:

Investigation

The Members first discussed an apparent failure of the GMC to adequately investigate the full extent of the issues of concern with regard to the Registrant's fitness to practise, and ensure the panel were fully apprised of these.

They noted that the matter referred to the panel was referred solely on the basis of an alleged lack of competence which was identified in a performance assessment in [REDACTED]. The Members were concerned that this did not take account of other allegations of misconduct which were also being considered by the GMC Case Examiners, such as allegations of dishonesty.

Further, it was not clear to the Members why the GMC had decided to pursue the case as a performance case rather than misconduct, given the large number of serious concerns raised, evidence of harm caused, and the conclusion of the performance assessment that Dr ██████ should cease to practise. The Members noted that a performance case cannot result in erasure. This was a significant factor to consider given the impact that proven allegations could have had on public confidence in the profession and maintaining standards. The Members concluded, therefore, that the GMC had erred in not treating this as a performance and misconduct case.

The Members queried whether the GMC could/should have persuaded the panel that the possibility of wider conduct concerns could have been considered as part of the VE decision and subsequently whether there was a failure of the GMC to weigh this in the balance.

The Members were advised that the Panel had been entitled to look at the overall context of the case, including the Registrant's dishonesty and failure of the GMC to investigate and provide the full picture to the Panel, which has a duty of inquiry. It could be said that the Panel should have dealt with the GMC's failure to investigate these issues.

The Members acknowledged that the Panel had been faced with a challenging decision where significant, long-standing concerns had been raised about Dr ██████ practice, on which no admissions had been made. The Members noted that the focus of the Panel appeared to have been on the VE application rather than considering the Registrant's response to the allegations.

The Members considered how they should take into account matters that were not part of the formal charge faced by the Registrant. They were advised that the Panel should have been concerned with wide ranging allegations from a number of different sources.

The Panel had also been entitled to take into account the earlier VE applications. The Members considered that it was clear from the determination that in granting VE the Panel had only looked at the issue of the Registrant's competence.

The Members noted that no allegations of inappropriate treatment had been brought against the Registrant. The Members were advised that the weight to be given to this was a matter of judgement. The Members questioned whether, had the Panel been in possession of evidence of inappropriate treatment, it would have influenced their decision to grant VE. They queried whether the Panel was in a position to make a fully informed decision without being fully apprised of the Registrant's failings.

The Members concluded that the GMC fell into serious procedural error by failing to ensure that the panel which made the VE decision was fully apprised of all matters of concern in relation to the Second Respondent's fitness to practise. The Members considered that had the Panel been aware of the full extent of the concerns about the Registrant's conduct, then public interest considerations would have tipped the balance towards rejecting the VE application.

Medical evidence

The panel received evidence remotely from [REDACTED], Consultant Psychiatrist on behalf of [REDACTED], together with an additional report dated [REDACTED].

The Members next discussed the medical evidence available to the Panel, particularly whether the failure of the GMC to obtain an updated medical report from [REDACTED], Consultant Forensic Psychiatrist, and to ensure that he was called as a witness to give evidence and to be cross-examined, meant that the Panel was not in a position to make a proper assessment of the case.

The Members noted the report of [REDACTED], dated [REDACTED], which stated his opinion that [REDACTED] symptoms were capable of being managed, that he was capable of instructing his legal representatives and attending a hearing, and that [REDACTED] did not elicit factors associated with heightened risk of suicide. This put forward a different perspective to the other medical opinions before the panel. The GMC sought to rely on this evidence but did not call [REDACTED]. The GMC ought to have been aware that absence of oral evidence from this witness would affect the weight a panel would place on it.

The Members noted that the panel heard evidence remotely from [REDACTED], Consultant Psychiatrist, and accepted his evidence that [REDACTED] presented as being a high suicide risk if he was required to continue with the proceedings, and could not engage properly with a substantive hearing. However, they noted that neither his report nor his oral evidence expressly dealt with [REDACTED] ability to instruct his lawyers, and considered there to be a distinct difference between his ability to engage with the substantive hearing and his ability to provide instructions.

The Members were concerned that it appeared that parts of [REDACTED] evidence might be advocacy on [REDACTED] behalf as opposed to acting as an expert called to give evidence to the Panel. They were concerned that [REDACTED] appeared to accept too easily the evidence that was given to him by the instructing solicitors, especially about [REDACTED] 'sticking his head in the sand'.

The Members considered whether there was evidence that [REDACTED] health concerns were significantly over and above those of a typical registrant faced with such proceedings, but were not satisfied that there was.

The Members considered that the evidence of [REDACTED] appeared to have tipped the balance in favour of VE.

The Members noted that the Panel considered that [REDACTED] was able to give clear and cogent evidence and was satisfied that it could attach more weight to the opinion of [REDACTED] as to the extent of [REDACTED] mental health condition than it could to that of [REDACTED]. The Members were concerned that [REDACTED] view was not shared by those providing primary care to the registrant, who did not seem to consider that he was a suicide risk. Given the differing opinions about the Registrant's state of health, the Panel should have been provided with all relevant evidence before making a decision. This is important in any case but particularly in this case because of the impact it could have on public

confidence.

The Members concluded that this failure, together with the undue weight the panel placed on the evidence of [REDACTED], was a serious procedural irregularity.

Rejecting the VE application and proceeding in absence

The Members discussed whether the panel ought to have given consideration to the possibility of proceeding in the absence of [REDACTED], particularly where it was not contended that he lacked capacity but rather that he would be “overwhelmed” and at a high risk of suicide if he participated in the hearing.

The issue of [REDACTED] ill-health was first raised within his first VE application and it was submitted that [REDACTED] was unable to participate in proceedings due to his ongoing mental health condition. The Members considered that this argument was somewhat undermined by the fact that [REDACTED] had been able to give instructions to make VE applications, in addition to instructing Counsel on Judicial Review applications.

However, the Members concluded that there is a conceptual difference between instructing a Lawyer to make a VE application and engaging in substantive fitness to practise proceedings, which clearly requires significant involvement from the Registrant.

Public protection

The Members discussed whether the decision was sufficient to protect the health, safety and wellbeing of the public, bearing in mind that the registrant can no longer practise and that it appears unlikely on the evidence that he will seek to be restored to the register in the future.

The Members had regard to the GMC regulations which provide a safeguard that any restoration application would be referred to the case examiners to consider any outstanding fitness to practise concerns, and that should [REDACTED] apply for restoration, he would be required to satisfy the requirements of a performance assessment before being able to practise again. The Members further noted that [REDACTED] had not practised medicine since [REDACTED] and that he had since retired from the Trust and private practice on [REDACTED]. It was therefore reasonable for the Panel to assume that due to his age, the fact that he had retired, and his length of time away from practice, he would not seek to return. The Members considered that this view was also supported by the evidence that was before the panel in respect of [REDACTED] ill health.

The Members therefore concluded that the decision to allow VE was arguably sufficient to maintain patient safety.

Public confidence and upholding of professional standards

The Members took into account the seriousness of the allegations in this case and that they are potentially numerous and wide ranging and engage the public interest to a high degree. They took into account the Judicial Review proceedings issued by patient/s challenging the panel’s decision to allow VE, the largest ever recall of patients, the Public Inquiry, and the GMC’s expression of disappointment with the Panel’s decision.

They noted the Case Examiner's view that it would only be appropriate to halt the proceedings and grant voluntary erasure in "the most exceptional circumstances, if for example [REDACTED] lacked mental capacity to instruct his solicitor, or if he was suffering from a terminal or very serious illness". They further noted that a fully ventilated hearing on [REDACTED] alleged deficient performed had taken place and it was the view of the Case Examiner in [REDACTED] that these must be heard before the issue of VE was considered.

However, the Members considered that at the forefront of the panel's determination was the fine balancing act to be had between the sustained maintenance of public confidence and the interests of the Registrant and the risk of suicide.

The Members, however, considered that it was clear that the lack of a public hearing had already had an impact on public confidence in the profession and that the decision sent entirely the wrong signal to the public; that a member of the medical profession can have an exceptionally large number of complaints against him and avoid being held accountable for them by being allowed to take VE.

The Members concluded, therefore, that the Panel did not attach proper weight to the seriousness of the public interest concerns identified by the GMC, resulting in a decision which is insufficient for the maintenance of public confidence in the profession and to maintain proper professional standards and conduct for members of the profession.

Conclusion on insufficiency for public protection

The Members concluded that the decision to allow VE was insufficient for public protection in the following respects.

- The GMC failed to fully investigate the case and present the wider case to the Panel, including the misconduct allegations
- The Panel failed to take account of other misconduct allegations against the Registrant and the wider concerns about his fitness to practise.
- The failure of the Panel to obtain alternative medical evidence or obtain an updated medical report from [REDACTED] or require his evidence at the hearing,
- The undue weight placed by the Panel on the evidence of [REDACTED].

The Members considered there was a failure of Panel to attach proper weight to the seriousness of the public interest concerns identified by the GMC, and that consequently, the granting of application for VE is insufficient for the protection of the public, for the maintenance of public confidence in the profession and to maintain proper professional standards and conduct for members of the profession.

10. Referral to court

Having concluded that the panel's Determination was insufficient for public protection, the Members moved on to consider whether they should exercise the Authority's discretion to refer this case to the relevant court.

In considering the exercise of the Authority's discretion, the Members received legal advice as to the prospects of success and took into account the need to use the Authority's resources proportionately and in the public interest.

The Member discussed the effect of a successful appeal if the court were to quash the decision and whether the Registrant could launch a further VE application. They also discussed the Judicial Review proceedings being issued by patients, and the potential effects of these on any appeal.

However, the Members concluded that its decision should not be influenced by unknown future events or Judicial Reviews about which they have no details.

The Members took into account that a decision to appeal may have an impact on the Registrant's health. However, whilst a difficult decision to make, the Members concluded that the public interest outweighs those concerns. The case can be managed with care and efforts made to ensure that the registrant receives support.

The Members also took account of the letters from the groups representing patients and the Northern Ireland Health Committee, which are indicative of the current level of disquiet in Northern Ireland. However, the Members were advised that there were no particular issues in relation to these to be taken into account as part of their decision making.

Taking into account those considerations, along with advice on the prospects of success, the Members agreed that the Authority should exercise its power under Section 29 and refer this case to the High Court of Justice of Northern Ireland.



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Antony Townsend (Chair)

21st February 2022

Dated

11. Annex A – Definitions

In this note the following definitions and abbreviations will apply:

The Authority	The Professional Standards Authority for Health and Social Care
The Panel	A Medical Practitioner’s Tribunal Service of the GMC
The Registrant	██████████
The Regulator	The General Medical Council
Regulator’s abbreviation	GMC
The Act	The National Health Service Reform and Health Care Professions Act 2002 as amended
The Members	The Authority as constituted for this Section 29 case meeting
The Determination	The Determination of the Panel sitting on ██████████
The Court	The High Court of Justice of Northern Ireland
VE	Voluntary Erasure
CE	Case Examiner