

COUNCIL FOR HEALTHCARE REGULATORY EXCELLENCE

NOTE OF CASE MEETING ON 10 MAY 2005

AT 11 STRAND, LONDON WC2

Re: Dr Abdel Bagi Hassan Babiker

PRESENT: Jane Wesson (Chair)
Frances Dow
Hew Mathewson

IN ATTENDANCE Sandy Forrest (Director)
Michael Andrews (Fitness to Practise Manager)
Eric Salem (CHRE Officer)
Len Murray, Associate, Baker & McKenzie (Legal Adviser)
Holly Brown, Baker & McKenzie (Trainee Solicitor)

Definitions

Case meeting of council members: the meeting

Fitness to Practise Panel: FPP

General Medical Council: GMC

Dr Abdel Bagi Hassan Babiker: Dr Babiker

Dr Abdel Magid Osman Bakheit: Professor Bakheit

Dr Claire Gerada: Dr Gerada

Mr Derek Evans: Mr Evans

NHS Reform and Healthcare Professions Act 2002: the Act

Court of Appeal Judgment handed down on 20 October 2004 in *Dr Giuseppe Ruscillo v (1) The Council for the Regulation of Health Care Professionals (2) The General Medical Council and Council for the Regulation of Health Care Professionals v (1) The Nursing and Midwifery Council (2) Steven Truscott*: the *Truscott/Ruscillo* judgment

High Court Judgment handed down on 30 April 2004 in *Council for the Regulation of Healthcare Professionals v (1) The General Medical Council (2) Dr Olagbalekan Solanke*: the *Solanke* judgment.

High Court Judgment handed down on 31 January 2005 in *Council for the Regulation of Health Care Professionals v (1) The General Medical Council (2) Dr Basiouny*: the *Basiouny* judgment

High Court Judgment handed down on 14 April 2005 in *Council for the Regulation of Health Care Professionals v (1) The General Medical Council (2) Professor Southall*: the *Southall* judgment

The FPP's decision

The meeting considered whether the decision of the FPP of the GMC on 1 April 2005 to suspend Dr Babiker's registration for six months, without provision for a resumed hearing, was unduly lenient and should be referred to the High Court under Section 29 of the Act. The FPP's decision followed a finding of serious professional misconduct by Dr Babiker for prescribing and supplying drugs to individuals in Sudan who were his relatives, not in his care, and without an assessment, or any adequate assessment, of the individuals' conditions.

Documents

The following documents were before the meeting:

- (a) Transcripts of the FPP hearing held on 14 and 15 March 2005.
- (b) Exhibits put before the FPP hearing, including expert evidence from Dr Gerada.
- (c) Determination of the FPP on 1 April 2005.
- (d) Report prepared by Baker & McKenzie dated 10 May 2005.

Conflicts of Interest

The Chair informed the meeting that the members convened had no apparent conflicts of interest and no conflicts of interest were registered.

Matters noted by the meeting

The meeting noted the matters set out in paragraphs 1 to 21 below.

The FPP's findings

1. There were a number of matters considered by the FPP:
 - (a) The FPP noted that Dr Babiker obtained, on eight occasions, a quantity of drugs intended for other people by writing prescriptions in his own name in the form of signed orders. On two other occasions, he attempted to obtain drugs for use by other people by way of signed orders but changed them to private prescriptions when challenged by Mr Evans, former Pharmacy Manager of Safeway Megastore in Plymstock, Plymouth. On five occasions, Dr Babiker prescribed and supplied drugs by way of a private prescription to people who were not under his care and were his relatives.
 - (b) The FPP concluded that presenting signed orders for drugs to be used by other people was misleading, and furthermore, the FPP was particularly concerned that Dr Babiker continued to do so notwithstanding the advice given by Mr Evans that it was inappropriate.
 - (c) The FPP found in respect of all the occasions on which Dr Babiker obtained the drugs by signed orders and private prescriptions that the drugs were prescribed and supplied to the Sudan patients without an assessment, or adequate assessment, of the person's condition and without adequate knowledge of the person's health, history or medical records. The FPP also

found that Dr Babiker failed to keep any, or any adequate, records. The FPP concluded that Dr Babiker had prescribed and supplied drugs, which included drugs with potential for abuse, without taking adequate steps to ensure that those drugs would not be abused.

- (d) The FPP concluded that Dr Babiker's actions were not in the best interests of the people for whom the drugs were prescribed, were an abuse of his position as a doctor and were likely to bring the profession into disrepute.
- (e) The FPP considered the GMC's guidance in relation to good standards of practice contained in the *Good Medical Practice* (2001 edition). The FPP noted that the *Good Medical Practice* states that all patients are entitled to good standards of practice and care from their doctors and that good clinical care includes an adequate assessment of the patient's conditions, based on the history and symptoms and, if necessary, an appropriate physical examination of the patients.
- (f) The FPP noted that Dr Babiker admitted that he did not retain the faxes containing the prescriptions issued by Dr Musa (the primary practitioner of Dr Babiker's family in Sudan), and that he did not undertake any assessment of the patients, or keep any records of the faxed prescriptions, signed orders or private prescriptions that he issued. The FPP noted that the *Good Medical Practice* states that in providing care a doctor must keep clear, accurate, legible and contemporaneous patient records which report the relevant clinical findings, the decisions made, the information given to patients and any drugs or other treatment prescribed. It also states that doctors must prescribe drugs or treatment, including repeat prescriptions, only where they have adequate knowledge of the patient's health and medical needs.
- (g) The FPP noted Dr Babiker's argument that the patients were not his but Dr Musa's, but it accepted the opinion of Dr Gerada that in signing a prescription, the doctor assumes responsibility for the prescription and the appropriateness of that prescription. Dr Gerada was the expert witness called by the GMC. Dr Gerada is a General Practitioner and also Chair of Ethics for the Royal College of General Practitioners and a member of the Advisory Council on the misuse of drugs. The FPP rejected Dr Babiker's assertion that he had no direct responsibility for the drugs he obtained for his family on the basis that another treating doctor recommended them.
- (h) The FPP accepted the evidence of Dr Babiker and that of Professor Bakheit that there is no formal health service in the Sudan and no continuity of care, such as is available in the UK and that Dr Babiker was therefore only seeking to help members of his family.
- (i) The FPP noted the evidence given on Dr Babiker's behalf as to his professional performance and integrity in his current post as staff grade doctor. The FPP considered the supportive testimonials submitted on Dr Babiker's behalf. The FPP considered these matters in relation to the sanction which should be imposed. The FPP noted that there had been no previous proceedings against Dr Babiker in relation to his fitness to practise.

Sanction imposed by the FPP

2. The FPP considered that the findings against Dr Babiker represent a serious breach of the principles of *Good Medical Practice*. The FPP considered generally the range

of sanctions available, as well as considering the GMC's *Indicative Sanctions Guidance*. The FPP stated that they bore in mind their duty to protect patients and to maintain public confidence in the profession. The FPP considered the fact that Dr Babiker failed to take on board Mr Evans' advice, and concluded that a reprimand would be wholly insufficient. The FPP considered that it would not be possible to formulate conditions that would be appropriate, practicable and measurable and consequently concluded that this sanction would also be insufficient.

3. The FPP expressed concerns about whether or not Dr Babiker fully understood the seriousness of his actions and his lack of familiarity with the principles of *Good Medical Practice*. The FPP concluded that in order to protect patients, maintain public confidence in the profession, and uphold proper standards of conduct, it was necessary and proportionate to suspend Dr Babiker's registration for six months. The FPP recommended that during his suspension Dr Babiker took steps to become properly informed about the principles of *Good Medical Practice*, paying particular attention to medical ethics, and that he should become familiar with the regulations governing prescribing. Taking into account the circumstances of the case, the FPP did not consider it appropriate to direct that there be a resumed hearing.

Public protection

4. Having been advised that CHRE had jurisdiction under section 29 of the Act, in considering whether it was desirable for the protection of members of the public for the meeting to refer this case to the High Court, the meeting considered whether Dr Babiker's conduct posed a direct risk to patients and the public and whether his conduct and the sanction imposed risked undermining public confidence in the profession.
5. The meeting noted that the FPP accepted Dr Babiker's testimony about his reasons for prescribing the drugs and what he did with them once he had obtained them. The meeting noted further that Dr Babiker's version of events was not challenged by contrary evidence from the prosecution. In particular, the meeting noted that no inquiry was made into the existence of Dr Musa and Dr Babiker's relatives in Sudan. The meeting considered that these would have been simple inquiries to have made and that consequently such inquiries should have been made.
6. The meeting considered the issue of Dr Babiker's honesty. The meeting noted that the FPP was advised by the Legal Assessor on the legal meaning of dishonesty and subsequently found that Dr Babiker's actions were not dishonest. The meeting also considered the conflicting testimonies of Dr Babiker and Mr Evans and noted that the FPP decided not to favour one or the other. The meeting noted that Dr Babiker did not appear to take any steps to conceal his actions.
7. The meeting were referred to the *Basiouny* judgment which stated that the Court will only intervene to overturn an FPP's finding of fact where the finding challenged is "manifestly wrong". This might be because of under prosecution as a result of not obtaining relevant material. The meeting noted that the FPP had questioned Dr Babiker in relation to his honesty and had been able to assess Dr Babiker's demeanour when giving evidence. The meeting considered that although it would have been better if there had been further investigations, the FPP could have reached a view that Dr Babiker was not dishonest and this was not manifestly wrong.

Whether other sanctions might better protect the public

8. The meeting considered whether other sanctions available might better protect the public. Dr Babiker's case was commenced prior to 1 November 2004 and therefore the sanctions available to the FPP were those under the previous version of section 36 of the Medical Act 1983. The options were to:
 - (a) Impose conditions on Dr Babiker's practice for a period of up to three years;
 - (b) Suspend Dr Babiker. The initial period of suspension cannot exceed twelve months, however, the FPP may direct that a period of suspension may be extended for a further period not exceeding twelve months; or
 - (c) Erase Dr Babiker from the register.
9. The FPP could also have decided that there should be a resumed hearing at the end of the period of suspension. This could have incorporated steps Dr Babiker should have carried out during the period of suspension.

Conditions

10. The meeting noted that Dr Babiker's counsel submitted to the FPP that Dr Babiker would voluntarily submit to certain conditions being imposed. The conditions proposed were that Dr Babiker:
 - (a) should not practise medicine except within the NHS;
 - (b) be prohibited from writing private prescriptions;
 - (c) not obtain medication by way of a signed order; and
 - (d) comply with any training or education requirements ordered by the FPP.
11. The meeting concluded that the proposed conditions may have addressed the public protection issues, however, the meeting did not consider that the FPP reached a manifestly inappropriate decision by suspending Dr Babiker instead. The meeting noted the Court's comments in the *Solanke* judgment indicating that suspension from the register can be a harsher sanction than imposing conditions.

Suspension

12. The meeting considered whether a twelve month suspension of Dr Babiker's registration would better protect the public. The meeting considered that removing Dr Babiker from practice for twelve months might generate some public protection issues unless appropriate training was arranged during that period or Dr Babiker was assessed before returning to practice. The meeting also considered the indication in the *Solanke* judgment, that where suspension has been imposed, the decision may not be unduly lenient because the maximum 12 month period was not imposed.

Erasure

13. The meeting did not consider that erasure was an appropriate sanction that the FPP could have imposed in this case.

Resumed hearing

14. The meeting considered whether it was appropriate that the FPP decided not to direct that there be a resumed hearing. The meeting noted that the FPP did not omit to consider the issue of a resumed hearing, but that it did not give detailed reasons for its decision not to direct a resumed hearing, beyond saying that it was not appropriate in the circumstances of this case.
15. The meeting considered the comments of Collins J in the *Southall* judgment that after a period of suspension a resumed hearing may be required to address any issues of public protection. The meeting recognised that Collins J was not suggesting that if an FPP decides not to have a resumed hearing, that decision should always be referred to the High Court. The meeting considered that the FPP should have provided more detailed reasons for deciding not to have a resumed hearing. The meeting considered that where an FPP decides not to direct a resumed hearing, the reasons given should explicitly address why the FPP believes this is appropriate in public protection terms.
16. The meeting noted that the FPP had expressed the view that during Dr Babiker's suspension he should become properly informed about the principles of *Good Medical Practice* paying particular attention to medical ethics and he should also become cognisant of the regulations governing prescribing. The meeting considered whether a suspension for six months without any mandatory training or assessment before the practitioner resumes practice was an appropriate sanction given the matters that Dr Babiker had been asked to address. The meeting concluded that it would be difficult for a resumed FPP to test that Dr Babiker had become sufficiently acquainted with the principles of *Good Medical Practice* and the prescribing regulations. Therefore formally requiring him to take these steps would not necessarily address any public protection concerns.
17. The meeting also concluded that it would be difficult to formulate appropriate conditions after the suspension in view of the fact that Dr Babiker was prescribing inappropriately in a private capacity rather than within the NHS. The meeting noted that there was no evidence that Dr Babiker had continued to prescribe for his relatives in Sudan after the GMC commenced the complaint.
18. Given that Dr Babiker had been suspended for six months and that the FPP's view that he was not dishonest was not manifestly wrong, the meeting considered that this case might not need to be referred to the Court on public protection grounds. However, the meeting considered it appropriate to look at whether the decision was unduly lenient.

Undue leniency

19. The meeting noted that the Court of Appeal held in the *Truscott/Ruscillo* judgment that the test applied by the High Court as to whether a decision is "wrong" is the same as the test of "undue leniency" applied by the CHRE. Consequently, the test to be applied by the Court is a relevant consideration for the meeting. The meeting was advised that it was appropriate to consider this issue.
20. In relation to the application of the "undue leniency" test under section 29, the meeting noted the following paragraphs of the *Truscott/Ruscillo* judgment:

Paragraph 73: *"the test of undue leniency ... must, we think, involve considering whether, having regard to the material facts, the decision reached*

has due regard for the safety of the public and the reputation of the profession."

Paragraph 76: "We consider that the test of whether a penalty is unduly lenient in the context of section 29 is whether it is one which a disciplinary tribunal, having regard to the relevant facts and to the object of the disciplinary proceedings, could reasonably have imposed."

Paragraph 77: "In any particular case under section 29 the issue is likely to be whether the disciplinary tribunal has reached a decision as to penalty that is manifestly inappropriate having regard to the practitioner's conduct and the interests of the public."

21. The meeting noted that the FPP found Dr Babiker guilty of serious professional misconduct and imposed a six month suspension on Dr Babiker's registration. The meeting also noted that the FPP did not give reasons in its determination as to why it imposed a suspension of six months rather than a suspension of a longer period up to twelve months. The meeting noted further that the FPP did not provide sufficiently detailed reasons in its determination for why it decided not to have a resumed hearing. However, the meeting considered that based on the facts found by the FPP, it had not been unduly lenient to impose a six month period of suspension. Given the matters noted in paragraphs 14 to 18 above, the meeting considered that the decision of the FPP not to hold a resumed hearing was not unduly lenient.

Conclusions

The meeting concluded that:

1. Having considered the legal advice provided, it had jurisdiction under section 29(4) of the Act to consider whether or not to refer this case to the High Court.
2. Based on the matters noted by the meeting in paragraphs 1 to 21 above, the meeting concluded that the sanction imposed by the FPP did not meet the section 29 criteria of undue leniency. Therefore this case could not be referred to the High Court.

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JANE WESSON (Chair)

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DATED