

**PRIVILEGED AND CONFIDENTIAL**

**COUNCIL FOR HEALTHCARE REGULATORY EXCELLENCE**

**CASE MEETING OF COUNCIL MEMBERS**

**ON 9th AUGUST 2005**

**AT 11 STRAND, LONDON WC2**

**RE: DR DAYANANDA RAJAPAKSE AND THE DECISION OF THE FITNESS TO PRACTISE PANEL OF THE GENERAL MEDICAL COUNCIL MADE ON 24TH JUNE 2005**

**PRESENT:** Peter North (Lay Member, in the Chair)  
Hew Matthewson (Regulatory Member)  
Frances Dow (Lay Member)

**IN ATTENDANCE:** Julie Stone (Deputy Director)  
Michael Andrews (Fitness to Practise Manager)  
Briony Mills (Fitness to Practise Officer)  
Charles Atkins (Legal Adviser, Bevan Brittan)  
Edward Hooper (Legal Adviser, Bevan Brittan)

- 1** Dr Dayanandra Rajapakse ("Dr Rajapakse") is a 64 year old registered medical practitioner (registration number PH43175). He appeared before a Fitness to Practise Panel ("the FPP") of the General Medical Council ("the GMC") on 20<sup>th</sup> – 24<sup>th</sup> June 2005 in relation to a charge of serious professional misconduct.
- 2** The FPP heard the case in accordance with the transitional arrangements under the Medical Act 1983 and the General Medical Council Preliminary Proceedings Committee and Professional Conduct Committee (Procedure) Rules 1988 ("the 1988 Rules").
- 3** The heads of charge and the findings of the FPP against Dr Rajapakse were:

Heads of charge	Findings
1. At all material times you were employed by Care Principles Ltd as a Consultant Psychiatrist at Beech House, Newmarket, Suffolk;	Admitted and proved
2.a. In mid 2000, on approximately eight occasions, you provided treatment to Ms C, a Mental Health Act Administrator and your Clinical Secretary to alleviate her symptoms of stress and anxiety,	Proved
b. The above treatment was provided to Ms C in your office at Beech House, the workplace shared with Ms C and other colleagues	Proved
c. On at least two of the above occasions, you locked your office door whilst you provided treatment to Ms C,	Proved
d. You did not maintain any records of the treatment given to Ms C,	Proved
e. You did not notify Ms C's GP of the treatment that you were providing;	Proved
3. a. In the course of your treatment of Ms C, you told her that you were going to use "masturbation therapy", which you sought to persuade her was a well known and recognised treatment,	Not proved
b. In the course of that treatment of Ms C you,	Not proved
i. encouraged her to touch herself over her clothing,	Not proved
ii. encouraged her to touch herself under her clothing,	Not proved
iii. encouraged her to remove her clothing,	Not proved
iv. on at least one occasion, placed your fingers inside her vagina,	Not proved
v. fondled her breasts,	Not proved
vi. had oral sex with her,	Not proved [and withdrawn]
vii. attempted to force her hand down your trousers;	Not proved

## Heads of charge

## Findings

- |   |   |
|---|---|
| 4. Your actions as described in 2. and 3. Above were,<br>a. Inappropriate,<br>b. Indecent,<br>c. An abuse of your professional position,<br>d. Not in the best interests of your patient;   | Proved in relation to head of charge 2 only<br>Not proved<br>Proved in relation to head of charge 2 only<br>Proved in relation to head of charge 2 only |
| 5. During the course of 2004-2000 you,<br>a. Offered massage therapy <del>and hypnotherapy</del> to a colleague, Ms P, the Corporate Head of Learning and Support Services at Care Principles Ltd,<br>b. Offered to carry out this treatment at Ms P's home and in the absence of her partner,<br>c. Made persistent and unwelcome advances towards Ms P; | Proved<br>Not proved<br>Proved  |
| 6. Your actions as described in 5. a. – c. above were inappropriate.  | Proved in relation to heads 5(a) and 5(c) only  |

- 4 In respect of the matters found proved, the FPP found Dr Rajapakse guilty of serious professional misconduct and suspended his registration for 9 months with effect from 23<sup>rd</sup> July 2005.

## Documents

- 5 The following documents were before the meeting:-
- (1) Determination of the FPP dated 24<sup>th</sup> June 2005
  - (2) Transcript of hearing 20<sup>th</sup> –24<sup>th</sup> June 2005
  - (3) Exhibits before the FPP
  - (4) Statement of Ms C dated 23<sup>rd</sup> February 2005
  - (5) Supplementary statement of Ms C dated 24<sup>th</sup> February 2005
  - (6) Statement of Ms P dated 6<sup>th</sup> December 2004

- (7) The GMC's Indicative Sanctions Guidance April 2005
- (8) Report by Bevan Brittan LLP prepared 5<sup>th</sup> August 2005
- (9) Section 29 Protocol and Process Guidelines (November 2004).

### **Conflicts of Interest**

- 6 Mr North declared that he was a lay assessor for the GMC but had no involvement in Dr Rajapakse's case.
- 7 The members declared that they had no conflicts of interest and none was apparent.

### **Jurisdiction**

- 8 The members noted that the purpose of the meeting was to decide whether to exercise the CHRE's statutory discretion to refer to the High Court under Section 29 of the NHS Reform and Health Care Professions Act 2002 ("the 2002 Act") the FPP's decision in respect of Dr Rajapakse.
- 9 It was agreed that the CHRE had the power to refer this case under Section 29 (4) (a) of the 2002 Act if they considered that the decision of the FPP was unduly lenient and it was desirable so to refer for the protection of members of the public.
- 10 The CHRE's time for referring the matter under Section 29 will expire on 17<sup>th</sup> August 2005.

### **Matters noted by the members**

- 11 At the time of the matters alleged Dr Rajapakse was a Consultant Psychiatrist employed by Care Principles Limited at Beech House, Newmarket, Suffolk.
- 12 The heads of charge against Dr Rajapakse were in summary that;
  - On about eight occasions in 2000 Dr Rajapakse provided treatment to a colleague Ms C; on at least two occasions he locked his office door when treating her; he did not keep records; and, he did not notify her GP.
  - In the course of treating Ms C he told her that he would use masturbation therapy; he encouraged her to touch and undress herself; and, he sexually assaulted her (including a specific head of charge that Dr Rajapakse had oral sex with her).

- During 2000 he offered massage therapy and hypnotherapy to a colleague Ms P; offered to carry out the treatment at her home; and, made persistent and unwelcome advances to her.

**13** The FPP received evidence on behalf of the GMC from:

- Ms C
- Ms S Parkin (Counsellor in private practice, who treated Ms C)
- Ms M Harrington (Officer Manager, Beech House)
- Miss P
- Mrs Y King (Head of Social Work, Beech House)
- Dr Y O'Brien (Head of Psychology, Beech House)
- Mr R G Bennett (Unit General Manager, Beech House)

and on behalf of Dr Rajapakse from:

- Dr Rajapakse himself
- Mrs M Rajapakse
- Dr M Heap (Chartered Clinical and Forensic Psychologist).

**14** The FPP delivered their determination on findings of fact, serious professional misconduct and sanction on 24<sup>th</sup> June 2005. It found some but not all heads of charge proved and that they amounted to serious professional misconduct.

**15** The FPP found not proved the allegations of indecency under head of charge 3 in relation to Ms C, that hypnotherapy had been offered to Ms P or that Dr Rajapakse had offered to carry out massage therapy for Ms P at her home.

**16** Ms C was not only vulnerable by virtue of her depression, for which she was also receiving counselling elsewhere, but also worked as Dr Rajapakse's clinical secretary. The FPP found Dr Rajapakse's conduct an abuse of his professional position and not in her best interests.

**17** The FPP, having regard to Ms C's evidence and Dr Rajapakse's acceptance that he took her medical history, found that there was a doctor/patient relationship in mid 2000 and that he was treating her for a period of about 2 months.

**18** The FPP found that the treatment took place on approximately eight occasions in Dr Rajapakse's office and that on at least two occasions the door was locked.

- 19** The FPP found that Dr Rajapakse had not kept medical records and that he had not notified her GP of his treatment of Ms C.
- 20** The alleged abuse of Ms C occurred in mid-2000 but that a complaint was not made until September 2003.
- 21** It was the belief of Ms C that Dr Rajapakse had hypnotised her [Day 1/14 and 36], but the FPP made no finding on this issue.
- 22** The members noted Ms C's evidence that Dr Rajapakse had used hypnosis but it had not been included as a head of charge.
- 23** In any event there was no finding by the FPP as to whether or not Dr Rajapakse had hypnotised Ms C.
- 24** The FPP made no finding as to whether or not a statement made by Ms C and dated 8<sup>th</sup> March 2000 (exhibit C1) was contemporaneous.
- 25** If it had been made contemporaneously, then although it would not have been evidential in itself of the matters referred to in it, it may have assisted the FPP in considering the sequence of events and how matters unfolded and progressed.
- 26** A letter dated 12<sup>th</sup> December 2000 (exhibit C2) had been sent by Ms C to Dr Rajapakse and the FPP had made no finding as to the meaning of the letter or the conclusions that could be drawn from it.
- 27** There was uncertainty as to whether an undated note (exhibit C3) had been given by Ms C to Dr Rajapakse [Day 1/21 and 39-40] and in any event the FPP made no finding as to the meaning or conclusions that could be drawn from it.
- 28** Ms C was not asked at the hearing, and nor did she volunteer, information about her specific allegation that Dr Rajapakse had performed oral sex upon her, although she was asked by Counsel for the GMC "if anything else happened in the sessions which she had not told the FPP about". [Day 1/17]
- 29** In light of this an unopposed submission was made to and accepted by the FPP to delete that head of charge. [Day 2/70]

- 30** When during a police interview Dr Rajapakse described a sexual encounter that Ms C had told him about, he had said to Ms C “relive the situation and then go into detail what exactly happened”. (exhibit C7/5)
- 31** The FPP made no finding as to the nature and meaning of Dr Rajapakse’s account as set out above and whether this was consistent with the allegations of sexual misconduct and assault.
- 32** The FPP gave no reasons why it preferred Dr Rajapakse’s evidence in relation to Ms C’s complaints of sexual misconduct and why they found not proved the allegations of sexual misconduct and assault at head of charge 3 (as amended by the withdrawal of head of charge 3vi). The members also noted that no motive was investigated as to why Ms C would have made up the allegations.
- 33** In relation to Ms P, the members noted that she was vulnerable in that she was known to have suffered from anxiety attacks and was also a work colleague of Dr Rajapakse.
- 34** Ms P’s evidence was that Dr Rajapakse had offered her massage therapy and hypnotherapy. [Day 2/6]
- 35** The FPP gave no reasons as to why they were not satisfied that hypnotherapy had been offered to Ms P.
- 36** The FPP instigated the removal of the allegation of hypnotherapy at head of charge 5 b) notwithstanding that this reduced the seriousness of the charge and this was unopposed by Counsel on behalf of the GMC.
- 37** The FPP gave no indication as to why it preferred Dr Rajapakse’s evidence about Ms P’s complaint that Dr Rajapakse offered massage therapy (hypnotherapy having been deleted from the charge) at her home and in the absence of her partner when it had accepted her evidence in relation to unwelcome advances made to her and the offer of massage therapy.
- 38** Ms P’s credibility seemed to have been affected as she appeared confused in relation to the number of journeys that she took with Dr Rajapakse. In her evidence and statement she refers to two journeys, but in cross-examination that there were three journeys. [Day 2/19]
- 39** The FPP were given to read the testimonials before reaching a decision on the facts. [Day 4/1]

- 40 It was found by the FPP that Dr Rajapakse had failed to maintain appropriate behavioural boundaries in relation to the heads of charge proved and that he did not understand the importance of maintaining appropriate professional boundaries between a doctor and colleagues, particularly colleagues of the opposite sex.
- 41 The members noted the testimonials put forward on behalf of Dr Rajapakse.
- 42 Dr Rajapakse apologised to Martin Cooper for his actions in relation to Ms P, but had not otherwise apologised to either Ms C or Ms P.
- 43 The FPP did not question Dr Rajapakse on issues relating to his fitness to practise.
- 44 The FPP considered resumed consideration after a period of suspension but rejected it on the basis that they were not concerned with issues regarding his clinical competence.
- 45 Dr Rajapakse has not worked since November 2003.
- 46 The suspension will expire in April 2006.

### **Members' Consideration**

- 47 Taking account of all the matters they noted above, the members considered the case raised the issue of public protection in terms of:-
- i) The extent to which Dr Rajapakse would be a risk to patients and the public if he returns to practise without assessment to ensure that he is fit to practise; and
  - ii) Maintaining the reputation of the profession and public confidence in regulation.
- 48 The members considered that in light of the belief by Ms C that she had been hypnotised this was a factor which should have required the FPP to make a finding and give reasons as to why they did not accept her evidence. Had Dr Rajapakse used hypnosis then, as Dr Rajapakse would have known, this would have been a more serious allegation because of the decreased control this would have allowed Ms C.
- 49 In relation to the statement dated 8<sup>th</sup> March 2000 (exhibit C1), the letter dated 12<sup>th</sup> December 2000 (exhibit C2) and the undated note (exhibit C3) the members considered that the absence of the FPP's findings as to the meaning and conclusions to be drawn from

them was wholly inadequate as they were not inconsistent with an allegation of sexual misconduct and sexual assault.

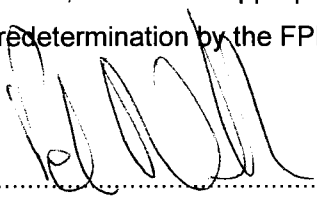
- 50** The GMC's counsel did not examine Ms C about the allegation of oral sex was, which may have affected the FPP's assessment of her credibility.
- 51** The members considered that in the absence of any findings as to the nature and meanings of Dr Rajapakse's account regarding the police interviews in which he had asked Ms C "to relieve the situation", the FPP had not put themselves into a position to reach a proper conclusion on which evidence to prefer.
- 52** The members considered that the absence of reasons in preferring Dr Rajapakse's evidence on allegations of sexual misconduct and assault in relation to Ms C, and on the allegation that he had offered massage therapy at the home of Ms P in the absence of her partner, meant that the FPP had failed to put themselves into a position to reach a proper conclusion on which evidence to prefer.
- 53** The members considered that the FPP were wrong to give no reasons for their decision to amend the charge 5a) by deleting reference to hypnotherapy.
- 54** The members considered that the FPP were wrong to review the testimonials on behalf of Dr Rajapakse before they made their findings of fact in circumstances where they did not explain what they made of this evidence.
- 55** The FPP did not take proper account of Dr Rajapakse's apparent lack of insight by virtue of his denial of heads of charge 2 (in relation to "treatment"), 5a) and c) and lack of remorse into the proven misconduct, particularly where there had been a failure to maintain behavioural boundaries with work colleagues.
- 56** The members considered that the decision to impose a suspension of 9 months without resumed consideration was manifestly inappropriate and unduly lenient.
- 57** Following its determination of facts and serious professional misconduct, the FPP did not have the opportunity to question Dr Rajapakse on issues relating to his fitness to practise. Therefore it could not properly assess the extent to which he would be a risk to patients and the public upon the expiry of his suspension in April 2006. The testimonials presented on his behalf would not assist in this regard.

- 58 Although the FPP considered whether resumed consideration was required in this case, the members considered that they were wrong to determine that it was not necessary in this case solely because issues of clinical competence were not involved at the time the FPP came to consider the case.
- 59 The FPP's decision failed to have sufficient regard to the extent to which Dr Rajapakse's further absence from work might have impaired his fitness to practise and to establish that he had addressed his deficiencies. Dr Rajapakse had not worked for approximately 20 months before the FPP hearing and would be suspended for a further nine months thereafter following the implementation of the suspension on 23<sup>rd</sup> July 2005; a period of some 30 months.
- 60 The decision not to order resumed consideration was inconsistent with the GMC's Indicative Sanctions Guidance which provides, "In most cases, however, where a period of suspension is imposed and in all cases where conditions have been imposed the Panel will need to be reassured that the doctor is fit to resume practise either unrestricted or with conditions or further conditions."
- 61 The members also considered that the decision as to sanction was inconsistent with Dame Janet Smith's views in the Fifth Report of the *Shipman Inquiry*, in which she stated, "I would have thought it would be a rare case of suspension in which it is not appropriate to review the position at the end of the period of suspension".
- 62 It was mandatory for the FPP to be satisfied, for the protection of patients and the public and to maintain confidence in regulation, as to Dr Rajapakse's competence to practise following his return to work some two and a half years after he had last worked.
- 63 In the circumstances the FPP failed to provide proper reasons to support their decision to prefer the evidence of Dr Rajapakse in relation to the allegations of sexual misconduct and assault rather than that of Ms C and Ms P. The absence of reasons undermines the conclusions on the issues that were before it and as a result it is not possible to be satisfied that the FPP did properly consider and evaluate all the evidence.

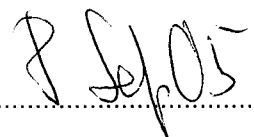
## Conclusions

- 64 Dr Rajapakse represents a risk to the public.

- 65 The FPP's decision was unduly lenient because it failed to provide proper reasons for finding not proved the heads of charge 3.a., 3.b.i-v. and vii, 4.a.-c., 5b. and 6. relating to alleged sexual misconduct. In the absence of proper reasons, the FPP did not have good grounds to support its findings of fact, which were therefore manifestly wrong. Consequently the FPP's determination of the appropriate sanction was manifestly inappropriate.
- 66 The FPP should redetermine, with proper reasons, its findings of fact under the heads of charge 3.a., 3.b.i-v. and vii, 4.a.-c., 5b. and 6, including (if the Panel considers it necessary) rehearing some or all of the evidence. The FPP should further redetermine serious professional misconduct and sanction in the light of the redetermined findings of fact.
- 67 Further, to ensure public protection, the FPP should have directed a resumed hearing of Dr Rajapakse's case to ensure that he is fit to practise before his suspension expires in April 2006. Its failure to do so was unduly lenient.
- 68 The FPP should direct a resumed hearing if it redetermines that the appropriate sanction to direct under section 36 of the Medical Act 1983 is other than erasure.
- 69 Alternatively, if the Court does not accept the Council's submissions as to the inadequacy of the FPP's reasons, then the Court should be asked to direct a resumed hearing.
- 70 It is desirable for protection of members of the public for the Council to refer the case to the High Court under Section 29(4)(a) of the 2002 Act.
- 71 The Council should invite the GMC to agree that the High Court should remit the case for a new determination. In the event that an alternative to remittal is recommended, the members reserved to themselves the decision whether or not to approve it.
- 72 The meeting concluded that the case should be referred to the High Court. If the GMC agree that the FPP decision was unduly lenient, then subject to agreement of appropriate terms, it would be appropriate to invite the High Court to direct that the case be remitted for redetermination by the FPP.



.....  
**Peter North (Chair)**

Dated  .....2005

