

# COUNCIL FOR HEALTHCARE REGULATORY EXCELLENCE

## NOTE OF CASE MEETING ON 17 AUGUST 2005

At 11 Strand, London, WC2N 5HR

Re: Dr Tapash Kumar Saha

PRESENT: Peter North  
Lois Willis  
Michael Copland-Griffiths

IN ATTENDANCE: Sandy Forrest, Director, CHRE  
Briony Mills, Fitness to Practise Officer, CHRE  
Len Murray, Associate, Baker & McKenzie (Legal Advisor)  
Andrew Hill, Associate, Baker & McKenzie

AS OBSERVERS: Katrina Mitchell, Legal Seconded, CHRE  
Katie Golding, Summer Clerk, Baker & McKenzie

### 1. DEFINITIONS

In this note, the following abbreviations will apply:

"the Act"	<i>NHS Reform and Healthcare Professions Act 2002</i>
"the Campbell Judgment"	Judgment of the Court of Appeal in <i>R (on the application of Campbell) v The General Medical Council</i> [2005] EWCA Civ 250
"CHRE"	Council for Healthcare Regulatory Excellence
"the Council"	CHRE as constituted at its meeting on 17 August 2005
"the Fleischmann Judgment"	Judgment of the High Court (Newman J) in <i>Council for the Regulation of Health Care Professionals v The General Dental Council &amp; Fleischmann</i> [2005] EWHC 87.
"the FTP Panel"	Fitness to Practise Panel of the GMC
"the GMC"	The General Medical Council
"Indicative Sanctions Guidance"	The GMC's publication dated April 2005 entitled <i>Indicative Sanctions Guidance for Fitness to Practise Panels</i>
"Dr Saha"	Dr Tapash Kumar Saha MB BS (Dhaka) MRCOG, reg. no. 4151429
"the Southall Judgment"	Judgment of the High Court (Collins J) in <i>Council for the Regulation of Health Care Professionals v The General Medical Council &amp; Southall</i> [2005] EWHC 579
"the Truscott/Ruscillo Judgment"	Judgment of the Court of Appeal in <i>Ruscillo &amp; The General Medical Council v Council for the Regulation of Health Care Professionals and Council for the Regulation of Health Care Professionals v The Nursing and Midwifery Council &amp; Truscott</i> [2004] EWCA Civ 1356

## **2. THE FTP PANEL'S DECISION**

On 5 July 2005, the FTP Panel found impaired the fitness to practise of Dr Saha, immediately suspended his registration until 3 February 2006 and ordered a resumed hearing. The Council considered whether this decision should be referred to the High Court pursuant to section 29 of the Act. Dr Saha's registration address is in Wales.

The allegation before the FTP Panel was that Dr Saha's fitness to practise was impaired because, at Bristol Crown Court on 29 October 2004, he was convicted upon indictment of indecent assault on a female and, on 19 November 2004, he was sentenced to nine months imprisonment. The indecent assault occurred at St Michael's Hospital in Bristol, during the nightshift on Sunday, 1 September 2002. Dr Saha was working at that hospital as a locum specialist registrar and the victim of the assault was a young senior house officer in obstetrics and gynaecology, working the same shift in the hospital. Dr Saha was also employed at that time as a locum consultant in obstetrics and gynaecology and as a locum gynaecological oncologist at Royal Hallamshire Hospital by the Sheffield Teaching Hospitals NHS Trust. Dr Saha denied the charge against him at trial, and also maintained his denial of the allegation, notwithstanding his conviction, before the FTP Panel.

The FTP Panel found that, despite the serious nature of the offence for which Dr Saha was convicted, there was evidence that made this an exceptional case for which a period of suspension would be the appropriate and proportionate sanction, rather than erasure.

## **3. DOCUMENTS**

The following documents were before the Council:

- The transcripts of the hearing before the FTP Panel (4 and 5 July 2005).
- The exhibits tendered to the FTP Panel on behalf of the GMC and Dr Saha.
- The Decision of the FTP Panel (5 July 2005).
- A report prepared by Baker & McKenzie LLP, dated 10 August 2005.
- CHRE's Section 29 Case Manual and Guidance Note for Members Attending Case Meetings.

## **4. CONFLICTS OF INTEREST**

The Chair informed the Council that the members convened had no apparent conflicts of interest and no conflicts were registered. The Chair noted that he was a lay assessor for the GMC but had had no involvement with this case.

## **5. MATTERS NOTED BY THE COUNCIL**

The Council noted the following matters:

### **5.1 The Application of the Campbell Judgment to the new Rules**

Dr Saha's fitness to practise had been assessed by the FTP Panel under *The General Medical Council (Fitness to Practise) Rules 2004*. The FTP Panel were advised by the Legal Assessor as to the application of the Campbell Judgment to the new Rules. The Council noted that the FTP Panel had only considered evidence in mitigation when considering the sanction to impose on Dr Saha.

## **5.2 The FTP Panel's findings of fact**

The FTP Panel found that Dr Saha was:

*"convicted after a trial for indecent assault on a junior colleague at work whilst both of you were on duty. That conviction resulted in a custodial sentence. The Panel has taken a serious view of the offence and it has found that your fitness to practise is impaired."*

## **5.3 The Criminal Court's sentencing remarks**

Mr Justice Foley, upon sentencing Dr Saha, had said:

*"The court saw and heard your victim relive her distress. The jury believed her and the jury disbelieved you. The court deems it to be an aggravating feature that after your sexual assault she had to go back to her extremely important work as a doctor in the maternity hospital. It was through her skill, courage and professionalism that she managed to get through her vital work."*

## **5.4 The Sanction - Suspension**

After considering each of the options available to it, the FTP Panel suspended Dr Saha's registration, on the following basis:

*"The Panel found that, despite the serious nature of the offence for which you were convicted, there is evidence that makes this an exceptional case for which a period of suspension would be the appropriate and proportionate sanction, rather than erasure. There is no evidence that you pose a risk to patients and you retain the confidence of professional colleagues, including a senior female colleague. There is evidence of your clinical skills and of the work you have done to improve gynaecological oncological services for the patients of Dumfries and Galloway. The Panel has been told that there is no record of any patient complaint made against you."*

## **5.5 The Period of Suspension**

The FTP Panel suspended Dr Saha's registration for 7 months, on the following basis:

*"Having determined that a period of suspension was sufficient the Panel then considered what period of time would be appropriate. Any period imposed must be sufficient to mark the Panel's disapproval of your conduct, maintain public confidence and send to the public and the profession a message about the standard of behaviour required from doctors. Because the Panel has not excluded the possibility that you may be permitted to return to work at some future date, it is mindful of the possibility that a prolonged period of suspension may result in a significant deterioration of your technical skill. You have not worked since you were sent to prison on 19 November 2004, and your registration was suspended by the Interim Orders Panel on 4 February 2005. Taking all of the relevant factors into account, the Panel is satisfied that it is appropriate and proportionate to direct the Registrar to suspend your registration until 3 February 2006. That will mean that you will then have been suspended for a total period of one year."*

## **5.6 Resumed Hearing**

The FTP Panel ordered Dr Saha to attend a resumed hearing before the expiry of his period of suspension, at which time he would be required to provide written confirmation of the

steps he has taken to maintain his knowledge and an action plan detailing his proposals to return to work in line with the guidance published by the Royal College of Obstetricians & Gynaecologists.

## **5.7 Immediate Sanction**

The FTP Panel directed that Dr Saha's registration be suspended immediately so as to maintain public confidence in the profession.

## **6. APPLYING SECTION 29 TO THE CASE**

The Council considered the following issues:

- Did the FTP Panel's Decision give rise to issues of public protection?
- Was the FTP Panel's Decision unduly lenient?
- If the answers to the above questions were "Yes", should the Council exercise its discretion to refer the FTP Panel's Decision to the High Court?

### **6.1 Public Protection**

The Council considered that the FTP Panel's Decision did give rise to issues of public protection. Although the FTP Panel considered that there was no evidence before it that Dr Saha presented a risk to patients and there was no record of any patient complaint against him, the Council was of the view that it could not be concluded from that that there was no future risk to patients and/or other members of the public, including colleagues. The Council also considered public protection to include matters such as maintenance of public confidence in the profession, public perception of the decision, as well as deterrence of the same or similar conduct by other practitioners.

The Council considered the approach taken in the Fleischman Judgment, including Newman J's comments (paragraph 55) about similar standards applying to erasure as apply to registration. Mr Justice Newman held:

*"Section 27(1) of the Dentist Act 1984, notably, confers a discretion in the case of a criminal conviction being proved; erasure is not automatic. Further, rule 11(1) of the Procedure Rules requires the circumstances leading up to the conviction and the character and the previous history of the dentist to be considered. This requirement is not laid down because the proceedings are aimed at punishing the practitioner. The rule reflects the need for fairness to be accorded to a duly qualified practitioner where his livelihood is at stake. The graduated approach to the penalty, which the Rules require, is designated to secure proportionality. Thus the disciplining of a registered dentist involves subtly different considerations from those which apply to an applicant for registration. That said, I have no doubt that the differences should not be allowed to give rise to the existence of a double standard in connection with those who are entitled to be in practice. The requirement that an applicant for registration be of "good character" secures the need for the public to be protected by the maintenance of high standards and the high reputation of the profession which has to be served at the stage of an application for registration as well as in disciplinary proceedings. The protection of the public will not be served by the application of a different standard at erasure from that which is applied when considering registration."*

The Council considered the submissions on sanction made to the FTP Panel by Counsel for the GMC, which were based on the Indicative Sanctions Guidance. It was submitted that

because public confidence in the medical profession is "clearly undermined" by Dr Saha's conduct and subsequent criminal conviction and because he has failed to show any insight into the seriousness of his actions, the appropriate sanction was to erase his name from the medical register. The Council particularly noted the references to factors in the Indicative Sanctions Guidance of abuse of position and lack of insight.

With respect to the apparent lack of insight shown by Dr Saha into his conduct, the Council considered paragraph 30 of the Southall Judgment, where Mr Justice Collins held:

*"Absence of remorse and contrition is likely to be indicative of a lack of insight or of maintenance of unreasonable views. In either event, it may show that a risk of repetition exists. This is clearly relevant in deciding on the appropriate sanction. But lack of remorse should not result in a higher sanction as punishment. Punishment may be an inevitable effect of whatever sanction is imposed but it must not be an element in deciding what is the appropriate sanction. The PCC must decide whether the risk of repetition does really exist. Provided that they have properly considered all the relevant circumstances and have had regard to the correct principles and have reached a conclusion which is itself reasonable, this court will not interfere. Furthermore, the [Indicative Sanctions] Guidance is just that and it does not automatically follow that erasure must follow if any of the bullet points set out apply. The overarching principles must be taken into account and they include a recognition that the public interest may, despite a finding that he has been guilty of serious professional misconduct, indicate that a doctor should be able to return to safe work. And the conduct must, if erasure is to be justified, be fundamentally incompatible with being a doctor. In that respect, I agree with what is said in the Guidance."*

The Council noted that, although Dr Saha had maintained his innocence before the FTP Panel, it did not appear that he had sought to pursue any of the avenues of appeal which may have been open to him to contest the jury's verdict. Whilst the Council recognised that it was difficult to reach a firm conclusion on the level of insight Dr Saha had into his conduct, the FTP Panel's conclusion that there was no evidence of risk to patients and the public was also open to question given that Dr Saha did not acknowledge the incident took place, let alone its seriousness.

Given the matters noted above and those considered by the Council in relation to whether the decision was unduly lenient (set out below), the Council considered that the suspension of Dr Saha for 7 months, having previously been convicted for committing indecent assault on a junior female colleague, would harm public confidence in the profession and would be perceived by the public to be an inadequate sanction. The Council also considered that allowing Dr Saha to return to practice without any restrictions on his registration might send the wrong message to the profession about protecting female practitioners from serious abuses of position by their senior colleagues.

## **6.2 Undue lenience**

The Council considered that the FTP Panel's Decision was unduly lenient. The Council did not consider that the sanction addressed its concerns about public protection: subject to the decision of an FTP Panel of the GMC at the resumed hearing, Dr Saha would be entitled to return to unrestricted practise on 3 February 2006. The Council noted that the FTP Panel had asked that Dr Saha show at the resumed hearing that he has maintained his clinical skills and knowledge. However, Dr Saha has not been required to take any steps which directly relate to or address his conduct. The Council recognised that it might not be possible to identify training which specifically dealt with Dr Saha's conduct issues. Given these matters, the Council considered that the resumed hearing would likely not result in the

imposition of any further sanctions on Dr Saha which addressed the Council's public protection concerns.

In this context, the Council considered paragraphs 73, 76 and 77 of the Truscott/Ruscillo Judgment, where the Court of Appeal held:

*"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."*

*"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."*

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

The Council considered that the suspension of Dr Saha for 7 months, having previously been convicted for committing indecent assault on a junior female colleague, did not have due regard to the safety of the public and the reputation of the profession. It was a sanction which the FTP Panel could not have reasonably imposed. The Council also considered that it might be inconsistent that, although the FTP Panel considered there was no risk to patients and the public and so did not erase Dr Saha from the register, the FTP Panel determined it necessary to commence his suspension immediately in order, it said, to maintain public confidence in the profession.

The Council considered the FTP Panel's view that exceptional circumstances existed which made it appropriate and proportionate that Dr Saha's registration be suspended, rather than erased. The Council noted that the FTP Panel did not specifically state what it considered to be the exceptional circumstances. It appeared that the FTP Panel placed weight on the testimonials provided by Dr Saha and specific reference was made to Dr Saha retaining the confidence of professional colleagues including a senior female colleague. The Council noted the testimonial evidence presented to the FTP Panel showed his clinical skills to be of a high standard and him to have assumed a leadership position within his team. Nevertheless, the Council did not consider that, in all the circumstances, Dr Saha's testimonial and evidence in mitigation amounted to circumstances sufficiently exceptional as to reduce the appropriate sanction for a practitioner who had demonstrated conduct which was fundamentally incompatible with being a doctor.

### **6.3 Discretion**

Given the matters noted above, the Council considered that it would be appropriate to exercise CHRE's discretion to refer Dr Saha's case to the High Court.

## **7. CONCLUSION**

The Council concluded that:

- (a) It had jurisdiction under section 29 of the Act to consider whether or not to refer this case to the High Court.
- (b) Based on the matters noted by the Council in sections 5 and 6 above, the relevant decision of the FTP Panel, having found impaired Dr Saha's fitness

to practise, to suspend Dr Saha's registration until 3 February 2006 (with immediate effect) and to order a resumed hearing was unduly lenient and should not have been made and it was desirable for the protection of members of the public for CHRE to refer this case to the High Court.

- (c) The criteria in section 29 of the Act having been satisfied, it was appropriate for the Council to exercise CHRE's discretion to refer this case to the High Court.

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Peter North (Chair)  
(for and on behalf of CHRE)

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Date: