Meeting of the s40A Panel to consider the cases of Dr Marco CAPECE and Dr Giulio GARAFFA

Held on 18 March 2020.

Panel members present

Charlie Massey, Chief Executive (in the Chair)
Colin Melville, Medical Director and Director of Education and Standards
Anthony Omo, General Counsel and Director of Fitness to Practise

In attendance

Jennifer Richardson, Senior Legal Adviser
Jim Percival, Principal Legal Adviser and Deputy General Counsel
Tim Swain, Head of OCCE, Corporate Directorate (Panel Secretary)

Purpose of this note

1 This meeting note records a summary of the Members’ consideration of the relevant decisions of the Medical Practitioners Tribunal (‘MPT’) which considered the Doctor’s case (“the decision”), and the Panel’s decision on behalf of the General Medical Council as to whether or not to exercise the power to appeal the decision pursuant to section 40A Medical Act 1983.

The relevant decision

2 The Principal Legal Adviser confirmed that the decision in each of the two cases was a relevant decision for the purposes of s.40A, as each was a decision giving a direction for suspension, within the meaning of s40A(1)(a) Medical Act 1983.

Consideration

3 As the MPT held a joined hearing in the cases of Dr Capece and Dr Garaffa, the Panel, likewise, considered both cases in a joined Panel meeting.
4 The Panel considered the record of the MPT’s determination and the legal advice in both cases in detail.

Dr Capece

5 The Panel noted that this was an unusual case, in that it remained difficult to ascertain precisely what had happened and what the motivations were for the dishonest action of Dr Capece. The Panel focused particularly on the lack of clarity about when Dr Capece had altered the consent form of Patient A, to add ‘+vaginectomy’ as this would have a significant bearing on how the conduct of Dr Garaffa, as well as the nurse involved, should be interpreted.

6 At the same time, the Panel recognised that it could not realistically challenge the MPT’s findings of fact, and so had to accept the MPT’s factual findings in regard to Dr Capece’s dishonesty, when considering whether or not to exercise the right of appeal.

7 In that context, the Panel had some concerns about the weight the MPT placed on mitigating factors in deciding against the sanction of erasure. In particular, in light of the fact that the Tribunal found that Dr Capece had sustained a false narrative about events right through the hearing, the Panel was unconvinced that his dishonesty could be considered to be a ‘single act’.

8 Nevertheless, the Panel recognised that it was not outside of the range of reasonable responses for the MPT to give a direction for a 12-month suspension in this case.

9 The Panel then considered the MPT’s decision not to require a review hearing at the end of the period of suspension. The Panel noted that paragraph 164 of the Sanctions Guidance is clear that in most suspension cases a review hearing is likely to be necessary. The Panel considered that a finding of serious dishonesty, being a type of misconduct from which it is particularly hard to remediate, is exactly the type of case where a review hearing should occur before the doctor is able to resume practice. While it is open to the Tribunal to depart from that guidance in appropriate cases, the Panel were unconvinced by the reasoning of the MPT not to do so in this case.

10 The Panel noted that one mechanism to gain assurance would be for the GMC to direct the MPTS to hold a review hearing, using powers under Section 35D(4B) of the Medical Act. At the date of the Panel’s meeting, an Assistant Registrar decision had not yet been made.

11 The Panel felt that this case would be most proportionately remedied by the GMC directing the MPTS to hold a review hearing at the end of Dr Capece’s suspension. The Panel therefore adjourned to allow a GMC Assistant Registrar to consider whether to direct the MPTS to hold a review hearing prior to the expiry of Dr Capece’s period of suspension pursuant to Section 35D(4B) of the Medical Act 1983 (as amended).
A GMC Assistant Registrar subsequently did decide to direct a review for Dr Capece to demonstrate how he has further developed insight and kept his knowledge and skills up to date.

The Panel therefore decided not to appeal the MPT’s decision pursuant to S40A Medical Act 1983.

**Dr Garaffa**

14 The Panel noted that the GMC had sought the sanction of a suspension and this had been the decision of the MPT in this case. The Panel therefore decided not to appeal the MPT’s decision pursuant to S40A Medical Act 1983.

15 The Panel also noted that the MPT had not required a review hearing at the end of the period of suspension and expressed some concerns about the level of Dr Garaffa’s insight.

16 The Panel understands that Dr Garaffa intends to appeal the sanction of the MPT under s40 of the Act. The Panel therefore considered it was appropriate to await the servicing of that appeal before the GMC Assistant Registrar gave consideration as to whether to direct the MPTS to hold a review hearing prior to the expiry of Dr Garaffa’s period of suspension pursuant to Section 35D(4B) of the Medical Act 1983 (as amended).

4 May 2020

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Charlie Massey (Chair) Dated

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**Background**

17 This case concerns the determination of an MPT, which concluded on 21 February 2020, considering the matter under Part 4 of the 2004 Rules.

18 The background to the allegation of misconduct is as follows:

19 The cases of Dr Capece and Mr Garaffa were heard together, and arise out of gender reassignment surgery carried out on Patient A on 29 October 2016. Patient A consented to have a hysterectomy and metoidioplasty but had not consented to having his vagina removed (vaginectomy). Mr Garaffa, the consultant surgeon,
performed the vaginectomy in error. Dr Capece did not perform the surgery himself but was delegated to carry out the consent procedure by Mr Garaffa.

20 In relation to Dr Garaffa, the MPT found that he had limited insight but was ‘satisfied that, by reason of the steps he has taken to remediate his practice, the risk of Mr Garaffa repeating his misconduct is low.’ The Tribunal determined that Dr Garaffa’s registration should be suspended for a period of 5 months, with no review hearing directed.

21 In relation to Dr Capece, it was alleged and found proved that he dishonestly altered the consent form to add the word “+vaginectomy” without Patient A’s knowledge and knowing that Patient A had not consented to the vaginectomy procedure. The Tribunal found that Dr Capece’s conduct amounted to misconduct and that his fitness to practise is impaired. It imposed a sanction of 12 months’ suspension. The Tribunal decided it was not necessary to direct a review of Dr Capece’s case.

The General Medical Council’s power to appeal pursuant to s.40A

22 With effect from 31 December 2015, the General Medical Council acquired the power to appeal to the High Court (or equivalent courts in Scotland and Northern Ireland where relevant) against relevant decisions of a Medical Practitioners Tribunal (“MPT”) if it considers that the decision is not sufficient (whether as to a finding or a penalty or both) for the protection of the public.

23 The basis upon which the GMC will consider whether or not to exercise this power to appeal is described in “Appeals by the GMC pursuant to s.40A of the Medical Act 1983 (“s.40A appeals”) – Guidance for Decision-makers” (“the Guidance”).

24 Decisions concerning the exercise of the s40A power to appeal were originally delegated by the Council to the Registrar. However, following recommendations from Sir Norman Williams’ Review Council agreed that decision-making in prospective appeals involving decisions of Medical Practitioners Tribunals be delegated to a three person Executive Panel comprising: the Chief Executive and Registrar as Chair; the Medical Director and Director of Education and Standards; and the Director of Fitness to Practise (or their nominated Deputies if not available) (“the Panel”).

25 As the Guidance makes clear, when considering whether to bring a s.40A appeal in a particular case, it will be necessary to consider the following questions:

25.1 Based on their assessment of all of the information held, and in the particular circumstances of the case, and having regard to the factors set out in the Guidance, does the Panel consider that the MPT’s decision is not sufficient to protect the public?

25.2 If the Panel is of the view, on its assessment of all the information held, in the particular circumstances of the case, that there are grounds to consider that
the MPT’s decision is not sufficient, it will consider whether exercising the power of appeal would further, rather than undermine, the achievement of the over-arching objective.

25.3 If the answer is yes, then the GMC may exercise its power of appeal

25.4 In considering that question the Panel will be required to consider and weigh a number of competing factors (including its assessment of the prospects of success of the appeal, and the nature and importance of the issues which would be aired).