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## **Ahmed Abbas Hussein v GMC [2013] EWHC 3535 Admin**

### ***Background***

Mr Hussein, a consultant orthopaedic surgeon, appeared before a Fitness to Practise Panel ('Panel') in November 2012 who found that his fitness to practise was impaired by reason of misconduct in providing medical care to a person with whom he had a close personal relationship, and the way in which he provided such care. The Panel suspended his registration for a period of three months.

Mr Hussein appealed under Section 40 of the Medical Act 1983. The principal issue, on appeal, was whether the Panel was wrong in its finding that, when a registered doctor introduces a friend or relative to a medical colleague for the purposes of medical advice or treatment, however informally, the doctor (a) is therefore taking responsibility for the medical care of that friend or relative and (b) is to be considered as making a 'referral', requiring a doctor to comply with professional obligations as to the provision of adequate medical information to the receiving doctor and communicating with the patient's general practitioner.

### ***Appeal***

The appeal was considered by Mr Justice Phillips on 13 November 2013.

The judge set out the essential facts which were not in dispute in the appeal in paragraphs 3 to 7.

He then sets out, in summary, the allegation by the General Medical Council ('GMC') and the Panel's findings (paragraphs 8 -12) followed by the relevant GMC guidelines (paragraphs 13 -18).

Mr Justice Phillips then goes on to consider the Panel's approach and its reasoning (paragraphs 19 -26) before considering the issues on appeal (paragraphs 27 - 28).

In the grounds of appeal, Mr Hussein contended the Panel was wrong, both in its determination of the application under Rule 17(2)(g) of the General Medical Council (Fitness to Practise) Rules 2004, and in its final determination, in finding that informal introductions of RJ to AS were capable of being and were referrals which engaged the guidelines set out in Good Medical Practice ('GMP'). Further that if his grounds for appeal were upheld, that even though the Panel's findings of misconduct in relation to other matters of the allegation which were not challenged, those findings as to Mr Hussein's fitness to practise and the sanction imposed could not be sustained.

Mr Justice Phillips then considered the approach to Section 40 appeals by the High Court (paragraphs 29 - 31) before setting out the discussion in relation to each of the issues which were the subject of the appeal:

(a) The meaning of 'referral' – whether the GMC definition should be applied (paragraphs 32 -37).

The Judge noted that the Panel's primary position was that, in considering whether Mr Hussein had made referrals within the meaning of the allegation, the term 'referral' should be given its ordinary meaning as understood by people both in and outside the medical profession. They considered that the term was not to be limited to the meaning ascribed to it in GMP.

Mr Justice Phillips noted, however, that the context in which the concept of a 'referral' failed to be considered by the Panel was an allegation that the doctor has misconducted himself by reference to the standards set out in GMP. The use of the term 'referred' in the allegation could only be understood as a reference to referrals which engaged in those standards (paragraph 33).

The Judge considered that the logical starting point must be the definition of that very term to be found in GMP. He confirms (paragraph 33):

*'At the core of the GMP definition of 'referral' is the concept of transferring responsibility for a patient's care, from which it is clear that the guidance relates to a situation where a doctor with existing professional responsibility for a patient arranges for the patient to see another doctor'.*

The Judge noted that the only expert witness brought by the GMC took the view that the informal introduction effected on Mr Hussein did not engage the guidance from GMP. Whilst the Panel was critical of that evidence, their reasoning in that regard suggested a degree of confusion (paragraph 34).

Mr Justice Phillips confirmed that he was satisfied the Panel was wrong in its primary finding that it is not necessary for a doctor to be transferring existing professional responsibility for a patient in order for there to be a referral to which the guidance in GMP applies (paragraph 36).

He goes on to accept the submission, on behalf of Mr Hussein, that in determining the case on the basis of an understanding of the meaning of 'referral' it is outside the definition of that term in GMP (but not having revealed its approach in dismissing the Rule 17(2)(g) application), the Panel did so without giving Mr Hussein proper warning of that approach and a corresponding opportunity to call his own expert evidence. In the circumstances, the Judge's view was that the Panel's finding in that regard was therefore 'unjust by reason of a serious procedural irregularity' (paragraph 37).

(b) Whether Mr Hussein assumed responsibility for RJ's medical care so as to be a referring doctor (paragraphs 38 - 43)

Counsel for the GMC accepted that the Panel's formulation as set out in paragraph 38 was too wide and the Panel must have intended to limit the proposition to introductions to specialists (paragraph 39).

Counsel for the GMC also submitted, which the Judge accepted, that the interpretation of GMP and the relevant standards are something which was probably within the Panel's area of judgment.

Notwithstanding that agreement, Mr Justice Phillips considered the Panel's reasoning was flawed for a number of reasons set out (paragraph 40) as follows:

*"(1) The GMP definition of 'referral' is firmly based on the concept of one doctor transferring some or all of the existing professional responsibility of the medical care of a patient to another. The GMP provisions as to referral are designed to ensure that, on effecting such a transfer, a doctor is obliged to ensure a continuity of care by sharing the information he holds in that professional capacity.*

*(2) If, as the Panel have found, such responsibility arises automatically on any introduction to the specialist, the GMP definition would be rendered redundant and replaced by a much broader everyday meaning preferred by a Panel, namely, that any introduction by a doctor to a specialist, however, casual, is a referral.*

*(3) The effect of such a re-writing of the definition would be dramatic. Without any express provision in GMP or other clear professional guidance, a doctor would nevertheless automatically be guilty of misconduct by making any casual introduction to a specialist (both because they would be considered to be providing*

*medical care to a friend/relative and because they would not be in a position to share medical records and information).*

*(4) If the GMC had intended to make such a broad provision, effectively making it improper for a doctor to introduce a friend or relative to a specialist, it could plainly have done so. But, in my judgment, it is simply not possible to interpret the definition of 'referral' in GMP as introducing such a wide prohibition.*

*(5) There is also no obvious reason to interpret the definition of 'referral' so broadly as to include informal introductions...*

*(6) The Panel concluded that, by arranging the consultations, Mr Hussein had assumed responsibility for RJ's medical care so that he had made a formal 'referral' and not casual introductions. However, the Panel's reasoning effectively removes any scope for a casual introduction which does not amount to a referral with the Panel's understanding of GMP. The fact that the Panel did apparently see the continuing possibility of a doctor making a casual introduction not engaging professional responsibilities calls into question its reasoning and/or whether or not it intended the consequences of that reasoning."*

The Judge concluded that, giving all due weight to the Panel's specialist understanding of what the medical profession expects of its members, he was satisfied for reasons set out above, that the Panel's interpretation of the definition of 'referral' in the GMP was wrong.

He goes on to note that, in Dr Hussein's case, it was open to the Panel to consider whether his overall actions in relation to RJ's care including ordering scans, discharging him from hospital and arranging a number of consultations over a number of years, demonstrated that he was acting as a doctor more generally. It appears that the Panel did have such an approach in mind at the time of its determination of the Rule 17(2)(g) application, but in its final ruling it did not find Mr Hussein was acting as RJ's doctor more generally, but based its findings squarely on the broad principle that any introduction to a specialist is in itself an assumption of medical responsibility and so constitutes the referral. In the circumstances he did not consider such a finding could stand (paragraph 43).

(c) A finding in relation to the ordering of some scans (paragraphs 44 – 46).

The Panel found that Mr Hussein wrongfully provided medical care to RJ when ordering scans prior to the first and third consultations. Mr Justice Phillips concluded this was a finding which was plainly open to the Panel and there was no basis on which he could interfere with the assessment.

Counsel for the doctor challenged the finding on the basis it was phrased as providing medical care to RJ 'on making the referral [to AS]'. On the basis that the Judge had found there had been no referral, Counsel submitted the finding therefore could not stand.

The Judge considered that the issue of the propriety of ordering the scans had been considered separately, both in evidence and argument before the Panel, and that it had reached discrete findings in relation to Mr Hussein's role in ordering each scan when determining sub paragraphs 1(c) and 5(c) of the allegations. In the circumstances, he was satisfied that the findings relating to the scans should stand (paragraph 46).

As a result of his determination, Mr Justice Phillips allowed the appeal in relation to the Panel's findings in relation to paragraphs 1, 2, 5 and 6 of the allegation, except for the finding in relation to the ordering of the scans. He concluded by remitting the case to a different Panel for consideration of the question of Mr Hussein's fitness to practise and the appropriate sanction (paragraph 48).

### ***Salient Points***

- Where an allegation of misconduct is based on a failure to follow guidance e.g. Good Medical Practice then it is the same guidance which must be looked to in order to provide a definition of any term relied on, rather than importing a broader "everyday" meaning (paragraph 40)

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