

21, 1971
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IN THE PRIVY COUNCIL

No. 6 of 1971

ON APPEAL FROM THE DISCIPLINARY COMMITTEE
CONSTITUTED UNDER SECTION 32 of the MEDICAL
ACT, 1956

B E T W E E N: RICHARD WORDSWORTH BARKER Appellant

- and -

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
-7 APR 1972
25 RUSSELL SQUARE
LONDON, W.C.1.

THE GENERAL MEDICAL COUNCIL Respondent

CASE FOR THE APPELLANT

Record

1. This is an appeal by the Appellant, Richard Wordsworth Barker, from a decision of the Disciplinary Committee of the Respondent Council upon the 24th February 1971 that by reason of a determination that he had been guilty of serious professional misconduct the registration of the Appellant should be suspended for a period of 9 months

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2. On the 24th February 1971, the Disciplinary Committee held an Inquiry into the following charge against the Appellant :-

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"That, being registered under the Medical Acts,

(1) In September, 1963, you entered into a professional relationship with Mrs. Carola Alphonsa Maria Kerr then of Sweet Briar, Blackberry Lane, Four Marks, near Alton, Hampshire, and with her husband and son, and you subsequently attended her and members of her family on numerous occasions;

(2)(a) You retained Mrs. Kerr's name on your list until November 20, 1968, when she removed her name from your list without the knowledge of her husband;

(b) You retained the names of Mr. Kerr and his son and daughter on your list until October, 1969;

(3) For some weeks during July and August, 1968, you employed Mrs. Kerr as a receptionist in your practice;

(4) During the period when Mrs. Kerr and her family were your patients, (and during the period when you employed Mrs. Kerr as a receptionist,) you abused your position as a medical practitioner by forming an improper association with her, and from November, 1968, onwards you frequently committed adultery with her, and since September, 1969 you have cohabited with her;

And that in relation to the facts alleged you have been guilty of serious professional misconduct."

p.2 At the said Inquiry, the Appellant was present and represented by Mr. P. Baylis of Messrs. Hempsons, Solicitors to the Medical Defence Union. Mr. G.J.K. Widgery, Solicitor to the Council, appeared in order to place the facts before the Committee.

3. At the conclusion of the said Inquiry, the Disciplinary Committee held that all the facts alleged in the charge were proved, except that the Committee found not proved the words in Head (4) of the charge "and during the period when you employed Mrs. Kerr as a receptionist". The Committee

p. 47 further held that the evidence showed that the Appellant abused his position as medical adviser to the Kerr family in order to pursue his association with Mrs. Kerr. Accordingly they adjudged the

p. 49 Appellant guilty of serious professional misconduct.

4. There is no dispute about the primary facts.

p. 7 From 1963 Mr. and Mrs. Kerr and their family were patients of the Appellant. At no time prior to the events hereinafter described was there any social or friendly relationship between the Appellant and any

pp.8, 17 member of the family. Mrs. Kerr had worked as a

night nurse in a local hospital from early 1966 until the middle of 1968. In the middle of 1968 the Appellant's permanent receptionist, who was shortly to go on holiday, suggested that Mrs. Kerr would be a suitable person to act as temporary receptionist. The Appellant accordingly invited Mrs. Kerr to work for him for this short period, and she did so for approximately $2\frac{1}{2}$ weeks. It was accepted by the Committee that the relationship during this period was one of complete propriety. During his summer holidays in 1968 the Appellant decided that he would like to learn German. He knew that Mrs. Kerr was German-born and spoke German fluently. Upon his return from holiday, he suggested that she should give him German lessons. Mrs. Kerr began to do so, with the full knowledge of and without objection from her husband. The lessons commenced in September 1968. At the end of September or beginning of October 1968, Mrs. Kerr ^{after an interview} decided to transfer from the Appellant's list of patients to the list of a Dr. Everett, and the Appellant accordingly signed her medical card. Mrs. Kerr first received treatment from a representative of Dr. Everett's practice on about 14th October 1968. Whilst the Executive Council did not complete the formalities for removing Mrs. Kerr from the Appellant's list until November 1968, it appears to have been accepted that the significant time was that at which Mrs. Kerr sought to remove her name from the Appellant's

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pp.19,26 list. Later in October 1968 the Appellant took Mrs. Kerr out to dinner at a hotel in Sonning. At this dinner, both realised that an affection was developing between them. Thereafter their relationship progressed rapidly until adultery was committed in November 1968. When Mr. Kerr learned of this association, he left the neighbourhood and, although he remained formally on the Appellant's list until late in 1969, he ceased for all practical purposes to be his patient when he left the area. From that time, he received treatment from another doctor. Since approximately October 1969 the Appellant and Mrs. Kerr, who is now known as Mrs. Barker, have lived as man and wife and it is their intention to marry if and when Mrs. Kerr shall be free to do so.

5. The 1971 edition of "Professional Discipline" issued by the General Medical Council ("the Blue Book") contains statements of types of misconduct which have in the past been regarded as grounds for disciplinary proceedings. In so far as relevant to this appeal, the following principle is laid down:-

"(v) Abuse of professional position in order to further an improper association or commit adultery

The Council has always taken a serious view of a doctor who abuses his professional position in order to further an improper association or to commit adultery with a person with whom he stands in professional relationship."

It is a curious feature of the present case, to which the Appellant refers in more detail subsequently, that neither the form of the charge nor the presentation of the case on behalf of the Respondent Council emphasised that the existence

of misconduct depends upon showing that the professional relationship was abused in order to further the improper association. Both the charge and the opening address on behalf of the Respondent Council suggested that it might be enough simply to establish that the Appellant had committed adultery with the wife at a time when he was medical adviser to any member of the family. Such suggestion was, the Appellant submits, wrong and potentially misleading. In the last analysis, however, the Committee accepted the correct test that, as the Blue Book lays down, there must be some positive way in which the professional relationship is abused so as to further the association. In announcing the determination of the Committee, the President said:

"Dr. Barker, in the view of the Committee the evidence which has been adduced shows that you abused your position as the family's medical adviser in order to pursue your association with Mrs. Kerr. They have accordingly judged you to have been guilty of serious professional misconduct in relation to the facts which have been proved against you in the charge, and they have directed the Registrar to suspend your registration for a period of nine months."

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6. The first submission on behalf of the Appellant is that there was no evidence upon which the Committee could properly find that the professional relationship had been abused in order to further the association. The Committee made no specific finding as to whether the Appellant had abused his relationship with all the family and, if not, with which members of the family. With regard to Mrs. Kerr, the relationship between the

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p.47 Appellant and her as doctor and receptionist in July 1968 had been perfectly proper. There was no evidence that Mrs. Kerr had consented in September 1968 to give German lessons because of the fact that the Appellant was her doctor, or that she would not have given the lessons if he had not been her doctor. At no time from the commencement of German lessons did Mrs. Kerr receive treatment from the Appellant. There was no evidence that the development of the affectionate association and subsequent adultery did not spring simply from the fact that the Appellant and Mrs. Kerr were meeting regularly for German lessons. Before the existence of affection was recognised by either party, the Appellant had, for all practical purposes, ceased to be Mrs. Kerr's doctor. There was no evidence that the fact that the Appellant had been Mrs. Kerr's doctor was other than wholly extraneous and coincidental to the development of the friendship. With regard to Mr. Kerr, it was not suggested that at any time from the summer of 1968 he received treatment from the Appellant. It was not suggested that he would have objected to his wife giving German lessons but for the Appellant's professional position. On the contrary, the evidence was that the marriage between Mr. and Mrs. Kerr had not been entirely happy and that Mrs. Kerr led to some extent an independent life. With regard to the children, there was no suggestion that in the summer or autumn of 1968 the Appellant treated the children or in any way came into contact with Mrs. Kerr because of his professional relationship with the children. The evidence showed that the affectionate

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association developed solely from the meetings between the Appellant and Mrs. Kerr for German lessons. There was no evidence that he in some way took advantage of his professional position in order to further his association with Mrs. Kerr.

7. Accordingly the Committee should not have held that the Appellant had been guilty of serious professional misconduct. This case is fundamentally different from De Gregory v. G.M.C. (unreported) and McCoan v. G.M.C. (1964) 1 W.L.R. 1107, which were cited in opening.

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In De Gregory the Appellant gained entry into the family confidence by virtue of his position as the family doctor and the association with the wife developed from his friendship with the family. In McCoan the association developed directly out of professional treatment. It is also significant that the relevant principles as set out in the Blue Book had been completely rewritten in the 1971 edition so as to emphasise the need to show that there had been some positive abuse of the professional position in order to further the association.

8. The second submission of the Appellant is that the Committee never held due inquiry into the crucial issue of whether the Appellant abused his professional relationship in order to further the improper association. It was alleged, in Head (4) of the charge, that "During the period when Mrs. Kerr and her family were your patients ... you abused your position as a medical practitioner by forming

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an improper association with her ..." From this wording, members of the Committee could reasonably have been expected to understand that the sole fact that the Appellant was doctor to members of the family would of itself mean that he necessarily abused his professional position by forming an affectionate relationship with Mrs. Kerr. It is essential that the charge should indicate with clarity the gravamen of the misconduct alleged: see Tarnesby v. The General Medical Council (unreported). The presentation of the facts on behalf of the Respondent Council did not clarify the issue. It was said in opening :

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"It will be for the Committee to decide whether on the evidence you find that by entering into an improper association with his patient, Mrs. Kerr, which led to their adultery, Dr. Barker abused his position as medical adviser to Mrs. Kerr and her husband and children and in so doing was guilty of serious professional misconduct."

This approach was adopted throughout the Inquiry, as the following passage in cross-examination indicates:-

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"Q So is not it the case that you allowed your professional relationship with this lady to deteriorate into something else? A. I do not think it did. My professional relationship with her was a separate one from the relationship I had with her as a German teacher, and from then on she was not my patient. I do not think I let it deteriorate. That is my opinion."

Q You took on a new relationship with this lady? A. As a German.

Q A lady who was your patient at the time? A. She became my German teacher. She was my patient at the start of the time and she was teaching me German, and in the technical sense she was on my list."

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The issue was further blurred because the case was presented on the footing that the Appellant had abused his professional relationship with all members of the family, and it was never suggested that he

might have abused his position with regard to one member but not the other members. There was no analysis of the way in which it was suggested he abused his position, otherwise than by entering into an affectionate association with Mrs. Kerr at a time shortly after she had effectively ceased to be his patient and while her husband and children remained on the Appellant's list.

9. Accordingly, until the conclusion of all the evidence given at the Inquiry the Committee had been required and invited to approach the case without regard to the crucial question of whether the professional relationship had been abused in order to further the affectionate association. Whilst it was submitted by Mr. Baylis on behalf of the Appellant in his closing speech that this was the correct test to be adopted by the Committee, the Committee nevertheless went on to consider in camera the facts alleged in the charge without making any amendment or modification to the form of the charge. They determined in accordance with the terms of Head (4) of the charge that the Appellant had abused his position by forming "an improper association". Thereafter there was only short argument, but after further deliberation in camera the President announced that the Committee had determined that the Appellant had abused his professional relationship in order to further the association. It is clear from the words in which the President announced the Committee's

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decision that this finding was essential to the decision that serious professional misconduct had been committed. The charge of serious professional misconduct was thus ultimately found proved on the basis of a vital specific finding which had never been made part of the charge against the Appellant nor of the presentation of the case against him. It also follows that there must be grave doubt as to whether the Committee applied the correct test at the time when they were evaluating the evidence as it was being given or determining upon the allegation in the charge that the Appellant had "abused" the relationship.

10. The Appellant also appeals against the suspension of his registration. The Blue Book states that the Committee acts upon the following principles :-

"In any case the Committee must therefore first consider whether the public interest requires it to remove the doctor's name from the Registrar, or to suspend his registration. Subject however to this overriding duty to the public the Committee considers what is in the best interests of the doctor himself."

In the instant case, since the decision of the Committee, and without any prompting on behalf of the Appellant, a petition has been signed by more than 400 patients of the Appellant. The Appellant respectfully seeks leave to refer to this petition at the hearing. In the submission of the Appellant, it would be obviously in his best interest to allow him to continue in practice without interruption. The petition is indicative of the fact that it would be in the best interests of the patients of the Appellant. When this aspect of the public interest is weighed against any other aspect, it is submitted that on the facts of this case the

balance comes down firmly in favour of not suspending the registration of the Appellant.

THE APPELLANT THEREFORE HUMBLY SUBMITS that this Appeal should be allowed for the following among other

R E A S O N S

- (1) BECAUSE there was no evidence upon which the Committee could hold that the Appellant had abused his professional relationship in order to further his improper association with Mrs. Kerr.
- (2) BECAUSE the Committee were wrong in finding that the Appellant had abused his professional relationship in order to further the said association.
- (3) BECAUSE the Committee were wrong in holding that upon the facts of this case the Appellant had been guilty of serious professional misconduct.
- (4) BECAUSE the Committee never held due inquiry into the essential fact upon which they ultimately found serious professional misconduct proved, namely, that the Appellant had abused his professional relationship in order to further the said association.
- (5) BECAUSE the charge against the Appellant did not disclose the fundamental ingredient of serious professional misconduct which was ultimately found proved against him.
- (6) BECAUSE the Committee ought not to have suspended the registration of the Appellant or, alternatively, ought not to have suspended it for a period of 9 months.

ROBERT ALEXANDER

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BETWEEN:

RICHARD WORDSWORTH BARKER
Appellant

- and -

THE GENERAL MEDICAL COUNCIL
Respondent

CASE FOR THE APPELLANT

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