Neutral Citation Number: [2015] EWHC 6621 (Admin)

Case No: CO/635/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
BETWEEN:

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2015

Before :

Mr Justice HADDON-CAVE

- -

Between :

THE QUEEN **on the application of Dr ANUP CHAUDHURI**	**Claimant**
- and -	
GENERAL MEDICAL COUNCIL	**Defendant**

- -
- -

Robert Kellar (instructed by **Radcliffes Le Brasseur Solicitors**) for the **Claimant**
Catherine Callaghan (instructed by **General Medical Council In House Legal Team**) for the **Defendant**

Hearing dates: 9th/10th July 2015

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

……..
HADDON-CAVE

Mr Justice Haddon-Cave :

INTRODUCTION

1. This case concerns the application of Rule 4(5) of the General Medical Council (Fitness to Practise) Rules 2004 (known as the 'five year rule'):

> "No allegation shall proceed further if, at the time it is first made or first comes to the attention of the General Council, more than five-years have elapsed since the most recent events giving rise to the allegation, unless the Registrar considers that it is in the public interest, in the exceptional circumstances of the case, for it to proceed"

2. The Claimant, Dr Chaudhuri, challenges the Defendant GMC's failure to apply the five-year rule in his case, and the GMC's subsequent refusal to revisit its initial decision when it was pointed out that the decision was based on a factual error (see the correspondence dated 31st July 2014, 21st October 2014 and 18th December 2014).

3. The case arises in the context of the GMC's Fitness to Practise ("FTP") procedure. The issues in this case are three-fold. First, whether, and in what circumstances, the five-year rule is engaged. Second, whether and in what circumstances, the GMC may revisit a decision taken under Rule 4(5). Third, whether the procedure adopted by the GMC in this case was unfair.

THE FACTS

4. The Claimant, Dr Chaudhuri, is a general practitioner, aged 70. He is currently the subject of two separate investigations by the GMC arising from complaints on behalf of a patient (who shall be referred to as "MV") regarding treatment in 2008 and 2013. The present judicial review proceedings concern only the allegation relating to 2008.

5. MV complained of a sub-mandibular swelling and was attended by Dr Chaudhuri on three occasions in 2008: on 2nd April, 7th April and 22nd May 2008. On 2nd April 2008, Dr Chaudhuri noted that MV had no problem swallowing, no sore throat and had never smoked tobacco and prescribed antibiotics (*Erythromycin*). On 7th April 2008, MV telephoned the surgery because he had lost his prescription and was complaining of diarrhoea and was advised to drink plenty of water. On 22nd May 2008, Dr Chaudhuri noted that MV's right sub-mandibular gland was palpable, but the patient was not tender and asymptomatic and simply gave MV reassurance. He also prescribed emollient cream and *Hydrocortisone* and *Miconazole* ointment for an itchy rash "in axilla Left thigh, eczema rash". It is common ground that MV was not seen again by Dr Chaudhuri in 2008.

6. In 2009, MV was seen by head and neck surgeons and his throat and larynx initially assessed as normal. However, he was subsequently diagnosed with cancer at the base of his tongue. He underwent chemotherapy and radiotherapy treatment for the cancer which was successful.

7. On 26th July 2013, the GMC received a complaint from a relative of MV (who shall be referred to as "JM") which stated as follows:

> "Complaint details
>
> *2 April 2008* went to Dr Chaudhuri with large neck lump – antibiotics given. Second and third visit in *June and August* with neck lump antibiotics given. (3 visits over 10 months with neck lump) Saw Locum GP with neck lump who urgently referred him to ENT consultant, Stage 2 tongue cancer diagnosed. …" (emphasis added)

8. It should be noted that the complaint lodged by JM stated the dates of the 2008 consultations with Dr Chaudhuri incorrectly as "2 April 2008… June and August 2008".

9. On 30th July 2013, the appointed Assistant Registrar at the GMC, Ms Shepherd ("the Assistant Registrar"), examined the complaint under Rule 4. She concluded that rule 4(5) was not engaged. She subsequently made the following note of the reasons for her decision:

> "Allegation reasoning – The complainant alleges: April – August 2008 – Dr. Chaudhuri repeatedly treated a lump on the patient's neck with antibiotics. On returning the practice for the fourth time the patient saw a locum doctor who made an urgent referral to ENT. The patient was subsequently diagnosed with Stage 2 cancer of the tongue".

10. On 29th August 2013, the GMC wrote to Dr Chaudhuri notifying him that a complaint had been lodged against him in respect of patient MV and providing a copy of the index complaint and inviting him to comment. At this stage, however, Dr Chaudhuri was not told that there had been any consideration under Rule 4(5).

11. On 10th October 2013, the GMC received copies of MV's medical records. The records showed that the latest consultation had been on 22nd May 2008, *i.e.* more than five years before the index complaint was lodged (5 years 2 months). The case nevertheless progressed and an expert's report by a Dr Tidy was produced on 2nd April 2014 and was served on Dr Chaudhuri on 23rd April 2014.

12. On 12th June 2014, the Assistant Registrar of the GMC served Dr Chaudhuri with a letter under Rule 7 of the 2004 Rules, formally notifying him of the allegations now under consideration and giving him a further opportunity to comment before the matter was considered by the Case Examiners. The letter stated that separate allegations arose in relation to the consultations on "2nd April 2008" and "26th June 2013".

13. On 2nd, 8th and 10th July 2014, Dr Chaudhuri's solicitors, Radcliffes LeBrassaeur, wrote to the GMC seeking a copy of the Assistant Registrar's decision under Rule 4(5) in relation to the 2008 allegations. On 31st July 2014, the GMC confirmed that the basis of Ms Shepherd's decision as Assistant Registrar was that, on the basis of the allegation put forward by JM on 26th July 2013, "…the most recent event took place in August 2008, meaning that [JM] made her complaint within 5 years (4 years 11 months)".

14. On 1st September 2014, Dr Chaudhuri's solicitors drew attention to the factual error in Ms Shepard's decision and invited the GMC to reconsider the Assistant Registrar's decision:

> "… Dr. Chaudhuri's last clinical encounter with the patient in the relevant period was not in August 2008. That reflects an error on the part of the complainant. The last appointment with Dr. Chaudhuri in the relevant period was on 22 May 2008. It was therefore outside the 5 year period and not within it…"

15. On 21st October 2014 and 18th December 2014, the GMC confirmed that it was not prepared to revisit the Assistant Registrar's decision under Rule 4(5) and gave the following reasons:

> "At the time the allegation was received by the GMC, the Registrar correctly determined that the five-year rule was not engaged. The complaint was received on 26 July 2013, and it was stated that the last attendance by the patient with Dr. Chaudhuri was August 2008. This is within the 5 year period. The Registrar therefore determined to refer the allegations to the Case Examiners for a decision under Rule 4 (2)."

16. On 15th January 2015, Dr Chaudhuri's solicitors issued a pre-action letter. On 10th February 2015, these judicial review proceedings were issued on behalf of the Claimant.

THE LAW

The 2004 Rules

17. The full text of Rule 4 of the 2004 Rules reads as follows:

> "*Initial consideration of referral of allegations*
> 4. (1) An allegation shall initially be considered by the Registrar.
> (2) Subject to [paragraphs (3) to (5)] and rule 5, where the Registrar considers that the allegation falls within section 35C(2) of the Act, he shall refer the matter to a medical and a lay Case Examiner for consideration under rule 8.
> [(2A) Where the Registrar considers that an allegation does not fall within section 35C(2) of the Act the Registrar must notify the maker of the allegation (if any) accordingly.]
> (3) Where–
> [...]
> (b) in the case of an allegation falling within paragraph (5), the Registrar does not consider it to be in the public interest for the allegation to proceed; or
> (c) the Registrar considers that an allegation should not proceed on grounds that it is vexatious,
> he shall notify the practitioner and the maker of the allegation (if any) accordingly.
> (4) The Registrar may, before deciding whether to refer an allegation, carry out any investigations as in his opinion are appropriate to the consideration of–
> (a) whether or not the allegation falls within section 35C(2) of the Act;
> (b) the practitioner's fitness to practise; or
> (c) the matters outlined within paragraph (5) below.
> (5) No allegation shall proceed further if, at the time it is first made or first comes to the attention of the General Council, more than five years have elapsed since the most recent events giving rise to the allegation, unless the Registrar considers that it is in the public interest, in the exceptional circumstances of the case, for it to proceed.

18. Rule 7 provides as follows:

> "*Investigation of allegations*

(1) As soon as is reasonably practicable after referral of an allegation for consideration under rule 8, the Registrar shall write to the practitioner-

(a) informing him of the allegation and stating the matters which appear to raise a question as to whether his fitness to practise is impaired;
(b) providing him with copies of any documents received by the General Council in support of the allegation;
(c) inviting him to respond to the allegation with written representations within the period of 28 days from the date of the letter; and
(d) informing him that representations received from him will be disclosed, where appropriate, to the maker of the allegation (if any) for comment.

(2) The Registrar shall carry out any investigations, whether or not any have been carried out under rule 4(4), as in his opinion are appropriate to the consideration of the allegation under rule 8."

19. Rule 8 provides as follows:

"*Consideration by Case Examiners*
8. (1) An allegation referred by the Registrar under rule 4(2), 5(2), 12(6)(b) or 28(3)(c) shall be considered by the Case Examiners.
(2) Upon consideration of an allegation, the Case Examiners may unanimously decide-(a) that the allegation should not proceed further;
(b) to issue a warning to the practitioner in accordance with rule 11(2);
(c) to refer the allegation to the Committee under rule 11(3) for determination under rule 11(6); or
(d) to refer the allegation for determination by a FTP Panel."

20. Rule 12 provides as follows:

"*Review of decisions*
12. (1) Subject to paragraph (2), the following decisions may be reviewed by the Registrar–

(a) a decision not to refer an allegation to a medical and a lay Case Examiner or, for any other reason, that an allegation should not proceed beyond rule 4;
(b) a decision not to refer an allegation to the Committee or a FTP Panel;
(c) a decision to issue a warning in accordance with rule 11(2), (4) or (6); or
(d) a decision to cease consideration of an allegation upon receipt of undertakings from the practitioner in accordance with rule 10(4)."

General Principles

21. I summarised the principles applicable to the application Rule of 4(5) in *D v. GMC* [2013] EWHC 2839 as follows:

"(1) The "five-year rule" provides "a distinct and free-standing safeguard which sets a general prohibition against the pursuit of long-delayed complaints" . It provides only for very limited, i.e. "exceptional", circumstances in which such complaints may proceed. In the event of a wrong decision there is no satisfactory remedy later in the proceedings (see Gibbs J in *Peacock v. The General Medical Council* [2007] EWHC 585 (Admin)).

(2) It is not appropriate to either water down, or re-word, the rule 4(5) test: the Registrar must be satisfied that there are circumstances of the case which can fairly be described as "exceptional circumstances" and that proceeding with the case is in the public interest, in those exceptional circumstances (see Sullivan J in *Gwynn v. The General Medical Council* [2007] EWHC 3145 (Admin)).

(3) Although a reasonable amount of time should be allowed to pursue complaints, the policy underlying rule 4(5) is that practitioners should not be pursued by stale complaints. Rule 4 (5) therefore applies a prohibition subject to a narrowly drawn exception (*Guidance* , paragraph 13).

(4) The Registrar's decision must identify the public interest and the exceptional circumstances pertinent to the particular allegations under consideration (*Guidance* , paragraph 15 and footnote 52; *Gwynn* , (*supra*)).”

22. The function of the Registrar at the Rule 4 stage is limited. It is no part of the Registrar's functions at the Rule 4 stage to decide whether there has been impaired fitness to practise or to establish the facts of the complaint (*c.f. (Rita Pal) v GMC* [2009] EWHC 1061 (Admin) at [11]-[12], [32]-[33]).

GMC GUIDANCE AND PROCESS

The GMC Guidance

23. The GMC issued guidance on the approach to be taken by the GMC Registrar when making decisions under rule 4(5) of the 2004 Rules. The latest version of the Guidance issued in May 2010 is headed "*Revised Aide Memoire*". The Guidance states the question for decision-makers to ask is as follows: giving the various relevant factors the weight considered appropriate, is it "in the public interest, in the exceptional circumstances of the case, for it to proceed?". The Guidance lists eight factors which are "typically" relevant when considering exceptionality:
    (1) The extent of the lapse of time (beyond five-years).
    (2) The reason(s) for the lapse of time.
    (3) The extent to which relevant evidence is no longer available due to the lapse of time.
    (4) The gravity of the allegations.
    (5) The number of incidents alleged: a pattern of misconduct or a single episode.
    (6) The extent of any continuing unwarranted risk to the public and/or to public confidence in the medical profession.
    (7) The extent to which the allegation has been ventilated before other public/ adjudicatory bodies and the practitioner's employer.
    (8) Whether the allegation raises an important, new and/or developing point of practice principle or law.

Stages of the FTP disciplinary process

24. In broad terms, there are five stages to the FTP disciplinary process:

(1) *Stage 1:* the 'triage' stage, involving the Registrar's decision on the application of the five-year rule and referral to the Case Examiners (Rule 4);

(2) *Stage 2:* the initial investigation stage, involving notification of the practitioner, investigation of the allegations and referral by the Registrar to the Case Examiners (Rule 7);

(3) *Stage 3:* the optional stage of referral by the Registrar to the Interim Orders Panel ("IOP") which may be made at any stage (Rule 6);

(4) *Stage 4:* the Case Examiner stage, involving detailed investigation case and potential referral to the FTP Panel (Rule 8);

(5) *Stage 5:* the FTP stage, involving the substantive hearing before the FTP Panel, the decision as to impairment and the decision as to sanctions (Parts 3 and 4 of the 2004 Rules)

GROUNDS

25. The Grounds lodged in support of Dr Chaudhuri's judicial review may conveniently be summarised under three heads as follows.

(1) *Error of Fact*: Whether the question whether "more than five years have elapsed since the most recent events giving rise to the allegation" is an objective question of precedent or jurisdictional fact such that the Court should intervene to correct a clear and admitted error. Alternatively, whether there was a material error of fact amounting to an error or law in this case or whether there was a material error of fact in this case (Ground 1).

(2) *Refusal to Reconsider*: Whether it was unlawful for the GMC to refuse to reconsider and correct its decision that Rule 4 (5) was not engaged once it was on notice that the original decision was vitiated by a material error of fact (Ground 4).

(3) *Procedural Unfairness*: Whether the error into which the GMC fell was generated by procedural unfairness. It is contended that Dr Chaudhuri was not provided with a properly informed opportunity to make representations in relation to the Registrar's decision. Further or alternatively, the Registrar failed to acquaint herself adequately with the factual material relevant to her decision before concluding that Rule 4 (5) was not engaged (Grounds 2, 3 and 5).

SUBMISSIONS

Claimant's submissions

26. Mr. Kellar, Counsel for the Claimant, helpfully summarised his submissions in relation to the three issues as follows:

(1) Mr Kellar's primary submission was that in determining that rule 4 (5) was not engaged the Registrar erred in relation to an issue of precedent fact: see, inter alia, *R (A) v. Croydon London Borough Council* [2009] UKSC [29-31]. The first limb of rule 4 (5) raises a hard edged or objective question of fact. Unlike the second limb of

rule 4 (5), and other parts of the Rules, the first limb of rule 4 (5) was not drafted in terms requiring the exercise of any judgment or discretion by the Registrar. Regard must be had to the ordinary and natural meaning of the words "giving rise to" which show that the Registrar should focus upon the date of the actual events that caused or brought about the complaint. The rule must also be construed in a manner that was consistent with its underlying purpose: a safeguard against long delayed complaints. That purpose would be frustrated if an error (innocent or deliberate) by the complainant was capable of depriving a doctor of the rule's protection. Moreover, this would be an unjust outcome because there was no satisfactory alternative remedy later in the proceedings. The Court should strive to construe the rule so as avoid such injustice unless constrained to do so by clear language. Further, the GMC's interpretation was difficult to reconcile with its own guidance. Finally, the fact that the Registrar's function was normally limited under rule 4 (2) (See *Rita Pal* [2009] EWHC 1061 (Admin)) did not mean it was necessarily so limited under rule 4 (5); the language of the two paragraphs was very different. Mr. Kellar submitted that if the Claimant succeeded on his primary ground it was unnecessary for the Court to go further and consider his alternative grounds of challenge. The Court should quash the decision of 30 July 2013 (communicated on 31 July 2014) for error of precedent fact and remit the matter to the Registrar for reconsideration.

In the alternative, Mr. Kellar submitted that the Registrar's decision was premised upon a fundamental and material error of fact amounting to an error of law: see, inter alia, *March v. Secretary of State for the Home Department* [2010] EWHC 765 (Admin) [20(iii)]. It was to be inferred from the statement of Ms. Shepard (paragraph 43) that she reached her decision on the erroneous assumption that the dates contained in the originating complaint were accurate and true. The reality is that she would have reached a different conclusion if she had had any reason to doubt the accuracy of the dates provided. The Registrar's fundamentally mistaken assumption was sufficient for the Court to intervene. Again, Mr. Kellar submitted that if the Claimant succeeded on this ground it was unnecessary for the Court to go further and consider his remaining alternative grounds of challenge.

(2) Mr. Kellar submitted that it was unreasonable for the Defendant to refuse to reconsider the matter once it was on notice of the material error of fact. Mr. Kellar's primary submission was that the mandatory wording of Rule 4 (5) ("shall not proceed further") was such that the Defendant was under a legal duty to reconsider. Mr. Kellar did not accept that the Registrar was functus officio because no referral to the Case Examiners had been notified to the Claimant (or to the Case Examiners) at the point in time that the Defendant received the medical records: see rule 7 and *R (Anufrijeva) v. Secretary of State for the Home Department* [2003] UKHL 36 [26-32]. In any event, even after referral the Registrar had an inherent or implied power to revisit a decision to refer made on the basis of a fundamental error of fact where it was necessary to do so in the interests of justice: see (*inter alia*) *Fajemisin v. GDC* [2013] EWHC 3501 [37]. Alternatively, the GMC could and should have achieved the same result by agreeing to a consent order in the Administrative Court remitting the matter for reconsideration. The ability of GMC to correct fundamental errors in these ways meant that it was unnecessary for the Registrar to undertake onerous investigations at

the outset into the dates of events giving rise to the allegations. Again, Mr. Kellar submitted that if the Claimant succeeded on this ground it was unnecessary for the Court to go further and consider his final ground of challenge.

(3) Mr. Kellar submitted that, given the Defendant's refusal to reconsider in this case, the procedure adopted was unfair. The unfairness arose from a number of factors in combination: the failure of the Defendant to notify the Claimant of the Registrar's decision at the time when it was made; the failure to grant the Claimant an informed opportunity to make representations about it; the failure of the Defendant to acquaint itself with the material central to its decision and the refusal of the GMC to revisit rule 4 (5) once the error had been brought to its attention. Mr. Kellar emphasised that it was the final factor that made the previous factors material. Mr. Kellar also submitted that the Registrar was required to approach the present case with particular care because the complaint was very close to the 5 year threshold, the Registrar did not have access to the records or any other means of verifying the relevant dates and because the complaint had been made by a third party and not the patient himself.

Claimant's submissions

27. Ms Callaghan, Counsel for the GMC's submissions on the three issues can be briefly summarised as follows:

(1) The five-year rule is intended to protect doctors from long-delayed allegations – and , the "*most recent events giving rise to the allegation"* means the *alleged* events, not the events as they subsequently turn out to be. This construction is not only the natural and proper meaning of the words, but is consistent with the statutory purpose of Rule 4 and the Registrar's function under that rule. The Registrar was correct to conclude, on the basis of the allegation before her, that the five-year rule was not engaged, and to refer the allegation to Case Examiners for consideration.

(2) The Registrar has no power or obligation to reconsider a decision that an allegation should be referred to Case Examiners, in the absence of a Court order to do so: see *R (Hibbert) v GMC* [2013] EWHC 3596 (Admin) at [19]-[21]; *R (Rycroft) v Royal Pharmaceutical Society of Great Britain* [2010] EHWC 2832 (Admin) at [63]. Even if there was such a power, it was not unreasonable or unlawful not to reconsider it in the circumstances of this case, where there are a number of further stages in the proceedings, each of which could result in the case being closed without any adverse finding against Dr Chaudhuri. The outcome was, therefore, not unjust.

(3) There was no procedural unfairness. In the circumstances of this case, where the dates on the face of the allegation were clear and did not give rise to any cause for concern, the Registrar was not obliged to invite Dr Chaudhuri to make representations or to carry out any enquiry or investigation before (or after) reaching a decision that Rule 4(5) was not engaged. Irrespective of whether there is any duty to give reasons for a decision that Rule 4(5) is not engaged (which does not arise), the GMC has plainly provided sufficient reasons for Dr Chaudhuri to understand the basis of its decision (which Dr Chaudhuri now appears to accept).

ANALYSIS

(1) Error of Fact

28. The first question for decision is whether Rule 4(5) gives rise to an objective question of precedent or jurisdictional fact such that the Court should intervene to correct a clear and admitted error (Ground 1).

Construction

29. The key issue in this case is one of construction. The Registrar is required by Rule 4(5) to decide whether "…more than five years have elapsed since the most recent events giving rise to the allegation". Mr Kellar contends that the reference to "the most recent events" is a reference to the *actual* events from which the allegation arises and that Rule 4(5) refers to an issue of precedent or jurisdictional fact. Ms Callaghan contends that "the most recent events" refers to the *alleged* events and does not give rise to an issue of precedent or jurisdictional fact.

Actual or alleged dates

30. In my view, the construction of Rule 4(5) is pellucid: it is directed to the time elapsed since the *actual* date upon which the most recent events in question are alleged to have taken place and the five-year threshold is a matter of precedent or jurisdictional fact.

31. This is the plain ordinary meaning of the words "No allegation shall proceed further if… more than five years have elapsed since the most recent events giving rise to the allegation". The reference to "the most recent events" is intended to be regarded as separate and different from the reference to "the allegation" itself. This is clear from the linking but separating words "giving rise". This is also clear from the meaning of the term "allegation" which is narrowly defined in Rule 2 as simply "an allegation that the fitness to practise of a practitioner is impaired". Ms Callaghan suggested that the words "giving rise" meant 'forming the basis of' or 'underpinning' the allegations. However, this does not assist her: it is clear that the reference to "the allegation" does not include or comprise the underlying events but is the result of them.

32. This construction is supported by the GMC's own guidance. The GMC's *Revised Aide Memoire* states in paragraph 7: "…the Registrar must identify 'the most recent events giving rise to the allegations' and the date when those events occurred". The Registrar is, therefore, required to identify the *actual* date upon which those events in question occurred, not merely the *alleged* date upon which the events are alleged to have occurred.

33. The Registrar is entitled to take the allegations stated in the complaint at their face value (see Collins J in R(*Rita Pal) v. GMC* [2009] EWHC 1061 (Admin) [11-12]). It follows that, when considering the application of the five-year rule, the Registrar is entitled to rely on the dates referred to in the complaint as *prima facie* evidence of the *actual* dates. This is key to understanding the true construction of Rule 4(5). The Registrar is only obliged to investigate further if there is reasonable room for doubt. This construction is also consonant with the power of the Registrar under Rule 4(4) to carry out any investigation appropriate to the consideration of the matters outlined in Rule 4(5). The Rule 4(4)

power is regularly used in relation to impairment (see the statement of Ms Shepard). The power is equally available to clarify any doubt as to the relevant dates.

34. Ms Callaghan accepted that the Registrar must take the information contained in the complaint 'at face value' unless there was good reason to doubt it and that doubt was easy to resolve. Mr Kellar submitted that this was a fatal concession. It was certainly illuminating, because the concession does not sit easily with the GMC's stated position that the Registrar was concerned with, and only with, the alleged dates and not the actual dates of the events giving rise to the allegation.

35. For these reasons, in my view, it is clear that the five-year calculation which the Registrar is required to carry out under Rule 4(5) is clearly predicated on an assessment of actual dates, but the Registrar is entitled to take a *prima facie* view as to what the actual dates are on the basis of the information in the complaint.

Precedent or jurisdictional fact

36. Is the five-year rule a matter of precedent or jurisdictional fact? In my view, the language, structure and context of Rule 4(5) indicates that it is. Rule 4(5) comprises two parts: the rule and the proviso. The language in which the first half of Rule 4(5) is expressed is stark and redolent of a precedent or jurisdictional fact: "No allegation shall proceed further if… more than five years have elapsed…". It is vanilla question of fact which admits only of a binary answer. No value judgment is required to answer it. This is in contrast to the wording of the proviso in the second half of Rule 4(5) which does require the Registrar to exercise a value judgment: "…unless the Registrar *considers* that it is in the public interest…" etc. The stark wording of the first half of Rule 4(5) is in contrast not only to the value judgment language of the second half of Rule 4(5) but also the language in *e.g.* Rules 4(1), 6 and 7(2).

37. The date upon which an event or an alleged event took place (as opposed to the event itself) is an objectively verifiable fact. A date is no less an actual date merely because the event which is said to have taken place on that date is not yet proven, *e.g.* negligent treatment or negligent surgery or mistaken prognosis or a wrong prescription. In a case of negligent treatment by a GP, it would be the date upon which a particular patient appointment with the GP doctor took place. In a case of negligent surgery, it would be the date upon which the operation on that patient by that surgeon took place. Equally, calculating the period of five-years is an objectively verifiable matter and does not require a value judgment.

38. In my judgment, Rule 4(5) raises an objective question of precedent or jurisdictional fact.

Material error of fact

39. In view of my conclusion on the primary way in which Mr Kellar puts his case on Ground (1), I can deal briefly with his alternative argument under this head based on a material error of fact amounting to an error of law. It is trite law that the court has power to intervene where an administrative decision is based on an error of fact which is material and a different decision might have been made but for the error (see *Haringey LBC v. Secretary of State* [2008] EWHC 20101 at [11], [12] and [16]). It is clear from the statement of Ms Shepard she would have reached a different conclusion if she had known

of the mistake as to the date of the last appointment. Accordingly, in my view, the Court has power to intervene on this basis also.

Conclusion on Ground (1)

40. For the above reasons, in my judgment, the question of whether or not more than five years have elapsed since the actual date of the most recent events giving rise to the allegation of fitness impairment of the practitioner under Rule 4(5) is an objective question of precedent or jurisdictional fact. It is common ground that the date stated by JW in the complaint, namely "August 2008" was wrong and should have been "May 2008" and that the Registrar was, thereby, led into material error when making her original Rule 4(5) decision. In these circumstances, the Court has the power to intervene and quash the original Rule 4(5) decision by the Registrar and remit the matter for reconsideration.

41. In view of my decision on Ground (1), it is not necessary to go on to consider the other Grounds. However, in case I am wrong about construction, I nevertheless turn next to consider the second question regarding the power to reconsider (Ground 4).

(2) Refusal to reconsider

42. The second question for decision is whether it was unlawful for the GMC to refuse to reconsider and correct its decision that Rule 4(5) was not engaged, once it was on notice that the original decision was vitiated by a material error of fact (Ground (4)). This only arises if I am wrong about Ground (1) above.

Power to correct decisions vitiated by fundamental mistake of fact

43. Mr Kellar submitted that a public body such as the GMC had an inherent or implied power to correct a decision made under a fundamental mistake of fact. Ms Callaghan submitted that, absent an express power, a statutory body has no power to reconsider previous decisions, except to correct minor slips or accidental errors which do not substantially affect the rights of the parties or the decision arrived at; and the instant case could not properly be described as falling into the category of a 'minor slip'. She further submitted that it was significant that Rule 12 did not give the Registrar power to review a decision that Rule 4(5) was not engaged and an allegation was referable to the Case Examiners under Rule 4(2).

The conflict in the authorities

44. There has been a debate about the power of a public body to correct mistakes other than slips. The debate centred on the correctness of the following passage in the 7th edition (1994) of *Wade & Forsyth, Administrative Law,* at p. 262 (which is also to be found in the last but one edition the 10th edition (2008) at p. 194):

> "Even where such powers are not conferred, it is possible that statutory tribunals would have power, as has the High Court, to correct accidental mistakes; to set aside judgments obtained by fraud; and to review a decision where facts subsequently discovered have revealed a miscarriage of justice."

45. There is a conflict in the authorities on the scope of a public authority's power to review its own decisions: see *Akewushola v Secretary of State for the Home Department* [2000] 1 WLR 2295 (CA) at 2300-2301; *R (Secretary of State for the Home Department) v Immigration Appeal Tribunal* [2001] QB 1224 at [67]; *Porteous v. Wess Dorset District Council* [2004] EWCA Civ 244; *Jenkinson v NMC* [2009] EWHC 1111; *R (B) v Nursing and Midwifery Council* [2012] EWHC 1264 (Admin) at [32]-[39]; and *Fajemisin v. General Medical Council* [2013] EWHC 3501 (Admin).

46. I respectfully adopt the analysis of Keith J in *Fajemisin* (*supra*), who followed the Divisional Court in *Porteous* (*supra*) (Mantell LJ and Sir William Aldous), which held that the local authority had a power to revisit and rescind an earlier decision based on a fundamental mistake of fact. In my view, the inherent jurisdiction of public bodies to revisit previous decisions is not limited simply to correcting slips or minor errors which do not substantially affect the rights of the parties or the decision taken; on the contrary, public bodies have the inherent or implied power themselves to revisit and revoke *any* decision vitiated by a fundamental mistake as to the underlying facts upon which the decision in question was predicated.

Broad corrective principle

47. I have no doubt that such a broad corrective principle exists in administrative law. Public bodies must have the power themselves to correct their own decisions based on a fundamental mistake of fact. To suggest otherwise would be to allow process to triumph over common sense. There is no sense in requiring wasteful resort to the courts to correct such obvious mistakes. Administrative law should be based on common sense.

48. The vitiating effect of fundamental mistakes of fact is well recognised in other areas of law, *e.g.* fundamental mistake in contract law (*c.f. Bell v. Lever Bros* [1932] AC 161). There have been previous helpful straws in the administrative wind regarding errors of fact giving rise to a duty to reconsider (see *e.g. Rootkin v. Kent County Council* [1981] 1 WLR 1186, *per* Lawton LJ; *R v. Newham LBC, ex parte Begum* [1996] 28 HLR, 646 at 656 *per* Stephen Richards J; *Crawley BC v. B* [2000] EWCA Civ 50; *R v. Bradford Crown Court, ex parte Crossling* [2000] COD 107; *R v. Inner London North Coroner, ex parte Touche* [2001] EWCA Civ 383 at [36]; *R(Zahid Hafeez) v. Secretary of State for the Home Department* [2014] EWHC 1342 (Admin) *per* Green J at [25]-[37]). Even the High Court has the power to reopen its own appeal procedure to prevent real injustice (see *Taylor v. Lawrence* [2003] QB 528 at [54].)

49. A broad corrective principle of the nature described above is consonant with the principles of proportionality and utility. It is also consonant with the emerging principle of "good administration" in administrative law (see *Bank Mellat (Appellant) v Her Majesty's Treasury (Respondent) (No. 2)* [2013] UKSC 39, Lord Sumption JSC at paragraph [32]; *R(Plantagenet Society v. Secretary of State for Justice* [2014] EWHC 1662 and the cases cited at [93] such as *Case T-83/91 Tetra Pak International SA v. Commission of the European Communities*; *Case T-231/97 New Europe consulting Ltd v. Commission*; and *Joined Cases T-33/984 and T-34/98 Petrotub v. Council*; *European Administrative Law*). Not to have such a principle would be inimical to good administration.

50. In my view, the law is correctly stated in the current edition of *Wade & Forsyth, Administrative Law,* the 11th edition (2014), at p. 192:

> "Even where such powers are not expressly conferred, it seems that statutory tribunals have power to correct slips and to set aside judgments obtained by fraud or based on a fundamental mistake of fact."

51. The principle would naturally operate subject to the ordinary principles of fairness in administrative law (*e.g.* legitimate expectation and the rights of persons acting to their detriment in reliance upon such decisions).

Functus officio

52. Ms Callaghan argued that the Assistant Registrar was *functus officio* in respect of her Rule 4 functions and relied upon the decision of Holgate J in *R (Gannon) v General Medical Council* (Claim No. CO/613/2015).

53. In *Gannon* (*supra*), Holgate J refused permission for judicial review in that case and held that Rule 12 (which grants the Registrar power to reconsider certain decisions other than Rule 4 decisions) indicated that Rule 4 decisions were themselves not reviewable; and the Registrar was, therefore, *functus* once a Rule 4 decision was made. Holgate J relied on to decisions such as *R(Rycroft) v. Royal Pharmaceutical Society* (*supra*) (Wyn Williams J), *R(Hibbert) v. GMC* [2013] EWJC 3596 (Simler J), and *R(B) v. NMC* [2012] EWHC 1264 (Lang J).

54. Section 12(1) of the Interpretation Act 1978 provides:

> "Where an Act confers a power or imposes a duty it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, from time to time as occasion requires."

55. It may well be that the existence of Rule 12, which grants express powers to review in situations other than Rule 4 decisions, amounts to a sufficient contrary indication.

56. In my judgment, however, this is not germane and the above cases are distinguishable. *Gannon* and the other cases were not considering the situation which arises in the present case, *i.e.* a Rule 4 decision vitiated by a fundamental mistake of fact. The existence of Rule 12 does not, in my view, obviate the inherent or implied power on public authorities to correct fundamental mistakes of fact or prevent the operation of the broad corrective principle enunciated above and expressed in *Fajemisin* and *Porteous* (*supra)*. Further, it is noteworthy also that the opening wording of Rule 4(5), "No allegation shall proceed further if…", is general terms with no temporal limit. Application of the five year rule is not confined simply to the 'triage' stage, *i.e. Stage 1*. It is potentially open to operation at any stage of the GMC disciplinary process. In practice, any mistakes or misunderstandings as to the dates of the events giving rise to the allegation of impairment are likely to emerge or be picked up during the investigation stage by the Registrar of the allegations (as in this case) (*Stage 2*), or during the Case Examiner stage (*Stage 3*) when the evidence is examined in detail. However, in my view, the Registrar has the power to correct mistakes as to the application of the five-year rule at any stage if fundamental mistakes or misunderstandings as to the relevant dates emerge.

Conclusion on Ground (4)

57. In summary, in my judgment, the broad corrective principle enunciated above is applicable in this case. The Assistant Registrar had the power and duty to revisit and revoke her Rule 4(5) decision upon discovery that her original decision was based on a fundamental mistake as to the underlying facts. The Assistant Registrar's refusal to reconsider her decision was unlawful.

(3) Procedural unfairness

58. The third question for decision is whether the GMC fell into error because of procedural unfairness, *viz.* failing to give Dr Chaudhuri an opportunity to make representations in relation to the Registrar's Rule 4(5) decision and the Registrar failing to acquaint herself with the factual material relevant to her decision before concluding that Rule 4 (5) was not engaged (Grounds (2), (3) and (5)). A reasons challenge is also made. These questions only arise if I am wrong on Grounds (1) and (4) above.

59. There is nothing in Mr Kellar's makeweight 'procedural unfairness' arguments. The Registrar is entitled to rely on the assertions in the initial complaint as *prima facie* evidence of the actual dates of the events giving rise to the allegation of impairment (see above). In the absence of special reason for doubt, the Registrar is not obliged in every case to double check details of the complaint at the 'triage' stage, let alone give the practitioner the opportunity to question the dates alleged. This would obviously be impractical and wasteful, as well as inimical to the filtering process which the Registrar has to carry out at the Rule 4 stage: the GMC receives and processes in the region of 10,000 complaints annually.

60. The cases of *R (Gwynn) v GMC* [2007] EWHC 3145 (Admin) and *R(Hibbert) v GMC* [2013] EWHC 3596 (Admin) cited by Mr Kellar are distinguishable because they were waiver cases, *i.e.* decisions taken under the proviso to Rule 4(5) that, notwithstanding that more than five years have elapsed since the events giving rise to the allegation of impairment, it is in the public interest, in the exceptional circumstances of the case, for it to proceed.

61. There was nothing to put the Registrar who dealt with this case on inquiry when she made the initial Rule 4(5) decision and, therefore, no procedural or other unfairness at the initial 'triage' stage (*Stage 1*). Neither, in my view, can there be any criticism of the Registrar for not having spotted the date discrepancy upon receipt of the medical notes. There was no obligation to check every single detail of the complaint against the medical records at the initial investigation stage, since to do so would be unduly burdensome and potentially wasteful. There was, therefore, in my view, no procedural or other unfairness at the initial investigation stage (*Stage 2*).

Conclusion on Grounds (2), (3) and (5)

62. Grounds (2), (3) and (5) are dismissed.

General observations

63. The GMC appear to have a misplaced anxiety that the integrity and smooth-running of the FTP disciplinary proceedings would be undermined if any of the Grounds were succeed. Properly understood, however, the FTP procedure is robust, flexible and fair. As I have explained above, the position is straightforward: the Registrar is entitled to rely on the complaint as *prima facie* evidence upon which to make the Rule 4 decisions; but the Registrar has the power to correct fundamental mistakes of fact at any time.

64. I do not accept Ms Callaghan's submission that such a construction would conflict with the 'triage' nature of the Registrar's role which involves carrying out an initial sift and render Rule 4(5) impractical or unworkable or impossibly burdensome because she would be required to investigate and double check the actual dates of the events in question in all 10,000 cases it received *per annum*, a task which she was not resourced, trained or able to do. This submission is circular and special pleading.

65. The procedure contemplated by Rule 4(5) outlined above is simple and works perfectly satisfactorily. Normally, the dates in the complaint will be clearly stated and there will be no difficulty in carrying out the task of (a) identifying the dates upon which the events give rise to the allegation of fitness to practice and (b) making the five-year rule calculation. As stated above, the Registrar can use the complaint as *prima facie* evidence to identify the most recent date upon which the events giving rise to the allegation of impaired fitness to practise in order to decide the Rule 4(5) question. It is only in the rare case, where *e.g.* there is unclarity or ambiguity or other difficulty in identifying the relevant date, will it be necessary for the Registrar to raise a query with the complainant or investigate the matter further using her Rule 4(4) powers (*c.f.* Collins J in R(*Rita Pal) v. GMC*, *ibid*, [35]).

66. In practice, as emphasised above, it is likely that any further difficulties as regards the dates are likely to come to light at the Rule 7(1) letter stage when the Registrar first writes to the practitioner informing him of the allegation and provides him with copies of the documents received in support of the allegation. It is at this stage that the practitioner is likely to point out any mistakes regarding the date or any disagreement. Indeed, this is precisely what happened in this case. Dr Chaudhuri received the Rule 7(1) letter on 12th June 2014 informing him of the allegation and on 2nd July 2014 his solicitors, Radcliffes LeBrassaeur, wrote back to the GMC explaining their mistake that it was more than five-years since the 2008 episode and, therefore, Rule 4(5) was engaged.

67. Ms Callaghan further submits that practitioners like Dr Chaudhuri who are under investigation need not worry if a decision at the Rule 4 stage turns out to have been incorrectly made because further safeguards are built into the FTP procedure, *viz. e.g.* the matter will be reviewed at the Case Examiner stage and may be dismissed on similar grounds. However, in my view, this is no panacea for the loss of the benefit of the proper application of the "distinct and free-standing safeguard" of the five-year rule at the initial Rule 4 stage (see *D v. GMC* [2013] EWHC 2839, *supra*).

CONCLUSION

68. For the above reasons, in my judgment, the claim succeeds on the Claimant's Ground (1) and Ground (4). Rule 4(5) raises an objective question of precedent or jurisdictional fact (*i.e.* whether more than five-years have elapsed since the actual date of the most recent events giving rise to the allegation of fitness impairment of the practitioner).

69. There was an error in the complaint lodged on behalf of the patient JW, namely that he had last been treated in "August 2008" rather than "May 2008". This was a fundamental and material error of fact. As a result of this error of fact, the Registrar fell into error in deciding that the five-year rule did not apply. Further, when the error was pointed out, the GMC should have corrected its original decision but refused to do so.

70. In these circumstances, the Court has the power to intervene and quash the original Rule 4(5) decision by the Registrar and remit the matter for reconsideration and I so order.