Neutral Citation Number: [2024] EWHC 2825 (Admin)

Case No: AC-2024-LON-000290

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/11/2024

Before :

MRS JUSTICE FOSTER DBE

- -

Between :

ANDREI CHRISTIAN JUCHI	**Appellant**
- and -	
THE NURSING AND MIDWIFERY COUNCIL	**Respondent**

- -
- -

Wafa Shah (instructed by **The Royal College of Nursing**) for the **Appellant**
Aofie Kennedy (instructed by **The Nursing and Midwifery Council**) for the **Respondent**

Hearing dates: 3rd July 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 8th November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE FOSTER

Mrs Justice Foster DBE :

Introduction

1. This is an appeal brought under Article 38(1) of the Nursing and Midwifery Order 2001 (referred to here as "the Order") against a decision of a Fitness to Practice Committee of the Nursing and Midwifery Council ("the Panel") set out in a notice of decision letter dated 3 January 2024, in which it determined that the Appellant's fitness to practise as a nurse was impaired by reason of his misconduct.

2. On 24 January 2023, the Panel imposed a striking off order against him.

3. Between April and December 2021, the Appellant, Andrei Christian Juchi, worked one day a week as a Mental Health Practitioner at St Luke's Primary Care Centre ("St Luke's") where he was employed to review, assess, and manage patients with mental health conditions. He was employed by them from 13 April 2021 until 31 January 2022. In the same period, he worked as a registered nurse at Kettering General Hospital. He came to be involved in the care of a woman at St Luke's referred to in the proceedings below as Patient A. Patient A was a vulnerable adult, having been a victim of sexual abuse in the past and had a diagnosis of PTSD, anxiety and depression.

4. On 16 December 2021, St Luke's received a letter from Patient A that alleged the Appellant had had a sexual relationship with her, had filmed a sexual encounter between them without Patient A's consent, had refused to delete the footage when Patient A asked and had threatened to post the footage online. She also alleged an ECG was performed without the offer of a chaperone, that he had asked her to remove her bra without medical justification and had become sexually aroused on another occasion whilst performing an ECG. He had last treated her on 25 August 2021.

5. Mr Juchi freely admitted when interviewed within St Luke's on 21 December 2021 that he had had a sexual relationship with Patient A; he confirmed that the relationship had begun whilst she was being treated by him professionally at St Luke's but stated that it did not take place in the workplace. He denied the other matters.

6. On 23 December 2021 Mr Juchi was referred to the NMC by the practice manager at St Luke's who had investigated the concerns. St Luke's suspended him on 26 January 2022 while they completed their internal investigation, following which on 31 January 2022 he was dismissed.

7. The Panel hearing took place from 4 to 8 September, 1 to 2 November and on 21 December 2023.

8. The NMC alleged the following against the Appellant (with the outcome recorded in square brackets as below):

   "*That you, a registered nurse:*

   1) Between 2 June 2021 and 31 August 2021 breached professional boundaries in that you:

      a. made contact with Patient A via Facebook; **[proved]**

b. *engaged in a sexual relationship with Patient A;* **[proved by admission]**
c. *on an unknown date made a video recording of Patient A having sexual intercourse with you without their consent and/or permission;* **[proved]**
d. *on 10 June 2021 whilst conducting an electrocardiogram ('ECG') on Patient A you:*
    i. *failed to offer a chaperone;* **[proved]**
    ii. *asked Patient A to remove their bra without clinical justification;* **[not proved]**
e. *on 9 July 2021 whilst conducting an electrocardiogram ('ECG') on Patient A you:*
    i. *failed to offer a chaperone;* **[not proved]**
    ii. *asked Patient A to remove their bra without clinical justification;* **[not proved]**

2) *Your conduct at charge 1(d)(ii) and/or 1(e)(ii) was sexually motivated in that you sought sexual gratification.* **[not proved]**

AND in light of the above, your fitness to practise is impaired by reason of your misconduct.

The Issue

9. The primary basis of this appeal is the submission that the Panel had the power to, and ought to have, re-opened the fact-finding stage of the hearing (which closed on 8 September 2023) when they reconvened on 1 November 2023. In common with many health regulators the Defendant has a three-stage hearing process: fact-finding, consideration of impairment and consideration of sanction, if necessary. The case had gone part-heard after 8 September 2023 following the Panel's announcement of its findings of fact and the reasons for them. The Appellant asked the Panel to re-open that stage on the basis he wished to adduce new evidence that had come into his possession concerning Facebook, which he said showed he was right about a particular point, namely, who had made the first contact on Facebook. They refused to do so (Grounds 1 and 2).

10. The evidence he wished them to re-open to consider was a screengrab recording which it was argued showed that Patient A sent the Appellant the initial Facebook friend request. It was said to show Mr Juchi accessing his Facebook and tracing it back on screen to show the initiating contact. It was supported by a statement from him explaining that he had thought about the issue before the hearing but:

> *"... At this stage, I did not know that there was a way to see on Facebook who had sent you friend requests.*
> *6. After the Facts stage of the hearing and the panel found against me and preferred the evidence of Patient A regarding the initiation of contact, I started to have a look to see if there was a way of finding this information on Facebook.*
> *7. After a couple of days of looking, I spoke to a friend of mine. He spends more time on social media than me. He informed me how to find who had sent me a friend request on Facebook. At first, I couldn't work out how to access this information from his instructions. He then informed me that there was a video on YouTube that would explain how to do this.*
> *8. I tried to find this information on YouTube but was unsuccessful.*

9. I then typed into Google a search term along the lines of ' how do you find friend requests on Facebook.' I then found a video which showed me how to access this information.
10. I then looked on my Facebook account and found confirmation that Patient A had sent me a friend request on 3 June [sic] 2021."

11. He says this amounts to him not reasonably being able to produce it earlier applying a *Ladd v Marshall* [1954] 1 WLR 1489 test which is submitted to be appropriate for the admission of new evidence in support of re-opening the fact-finding stage. The Appellant argues here as he did below that this material went to the heart of the patient's credibility and thus, the case, and so the evidence ought to have been admitted. The Panel he says applied an erroneous legal test when refusing, which amounts to an error of law vitiating the Panel's conclusions.

12. A second challenge is made (Grounds 6 and 7) to an earlier decision in the course of the hearing on day 3, 6 September 2023, when the Panel refused the Appellant's request to put in further evidence of social media exchanges after Patient A had finished her evidence and the Panel were questioning the Appellant about his contact with her on social media.

13. A free-standing challenge is also brought to the penalty of strike off (Ground 8) on the grounds that the Panel's reasoning was faulty, leading to a disproportionate sanction. Further challenges allege inadequate reasoning by the Panel leading to a successful appeal.

14. The NMC resists each challenge first on the ground that the Panel had no power to reopen the hearing on the basis of new evidence. Further, even had they had such power, the circumstances of the case and the relevance of the evidence was not as described by the Appellant and a refusal was lawful. Likewise in respect of the decision made in the course of proceedings; the decision not to allow further evidence that had not been put to Patient A was wholly within the Panel's case management discretion properly exercised. No separate reasons challenge can be made says the NMC.

15. In respect of the sanction of removal from the Register, the NMC say this is unimpeachable, and the Panel's characterisation of the misconduct and its approach to the facts evinced no appealable error.

The Hearing

16. Some context is necessary to understand the scope of the challenges made. The case was opened for the NMC on Monday 4 September 2023. The practice manager of St Luke's gave evidence first, was examined and cross-examined and questioned by the Panel. Patient A likewise. Her evidence continued through to Day 2. The NMC closed its case and Mr Juchi gave evidence on Tuesday 5 September 2023. He gave evidence in chief that there had been a telephone consultation on 2 June to plan a face-to-face appointment, and on 7 June he had a message from Patient A saying "hey" which he said was the result of him accepting her friend request on Facebook. This was before the face-to-face consultation planned for 10 June 2021. He said that when he accepted the Facebook request, he did not know this was the person he had arranged on the phone to have the face-to-face consultation with; he realised that later. He thought her mention

of an "invitation" was from the surgery. He could not answer when questioned why he continued contact on Facebook. He also accepted the relationship became sexual on the same day as his booked consultation with her, namely 10 June 2021 after it had taken place.

New Evidence

17. After cross-examination the Panel asked questions of Mr Juchi in the usual way, at which point Ms Shah (who appeared before the Panel and before me on behalf of Mr Juchi) made the first application in time, opposed by the NMC, to submit further social media materials between the parties. It was accepted by her that Patient A had not been asked about them nor indeed had she confirmed they were from her, Ms Shah argued that that was "a matter the panel could in due course take into account."

18. Ms Shah stated that because of questions asked by the Panel as to whether or not Patient A had invited the Appellant for a drink, (granted that Mr Juchi did not argue that the interaction of himself and Patient A was any mitigation), the additional social media materials were to be put in to support his position that he was telling the truth, because the Panel had asked about it and it was relevant to his credibility. The NMC objected, saying the issue that was put by the Panel was the answers given by Mr Juchi in the internal inquiry - a matter he had known of from the beginning, before the bundles were prepared, and it was unfair to Patient A who had been rather distressed when giving evidence and might not be available to be recalled, to allow in new evidence at this point.

19. The Panel, refused saying

> "*The application to admit the evidence is denied in light of the context and purpose of the panel's questions. It would be of limited relevance and in any event, and in particular, it would be unfair to admit the evidence at this late stage and disproportionate to do (inaudible) agreed bundle and the panel agrees with NMC submissions, particularly in respect of patient A so it is denied."*

The reasoning to the same effect in their final decision was as follows:

> *'The panel decided to deny the application to admit the evidence at the final point of the fact-finding stage. Given the context and purpose of the panel's questions it deemed any such evidence to be of limited relevance. The panel concluded that the NMC's bundle had been agreed at the outset of the hearing, Ms Shah had had sight of the bundle and could have served relevant evidence at a much earlier opportunity. The panel considered it would be unfair to admit the evidence at this stage since it would require Patient A to be recalled. The panel also recognised that Patient A had found giving evidence distressing. It was also not established if Patient A was available today and to adjourn the hearing would not be fair or proportionate given the limited relevance of the material.'*

20. Closing submissions were made on the Appellant's behalf, in the course of which Ms Shah indicated that Mr Juchi did not dispute the relationship with Patient A and accepted he ought not to have contacted her. The Panel adjourned until Friday 8th September to

consider their conclusions on the fact-finding stage of the hearing. At this point, when the Panel did return on 1 November 2022 having promulgated their fact decision, as stated, Ms Shah requested the Panel re-open the fact stage of the proceedings on the basis that where there had been a fundamental error of fact shown, a Panel had power to revisit their findings and this was such a case.

21. It is relevant to the context that in the course of opening Ms Shah had submitted the following with respect to the Appellant's admissions to certain of the allegations:

> " … *the registrant accepts with* [allegation]*1A that he made contact with patient A via Facebook, but that contact was initiated by patient A. In relation to 1B, he accepts that he engaged in a sexual relationship with patient A, … the registrant's position is that the relationship ended in mid-August 2021 so in terms of those allegations, the issue for the panel will be, what were the dates of that relationship and who initiated the contact on Facebook but the fact that there was contact on Facebook is accepted and the fact that there was a sexual relationship is accepted."*

22. Thus, although the gravamen of the first and most serious charge was *not* a matter of contention, the Appellant made strong submissions that the Panel should make a particular finding on the issue of who had made the invitation on Facebook, which they did, although such was not necessary on the wording of the allegation.

23. The Panel's decision on this issue given on 1 November 2022 when the hearing resumed for the next parts of the disciplinary process, namely misconduct and sanction, was in the following terms.

> *...'Based on the balance of probabilities the panel found it is more likely than not the Facebook friend request was sent by you'...*

and on the new material:

> *"Having viewed the recording, the panel acknowledged that it was strong evidence which supported the claim that Patient A made the initial contact with you through Facebook. However, the panel did not consider the evidence to be incontrovertible in the sense of not being open to challenge. The panel noted the NMC first had notice of this application yesterday and has therefore had no opportunity to carry out an investigation of its own in order to test the reliability of this evidence.*
> ***In any event, turning to the second question, even if the evidence was both clear and incontrovertible, the panel did not consider it to be a fundamental mistake of fact. The specific finding of who made the initial contact was ancillary and subsidiary and not part of the charge. Any such mistake was not fundamental because the charge would still be found proven****. The panel noted that the mischief in the charge was the fact of the contact and not the person who initiated it.'*

[Emphasis added]

24. The reasoning in the emphasised passage is challenged by the Appellant.

The Fact Findings of the Panel

25. The Panel noted at the start of their decision that in relation to charge 1a) the Appellant accepted he made contact on Facebook but argued that the initial contact was instigated by Patient A. In relation to charge 1b) Ms Shah had submitted that he accepted that he was engaged in a sexual relationship with his patient, but said the relationship lasted only to mid-August 2021. The Panel then said

> "*Noting that the submissions amounted to partial admissions and the request for additional factual findings, the panel concluded that the NMC was still required to prove both charges*."

26. In other words, they did not take the admissions that had been made by the Appellant as clear and conclusive but, to Mr Juchi's advantage, required the NMC to prove them.

27. The material findings of the Panel included:

> *"The panel first considered whether you made contact with Patient A on Facebook. The panel found this fact proved considering your admission and the clear evidence in the screenshot of the Facebook messenger conversation dated 7 June 2021. The screenshot confirms you had responded to messages from Patient A on both the evening of 7 June 2021 and the morning of 8 June 2021."*

28. They then recorded, accurately, that they had been specifically invited by Ms Shah to determine whether the Appellant or rather Patient A had initiated the contact on Facebook in spite of the fact that the allegation itself did not assert any more than "contact" unspecified – which had been admitted. The Panel said:

> *"The panel considered whether it was you or Patient A that initiated the Facebook friend request. The panel found the natural and ordinary interpretation of the wording within the Facebook messenger exchange was that the 'invite' referred to was a Facebook friends' invitation from you. The panel made no finding on your motive behind instigating the friend's request or whether you knew the identity of Patient A at the point of request."*

29. The Panel also said:

> *"The panel considered that social media contact with a patient with known mental health issues, a few days after your first telephone consultation, and a few days prior to your first face to face consultation was a breach of professional boundaries. In any event, the panel noted that charge 1a) was substantially admitted and you recognise, in your remediation evidence, that social media contact can deteriorate professional relationships between nurse and patient."*

30. In other words, the findings of breach were based on the fact of contact, the nature of the relationship and the patient's added vulnerability, not on the question of initiation. As to the relationship's duration (on which a particular finding and an amendment had been invited by Ms Shah), they recorded that Mr Juchi had said he started a sexual relationship with Patient A on or a couple of days after 10 June 2021 - the date of the face-to-face appointment. She had said it was 10 June, and the Panel accepted it was more likely than not that that was the day it had began. They recorded their finding that 1b) was proved in the following terms, indicating that duration was not of any real relevance in this case:

"The panel considered that having a sexual relationship with someone who was also a patient in your care was a plain breach of professional boundaries. Irrespective of the precise duration of your relationship, you had substantially admitted the charge in any case."

31. Again, the specific findings invited by the Appellant were not central to the Panel's conclusions. In respect of the video which was said to have been made of their sexual activity by the Appellant without consent, the Panel noted the consistency of Patient A's evidence through her initial complaint letter, answers in the investigation meeting, her witness statement and her oral evidence, including that she recalled she had been shown part of the video made. Her various statements to different people and over time were consistent with her oral evidence. The Panel accepted the incident had happened.

32. When accepting Patient A's evidence about the failure to offer a chaperone on 10 June 2021 the Panel noted that the paperwork was consistent with no offer of a chaperone – as she had recalled. They rejected the Appellant's explanation that he was unfamiliar with practice systems given he had been working there for 2 months at that point, saw 15-20 patients in the day and carried out 3-4 ECGs in a shift. The thrust of their findings was that where the documentation supported Patient A's memory of events, they accepted the matters were proven. In each case, the decision shows a careful recounting of the timing and sources of the written evidence and of the tenor of the evidence given orally, and a recognition throughout that the burden of proof rested on the NMC .

33. Although they accepted that the request to remove her bra had taken place at the June ECG, the Panel did not find proved the allegation that there was no clinical justification for its removal, given that no expert evidence was advanced in support of that contention, and given also that Patient A said she understood a first ECG was inadequate, hence the need for a second ECG without her bra. There were elements of the allegations not supported by paperwork or by Patient A's initial recollections whereas the earlier June ECGs were recorded and had been remembered initially by Patient A. Connected allegations therefore were found not proved by thePanel.

34. In other words, the body of the Panel's decision shows a careful and detailed analysis of the main points of the evidence, a consideration of corroboration, and logical conclusions drawn from it.

The Framework

35. There was no dispute about the legal framework within which this appeal takes place. It may be succinctly stated.

Court's Powers

36. The Appellant appeals as of right under articles 29(10), 38(1)(a) and (4) of the Order. Under Article 38(3):
"The court may:
(a) dismiss the appeal;
(b) allow the appeal and quash the decision appealed against;

(c) substitute for the decision appealed against any other decision the Panel could have made;

(d) remit the case to the Fitness to Practise Committee to be disposed of in accordance with the directions of the court."

6. Appeals by a practitioner or Appellant to the High Court are governed by the Civil Procedure Rules, Part 52.

CPR 52.1 states:
"52.21
(1) Every appeal will be limited to a review of the decision of the lower court unless—
(a) a practice direction makes different provision for a particular category of appeal; or

(b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.

(2) Unless it orders otherwise, the appeal court will not receive— (a) oral evidence; or (b) evidence which was not before the lower court.
(3) The appeal court will allow an appeal where the decision of the lower court was—

(a) wrong; or
(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.
(4) The appeal court may draw any inference of fact which it considers justified on the evidence.
(5) At the hearing of the appeal, a party may not rely on a matter not contained in that party's appeal notice unless the court gives permission."

Exercise of the Court's Powers

37. Ms Aoife Kennedy for the NMC, who did not appear below, referred the Court to a set of propositions derived from the authorities which was not contested by the Appellant and which I accept as accurate (see Cranston J in *Cheatle v GMC* [2009] EWHC 645 at paragraphs [12] to [15], referring to *Meadow v GMC* [2006] EWCA Civ 1390 and *Raschid v GMC* [2007] EWCA Civ 46) namely:

a. An appeal to the High Court is not confined to points of law but neither is it a *de novo* hearing; the Court's function is also not limited to a review of the panel decision, and in relation to findings of fact, it is entitled to exercise its own primary judgement on whether the evidence support such findings. However, the Court will not interfere with a decision unless persuaded it was wrong – and on considering that issue the focus must be directed to the matters in issue in the case in question;
b. In matters relating to judgement issues on professional standards, the court will exercise a distinctly secondary judgement and give particular respect to the judgement of the professional body as the specialist tribunal entrusted with the maintenance of the standard of the profession.
c. In matters of case management the Court adopts a similarly cautious approach, thus per Sales J at paragraph [12] in *Eunice Ogbonna-Jacob v Nursing and Midwifery Council* [2013] EWHC 1595 (Admin)
"*The court is careful not to treat itself as the primary decision maker in relation to matters of case management, such as the question of whether the hearing*

should have been adjourned, but confines itself to considering whether the decision made was "wrong", allowing considerable respect for the judgment of the disciplinary Panel in deciding on the appropriate course that it should adopt.'

d. Concerning reasons, in *Byrne v GMC* [2021] EWHC 2237 (Admin) Morris J had reflected that the authorities showed that where credibility was in issue between witnesses it may be enough to say that one witness was preferred to another, because the one manifestly had a clearer recollection of the material facts and other cases showed that even such limited reasons are not necessarily required in every case. He continued:

" ... 27. Finally, an appeal court will not allow an appeal on grounds of inadequacy of reasons, unless, even with the benefit of knowledge of the evidence and submissions made below, it is not possible for the appeal court to understand why the judge below had reached the decision it did reach. It is appropriate for the appeal court to look at the underlying material before the judge to seek to understand the judge's reasoning and to "identify reasons for the judge's conclusions which cogently justify" the judge's decision, even if the judge did not himself clearly identify all those reasons: see English v Emery Reimbold §§89 and 118."

e. As to sanction, it is clear the Court will not readily interfere with a sanction decision. Thus at paragraph [33] again from *Cheatle* (*supra*) following Bingham MR in *Bolton v Law Society* [1994] 1 WLR 512 (indeed, *passim* the cases),

'*… it would require a very strong case to interfere with a sentence imposed by a disciplinary committee, which is best placed for weighing the seriousness of professional misconduct. That a sanction might seem harsh, but nonetheless be appropriate, can be explained by the primary objects of sanctions imposed by disciplinary committees. One object is to ensure that the offender did not repeat the offence; the other, indeed the fundamental, objective is to maintain the standing of the profession'.*

Bearing mind also that in *R(on the application of Bevan) v GMC* [2005] EWHC 174 Collins J expressed it that the Court should only intervene where:

" *… the penalty imposed was outside the range of what could be regarded as reasonable; or, as I put it in my decision in Moody v General Osteopathic Council [2004] EWHC 967 Admin, if the decision was clearly wrong. But I bear in mind that the approach should be, and the Committee's approach should be: was the sanction of erasure appropriate and necessary in the public interest".*

New Evidence and Re-opening Proceedings

38. The power, absent express provision, in a statutory tribunal to re-open proceedings to admit "new evidence" after a fact decision has been promulgated, and the circumstances in which, if it exists, such power should be exercised, was not a matter of agreement between the parties. The NMC submitted that there is no power to reopen the fact-

finding stage to admit new evidence and therefore, the main grounds of challenge fall away.

39. They drew attention to the NMC (Fitness to Practice) Rules 2004, Rule 24(9) - (11) which refers to calling evidence before the panel:

> "…
> *(9) Unless the Committee has determined that there is no case to answer under paragraphs (7) or (8), the registrant may present her case to the Committee and present evidence in support of her case.*
>
> *(10) The Committee may hear final argument from the parties.*
>
> *(11) The Committee shall deliberate in private in order to make its findings on the facts and then shall announce to those parties present the findings it has made."*

This is in similar terms to the equivalent GMC provision in Rule 17(2)(i) and (ii) which states :

> *(i) the Medical Practitioners Tribunal shall hear any submissions from the parties as to the facts to be found proven by the Medical Practitioners Tribunal in the light of the evidence adduced pursuant to sub-paragraphs (f) and (h);*
>
> *(j) the Medical Practitioners Tribunal shall consider and announce its findings of fact and shall give its reasons for those findings;"*

and which has been considered by the Court in circumstances where a registrant had sought to admit new evidence after the fact-finding part of proceedings had been concluded, to which I shall turn shortly.

40. The Appellant argues that the power to re-open the fact-finding stage and admit new evidence is more widely drawn and allows materials to be admitted where there has been a factual mistake that may be described as "fundamental" which Ms Shah submits means of materiality in the context of the case. The discretion to do so Ms Shah says will be exercised on *Ladd v Marshall* principles akin to those applicable where new evidence is sought to be admitted on appeal. She suggested that Mr Juchi's case depended upon credibility and the new evidence sought to be adduced after the fact-finding decision had been promulgated went to that central issue. Failing to admit evidence that Patient A had initiated contact therefore was the making of a fundamental error of fact which vitiated the decision.

Re-opening Facts - Consideration

41. The authorities to which I was directed do not speak with one voice about the correct approach to the issues that were canvassed in this case.

42. The circumstances in which a statutory public body endowed with powers and obligations to investigate and/or hear contested issues of a judicial, administrative, disciplinary or like nature may review and/or revoke a decision it makes, absent an express power to do so has been the subject of a number of cases. Of relevance here are those which describe, with an element of fluidity of expression, a power to re-open in

terms of "new evidence" or "new facts" or "fundamental mistake of fact" in a regulatory context.

43. In *Nduka v GMC* [2017] EWHC 1396 (Admin), a case where an absent defendant asked the GMC, which had delivered their findings of fact, to re-open them later and change their conclusions, Lang J gave a narrow and respectfully, in my view, a correct interpretation of the GMC Rules similar in form to the Rules in issue here. The material had been available to the Appellant in *Nduka* before the hearing had started (see judgment at paragraph [50]). Holding there was no power to re-open the fact-finding stage in that case Lang J said:

> "48. *The Tribunal accepted the advice of the Legal Assessor and ruled that it had no power under the 2004 Rules to re-open the fact-finding stage after handing its decision, referring to TZ v General Medical Council [2015] EWHC 1001 (Admin) per Gilbart J at [82]). The Tribunal had announced its findings of fact, the first stage under rule 17(2)(j) and now had to move on to hear evidence and submissions on impairment of fitness to practise under rule 17(2)(k) . The Tribunal advised the Appellant that he could apply to adduce this further evidence at the impairment stage.* ***In my judgment, the Tribunal correctly applied the 2004 Rules. The general power to admit evidence under rule 34 could not be invoked by a party at any stage of the proceedings; that would be unworkable."***

[Emphasis added].

44. The case of *TZ* referred to in *Nduka* was another GMC registrant's request to adduce new evidence (there, after a draft only of the fact findings had been circulated to the parties alone). The judge gave consideration to what the position would have been if the next stage of proceedings had been reached- i.e. the fact decision had been promulgated and thus the fact-finding stage had been closed. Gilbart J held (obiter):

> "*82. I agree that after the factual decision was announced, the Rules did not permit the admission of the evidence.* ***It is of course right that a line must be drawn somewhere. That line is the announcement in Rule 17(2)(i) , which had not been reached in this case …"***
>
> [Emphasis added].

45. Cranston J took a rather different approach in *R (oao) Jenkinson* [2009] EWHC 1111 a case before the NMC where proceedings were premised on the conviction of the registrant for manslaughter. The conviction was later quashed by the CACD. The Court had to consider the existence and scope of any power in the statutory tribunal itself to "correct mistakes" as it was phrased, rather than by recourse to a superior court on appeal or by application for judicial review. He held as follows:

> *"28. In this case, there was a clear miscarriage of justice. That miscarriage of justice was the conviction on the basis of unsound expert evidence before Nottingham Crown Court. On the back of that, the council made its decision about misconduct. Neither the jury at Nottingham Crown Court, nor the Council*

by their decision, need shoulder any blame for what occurred. But clearly there was a miscarriage of justice because of the misleading expert evidence placed before the jury in 1998. That being the case, this case clearly falls within the passage set out in Wade and Forsyth and approved by Sedley LJ."

46. He was referring there to a passage from the textbook Wade and Forsyth on Administrative Law referred to by Sedley LJ (with whom Laws and Gibson LJJ had agreed) in the earlier case of *Akewushola v Secretary of State for the Home Department* [2000] 1 WLR at 295). Views have differed on whether Sedley LJ was indeed endorsing the editors' views or merely observing they had been expressed. Those views were to the effect that it was "possible" that there was inherent power to set aside a statutory tribunal's decision in cases of accidental slip, or of fraud or miscarriage of justice. (I should say the comment from *Akewushola* does not appear to me to be any endorsement of the broad principle as Sedley LJ goes on to say that a tribunal does not ordinarily possess the power to revise, except with regard to slips). The decision in issue there was that of an immigration officer in a different fact context and under different regulations – which elsewhere did give certain powers of reconsideration. The *Akewushola* observation had been in the following terms:

"For my part I do not think that, slips apart, a statutory tribunal - in contrast to a superior court - ordinarily possesses any inherent power to rescind or review its own decisions. Except where the High Court's jurisdiction is unequivocally excluded by private legislation, it is there that the power of correction resides."

47. Cranston J in *Jenkinson,* which was a judicial review case, found that the conviction presented an unusual situation where an inferior tribunal might be taken to have inherent power, without recourse to a court of superior jurisdiction, to quash a decision based upon a subsequently quashed conviction.

48. A passage from *Jenkinson* was prayed in aid in the present case:

"24. In relation to the obiter dictum of Sedley LJ, quoted earlier, it was contended by counsel that this overlooked decisions, notably the decision of the Lord Chief Justice in McFarlane. In Mr Edward's strong contention, the observations of Sedley LJ could not be regarded as a point of principle. In any event, both counsel submitted that the use of the word "ordinarily", in the passage quoted, indicated that even Sedley LJ conceded that in some cases there would be an inherent power on the part of a tribunal to take remedial action. Mr Edwards underlined that that meant that it would not be a matter of opening the floodgates.

25. In my view, it is clear on the facts of this case that the decision in 1998 was founded on a mistake, namely that the claimant was guilty of a criminal offence. ***Once that conviction had been quashed, the finding in respect of the misconduct and the sanction fell away. There is no room, as it were, for speculation or uncertainty as to what the outcome would have been had the Court of Appeal's decision been available after the Council's proceedings had been initiated, but before the hearing.***

26. Unlike Akewushola, there are no statutory powers for curing irregularities in this case, as there were in Rule 38 . ***The principle established by Sedley LJ recognises that ordinarily tribunals do not possess an inherent power. The word "ordinarily" indicates that in some circumstances that power exists. The first passage quoted from Wade and Forsyth clearly identifies that where, for example, there is an accidental***

> ***mistake, or a judgment based on a fraud or a miscarriage of justice, it is possible for a tribunal to take remedial action.***
> *27. In my judgment, it would be unwise to provide guidelines. The history of the common law is a history of new and unexpected instances. It would be incautious of me to lay down general guidance. It would also be unwise of me to ignore the obiter dictum of Sedley LJ, supported by a strong Court of Appeal. In my view, however, it is clear from what Sedley LJ said, and from the passage in Wade and Forsyth which he approved (from an earlier edition) the power of the Council is not important in cases of slips, accidental mistakes or miscarriages of justice. In these cases, the council can act in a corrective fashion.*
> *28. In this case, there was a clear miscarriage of justice. …"*
>
> [Emphasis added]

49. Whatever the correctness of this observation, it is clear that the nature of the so-called "new evidence", or the supervening events in that case is quite different from an application after the fact-finding decision has been publicised in the present case, to adduce further evidence on the issues that had been in contention.

50. I have stated that in any event I have difficulty with the suggestion that a tribunal's jurisdiction extends to a review or rectification of its own decision (other than where there is a slip) within the framework of a statutory disciplinary system. This statutory, carefully staged, disciplinary framework is different from governmental or local authority decision-making where the opportunity for successive decision-making or reconsideration may well arise. In some cases, although not here, a disciplinary framework affords a statutory mechanism for reconsideration. A disciplinary fact-finding also seems to me to be a decision of a different character from a decision of, for example a Registrar, within a regulatory body. In my judgement extraordinary or non-usual powers do not exist because there is no implicit fundamental injustice that requires the implication into an inferior tribunal's given powers of the additional, significant power to recall and rescind a decision when a statutory right of appeal, or a constitutional right to apply for judicial review already exist. The implication in such a case is for convenience only: jurisdiction already exists elsewhere to right the wrong.

51. Haddon-Cave J propounded a rather broader principle, obiter, in *R(oao) Chaudhuri v GMC* [2015] EWHC 6621 (Admin) where he referred to a "broad corrective principle" which he discerned in administrative law, saying

> "*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.*"

52. *Chaudhuri* involved a decision under Rule 4(5) of the GMC Rules (known as the 'five year rule') by the Registrar under which, absent an overriding public interest, no action will be taken after 5 years have elapsed since the matters complained of came to the attention of the regulator. The GMC had made an error of fact as to whether time had elapsed so as to raise the presumption of no action; there was no overring public interest in play. The proceedings were commenced when they would not have been, but for the

error. This then was a kind of quasi precedent fact or error that went to jurisdiction. It was not a contentious fact, as the quashed conviction in *Jenkinson* was not contentious.

53. Haddon-Cave J identified the conflict in the caselaw as to the scope of any corrective power in tribunals based upon mistakes that were not slips. He referred to *Fajemisin v General Medical Council* [2013] EWHC 3501 (Admin), preferring the approach taken by Keith J there, saying at [46] of *Chaudhuri* that

> "*… 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*."

54. He relied upon what he described as principles of proportionality and utility and continued:

> "*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;" [etc etc]* [49]

55. In *Fajemisin* upon which the Appellant relied before me, Keith J dealt with a dentist whose name had been directed to be removed from the Register after a disciplinary hearing. Mr Fajemisin argued that at the time of that hearing, he was not a registered dentist and the GDC had no jurisdiction over him – this was because he had previously been told that a decision had been made that his name be removed from the Register for failure of his CPD obligations. There had been a series of mistakes by the GDC in dealing with him since GDC policy was to <u>retain</u> a dentist on the Register if there was a disciplinary case under consideration, which there was. The GDC accepted that the earlier notification of removal sent to Mr Fajemisin by the GDC Registrar had to be revoked for the tribunal to have jurisdiction. The GDC decided they could revoke, and proceeded with the hearing which was challenged unsuccessfully by the registrant. The GDC reasoned they had made an administrative and not a judicial decision (as recorded at paragraph [19] of the judgment), and the rules allowed correction of administrative decisions as they gave power to do anything which "*in their opinion is calculated to facilitate the proper discharge of their functions*".

56. The judge characterised the case differently, as one which did not involve the question of judgement, rather it was ignorance of the true facts that lay behind or caused the decision to remove – that is ignorance of the pending disciplinary proceedings. Keith J analysed *Akewushola* and *Jenkinson* disagreeing with Cranston J in *Jenkinson* as to what was said in *Akewushola* by Sedley LJ. He noted that Lang J in *R (B) v Nursing and Midwifery Council* [2012] EWHC 1264 (Admin) also concluded Sedley LJ had not been approving a broad jurisdiction–only a slip rule power.

57. In the event the case of *Fajemisin* was decided on the basis of a further principle expounded by Keith J (see paragraphs [37] to[39]) that decisions made in ignorance of "fundamental facts" could be unravelled in the same way as it would be said that fraud "unravels all". A comparison to a housing case was made. The *Fajemisin* case also concerned not a decision of a Panel after the fact-finding stage of a disciplinary tribunal

but rather the Registrar's single judgment on whether to notify a removal for CPD failure. That decision could, it was held, be re-visited and revoked by the Registrar because based on a fundamental mistake of fact.

58. The case of *B* referred to by Keith J contains reasoning which, in my judgment succinctly expresses the position. Lang J heard a challenge to the NMC's reversal of its earlier decision (by its Investigating Committee) that there was no realistic prospect of a finding of impairment of fitness to practise in respect of nurse B. The NMC referred to *Jenkinson* and determined it was "slip" that they could review. The High Court held the NMC was not entitled to reverse its previous decision in reliance on that case. Lang J said:

" 37. Applying the relevant legal principles to this case, I do not consider that the IC was entitled to reverse its previous decision, in reliance on the decision in Jenkinson. The circumstances in Jenkinson were exceptional and very different to this case. In Jenkinson the parties were in agreement that the earlier decision of the NMC should not stand, as there was no longer any proper basis for it. As Cranston J. said, if the hearing had taken place after the Court of Appeal had quashed the conviction, there was no room for speculation or uncertainty as to what the outcome would have been. Moreover, in Jenkinson, the claimant stood to benefit from the rescinding of an adverse decision – the opposite outcome to this case.

38. In this case, the IC's first decision, though clumsily expressed, was a legitimate finding that there were systemic failures in the way in which the care home was run and therefore there was no realistic prospect of a finding of impairment of fitness to practise on the part of the Claimant. This was an exercise of judgment on the part of the panel. Although the exercise of judgment may have been flawed, it cannot properly be characterised as a "slip" (as the second IC panel described it). In my judgment, slips are "accidental errors which do not substantially affect the rights of the parties or the decision arrived at" (per Sedley LJ in Akewushola). Nor can it be characterised as a "miscarriage of justice" or a decision which was so obviously mistaken that there is now "no room for speculation or uncertainty" as to the appropriate outcome (as in Jenkinson).

39 Furthermore, I respectfully differ from Cranston J in his interpretation of Sedley LJ's judgment in Akewushola. I do not agree that Sedley LJ approved the passage in Wade & Forsyth which suggests that tribunals have inherent powers to rescind their own decisions, in certain circumstances, by analogy with the High Court. On my reading of the judgment, I consider that Sedley LJ was limiting the powers of tribunals to the correction of accidental slips. In my judgment, the correct course is to follow Akewushola not Jenkinson.

40. For these reasons, I accept the Claimant's submission that the NMC acted unlawfully and beyond its powers in rescinding and reversing the IC's decision of 16 March 2011, as set out in the letter of 22 March 2011."

59. I respectfully agree with the analysis of each of the earlier cases considered by Lang J in *B*. I have expressed my views above that on proper analysis I doubt the existence of an implied jurisdiction in (certainly) a fact-finding tribunal of limited jurisdiction to receive later material once their fact-finding task is statutorily complete, and likewise

(probably) in a non inter-partes tribunal context such as a Registrar's decision. It is the case that the latter class of decision-making is often subject to an express power of review in regulatory systems, when further material may be submitted in any event, however, a decision on that broader question is not necessary to dispose of this appeal.

Conclusion on main contentions

60. In any event, the extended principles cannot assist in this case since even they are not wide enough to encompass what is sought to be achieved by Mr Juchi. None of them supports the proposition that a fact-finding tribunal may revisit its completed fact-finding stage in order to consider the admission of new evidence on the points that had been in contention.

61. . In brief, in my judgement the following is the position:
    a. New evidence sought to be relied upon by the parties may be admitted on an appeal, subject to the requirements of the developed *Ladd v Marshall* test for new evidence to be admitted before the tribunal of appeal. Prior to the CPR the Court of Appeal had power to receive further evidence only on "on special grounds" (RSC Ord.59 r.10(2)); the "special grounds" were those set out in *Ladd v Marshall* [1954] 1 W.L.R. 1489, CA. [1] In *Terluk v Berezovsky* [2011] EWCA Civ 1534, CA, the Court of Appeal stated that the primary rule is now given by the discretion expressed in r.52.21(2)(b) coupled with the duty to exercise it in accordance with the overriding objective, although *Ladd v Marshall* is still referred to and the criteria are still relevant;
    b. No "*Ladd v Marshall* " jurisdiction applies to support a disciplinary panel admitting new evidence on matters in dispute in the proceedings where the fact-finding hearing is complete. The discretion to admit evidence in the course of those proceedings no longer applies as they are complete.
    c. A power to alter a decision is accepted to arise where the need to alter it stems from a mistake properly categorised as a slip, namely an accidental error which does not substantially affect the rights of the parties or the decision arrived at.
    d. The cases have, further, canvassed the existence of an extraordinary implied power in certain circumstances for a regulatory decision-maker such as a Registrar, or possibly a disciplinary panel to take note of certain facts that could cause them to examine and revisit their decision without the need to invite the High Court to consider the matter on appeal or by judicial review. An example of such so-called "new evidence" is the fact of the quashing of a conviction which founded the case against a registrant and which conviction no longer exists. Into this category of extraordinary power it has been suggested may come the case of a decision procured by or founded on a fraud which "unravels everything"[2].
    e. If such power does arise for a decision-maker, it is confined to matters which could be described as going in effect to the jurisdiction of the decision-maker. These might be described as in the nature of precedent facts, in the absence of which, the decision is rendered void or of no effect.

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[1] They were of course: (1) the evidence could not have been obtained with reasonable diligence for use at the trial; (2) the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; (3) the evidence must be such as is presumably to be believed; it must be apparently credible, though it need not be incontrovertible.

[2] Lazarus Estates v Beasley [1956] 1 QB 702 Per Denning LJ

f. There may possibly (although I am neither persuaded of the proposition, nor do I need to deal in detail with it for this case), be an even wider jurisdiction as suggested, to revisit previous decisions inherent in tribunals and other public bodies by virtue of their public character.

62. Ms Shah had submitted that the test applied by the panel to the exercise of their power to reopen the fact stage was wrong. They had applied a test that the evidence must be "incontrovertible" before it was admitted and the decision re-opened, whereas in fact it required only to be "apparently credible" as in the case of an appeal. She relied upon *Jenkinson, Fajemisin* and *Chaudhuri* in support of a power to re-open the fact -finding stage, and as to the scope of that power. She said the test used by the Committee was not reflected in those cases and since, in her submission, the Panel was determining whether there had been a "fundamental mistake", they should have applied a *Ladd v Marshall* test. I must reject that submission for the reasons given.

63. The Appellant argued further that the characterisation by the panel of the question of who initiated contact as ancillary and subsidiary was wrong - likewise it need only have found that the evidence "probably" would have made a difference.

64. The NMC submitted that as found in *TZ v GMC* and *Nduka,* the Rules do not permit the admission of further evidence following the announcement of facts. It is fair to say that the Panel and Legal Assessor were not assisted by any reference to these cases at the hearing below. *Jenkinson* the NMC submitted through Ms Aiofe Kennedy, who did not appear below, was an exceptional case. The jurisdiction might arise in the exceptional circumstances referred to that case but they did not obtain in the present case: here the material was not even admissible on *Ladd v Marshall* grounds. I agree. Even if the exceptional jurisdiction arises here the facts of this case are not within any expressions of it in the caselaw.

65. The thrust of the arguments was straight-forward: The NMC says that not only was there was no power in the panel to do as the Appellant asked in the current circumstances, but, even had the evidence been admitted at a late stage and considered by the Panel, it would have made no difference to the outcome of the case.

66. The Appellant submitted that on the contrary, credibility was of central importance in the case. The FTP had accepted the consistent evidence of the complainant that the first approach, the first "friend request" on Facebook, had come from the registrant and not from the complainant. Although the allegation was not pleaded in terms of initial contact, (the breach of standards alleged was the fact of contact itself), it was nonetheless highly relevant to the findings on other allegations where her evidence had been preferred over that of the registrant, and also went to the severity of the breach of the Facebook complaint.

67. Thus, it was said, even though the Registrant had admitted that he had had a sexual relationship with the complainant and that he had contacted her on Facebook, he was insistent to the Panel through Ms Shah that the Panel make a finding as to who made the first contact. In spite of her testimony, both oral and by reference to her earlier complaint and evidence to others, he maintained it was she who had done so, and not him. He submitted in these circumstances the material he wished to adduce late would

prove that her assertion was wrong, that she therefore was a liar, and that that would colour the whole of the hearing.

68. The primary submission of Ms Shah was that there was a centrality to the initiation of the Facebook encounter that coloured or could colour the whole of the case against Mr Juchi because it was an example of where his credibility was unjustly tainted. She took me to the Chair's interest in the Facebook contact which he says was after he had treated her, she looked him up and she thanked him. She said she owed him a drink – he said he could not go outside. The answers were given during the inquiry by St Luke's where he stated that it was after he had treated her – after the second review that they had gone out. This is not what was accepted in evidence namely, that the relationship started the day of the face to face appointment in June.

69. The problem with this submission is that it seeks to suggest that the nub of the case against Mr Juchi was entirely one of credibility in which the panel were struggling to assess the evidence of the practitioner against that of the Patient. That was not so. Central to the case was the powerful admission by Mr Juchi that he did indeed embark upon a sexual relationship with his patient. Not only that, she was demonstrably and to his knowledge very vulnerable on account of her personal sexual history which he had learnt as her medical professional in the course of mental health treatment. It was necessarily telling in my judgement that initially as recorded in the earlier interview materials Mr Juchi appeared to have no idea of the gravity of the relationship and breaches of professional duty. He stated initially in his defence that the sexual relationship did not take place on the premises – he later (by his second interview in Jan of 2022, and in evidence) came to realise that it was the fact of the relationship at all that was strikingly inconsistent with his obligations: when that realisation dawned, the document reflects, as did his evidence, his fearfulness and concerns for his position. The document was put in terms by the Panel chair.

70. The NMC also relied upon the principle that the Court recognises there will inevitably be differences in recollections, particularly in cases where credibility comes down to one person's word against another and that memories can be unreliable in witnesses of truth.

71. In *Dutta v GMC* [2020] EWHC 1974 (Admin) at [39] citing *Gestmin v Credit Suisse* [2013] EWHC 3650) it was expressly recognised that

> "*Memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is even true of "flash bulb" memories (a misleading term), i.e. memories of experiencing or learning of a particularly shocking or traumatic event. And that events can come to be recalled as memories which did not happen at all or which happened to somebody else.*"

72. In the regulatory context this was reflected in *Byrne v General Medical Council* [2021] EWHC 2237 (Admin)

> *"17. First, the credibility of witnesses must take account of the unreliability of memory and should be considered and tested by reference to objective facts, and in particular as shown in contemporaneous documents. Where possible,*

factual findings should be based on objective facts as shown by contemporaneous documents: Dutta §§39 to 42 citing, in particular, Gestmin and Lachaux."

and

"*in a case where the complainant provides an oral account, and there is a flat denial from the other person concerned, and little or no independent evidence, it is commonplace for there to be inconsistency and confusion in some of the detail. Nevertheless the task of the court below is to consider whether the core allegations are true: Mubarak at §20.*

[Emphasis added]

This latter principle derives from *Mubarak v GMC [2008] EWHC 2830 (Admin))*

73. Whilst as a forensic tactic, the centring on one conflict of evidence by Ms Shah was understandable, the centre of the case was in fact the relationship and its context. The Panel dealt with the matter thus:

"However, on the invitation of Ms Shah, the panel were asked to determine who instigated the contact by way of a Facebook friend request. Ms Shah maintained that Patient A did so. Ms Da Costa, on behalf of the NMC, maintained that it was you.

The panel considered that social media contact with a patient with known mental health issues, a few days after your first telephone consultation, and a few days prior to your first face to face consultation was a breach of professional boundaries. In any event, the panel noted that charge 1a) was substantially admitted and you recognise, in your remediation evidence, that social media contact can deteriorate professional relationships between nurse and patient."

74. The Appellant sought to suggest that the whole character of the case depended upon credibility and that the evidence he sought to adduce late and the application for re-opening of the fact-finding section of the case. I disagree.

75. In any event this Panel went on to ask itself whether or not there had been a fundamental mistake – a test which as appears from the reasoning above, they were not required to apply. They asked themselves, more favourably to the Appellant than the law requires, whether this new evidence could have undermined the case in the necessary fundamental manner – they held, inevitably, that it did not. Further, even if the panel had found Patient A's account was not reliable in relation to the initial Facebook invitation, that does not make her dishonest or that the entirety of her evidence should be disbelieved, as the cases relied upon by the NMC, set out above, demonstrate.

76. I have in any event asked myself whether I ought to exercise the "*Ladd v Marshall*" jurisdiction as it is now to be exercised considering the overriding objective, on this appeal. I do not do so. The evidence in question does not come within the requirements of the Rules. It is material that had a few simple questions been asked at an early stage by the Appellant, it could have been produced for the start of the hearing. More

importantly, in any event the question of first contact was never, as had been submitted, central or in indeed particularly material in this case for the reasons I have given.

Case management decision

77. Likewise I dismiss the appeal in so far as it relates to the case-management decision not to allow further social media material to be adduced after the NMC had closed their case and during questions to the Appellant by the Panel. The principles relied upon by the NMC set out at paragraph 38(c) above apply. The decision of the NMC was well within its case-management powers and is unappealable.

Penalty Consideration

78. Ms Shah submitted that in this case the Panel's minds had also been tainted by a view of Mr Juchi's credibility and adverse fact findings made and the "important information" his screen grab provided would have changed that with a concomitant effect upon sanction. I disagree.

79. The proportionality of the sanction of erasure is also challenged. That challenge must fail; what the submission does not recognise, as with submissions about a single point of credibility, was that the gravamen of the case was that part that was actually admitted by this Appellant. He admitted a sexual relationship with a patient, begun whilst he was treating her in circumstances not only of the professional relationship but of particular vulnerability namely PTSD, depression and anxiety. Moreover, these conditions of which he was aware stemmed she told him from sexual abuse and mistreatment in her past in the context of intimate relationships. Given the objectives of the sanctions regime and the public protection and professional reputational matters that arose, the sanction of removal from the register cannot be challenged here.

80. The NMC were carefully advised including as follows by the Legal Assessor to whom no challenge is made:

2…The panel must have regard to the purposes of its regulatory function, which involve pursuit of the following objectives: a need to protect, promote, and maintain the health, safety, and well-being of the public; to promote and maintain public confidence in the nursing profession; and seek to promote and maintain proper professional standards and conduct for members of the profession. The panel should have regard to any aggravating and mitigating factors which are present in this case. Aggravating factors might include an abusive position of trust, lack of insight into failings, a pattern of misconduct over a period of time, and conduct which puts patients at risk of suffering harm. Mitigating factors might include evidence that the registrant has shown insight and understanding in relation to the charges found proved against him and has attempted to address his shortcomings and personal litigation. The panel will need to take into account what are recognised as aggravating factors in the core guidance on sexual boundaries, two of which are present in this case. Namely, the vulnerability of the patients and the fact that the abusive behaviour happened on several occasions and over a period of time, and not just once. A third factor is likely to be the fact that the registrant was found to have made a video recording of an act of sexual intercourse with the patient without her knowledge or consent.

and

"*The NMC guidance states that sexual misconduct will be particularly serious if the nurse has abused the position of trust they hold as a caring professional. The panel should consider that generally, sexual misconduct will be likely to seriously undermine public trust in the profession. As in all cases, panels deciding on sanction must start their decision making with the least serious action, but they will very often find in cases of this kind, that the only proportionate sanction will be removal from the register*."

81. The court exercises only a secondary judgement in these matters in any event. I accept the manner in which the NMC expressed it in their skeleton argument thus:

"NMC guidance ... and case law make clear that cases of sexual misconduct, particularly involving abuse of position of trust with a vulnerable patient, will always attract the prospect of erasure, albeit it is not inevitable (see Bevan v General Medical Council [2005] EWHC 174 (Admin) and Giele v GMC [2005] EWHC 2143)."

82. Although argued fluently and tenaciously by Ms Shah, this appeal must be rejected on each of the grounds advanced.