



Neutral Citation Number: [2024] EWHC 2975 (Admin)

Case No: AC-2023-LON-002456

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/11/2024

Before :

MR JUSTICE RITCHIE

Between :

GREGORY EVBOREN

Appellant

- and -

THE NURSING AND MIDWIFERY COUNCIL

Respondent

Thomas Hoskins of counsel (instructed by Royal College of Nursing) for the Appellant
Matthew Cassells of counsel instructed by the Respondent

Hearing dates: 08.11.2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 21st November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Ritchie:

The Parties

1. The Appellant was a nurse, registered in December 2008, who worked in a private mental health hospital in Ealing called Cygnet at the relevant times. The Respondent was and is the regulatory body for nurses.

The Appeal

2. 5 years after his registration, in the summer of 2013, two inpatients at Cygnet complained that the Appellant had engaged in sexual activity with them. Patient A (PA) asserted that it was consensual, involved touching her body and fingering her vagina and that she wanted to go further but he did not. Patient B (PB) asserted the main activity occurred when she was asleep, involved him fingering her thigh near her vagina and it was not consensual. They both asserted hugs were given in the ward lift. The Appellant denied the allegations. The Respondent's Fitness to Practice Panel (the Panel) heard the evidence and decided that he had done many, but not all, of the alleged misdeeds and passed the sanction of erasing him from the register of nurses.
3. The appeal was launched in time under the statutory right to appeal pursuant to Article 38 of the *Nursing and Midwifery Order 2001*. No permission was needed. The power of this Court includes: to quash the Panel's decision and to put in place any decision which the Panel could have made.
4. CPR r.52.21 and PD52D para 19.1 applies to this appeal, so the appeal must be supported by evidence in writing (or oral evidence if the Court so orders) and is by way of rehearing. The word "rehearing" is flexible and interpreted differently in different types of appeal, so I shall return to it below. Suffice to say here that pursuant to CPR r.52.21 the appeal will only be granted if the Appellant can satisfy the Court that the Panel's decision was wrong or unjust.

Bundles

5. For the hearing I was provided with an appeal bundle, a bundle of authorities and skeleton arguments.

The Issues

6. This statutory appeal raises the following five main issues:
 - 5.1 What is the nature of the rehearing for this particular appeal?
 - 5.2 Burden of proof and standard of proof: did the Panel apply the wrong standard of proof or burden of proof?
 - 5.3 Assessment of credibility by the Panel: how should assessment of credibility be done and were the Panel's assessments wrong? This encompassed issues relating to: (1) previous allegations made by PA; (2) previous threats made by PA; (3) inadequacies in the evidence of PA concerning: CCTV, blood on sheets, perfume bottles and other matters; (4) alleged contradictions in the

Panel's own findings in relation to the evidence of PA and PB such that many charges were determined as not proven; (5) the hearsay evidence of other patients who asserted that PA was fabricating her allegations; (6) collusion between PA and PB; (7) complainants who were sectioned under the Mental Health Act 1983 and to what extent their evidence can be relied upon, if at all?

- 5.4 Cross-admissibility: how should the evidence of one complainant affect the Panel's decision on the evidence of another complainant and were the Panel's decisions wrong?
- 5.5 Giving reasons: did the Panel give adequate reasons for their decision?

The Evidence

7. No live evidence was heard on the appeal. The Bundle was the evidence before me. The Panel heard live evidence from PA, PB, Dr Bindman, G Mutandiro, G Mithi, S Sparke and the Appellant and a witness statement from NK was admitted in writing as hearsay evidence because she had died. I have anonymised the witnesses who were mental health hospital patients to protect their privacy.

Agreed facts

8. There were some agreed facts. In April 2012 PA informed a care assistant that she had been raped two days earlier. The police were informed and she was interviewed. She asserted the rape happened near an underground station in a support house in a room occupied by a man called John who was a friend she had met at a mental hospital in Edgware. She said that in her head she wanted to be raped as a kind of self-harm and went to the address knowing it might happen and it occurred in a closet. She had been allowed out of the mental hospital for only a few hours. They had been out twice before. They met at the tube station. They walked together to his place. Initially she sat on his bed and then they went into the closet where he penetrated her. After the event she left the supervised accommodation and a day or two later she took an overdose. The police interviewed John. He provided a prepared statement with a solicitor stating they had consensual sex. A Detective Inspector reviewed the file and decided there was insufficient evidence to proceed with the rape charge.
9. Further agreed facts were as follows. After the complaint by PA against the Appellant the police carried out an investigation. During that investigation one allegation was that she had bled during one of the alleged sexual activities with the Appellant in which he penetrated her with her fingers and her bed sheets were changed by a carer at Cygnet hospital called Lolu. All of the sexual contact was consensual and PA took advantage of this by asking for extra medication from him. The reason why PA chose to report the sexual behaviour with the Appellant was that she had recently spoken to other female patients who had left Cygnet hospital who asserted the Appellant had made them feel uncomfortable hugging them and asking them out for a coffee after they were released. The police noted on the 13th of June 2013 that CCTV had been installed in Cygnet hospital. The police seized PA's diary which was written in Hebrew. On the 5th of July 2013 the police received information from the manager at

Cygnets hospital that he had been approached by two residents at the hospital who informed him that PA had made the allegation up and it had “gone too far”. In September 2013 the police obtained witness statements from a resident whose initials were NK and from various staff. On the 1st of August 2013 the Appellant was interviewed and explained that PA had made her allegation because of two incidents. The first was PA had self-harmed and asked him not to inform staff. He refused because he had a duty of care to inform staff and he would ask a female member of staff to attend to her wounds. PA threatened that she would “put him” in trouble if he reported her self-harming. The second incident was that he and PA were in the Cygnets hospital garden and PA had a lighter. He asked her to hand it to him and told her he would report her and she replied that she would “put him in trouble”. He did report her for the lighter. In relation to PB he explained that she was in effect racist towards him and other black staff and asserted she had made similar allegations when she was at a Priory hospital. He was aware it was against the law to engage in sexual activity with patients suffering mental health illness. He was married with four children and lived with his wife and children. He denied any sexual activity with PA and stated her personal hygiene was disgusting. He described PA as suicidal and self-harming, a patient who hoarded drugs and then over dosed on them. He was aware she had made a rape allegation at her previous mental health hospital and was aware she had a relationship with the alleged rapist who was providing her with drugs. He denied sexual activity with PA and PB.

10. As to PB, the police were asked to contact her and did so on the 13th of June 2013. She reported that the Appellant was the subject of a complaint by an inpatient called “Vicky” which was investigated and the Appellant was suspended, but she made no complaints about sexual behaviour by the Appellant to her in that initial questioning.
11. The police noted in August 2013 that PA had been in communication with PB and had talked about the Appellant. In November 2013 the investigation was reviewed by a Detective Inspector, was closed and the Appellant was not charged because there was insufficient evidence to proceed. When PA was informed of this she stated she was upset and asked why, as she had a witness who saw them hugging.
12. In December 2018 the clinical lead at Barnet Mental Healthcare Trust was asked to describe PA’s mental health at the time when she again disclosed the sexual activity with the Appellant in 2017. The Trust advised that PA was the subject of a decision under Section 3 of the *Mental Health Act 1983* presenting with severe self-harming behaviour and suicidal ideations but was not suffering psychotic illness. She was able to engage in therapeutic treatment at that time.
13. The Appellant was a nurse of good character in 2013 who had worked since the allegations in 2013 without any reprimands, cautions or criminal convictions that were relevant and with only one minor medication error in one prescription.

The Panel's Judgment

14. The Panel consisted of two nurses (one a midwife and the other an unspecified nurse) and one lay member. They were assisted by a legal assessor. The fact finding hearing lasted 18 days. The sanction hearing lasted 5 days. It was all held virtually.

Panel's reasoning

15. The Panel found that the Appellant had been employed at the trust in the Cygnet hospital as a mental health nurse from August 2009 to February 2014. PA had been on ward from the 30th of July 2012 to the 5th of July 2013 and PB had been on ward in 2012. PA made her first complaints on the 12th of June 2013 and a police investigation followed. The police interviewed the Appellant and staff and decided to take no further action due to insufficient evidence. The hospital did not investigate or report the Appellant to the NMC. Then, in September 2017, PA was in another mental hospital in Edgware and repeated her allegations and the next month these were reported to the NMC. The Panel recorded that the charges had to be proved on the balance of probabilities and the burden of proof lay on the NMC. The Panel dealt with the Appellant's main defences. He raised the inherent probability of him engaging in sexual activity due to the presence of CCTV; the many female staff; the ward being busy; taking such a risk would ruin his career and there being no clear evidence of him gaining any sexual gratification. The Panel rejected that defence, finding that there was evidence of quiet times on the ward, including the Appellant working on both day and night shifts and carrying out one to one observations of PA and accompanying PA on escorted leave. Therefore, the Panel found that the Appellant had the opportunity to engage in sexual activity unobserved. The Panel found that no one could say when the CCTV had been installed at Cygnet hospital. It had been installed initially outside and then inside the hospital but not in the bedrooms and was installed last in the lift. PB, who was on the ward in 2012, made no mention of it but PA did say there was CCTV in the lift. The Panel was unclear whether CCTV had been installed in the lift at the time of PA's allegations of sexual activity in the lift. The Panel concluded that being an experienced nurse was no protection against misconduct and other experienced clinicians had engaged in sexual misconduct. The Panel decided that sexual gratification could come in different forms, physical and non-physical but found that it was impossible to determine whether the Appellant had gained any sexual gratification from the alleged sexual activity. The Panel decided it was not inherently improbable that the Appellant carried out the alleged sexual activity. In relation to PA the Panel determined that PA did not have a tendency to complain or allege sexually inappropriate behaviour despite the admitted rape allegation she had had made in 2012. She had a history of self-harming but there was no evidence she had fabricated allegations against treating mental health staff before. The Panel rejected the Appellant's defence that PA had lied when challenged or that she had threatened staff when challenged by staff. The Panel found that PA had trusted the Appellant as a result of their sexual touching and when the Appellant reported PA for self-harming and for possessing contraband (a lighter) she had felt betrayed. The Panel placed no weight on Witness 5's written evidence which had

been untested by cross examination and took into account that she had complex mental health issues and that relationships between inpatients were often challenging. (Patient NK was Witness 5). The Panel found that PA's evidence was largely consistent despite the passage of 10 years and they found no residual anger when listening to her live evidence. The Panel found no collusion between PA and PB who had not been in contact since 2013 but both gave evidence in 2024 at the hearing.

Charges not proven relating to PA:

Kissing

16. The Panel rejected PA's evidence that the Appellant had kissed her because she herself asserted she could not be certain because she does not like kissing and because her overall evidence was unconvincing.

Entering PA's room without knocking

17. Likewise, the Panel rejected PA's assertion that the Appellant walked into her room without knocking. They took into account the Appellant's denial, the hospital's policy and that PA asserted this only occurred once. The Panel considered it was more likely that PA did not hear his knock.

Penis touching

18. The Panel found that there was no evidence that PA touched the Appellant's penis or that he touched his own penis during their sexual activities. Firstly, PA provided no evidence that he touched his own penis. Secondly, PA's evidence on this charge was contradictory. In her NMC witness statement she asserted she did touch his penis and in her oral evidence she said that the Appellant did not allow her to touch him. In her later oral evidence she said she did touch his penis. These contradictions led the Panel to find that they were not satisfied that any penis touching occurred.

Refused medication

19. Likewise, the Panel rejected PA's evidence that she was refused medication by the Appellant after sexual activity. The Panel noted there was no such complaint in the original written complaint from PA or the police witness statement and this assertion only arose in 2019 in her witness statement to the NMC.

Extra medication

20. The Panel rejected PA's evidence that she was provided with extra medication over her allowed limit. Her evidence on this had been contradictory. On two occasions she had stated that he had only done this once, though in her initial complaint and her police witness statement in 2013, PA had stated the Appellant had provided extra medication more than once. The Panel also took into account the absence of any drugs charts in March and April 2013 and was not satisfied that PA would have known her prescription limits at the relevant times in any event.

Charges Proven relating to PA:

21. Set against the above list of charges not proven, is the list of charges which the Panel found were proven.

Touching PA sexually

22. The most serious charge laid against the Appellant was found proven. This related to penetrative fingering of PA's vagina. The Panel noted that PA's initial complaint to the trust, her police witness statement, her NMC witness statement and her oral evidence were all consistent relating to the Appellant hugging her, touching her breasts and penetrating her vagina with his fingers. They noted that her original verbal complaint on the 12th of June 2013 to members of staff included this assertion and this had occurred even when she was menstruating. The Panel also took into account the evidence of Miss Sparke, to whom the Appellant made the same assertion. The Panel did not consider that the inconsistencies in the details provided by PA were major or undermined the core evidence.

Sexual activity in the lift

23. The Panel found sexual activity between the Appellant and PA and the Appellant and PB in the lift on the ward on separate occasions. They considered the defence that PA's evidence about the presence of CCTV was unreliable. PA had asserted that the Appellant had turned the CCTV camera away before he had hugged her. In cross examination a photo of the lift was produced to her showing that the CCTV installed in the lift, as seen by the police on the 13th of June 2013, was a Dome which could not be "turned away". The Panel concluded that PA might have been mistaken and she may have been referring to the movement sensor which was in the lift. In any event the Panel noted the evidence of PA and PB both related to the Appellant hugging them in the lift. The Panel considered PA's accounts from her police statement in 2013 and her NMC statement in 2019 were consistent, as was her oral evidence and the Panel were satisfied that PA's account was credible. The Panel found both PA's and PB's accounts of hugs in the lift proven on the balance of probabilities.

Sexual comments

24. The Panel found that from the list of sexual comments in Schedule A to the charges comments 1 to 6, 8, 9, 11 to 14 were all proven because these were consistently alleged through PA's witness statements.

Charges found not proven relating to PB:

25. In relation to PB the Panel found that the main allegation of sexual assault without consent, namely by the Appellant entering her bedroom when she was asleep, taking down her pyjamas and underwear and touching her thigh, was not proven. The implication here may have been that he had penetrated her vagina with his fingers whilst she slept but that charge was not laid and PB was asleep at the time so did not expressly assert it. She asserted that she woke up to find her pants and pyjamas down and a bruise on her upper thigh with some pain there (beside her vagina) and saw the Appellant walking out of her room. The Panel took into account firstly that PB made no complaint in 2012 when this event was supposed to have occurred. However, she

did complain in her police interview dated 1st July 2013 in detail. However, the Panel determined that the evidence was “vague and weak”. The Panel took into account that the Appellant denied he had ever touched PB while she was sleeping. The Panel also rejected PB's account of the Appellant asking PB to go out with him, stay with him in London and to hug her. The Panel's reasoning on this includes a reference to a police witness statement dated the 24th of July 2013 but I am unable to find that in the appeal bundle. I note a handwritten date: 24/7/2013 was written on the interview note of 1.7.2013 and that may be the misunderstanding resolved. PB provided an interview to the police on the 1st of July 2013 and a witness statement to the NMC in July 2019. The Panel found at page 36 of their reasoning that “patient B’s police statement lacked detail in regard to this alleged incident and any conversations”. If this was a reference to her police interview then it is correct that the interview contained no assertion that the Appellant made these comments to her. The Panel analysed the asserted statement “do you want to go out with me?” As potentially having a number of meanings which were not sexual and decided that PB’s evidence lacked detail and that she did not have a clear recollection of the conversation and rejected PB’s assertion that the Appellant asked whether she would “stay with him”. The Panel also rejected PB's assertion that the Appellant asked her if he could hug her on the grounds that this was unlikely.

Charges found proven relating to PB:

26. The Panel found that the Appellant hugged PB in the lift and placed his hands on her bottom. They referred to PB’s police statement, which I interpret as meaning her police interview, her NMC witness statement and her oral evidence. The Panel considered PB’s evidence to have been consistent and reliable and again referred to her police witness statement dated 24th July 2013. The Panel found that it was unlikely that CCTV had been installed in 2012 and therefore rejected the Appellant’s submission that the presence of CCTV would have made such a hug unlikely.
27. Near the end of the reasoning the Panel found that the Appellant had sexual motivation for the proven actions and that he was grooming PA but not PB. They found both patients were vulnerable individuals and that the Appellant was in a position of power.

The Grounds of Appeal

28. These are the Appellant’s grounds of appeal:

Ground 1: The Panel applied the wrong burden and standard of proof by:

- a. Imposing an undue burden on the Appellant to disprove the allegations rather than having firmly in mind that the burden was on the NMC;
- b. Failed to apply the dicta in *Re H and others* [1995] UKHL 16 per Lord Nicholls at §73 as interpreted by Lord Hoffman in *Re B (a child)* [2008] UKHL 35 at §14-15 that the stronger the evidence should be before finding the allegation established.

Ground 2: The Panel failed to follow the correct approach to assessing credibility in, for example, *Suddock v. Nursing and Midwifery Council* [2015] EWHC 3612 (Admin) and the authorities referred to by the legal assessor in his advice.

Ground 3: The Panel did not adequately assess the credibility of the Appellant's evidence under oath and/or failed to give adequate reasons for an adverse credibility finding against him, including but not limited to the finding that previous entries into the nursing notes in March 2023 that an allegation had been made as self-defensive;

Ground 4: The Panel wrongly dismissed the likelihood of contamination and fabrication of the evidence by:

- a. Failing to give sufficient weight to the admitted hearsay evidence of NK and another patient present at the time and/or failed to give sufficient reasons for attaching no weight to it;
- b. Disregarding the concerns of the Police as to contamination;
- c. Failure to have regard to the inherent differences in the allegations made by Patients A and B.

Ground 5: The Panel were wrong to find the evidence of Patients A and B reliable in that such a conclusion was based on assumption, an incorrect view of, or inappropriate weight being attached to their evidence.

The Law

29. In the context of this appeal, which focusses on the Panel's findings of fact, where two accuser witnesses give evidence of wrongful sexual behaviour and one accused denies the behaviour, what is the nature of the rehearing and what is the definition of "wrong"?
30. In *Roach v GMC* [2024] EWHC 1114, I ruled at para. 14 that the appellate Court reanalyses the evidence given to the Panel below on such a rehearing. This is what is done. The correct approach to the test in relation to appeals against findings of fact run by way of review was considered by Sharp LJ and Dingemans J in the Divisional Court in *General Medical Council v. Jagjivan* [2017] 1 WLR 4438. The following principles were expounded (at paras. 39-40):

"The correct approach to appeals under [section 40A](#)

40. In summary:

- i) Proceedings under [section 40A](#) of [the 1983 Act](#) are appeals and are governed by CPR Part 52. A court will allow an appeal under CPR Part 52.21(3) if it is 'wrong' or 'unjust because of a serious procedural or other irregularity in the proceedings in the lower court'.

ii) It is not appropriate to add any qualification to the test in CPR Part 52 that decisions are 'clearly wrong': see *Fatnani* at paragraph 21 and *Meadow* at paragraphs 125 to 128.

iii) The court will correct material errors of fact and of law: see *Fatnani* at paragraph 20. Any appeal court must however be extremely cautious about upsetting a conclusion of primary fact, particularly where the findings depend upon the assessment of the credibility of the witnesses, who the Tribunal, unlike the appellate court, has had the advantage of seeing and hearing (see *Assicurazioni Generali SpA v Arab Insurance Group* (Practice Note) [2002] EWCA Civ 1642; [2003] 1 WLR 577, at paragraphs 15 to 17, cited with approval in *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23, [2007] 1 WLR 1325 at paragraph 46, and *Southall* at paragraph 47).

iv) When the question is what inferences are to be drawn from specific facts, an appellate court is under less of a disadvantage. The court may draw any inferences of fact which it considers are justified on the evidence: see CPR Part 52.11(4).

v) In regulatory proceedings the appellate court will not have the professional expertise of the Tribunal of fact. As a consequence, the appellate court will approach Tribunal determinations about whether conduct is serious misconduct or impairs a person's fitness to practise, and what is necessary to maintain public confidence and proper standards in the profession and sanctions, with diffidence: see *Fatnani* at paragraph 16; and *Khan v General Pharmaceutical Council* [2016] UKSC 64; [2017] 1 WLR 169, at paragraph 36.

vi) However there may be matters, such as dishonesty or sexual misconduct, where the court "is likely to feel that it can assess what is needed to protect the public or maintain the reputation of the profession more easily for itself and thus attach less weight to the expertise of the

Tribunal ...": see *Council for the Regulation of Healthcare Professionals v GMC and Southall* [2005] EWHC 579 (Admin); [2005] Lloyd's Rep. Med 365 at paragraph 11, and *Khan* at paragraph 36(c). As Lord Millett observed in *Ghosh v GMC* [2001] UKPC 29; [2001] 1 WLR 1915 and 1923G, the appellate court "will afford an appropriate measure of respect of the judgment in the committee ... but the [appellate court] will not defer to the committee's judgment more than is warranted by the circumstances".

vii) Matters of mitigation are likely to be of considerably less significance in regulatory proceedings than to a court imposing retributive justice, because the overarching concern of the professional regulator is the protection of the public.

viii) A failure to provide adequate reasons may constitute a serious procedural irregularity which renders the Tribunal's decision unjust (see *Southall* at paragraphs 55 to 56)."

Wrong

31. I shall follow and apply those principles when dealing with this appeal subject to the rulings below which may expand or clarify the meaning of "wrong". Findings which are challenged as "unjust because of a serious procedural or other irregularity in the proceedings in the lower court" are in a different category. When determining whether any of the Panel's material findings of fact were wrong, I will take into account that the definition of "wrong" remains flexible, or "elastic" as Warby J described it in *R (Dutta) v GMC* [2020] EWHC 1974 (Admin) at para. 21 or "calibrated" at Andrews J stated in *Suddock v NMC* [2015] EWHC 3612 at para. 33. I consider that the same approach is applied generally to decisions of an evaluative nature. There are certain aspects of the test which are well established and others nearer the outer boundaries which are beyond pre-definition and, in my view, rightly so. This is because the categories of wrongfulness are never closed, because the categories of human behaviour are not closed. If a finding of fact of the Panel is irrational or such that no reasonable Panel could have made it, that will fall comfortably within the definition of "wrong". Likewise, if the finding was made taking into account irrelevant matters or omitting from account relevant material and matters, that falls comfortably within the definition of "wrong". If a finding is based on no evidence at all, that will fall within the definition of wrong.

32. When the appellate Court is dealing with findings which are alleged to be: (1) “against the weight of the evidence”, or (2) an incorrect assessment of credibility, or (3) made by ignoring some identified contrary evidence, the test for what is wrong is more difficult to define, however, there are three “deference” thresholds which the appellate courts have identified to assist before a finding can be determined as wrong.

Due deference to professionals

33. Firstly, (see paras. 18-19 of *Roach*) there is a principle that deference should be shown to the expertise and experience of a professional Panel in professional regulatory appeals. This threshold is raised or lowered depending on the nature of the issue to which the finding of fact or decision related and the composition of the panel. If it related to clinical matters the threshold may be raised. If it related to mere fact finding (did this sexual act occur or not) it may be lowered. Thus, this threshold is described as being one where “the appropriate degree of deference” is given to the Panel. One factor to take into account is the composition of the Panel, for instance are they or are they not practitioners within the relevant field?

Live evidence deference

34. Secondly, deference is due to the tribunal who heard the live evidence, (see paras. 21-22 of *Roach*). This threshold espouses the obvious advantage that the first instance tribunal has when assessing the evidence because they will have heard all of the witnesses and seen them and so heard evidence in-chief, cross-examination and re-examination, often over many days (18 in this case). This advantage has been described as the tribunal having the whole “sea” of the evidence whereas the appellate Court only has “island hopping” evidence. Overall, appellate Courts have stated many times that they will not interfere unless satisfied that the advantage enjoyed by the first instance tribunal could not be sufficient to explain or justify the conclusion reached. This threshold is tempered a little by the acknowledgment in rulings that mere demeanour is not a powerful determinant of credibility (see Andrews J. at para 59 in *Suddock v NMC* [2015] EWHC 3612).

Deference due to the generous ambit of disagreement

35. The third threshold is deference due to the “generous ambit of disagreement” principle (see *Roach* at para. 23). Under this threshold appellate Courts are obliged to take into account that there is a generous ambit of disagreement allowed to the first instance tribunal on a decision of fact before the appellate Court will declare a decision wrong (See *Assicurazioni Generali SpA v. Arab Insurance Group* [2003] 1 WLR 577, per Ward LJ at para. 197). This has also been described as the appellate Court being “slow to interfere” and because findings of fact are a “jury question” (*Meadow v GMC* [2006] EWCA Civ. 1390, per Auld LJ at para. 197). In the end all of these thresholds overlap to a greater or lesser extent. In reaching these rulings I have taken into account the following rulings:

Lord Thankerton at page 488 in *Thomas v Thomas* [1947] A.C. 484;
Judge LJ at para. 23 in *R (Campbell) v GMC* [2005] 1 WLR 3488

Sir Anthony May at para. 197 in *Meadow v GMC* [2007] QB 462;
 Cranston J. at paras. 12 and 15, in *Cheatle v GMC* [2009] EWHC 645;
 Leveson LJ at para. 47 in *Southall v GMC* [2010] 2 FCR 77;
 Foskett J. at para 32 in *Fish v GMC* [2012] EWHC 1269;
 Andrews J. at paras. 33 and 59 in *Suddock v NMC* [2015] EWHC 3612;
 Cranston J. at para. 32 in *Yassin v GMC* [2015] EWHC 2955;
 Warby J at paras. 21-22 in *Dutta v GMC* [2020] EWHC 1974;
 Mostyn J. at paras. 6–12 in *GMC v Awan* [2020] EWHC 1553;
 Morris J. at paras. 11- 27 in *Byrne v GMC* [2021] EWHC 2237;
 Nicola Davies LJ in paras. 19-37 and 96-110 in *Sastry v GMC* [2021] EWCA Civ. 623;
 Hill J. at paras. 10-18 in *Shabir v GMC* [2023] EWHC 1772.

36. The result is that for many decades the phraseology for any restatement of the test of what is “wrong” has been necessarily vague. So, for instance: Lord Hailsham of Marylebone at p221F in *Libman v GMC* [1972] AC 217 put it this way: “*the findings of the committee were sufficiently out of tune with the evidence to indicate with reasonable certainty that the evidence had been misread.*” I shall work on the basis that for this rehearing relating to sexual misconduct findings the test of wrong involves all 3 gateways and the third gateway will involve the Appellant needing to cross all three thresholds to be able to justify any ground in which it is asserted that the Panel’s findings of fact or of evaluative judgments were wrong. Then the Appellant will need to persuade me that the decision was so against the weight of the evidence that I should declare it wrong.
37. I am comforted and guided by the fact that the appellate Court case law was recently reviewed by the Court of Appeal in *Sastry v GMC* [2021] EWCA Civ. 623, in which LJ Nicola Davies, between paras. 19 and 37, reviewed the historical development of the “was it wrong?” test from *Ghosh v GMC* [2001] 1 WLR 1915, to *Bawa-Garba v GMC* [2019] 1 WLR 1929. The case law was mostly in relation to decisions on sanction, not on findings of fact on misconduct, but did cover the latter at the end. The context was the difference between appeals by rehearing under S.40 of the *Medical Act 1983* governing doctors’ appeals from the GMC disciplinary tribunals and appeals by the GMC under S.40A which were a more limited right to appeal carried out by review. In both approaches the test for granting the appeal is based on the same trigger words: wrong or unjust, set out in CPR r.52.21. Nicola Davies LJ noted that in *Ghosh v GMC* [2001] 1 WLR 1915, the Judicial Committee of the Privy Council (the Board), at para 33, had ruled that:

“...The Board’s jurisdiction is appellate, not supervisory. The appeal is by way of a rehearing in which the Board is **fully entitled** to substitute its own decision for that of the committee. The fact that the appeal is on paper and that witnesses are not recalled makes it incumbent upon the appellant to demonstrate that **some**

error has occurred in the proceedings before the committee or in its decision, but this is true of most appellate processes.”

38. The Privy Council had then qualified the “fully entitled” phrase by the due deference to professional experience threshold. Nicola Davies LJ noted that the appellate jurisdiction was transferred to the High Court in 2003 and in *Meadow v GMC* [2007] QB 462, Auld LJ at para. 197 had set out the three thresholds I have summarised above before an appellate Court would overturn a professional Tribunal’s decision on sanction. These were commented upon in *Rashid v GMC* [2007] 1 WLR 1460, by Laws LJ at paras. 19-20 and by Cranston J. in *Cheatle v GMC* [2009] EWHC 645, at para. 15. The latter identifying or confirming gateway 3, which I have described above and confirming all of the three thresholds. In *Khan v GPC* [2017] 1 WLR 169, Lord Wilson, in the Supreme Court, at para. 36 approved the ruling in *Dad v GMC* [2000] 1 WLR 1538, that due deference is lower where the misconduct did not relate to clinical or professional performance. Then, Nicola Davies LJ came to *Jagjivan* and the paragraphs which I have set out above from that judgment which cover the test of wrong and the three thresholds. Finally, *Bawa-Garba v GMC* [2019] 1 WLR 1929, was compared with *Jagjivan*. In that decision all 3 judges, including the Lord Chief and the Master of the Rolls, ruled that the test for reviews and rehearings is the same (see para. 60) and confirmed the three due deference thresholds apply to appeals relating to evaluative decisions and findings which are essentially jury decisions (paras. 61-62 and 67). Finally, I take into account that if the appeal is against a primary finding of fact, the appellate Court is more reluctant to interfere than if it is a secondary fact, for instance an inference. CPR r.52.21 (4) itself points out the power of the appellate Court to make inferences.

Giving reasoning

39. I should also deal with the law on giving reasons because one of the grounds includes the assertion of inadequate reasons. A helpful summary of the duty to give reasons was provided by Hill J. in *Shabir v GMC* [2023] EWHC 1772, at para. 18, as follows:

“18. As to the duty to give reasons:

(i) The purpose of a duty to give reasons is to enable the losing party to know why they have lost and to allow them to consider whether to appeal: *English v Emery Reimbold & Strick* [2002] 1 WLR 2409 at [16] and *Byrne* at [24].

(ii) It will be satisfied if, having regard to the issues and the nature and content of the evidence, reasons for the decision are apparent, either because they are set out in terms or because they can readily be inferred from the overall form and content of the decision: *English* at [26] and *Byrne* at [24];

(iii) There is no duty on a tribunal, in giving reasons, to deal with every argument made in submissions: *English* at [17]-[18];

(iv) In a straightforward case, setting out the facts to be proved and finding them proved or not will generally be sufficient both to demonstrate to the parties why they have won or lost and to explain to any appellate tribunal the facts found: *Southall* at [56] and *Gupta* at [13];

(v) Where the case is not straightforward and can properly be described as “exceptional”, the position will be different: a few sentences dealing with “salient issues” may be essential: *Southall* at [56];

(vi) Specific reasons for disbelieving a practitioner are not required in every case that is not straightforward: *Byrne* at [119]; and

(vii) Where a Tribunal’s stated reasons are not clear, the court should look at the underlying materials to seek to understand its reasoning and to identify reasons which cogently justify the decision. An appeal should not be allowed 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 tribunal reach the decision it did: *English* at [89] and [118] *Byrne* at [27].”

Very serious allegations and anxious scrutiny

40. One final matter should be covered in this section on the law. I approach the burden of proof and standard of proof applying the following propositions:

- (1) The burden of proof lies on the complainant and the only standard of proof in all civil cases is the balance of probabilities.
- (2) There is no higher civil standard of proof in particularly serious cases and it is wrong to assert that the more serious the nature of the allegation, the higher the standard of proof required by the Courts for the complainant to overcome.
- (3) If the Court can determine the inherent probability or improbability of the alleged misconduct from the circumstances and the evidence then this can be taken into account when weighing the complainant’s and the accused’s evidence.

To support these propositions I refer to *In re H* [1996] A.C. 563, in which Lord Nicholls said the following at p586E-G:

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more

serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A stepfather is usually less likely to have repeatedly raped and had nonconsensual oral sex with his underage stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established. Ungood-Thomas J. expressed this neatly in *In re Dellow's Will Trusts* [1964] 1 W.L.R. 451, 455: "The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it."

41. He then went on to rule that the standard of proof is the same in all civil claims, big or small, serious or trivial. Any lingering doubts over the words of Lord Nicholls were put to bed by Baroness Hale at para 70 in *In Re B* [2008] UKHL 36; [2009] 1 AC 11:

"70. My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under section 31(2) or the welfare considerations in section of the Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies."

Analysis of each issue

What is the nature of the rehearing for this particular appeal?

42. Taking into account my summary of the law and procedure above, in my judgment this appeal by the Appellant nurse is to be run as a rehearing focussing on the grounds of appeal set against the test of whether the Panel's findings or decisions were wrong,

or the hearing was unjust, as alleged in the grounds. The test for whether findings of fact or evaluative judgments made by the Panel were wrong encompasses: (Gateway 1) whether the Panel failed to give adequate reasons; and (Gateway 2) whether the Panel's findings or decisions were irrational, ones which no reasonable Panel could make or took into account evidence which should not have been considered or failed to take into account evidence which should have been considered; and (Gateway 3) a broader test of whether the Panel's findings or evaluative judgments were wrong because they were so out of tune with the evidence or so against the weight of the evidence such that all three deference thresholds were crossed (due deference, live evidence deference and generous ambit of disagreement deference) and this appellate Court should quash them.

The burden of proof and standard of proof applied by the Panel

43. It is clear to me from the Panel's reasons that they expressly considered and applied the burden of proof properly. They put the NMC to proof and they assessed the NMC witnesses with a critical ear and eye. They rejected the evidence on charges where: (1) the evidence was of recent genesis instead of original genesis in June/July 2013; and/or (2) the witness was vague or uncertain either in the written evidence in chief or in the live evidence; and/or (3) the evidence contained internal inconsistency. All of those grounds for rejecting the "prosecution" evidence were logical and fair to the accused. The Panel also considered the defence evidence which sought to undermine the NMC evidence. I will deal with the specific evidence relied upon by the Appellant below. The transcript of the 18 days of evidence shows how the evidence of PA and PB was tested by detailed cross examination cross-referenced to the documents. I reject the assertion of the Appellant to the effect that the Panel reversed the burden of proof. As for the standard of proof, I deal with the issue of inherent probability or improbability below.

Assessment of credibility by the Panel

Previous allegations

44. The Appellant relied on the previous allegation made by PA as a ground upon which the Panel should have founded a rejection of the credibility of PA. PA admitted that she had made a rape allegation against a fellow mental health hospital ex-patient called John. The police reports of her complaints showed that her factual assertions were confusing and confused and were mixed with her own emotional desire to be physically and mentally harmed. John denied lack of consent for the sex they had in his room in supervised accommodation. She went there willingly. She stated that she wanted to be raped. The police decided not to raise charges against John. Does this set of facts, which took place a mere 12 months before the allegations, in any way undermine PA's reports of having consensual sex with the Appellant? It could have done potentially if John had been a clinician, but he was not. It could have done if John had denied the sexual activity and she had been exposed as a sexual fantasist, but he did not. I take into account and note that the Panel was provided with considerable evidence that PA had behaved in a sexually inappropriate manner many times on the

ward. So, for instance she had made verbal sexual advances to Mr G. Mithi, the ward manager and to Gillian Mutandiro, a nurse on the ward. I consider that PA becoming engaged in sexual activity with a staff member was potentially more likely in the light of this evidence so that it generally supported PA's assertions. I do not consider that the existence of the rape allegation did weigh heavily so as to undermine the credibility of PA. What it showed was that, at that time in 2012, she was in a serious, self-harming state and needed to be moved from a safe place hospital to a treatment-based hospital and that is what happened when PA was moved to Cygnet on 30.7.2012.

Previous threats

45. The Appellant relied on the notes of previous threats made by PA to him and to Doctor Power. On 27.3.2013 a drugs test on PA showed positive for morphine. PA asked for a complaint form against Doctor Power as a result of this test, she denied taking drugs whilst away from the hospital. The next day the Appellant was on ward and PA had self-harmed. She asked him not to report it. He said he had to and she needed bandages. The Appellant wrote in the notes that she threatened to "*put me in trouble by telling the management that I touch her all over her body inappropriately.*" The Appellant also told management. Mr G. Mithi, who was ward manager, gave evidence that PA had some time earlier said she fancied him and Gillian Mutandiro (another staff member) and asked if he had been with a prostitute. Further, many of the things PA said had a sexual content, so he became concerned that PA might accuse him of inappropriate behaviour too. He discussed this with Doctor Power and chose going forwards only to meet PA in rooms with glass windows so others could see him. This was firm evidence of how scared staff and nurses were about PA's sexualised behaviour on ward and the risk that she would make a complaint. I note the the Appellant made no such protective arrangements. The Panel did not ignore these facts. The Panel accepted that these threats were made. They were noted in the medical notes by the Appellant in March 2013, and again in June 2013 and by others in May 2013. Each threat to the Appellant arose out of a conflict situation between PA and the Appellant when he was obliged to report her activities (self-harming on one occasion and possessing a lighter on another). The threats to Doctor Power also arose out of conflict. The Panel decided, on the evidence which they heard and read, that the Appellant, who had written the threats into the notes faithfully, did so because he could later rely on them as "cover" for his wrong-doing, instead of deciding that they showed that PA was making threats to fabricate before she actually did fabricate the complaints. The Panel decided that PA did not have a history of making fabricated complaints. Without more, the notes of these threats were, in my judgment, neutral to the main issue of whether the sexual relationship was going on at the time. Certainly, the noted threats were chronologically close to the threats to Doctor Power, but in his case PA threatened to "make a complaint". In the Appellant's case PA threatened to reveal his wrongdoing. I do not consider that the Panel was wrong to decide that the notes did not support the Appellant's defence. I take into account the three deference thresholds and consider that the Panel's professional expertise on clinical situations is

of some relevance here. I also consider that they were best placed to make that decision having seen the witnesses' evidence live and heard cross examination. I also consider that the decision was within the reasonable ambit of disagreement.

CCTV

46. The Appellant relies upon the inadequacies in the evidence of PA concerning: CCTV, blood on sheets, perfume bottles and other matters. Taking firstly the strongest of these: the CCTV, PA asserted that the Appellant hugged her after turning the CCTV camera in the lift "away". There was no mention of the CCTV in the lift in PA's initial complaint letter but the next day she gave a witness statement to the police and did write down the CCTV allegation then. This was maintained throughout thereafter. The cross examination involved her being presented with a photo of the CCTV camera which was in a dome and could not be turned to one side. The Panel dismissed this inconsistency in her evidence by deciding she had confused it with a PIR movement sensor of some sort which the parties agreed was in the lift and was shown in the photo. This was an unimpressive part of PA's evidence and I can understand how some Panels would have found her evidence about the events in the lift unconvincing as a result. But I do not consider that the findings were irrational or that no reasonable panel would have accepted her core allegations of hugging inappropriately in the lift despite this detail being shown to have been unreliable. The evidence on the date of installation of the CCTV in the lift was unclear and there was a sensor in the corner of the ceiling. Nor was it made on no evidence, it was made on PA's evidence, the core of which was consistent and was persuasively maintained in the witness box. In my judgment, this CCTV evidence was of minor weight against her credibility. As to the perfume bottle and blood on sheets, there was no corroboration in PA's medical notes but I do not consider that medical notes are all knowing or all seeing and neither did the Panel.

Internal contradictions, vagueness or inadequacy

47. The Appellant relies on what he asserts are the contradictions in the Panel's own findings in relation to the evidence of PA and PB because many charges were determined as not proven. In relation to PA the Panel rejected quite a few charges for the reasons given, which included: vagueness, lack of chronological early complaint and inadequate memory. None of the reasons given for rejecting some of PA's evidence were illogical or irrational. All related to parts of her evidence not reaching the balance of probabilities level. The decisions were not based on credibility but on adequacy. In relation to PB this point has more force. Her main complaint was about the Appellant assaulting her whilst she was asleep which led to a considerable fear of him when she was on ward. The Panel's rejection of her evidence on her core assertion was a substantial decision and put into the shade their decision to accept her evidence of hugging in the lift. The rationale which the Panel gave for accepting PB's evidence of the hugging in the lift was that she had pursued the allegations despite the passage of 6 years between the events and being asked about them by the NMC in 2019. The Panel reasoned that if her allegations were untrue she would not have

bothered to continue with them in 2019. This makes sense and is logical. The Panel also took into account that by 2024 PB was in work (as a civil servant), out of the woods from a mental health perspective and the Panel appear to have found that she was an impressive and believable witness. Those were matters of live evidence about which I consider I should give due deference. Overall, on this issue I do not consider that the Panel were either irrational or taking into account irrelevant matters, nor do I consider that the decision was so out of tune that it played against the weight of the evidence. What the Panel did was apply a tough standard of proof to the core allegation and PB's evidence did not reach the balance of probabilities, so they rejected her core account of assault in her sleep.

Hearsay evidence

48. The Appellant relies on the hearsay evidence of other patients who asserted expressly to staff and the police that PA was fabricating her allegations against him. This evidence was set out in the ward medical notes recorded by other staff. Two patients: IL and NK, both reported hearing PA stating words indicating that she had fabricated the allegations against the Appellant. What IL is recorded in the notes dated 25.6.2013 as saying is harrowing. She asserted that PA was trying to persuade her to commit suicide and to self-harm and had made inappropriate sexual advances to her. IL also asserted that PA had admitted to her that her allegations against the Appellant were "untrue". NK was present at the time and heard the same admission. Both IL and NK were noted as saying that PA had threatened them to "stay on her side" and encouraged them to make false reports themselves. This was reported to the staff. Over the next few days PA was quiet and reportedly suicidal on ward as a result of knowing that they had reported he as telling lies. Furthermore, NK gave a witness statement to the police in September 2013 which she signed. This gave a fairly detailed account of the events concerning the lighter and the Appellant asking PA to hand it over and PA threatening that "*he's going to pay*". After PA made the complaints on 12.6.2013, NK asserted that she spoke to PA in the garden and asked why she had made the allegations up and PA said "*its gone too far now and I like the police visiting.*" NK informed the staff about this admission, but those words could be interpreted two ways. PA could have been saying I'll make him pay for his breach of trust placed by her in him because of their sexual activities. The Panel read the medical notes and admitted into evidence the witness statement made to the police by NK as hearsay, because she had died. IL was not called. When G. Mithi signed his police witness statement dated September 2013 he started by saying that he was making the statement in relation to a claim made by PA and a "counterclaim" made by IL against PA. However, the Panel decided that it could not place any weight on NK's witness statement (she was Witness 5). Likewise, the Panel appear to have placed no weight on the notes of what IL told the staff about PA telling her that she had falsified the allegations. The rationale given was that NK had complex mental health issues, and that the patients all had challenging and difficult relationships. But such considerations applied equally to the credibility of PA and PB and the Panel did not reject their evidence. I have carefully read the cross examination of PA on NK and

IL (Imi). She accepted that she confided in Imi, she rejected the assertion that she confided in NK and she asserted that she never admitted falsehoods, instead she confided her sexual activities with the Appellant to Imi. Imi then advised her to report them and this, together with discussions with Lorraine and Amy C led to her reporting the Appellant. The Panel's dismissal of the relevant evidence of IL and NK, albeit hearsay, does trouble me but did not lack logic. PA explained her position in her evidence. To give NK's evidence no weight was inappropriate. In my judgment it had some, but not a lot of weight and that should have gone into the balance when determining credibility. The weight was low because neither IL nor NK gave evidence. I do not know why IL did not give evidence but the Appellant did not call her. NK had died. Thus, the complainants were unable, through the NMC, to cross examine them on their assertions. This is important because their assertions may have fallen apart when tested. The Panel clearly had that in mind when they raised the lack of cross examination as the reason why they placed no weight on this hearsay evidence. I shall put this error into the balance below.

Collusion

49. The Appellant relies on admitted collusion between PA and PB as another factor undermining the credibility of both. This collusion came across in various ways. Firstly, PA told George Mithi and Gillian Mutandiro, on 12.6.2013, verbally that she "realised" having a sexual relationship with the Appellant was wrong when she spoke to Amy and Vicky, former patients, both of whom stated that the Appellant had asked them to be his "friend" when they were no longer residents. The next day PA wrote her complaint letter and asserted that she had been told that the Appellant had asked other patients for "coffee" after they were discharged and asserted it was a pattern of behaviour. PA told the police that she became concerned when she discovered that the Appellant may have been physically sexually active with other patients because she was worried that a lot of patients were victims of sexual assault and she did not want them to be vulnerable. All of this evidence was damaging to the Appellant, not of assistance to him. PB informed the police that PA had kept in touch with her after she had left Cygnet Hospital and telephoned her and told her she was in a relationship with the Appellant who had "fingered her" and she did not want to do that and felt coerced. The police noted that PA and PB had been in contact before they made their complaints. Indeed, the chronology of the complaints suggests that PA put PB up to making her complaint on 1.7.2013 when PA asked the Police to get in touch with her. PB had long since left the Cygnet by then. None of these facts were in issue. Indeed, they fitted with the assertion made by IL and NK that PA had tried to get them "on her side" after she made her complaint official. There is therefore some weight which should have been attached to these pieces of evidence by the Panel about the prompting of PB by PA and about PA misleading PB about the voluntary or coercive nature of the asserted sexual relationship. However, the triggering victims to come forwards and the collusion of complainants to fabricate are quite different matters. The Panel stated that they were not satisfied that PA and PB had colluded in fabricating the allegations and I consider that finding was one which they were

entitled to reach. If the appeal point is more subtle, that they should have found that PA was manipulating PB by mis-stating facts in her phone call, at least to the extent of the consensual nature of the sexual activity, I do not consider that it has much weight in the overall assessment of credibility. After all vulnerable women who have serious mental health conditions and have been sexually taken advantage of, are likely to want to have support from others who they understand have also suffered such abuse and may not always report to each other wholly accurately.

The mental health of the complainants

50. The complainants, PA and PB had been sectioned under the *Mental Health Act 1983* on the dates when the events which they alleged either occurred or did not occur. To what extent can their evidence be relied upon, if at all? It is noteworthy that the Panel refused to rely on the witness evidence of NK or the notes about what IL told staff and gave as one of their reasons NK's mental health status. At the start of her witness statement PA accepted that she was suffering from borderline personality disorder, manic depression and self-harming. PB described herself as having had several long stays in mental hospitals due to borderline personality disorder, depression and psychosis for which she took anti-depressant drugs and anti-psychotic drugs. PA was described by Doctor Bindman, her treating consultant psychiatrist from 2014 to 2019, as having an emotionally unstable personality disorder, depression and anxiety with self-harming and disassociation, a state in which she loses contact with reality for hours. However, he did not consider that her condition would have had any impact on her evidence because she did not have a psychotic illness. I compare this expert evidence with the condition of PB who did take anti-psychotic drugs and about whom no medical report was provided to the Panel. I note that the Panel rightly rejected to admit in evidence Doctor Bindman's opinion on the credibility of PA. I note that PA did not disclose the alleged sexual relationship with the Appellant to Doctor Bindman at all between 2014 and 2017. The Panel did not expressly deal in their reasoning with the mental health of PA or PB. I consider that this omission was relevant and could have been important. If witnesses are unable to care for themselves, or a danger to themselves, or need inpatient treatment and need to be admitted to a mental health hospital under S.3 of the *Mental Health Act 1983*, it seems to me that that is relevant to the assessment of their ability to give evidence and their credibility by any panel. At S.3(2) the Act states:

- “(2) An application for admission for treatment may be made in respect of a patient on the grounds that—
- (a) he is suffering from mental disorder of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital; and
 - ...
 - (c) it is necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment and it cannot be provided unless he is detained under this section; and

(d) appropriate medical treatment is available for him.”

So, the criteria do not automatically make the patient’s evidence untenable, it is a matter of evidence and degree. I am troubled that no medical such evidence was provided to the Panel about PB in 2012 and 2013. But then, the Appellant did not ask for the full medical notes of PB or instruct a consultant psychiatrist to report on her fitness to give valid evidence back then. In addition, the transcripts of the evidence show that PA and PB were lucid and rational when responding to cross examination in 2024, in so far as the written word can do so. I must also take into account that just because a person has mental health condition which is serious enough for admission to hospital that does not mean he/she is a liar. Mental health patients are very vulnerable and are entitled to protection from abuse and to be listened to very carefully. Taking all those matters into account and the evidence of Doctor Bindman I do not consider that the Panel’s approach to the evidence of PA and PB in relation to mental health was irrational or one which no reasonable panel would take nor do I consider that it was wrong or unfair, but it could have been better assisted. I consider that evidence about PB’s state of health should ideally have been provided by the NMC but her interview with the police, statement to the NMC and live evidence were sufficient for the Panel to reach their decision on her credibility.

Cross-admissibility

51. The law in relation to cross admissibility of witness’s evidence was agreed. The Panel were required first to assess the credibility of one complainant, say PA, then if found credible and if the evidence contained a clear modus operandi or pattern of behaviour with similarities to the complaints of PB, that credible evidence could be used as adding some weight to the complaint of PB. This works vice versa. The authority for this approach is *R v Chopra* [2007] 1 CR App R 16 and the Crown Court Bench Book direction in chapter 12. The Appellant’s complaint is that the Panel were not advised on this and appear to have believed PB’s evidence on the lift hug and then used that belief to push the credibility assessment of PA over the 50% mark in relation to her asserted lift hug. Reading the reasons as a whole I do not consider that is the approach which the Panel stated they took or what the Panel were deciding. They rejected PB’s core evidence as not reaching the balance of probabilities but accepted the lift hug, which was a more minor allegation. They accepted PA’s evidence because it had been consistent from her police witness statement, through her NMC statement, to her oral evidence. The Panel took into account that this allegation was not in her complaint letter dated 12.6.2013 but the Panel credited PA’s oral evidence in which she was firm. They accepted PA’s account that the Appellant had turned “the black thing” in the corner of the lift. The Panel concluded that PA may have been mistaken as to the nature of the “thing”, which may have been a sensor but found PA’s account credible. The panel then took into account PB’s lift hug evidence when considering PA’s lift hug charge. The Appellant seeks to argue that without PB’s evidence the panel would have rejected PA’s evidence. I do not read the reasoning that way. It seems to me that, having accepted PA’s account, they went on to accept PB’s account and implied that PA’s account raised the credibility of

PB's account to above the balance of probabilities. The reasoning at p39 makes this clear to me. I do not consider that the Panel misapplied the law in their approach on cross admissibility.

Lack of corroboration

52. The Appellant relied on lack of corroboration by any of the persons whom PA named as victims of the Appellant or who allegedly knew of his sexual advances to other patients: Lorraine, Amy C, Vicky and another girl. The police obtained no other witness statements from patients or previous patients. The Panel were clearly aware of this because it was raised in cross examination but did not state it expressly in their reasons. I do not see the need for them to have mentioned every issue raised by the Appellant in their reasoning and I consider that it is likely that the Panel had these matters in mind. I do not consider that the failure to mention them is a justification for saying that the Panel failed to give adequate reasons.

Inherent improbability/implausibility

53. The Appellant argued inherent implausibility before the Panel but this was rejected. The reasons given by the Panel are criticised by the Appellant. They relied on the fact that other senior nurses have engaged in illicit sexual activity with mental health patients. This is a matter to which the deference to professionals threshold applies in my judgment. Professionals who sit on the NMC Panel will know more than I about how often senior mental health or other nurses are charged with sexual impropriety and whether it is more or less likely that a senior or a junior nurse would do such things. Whilst it might seem inherently improbable to a man on the Clapham omnibus that a family man with children could engage in sexual activity with an inpatient at a mental hospital when he is a mental health nurse and knows he must not do so and will lose his job if he were to be found out, the lady on the Tooting Tube might consider that the "me too" movement shows how certain men in positions of power have been sexually abusing vulnerable women for generations. Inherent probability is a subject which may give rise to lively debate. I do not consider that the Panel was at all wrong to make the finding which they did.

Propensity of PA to falsify

54. The Appellant submitted that there was evidence that PA had a propensity to falsify. But in the event the submissions made to the Panel were in two steps. Step one was the submission that PA had the propensity to get angry when she did not like authority telling her what to do, and step two was that she had the propensity to falsify serious allegations as the result of her anger. The first step was well made and justified by the evidence. The second was not and the Panel rightly rejected it, in my judgment. The Rape allegation made in 2012 arose from a factual matrix which was mainly undisputed by John (save as to consent). They had sex in his room. The allegation she made to the police, which was messy, involved her asserting rape but being quite open with the police about probably wanting to be raped as a form of self-harm. I do not consider that proved either past falsification or propensity. What it proved was her

parlous state of mental health at the time. The threats to complain about Doctor Power in March 2013 never ended up in any real complaint because the drugs test result was overturned in a day and later the row blew over. In my judgment the Panel rejected the propensity submission rightly because there was no substantial evidence of falsification by PA before the complaint about the Appellant.

Giving reasons

55. Did the Panel give adequate reasons for their decision? I take into account the law on the adequacy of reasons neatly summarised by Morris J in *Byrne* and set out above. Reasons are provided to allow the loser to know why and how he has lost, to explain sufficiently to enable the loser to appeal and the adequacy requirement will be satisfied if, having regard to the issues and the nature and content of the evidence, the reasons for the decision are plain, either because they are set out in terms or because they can be readily inferred from the overall form and content of the decision. It is not necessary for them to be expressly stated, when they are otherwise plain or obvious. I consider that the Panel set out their decisions on the overarching issues and then on each charge and made their findings of fact, their decisions and reasoning clear. The key issue was the clash of evidence between the the witnesses: the two protagonists and the one antagonist. They had little or no extraneous or third party witness evidence or documentary evidence to assist them in their decisions on primary facts and credibility. So, they assessed internal consistency and logic and they assessed the complainants giving evidence. Whilst there are certain matters which have been omitted from the Panel's reasoning and others, which I have dealt with above, which are less than fully detailed, in my judgment it cannot be said that the Panel failed to explain how they reached their findings and decisions. I consider that where the reasons are not expressed they can properly be inferred.

Live evidence

56. At the root of this appeal is the Appellant's assertion that the Panel's assessment of the credibility of PA and PB and of the Appellant himself was wrong. The Panel accepted the evidence of PA on the core matters: that the Appellant started flirting in the garden when they were alone; the soon after started propositioning her when he and she were on escorted leave; that he asked her to undress and be naked when they got back to the ward; that he looked at her naked; that later he penetrated her vagina with his fingers more than once; that she wanted the sexual activity with him and wanted it to go further but he did not permit risky activities like undressing himself so she would see his body (and know his personal skin marks) or having full sex on ward and risk being caught. The Panel accepted that the activity went on for months. In her witness statement to the police she stated by reference to her diary that it started in February 2013 and so went on until her complaint in mid June 2013. That period neatly fitted the two written notes entries made by the Appellant of PA's threats to expose the relationship made in March and June 2013. It also fitted her description in evidence that the activity started months after she arrived because at first no escorted leave was allowed until PA's condition had stabilised. It also roughly fitted her

evidence that the conversation they had in the garden during which he opened up the whole alleged affair was around 3 months before her discharge. It was probably 5 months.

57. I have carefully read the evidence in chief and cross examination and re-examination of PA. The level of detail reached was high and the answers given by PA were consistent on the core issues save those relating to the number of times that she alleged the Appellant penetrated her with his fingers. For instance, at the start of cross examination she correctly answered questions on whether she had made sexual complaints about treating clinicians before and whether she had made sexual complaints about patients before. During cross examination evidence was put to PA about her rape allegation and her sexualised behaviour on ward, including being taken to A&E for inserting foreign objects into her vagina. It was put that her diary would have contained references to the Appellant if she had had sex with him. Her responses on the diary were evasive. On the perfume bottle she asserted it was a 30 ml mini bottle and she was unsure where she stored it in her room and accepted that no such bottle was ever found by staff. Then in answer to questions about the first threat she had made (March 2013) PA showed reasoning and gave logical explanations in cross-examination which were detailed and persuasive. In relation to her allegations of penetration with her consent, there were none in her complaint letter; there were such allegations in her police witness statement in which she asserted penetration on the first occasion she agreed to lie naked before him during observations and this may have been elided with another occasion when she bled, but the way the statement is written is unclear. In that statement another time is mentioned when he penetrated her and she was wet and he commented on that. In her NMC witness statement she mentioned only one such occasion. In cross examination she said this occurred only once and became flustered when her allegation of the second penetration was put to her. Where her evidence was vague or not in her police witness statement or undermined by the long, proper and firm cross-examination of Mr Hoskins, the Panel found it insufficient to satisfy the burden of proof. Considering that she was dealing with events 10 years before, the Panel found that her evidence on grooming and sexual activity was not unimpressive and I do not disagree from reading the transcript.

Analysis – were the Panel wrong?

58. It is one of the most difficult tasks of a first instance Tribunal to determine who is telling the truth on the balance of probabilities when there is no independent or objective external evidence to help sort the issues out. In this case there was no eye-witness, the medical notes did not provide corroboration to PA or the Appellant and there was no forensic evidence to assist the Tribunal. The Appellant asserted a full denial. So, the Tribunal assessed the credibility of PA and PB by analysing the very contemporaneous statements which they made and their later evidence and then watching and listening to their live evidence and in particular to cross examination. This will not just have been the demeanour of PA, PB and the Appellant. It involved, over 14 days of evidence in chief and cross-examination, during which time the Panel

was assessing the way in which they answered each question and how the answers interlocked; how readily they conceded matters they had to concede and whether they disseminated or evaded questions. I take into account all the matters listed by Morris J in *Byrne* at paras. 17-19, about the usual methods of assessing credibility by reference to objective facts and contemporaneous documents and only assessing demeanour as just a part of the process. I take into account some tolerance for inconsistency in detail and some confusion in complainants' evidence, which is normal. I also take into account the practice that where the allegation is a career threatening one, the Courts apply anxious scrutiny to evidence on the the appeal. I echo the words of Lord Hoffmann at para. 113 of *Re B* [2008] UKHL 35, [2009] 1 AC 11:

“... this is not a case where there were competing accounts of what had occurred. In respect of most of the allegations, the Appellant's evidence was a simple denial that the event or events had taken place. In such a case, the credibility of the denial can only be assessed by reference to the credibility of the evidence supporting the allegation which is denied.”

59. At its height the Appellant's case rests on the points made above which the Appellant submitted, taken together, show that the Panel were wrong to accept the evidence of PA and PB and to reject the Appellant's denial. The strongest 4 points made in favour of the Panel being wrong in my judgment are those relating to: the hearsay evidence, cross admissibility, collusion and self-contradiction in cross examination. None of those on their own would be enough to find that the Panel was wrong, as counsel for the Appellant conceded in submissions. I must ask: “do they amount to enough together?” I consider that they have some weight and might have persuaded me to reach a different view had I been sitting on the Panel, but I did not see or hear the evidence and substituting my tentative view is not the correct approach on an appeal. In my judgment the Appellant has failed to prove any Gateway 2 ground for this appeal. The points which militate against the Panel being wrong are all contained in the three thresholds for Gateway 3. Firstly, I consider that the professional deference threshold provides a low barrier in this case. These are straightforward factual disputes, but they do involve events on a ward and in a clinical setting which involves some deference to the understanding of professionals about decisions which nurses will have to make in such situations. I note that only one panel member was a nurse and I do not know if she was a mental health nurse. One other was a midwife. Secondly, the deference due to the Panel through them seeing and hearing the evidence live over a long hearing is substantial in this case. I have only read the transcript and the documents. I consider that the Panel will have gained a far wider and fuller understanding of the interlocking evidence than I have on a one day appeal. Thirdly, I take into account the generous ambit of disagreement permitted on matters of fact and evaluative judgments involving credibility such that an appellate Court is reluctant to overturn findings of fact. Finally, I assess the weight of the four points

raised which have some merit and consider that together they do not amount to nearly enough for me to rule that the Panel's decisions were wrong. In my judgment the Panel did not fall into error in their evaluation of the credibility of PA and the Appellant such that the decisions they took can properly be characterised as wrong. The same applies to their decisions relating to PB. Whilst I consider that they were wrong to place no weight on the evidence of the hearsay witnesses and they did not express themselves particularly well in relation to cross admissibility and did not mention collusion, I consider it very likely that the panel had those points in mind because they were raised in evidence and in submissions. I take into account that the evidence of complainants about sexual matters is rarely perfect. It is often lacking in peripheral detail or contains peripheral details which are undermined in some way. In this case the live evidence was provided 10 years after the event and that had to be taken into account by the Panel. However, the core evidence of PA was accepted by the Panel and I do not find the reasons advanced on appeal to overturn the decisions underlying that acceptance to be sufficiently weighty to rule that the Panel were wrong.

Credibility of the Appellant

60. The methods of assessing the credibility of witnesses or parties were summarised by Andrews J in *Suddock v NMC* [2015] EWHC 3612 at para 59 and spring from many earlier authorities on the subject. Whilst the Panel assessed the credibility of the evidence of PA and PB in some detail, the Appellant asserts that they did little more than note the Appellant's denials and reject them in relation to the Appellant's credibility. This is not quite correct. The Panel considered the Appellant's submissions on inherent improbability and rejected them too. They saw and heard his evidence. I can find no error in their approach to assessing his credibility. The real test was balancing whether PA and PB's evidence was credible after cross examination compared to his taking into account any objective evidence.

Consideration of each ground of appeal

61. **Ground 1:** As to the burden and standard of proof and the asserted inherent improbability of the misconduct alleged, for the reasons set out above at paragraphs 41-42 and 52, 57 and 58 above, I dismiss this ground of appeal. I do not consider that the Panel's decisions or their approach were wrong or unjust.
62. **Grounds 2 and 5:** As to assessing the credibility of PA and PB, for the reasons set out in paras. 43 to 58 above, I dismiss this ground of appeal. I do not consider that the Panel's decisions or their approach were wrong or unjust.
63. **Ground 3:** As to assessing the Appellant's credibility and failing to give adequate reasons, for the reasons set out at paras. 54 and 59 above, I dismiss this ground. I do not consider that the Panel's decisions or their approach were wrong or unjust.

64. **Ground 4:** As to the likelihood of cross-contamination/collusion and fabrication of the evidence of PA and PB, for the reasons set out at paras. 47-50, 53, 55-58 above, I dismiss this ground. I do not consider that the Panel's decisions or their approach were wrong or unjust.

Conclusions

65. The appeal is dismissed.

END