Neutral Citation No: [2023] NIKB 46	*Ref:* **McA12127**
	ICOS No: **2021/98494**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **17/04/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATIONS BY DANIELLE O'NEILL AND MICHAEL McHUGH FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE MEDICAL PRACTITIONERS' TRIBUNAL SERVICE OF THE GENERAL MEDICAL COUNCIL OF 1 OCTOBER 2021

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McALINDEN J

Introduction/General Background

[1] The applicant in the first case, Danielle O'Neill, was a patient of Dr Michael Watt and she considers herself to have been a victim of his malpractice. She is the patients' spokesperson for the Neurology Recall Patient Support Group, a group of patients formed organically in the course of the Recall and Inquiry process which followed on from the revelations commencing in May 2018, that health authorities in Northern Ireland were engaging in a patient recall in connection with Dr Watt's neurology clinical practice.

[2] In 2016, the applicant in the second case, Michael McHugh, was referred to Dr Michael Watt at the Royal Victoria Hospital by the stroke team when he had been seen for a mild episode with speech disturbance and worsening right sided weakness. He had been suffering from episodes of staring and inappropriate laughter, followed by confusion. This applicant alleges that he was misdiagnosed by Dr Watt and given the wrong treatment, including being prescribed lamotrigine. These clinical errors were identified upon recall in 2018 and, thereafter, he was subsequently given appropriate treatment.

[3] The applicants in both cases challenge the lawfulness of the decision making which led to Dr Watt being granted voluntary erasure from the medical register by

the Medical Practitioners' Tribunal following a hearing on 1 October 2021. The decision making of the General Medical Council and the Medical Practitioners' Tribunal Service ("the MPTS") is impugned. The respondent in both cases is the Medical Practitioners' Tribunal ("the MPT") of the General Medical Council ("the GMC"). The MPT is a statutory committee of the GMC and is accountable to the GMC Council and the UK Parliament. The MPT is independent in its decision making, and operates separately from the investigatory role of the GMC. The first-named Notice Party is the General Medical Council, being Dr Michael Watt's professional regulator, and the body that referred Dr Watt's case to the MPT. The second-named Notice party is Dr Michael Watt. The third-named Notice Party is the Department of Health for Northern Ireland ("the Department"). The grounds of challenge are practically identical in both cases and this matter came on for hearing on 3 March 2023. Judgment was delivered by the court on that date and orders were subsequently issued on 29 March 2023 in both cases.

[4] The court granted leave to both applicants and made a declaration that the respondent's decision of 1 October 2021 granting voluntary erasure from the medical register to Dr Michael Watt pursuant to section 31A of the Medical Act 1983 ("the Act") was unlawful, *ultra vires* and of no force or effect because:

(a) the respondent lacked jurisdiction to convene as a disciplinary tribunal solely to hear a voluntary erasure application on 27 September 2021;

(b) the Registrar of the General Medical Council lacked jurisdiction to refer Dr Michael Watt's voluntary erasure application to the Medical Practitioners' Tribunal on 28 September 2021; and

(c) the Medical Practitioners' Tribunal lacked jurisdiction to make a voluntary erasure decision on 1 October 2021.

[5] The court made an order of *certiorari* bringing up to the court and quashing the voluntary erasure and the respondent's decision of 1 October 2021 to grant Dr Michael Watt voluntary erasure from the medical register pursuant to section 31A of the Medical Act 1983. The court also ordered that the matter of costs would be reserved to be determined following further submissions from the parties. In this judgment, the court sets out its reasons and provides a summary of the factual and legal background which led to the quashing of the impugned decision making which is the subject of challenge in these cases. For the sake of brevity, the court shall concentrate on the first case to provide the relevant factual background.

[6] Dr Michael Watt is a consultant neurologist and he worked for many years as one of the consultant neurologists in the Belfast Health and Social Care Trust's Neurology Service. Numerous serious concerns came to light about a number of aspects of Dr Watt's clinical practice including the performance of epidural blood patch procedures for chronic headache in a large number of both NHS and private

patients and this led to a recall of patients in May 2018. Such were the nature and extent of the concerns raised that Dr Watt was referred to the GMC by the Belfast Trust. The Trust, his employer, also commenced investigations into the clinical practice of Dr Watt under the Department of Health guidance on "Maintaining High Professional Standards in the Modern HPSS." The Department of Health also instructed the Regulation and Quality Improvement Authority to carry out a review including the commissioning of an expert review of the records of all patients or former patients of Dr Watt who died in the previous ten-year period. The nature and extent of the public disquiet surrounding the revelations concerning Dr Watt's clinical practice was such that a non-statutory Inquiry was initially set up under the chairmanship of Mr Brett Lockhart KC to review the Neurology Service provided by the Belfast Trust.

[7] This non-statutory Inquiry was subsequently converted into a statutory Public Inquiry established to review matters related to the Neurology Service of the Belfast Trust. The Terms of Reference of the Public Inquiry tasked the panel with examining:

(a) issues of corporate governance and clinical governance procedures which led up to the recall of patients in May 2018 in particular the communication and escalation of the reporting of issues and concerns to the HSC Board, the Public Health Agency and the Department;

(b) the handling of complaints made about, and concerns raised in relation to Dr Watt;

(c) Dr Watt's participation in processes to maintain professional standards including appraisals; and

(d) whether there were any concerns or circumstances that should have alerted the Trust to investigate aspects of Dr Watt's clinical practice at an earlier stage.

The panel was requested to identify any learning point and to make recommendations to the Board.

[8] It is important to note that the Department, when converting this Inquiry into a statutory Public Inquiry, made it abundantly clear that this Inquiry had not been set up to look into the clinical practice of Dr Watt. The Department stated:

> "The clinical practice of Dr Michael Watt is being investigated by the General Medical Council (GMC) and employer led processes under Departmental Guidance on "Maintaining High Professional Standards in the Modern HPSS", it would, therefore, be inappropriate for the Public Inquiry to encroach on the GMC's remit or

> employer led processes. However, the Panel will consider the role of the Trust as an employer in terms of the professional practice in the context of the Trust's system of Governance during the period covered by the Public Inquiry."

[9] After it was reported in the press that the General Medical Council, following a referral by the Belfast Health and Social Care Trust, had taken Fitness to Practice proceedings against Dr Watt, the first-named applicant was selected by the GMC to form part of a group of 12 former patients to partake in a Fitness to Practice ("FTP") hearing before the Medical Practitioners' Tribunal. She agreed to do so and attended Zoom meetings with a GMC Investigations Officer. It is clear that both applicants and, indeed the general body of Dr Watt's patients, and, indeed, the Department itself understood and expected that the Fitness to Practice Proceedings would be held in public and would involve an examination of Dr Watt's clinical care of patients under his supervision.

[10] I now propose to set out in detail the relevant facts of this case. The following information is mainly gleaned from the affidavit of Ms Dawn Crook a senior legal advisor employed by the GMC dated 21 March 2022. On 18 April 2018, following a referral from the Belfast Health and Social Care Trust, the GMC opened an investigation into Dr Watt's fitness to practise in accordance with rule 4 of the General Medical Council (Fitness to Practise) Rules Order of Council 2004 ("the FTP Rules"). On 18 December 2018 the GMC wrote to Dr Watt in accordance with Rule 7 of the FTP Rules setting out an allegation that his fitness to practise was impaired by reason of his deficient professional performance. He was provided with an opportunity to respond and thereafter the case was referred to a Medical and Lay Case Examiner for consideration under rule 8 of the FTP Rules. On 6 February 2019 the Case Examiners decided to refer the allegation of deficient professional performance to the MPTS pursuant to rule 8(2)(d) of the FTP Rules for it to arrange for the allegation to be determined at an MPT hearing.

[11] The MPT fitness to practise hearing was provisionally listed to take place between 5 August 2019 and 2 September 2019, but following a series of legal issues and adjournments, the hearing was adjourned. Before the MPT hearing was rescheduled, Dr Watt made his first application for voluntary erasure (VE) from the medical register on 16 July 2020. If successful, this would have had the effect of erasing him from the medical register, and staying/terminating the fitness to practise proceedings before the MPT. Given that there was an open FTP investigation and that a referral had been made to the MPT (but a hearing on the referral had not as yet commenced), the Registrar referred that VE application to the Case Examiners in accordance with regulation 3(4)(c) of the General Medical Council (Voluntary Erasure and Restoration following Voluntary Erasure) Regulations Order of Council 2004 ("the 2004 VE Regulations"). The Case Examiners considered that first VE application and refused it by decision dated 3 September 2020. On

1 December 2020, Dr Watt made a second application for VE. Again, his application for VE was refused by the GMC Case Examiners on 17 February 2021. It is important to reiterate that in both instances, Dr Watt's VE applications were considered by the GMC Case Examiners pursuant to regulation 3(4)(c) of the 2004 VE Regulations.

[12] In the meanwhile, at some form of preliminary hearing before the MPTS on 8 December 2020, the hearing dates for Dr Watt's MPT fitness to practise hearing were re-scheduled in order to take place over three sessions. Session 1 would take place between 20 September 2021 and 1 October 2021. Session 2 was scheduled to take place between 1 November 2021 and 19 November 2021. Session 3 was scheduled to take place between 10 January 2022 and 11 February 2022.

[13] On 14 May 2021, Dr Watt brought judicial review proceedings challenging the decisions of the GMC Case Examiners to refuse his application for VE. On 6 July 2021, the Administrative court (E&W) refused permission/leave to apply for judicial review. One of the reasons for said refusal was that Dr Watt had an alternative remedy, *viz*, that it was open to Dr Watt to submit a further VE application to be considered by the MPT as a preliminary legal argument, if the application was submitted to the Registrar after the commencement of the MPT hearing. This was an argument made by the GMC in its summary grounds of response to Dr Watt's judicial review application.

[14] After the determination of Dr Watt's JR application, Dr Watt's representatives and the GMC appear to have engaged in several exchanges and it would appear that some form of understanding was reached between the GMC, MPTS and Dr Watt's representatives, whereby a third VE application would be made and would be referred by the GMC to the MPT pursuant to regulation 3(8) of the 2004 VE Regulations, meaning that Dr Watt's third VE application would be dealt with by the MPT rather than the Case Examiners of the GMC. No convenient dates were identified in advance of the then scheduled hearing on 20 September 2021.

[15] As an outworking of this understanding, the MPT case manager by direction given on 30 July 2021, indicated that Session 1 would only run from 27 September until 1 October 2021, and would sit for the purposes of dealing with Dr Watt's VE application. Sessions 2 and 3 would remain "as listed…so that the Tribunal could have considered the substantive case during those sessions, if Dr Watt's application for voluntary erasure was not granted."

[16] On 27 September 2021, Session 1 purportedly commenced. It is clear from all the evidence including the transcript of the hearing that the only substantive purpose of this hearing was to decide on whether Dr Watt should be granted Voluntary Erasure. The ancilliary issue of Dr Watt's application for the hearing of his Voluntary Erasure application to be held in private was also raised at that stage. It would appear that Dr Watt's representatives espoused and indeed expressed the view to the Tribunal at the purported hearing on 27 September 2021, that they could

have a third VE decision considered by the MPT without actually filing a third written VE application with the Registrar, that, in essence, such a fresh application was unnecessary. However, the GMC did not accept that a VE application could be entertained by the MPT without their being a prior application. During the hearing on 27 September 2021, counsel for the GMC reminded the Tribunal that, as of that time, no fresh application for Voluntary Erasure had been made by Dr Watt to the Registrar of the GMC. It would appear from the transcript that he expressed himself in the following terms:

> "With respect it can't be left like that. I do not know who it is suggested gave this indication that no VE application was necessary, but the reality is, in my submission, that the rules do make it necessary and the rules can't be elided. They are the statutory power by which this tribunal acts – forgive me for stating the obvious…The position, therefore, is that the only two applications for voluntary erasure were applications that have been refused and the time for challenging the refusal on the papers has passed. They have therefore been refused. There is no existing application for voluntary erasure.
>
> Secondly, as the rules make clear, applications for voluntary erasure must be made to the registrar, who can then refer it to this tribunal to deal with…May I direct your attention, sir, please to the relevant regulations, which I am sure you have in front of you. They are the General Medical Council Voluntary Erasure and Restoration following Voluntary Erasure Regulations 2004, regulation 3:
>
> > 'A practitioner may apply in writing to the Registrar in accordance with this regulation for his name to be erased from the Register.'
>
> I accept, of course, that this may be regarded as a mere formality, but it goes further than that. There is no provision for this tribunal to receive an application for voluntary erasure that I have been able to find. There is no basis for this tribunal dealing with an application for voluntary erasure unless it has been referred in appropriate circumstances to the tribunal by the registrar."

[17] The Chair of the Tribunal then indicated that the hearing would have to be adjourned for a fresh Voluntary Erasure application to be made to the Registrar of the GMC with a view to that application being immediately transferred to the

Tribunal for determination. It is rather ironic that in giving this direction, the legal chair of the Tribunal of the MPT stated that a fresh VE application should be made out of prudence so that "there can't be any potential argument as to the lawfulness or otherwise of any decision this tribunal makes this week."

[18] Following this, a fresh written application for Voluntary Erasure was submitted under regulation 3(1) of the 2004 VE Regulations. What actually happened was that at 5:46pm on 27 September 2021, an application for VE was e-mailed to the Registrar by Dr Watt's legal representatives with a covering e-mail which contained the following request.

> "I would be grateful if this VE application could be passed urgently to the Registrar for onward transmission to the Medical Practitioners' Tribunal who are due to consider his Voluntary Erasure application at a Preliminary Hearing scheduled for 27 September – 1 October 2021."

[19] At 9:03am on 28 September 2021, the Registrar without giving the matter any specific consideration simply referred the VE application to the MPT, purportedly in accordance with regulation 3(8) of the 2004 VE Regulations. The e-mail correspondence from the Registrar specifically stated that "we have not assessed any of the information contained in the application" but it is clear from this e-mail that the Registrar was acting on the assumption that the Fitness to Practise Hearing before the MPT had commenced. The Tribunal then proceeded to hear Dr Watt's fresh VE application between 28 September and 30 September 2021, with this hearing being in private. The MPT granted Dr Watt's VE application on 1 October 2021 and the applicant in the first case was subsequently given written notice of this decision.

[20] As a result, no public hearing examining Dr Watt's care of patients has ever taken place. Instead, what took place was a private hearing which resulted in a decision being made granting Dr Watt Voluntary Erasure. The result of this successful VE application is that Dr Watt's name is erased from the Medical Register with the net result that he can no longer practise medicine until such times as he might apply to be restored to the Register.

[21] The Voluntary Erasure of Dr Watt's name from the Medical Register, if it were allowed to stand, prevents any substantive Fitness to Practise issues that have been raised against Dr Watt being investigated in the context of any GMC Fitness to Practise proceedings. It prevents investigation of various allegations that the GMC had been made aware of and had brought to a state of readiness for hearing before a Tribunal including an allegation of dishonesty and an allegation of having or attempting to have an inappropriate sexual or emotionally inappropriate relationship with a patient.

[22] Statements issued at the time of the decision reflect the fact that the VE decision was granted prior to any substantive Fitness to Practise proceedings had commenced. A press release from the MPTS Press Office recorded that:

> "Between 27 September and 1 October an MPTS tribunal considered an application in private for the voluntary erasure of Dr Watt's name from the medical register, prior to the commencement of his substantive hearing.
>
> On Friday 1 October the tribunal determined to grant the application, which means his name has been removed from the medical register with immediate effect and he is no longer able to practise medicine in the UK."

[23] Similarly, a public record document from the MPTS website recorded the following:

> "The Tribunal convened in private to consider a voluntary erasure application on behalf of Dr Watt, prior to the case commencing.
>
> Having heard evidence in relation to exceptional circumstances under the Guidance on making decisions on voluntary applications and advising on administrative erasure, the Tribunal determined to accept Dr Watt's application for voluntary erasure. Dr Watt's name was therefore voluntarily erased from the Medical Register with effect from 01/10/2021."

[24] These documents combined with the transcript of the hearing before the Tribunal on 27 September 2021 clearly and conclusively establish that the decision by the MPT to issue the VE decision was taken before the substantive Fitness to Practise hearing had actually commenced before the MPT. For the reasons set out below, the court considers this to be a breach of the relevant rules governing VE and to be an act in excess of the MPT's jurisdiction which said act was patently *ultra vires* and unlawful. Indeed, the MPT's decision to hear and consider the third VE application in the circumstances of this case and the decision taken by the GMC to refer the VE application to the MPTS for decision were patently and obviously unlawful.

[25] The GMC's publication entitled "Guidance on making decisions on voluntary erasure applications and advising on administrative erasure", which is the Guidance cited in the public record document quoted above, records the jurisdictional limitations on the MPT taking a VE decision in such circumstances as these in the following, plain language:

> "3. A doctor may submit an application for voluntary erasure at any time and there is no requirement to wait until the conclusion of fitness to practise proceedings. The procedures for dealing with such applications apply to all registered doctors, whether or not they hold a licence.
>
> 4. Applications for VE will be referred to a lay and a medical case examiner in circumstances where an allegation is being investigated or information is received, including from the doctor applying, which may raise an issue of impaired fitness to practise. The case examiners will make a decision on whether to grant or refuse the application for voluntary erasure. If the case examiners fail to agree, the erasure application shall be referred to the Investigation Committee for determination.
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> 5. Case examiners will also consider VE applications if a case has been referred to a medical practitioners' tribunal (MPT), but the hearing has not yet started. If an application for voluntary erasure is received after a hearing before a MPT has begun, the Registrar shall refer the application for determination by the tribunal. This does not apply to referrals to the Investigation Committee."

[26] This Guidance indicates that the MPT should not have referred to it and clearly should not adjudicate upon a VE application where the relevant underlying proceedings before the MPT have not yet 'started' or 'begun.' In pre-action correspondence the MPTS provided little by way of justification for its having apparently considered and granted a VE application prior to the hearing commencing. In a letter dated 11 November 2021 on this issue it stated simply:

> "The Tribunal had jurisdiction to consider Dr Watt's application for voluntary erasure under regulation 3(8) of the GMC (Voluntary Erasure and Restoration following Voluntary Erasure) Regulations 2004 (as amended). Neither of the parties to the hearing (the GMC or Dr Watt) took any issue with the Tribunal's jurisdiction in this regard."

[27] In further pre-action correspondence the MPTS demonstrated a lamentable lack of understanding of what the relevant regulatory framework actually requires or alternatively a willingness to cut corners or flout specific statutory requirements by stating that on occasions an MPT will hear and determine VE applications before the MPT hearing has in fact commenced, and it further adumbrated that it considers

that, in some circumstances, the parties have the power to confer a jurisdiction on the MPT that it does not in fact possess where it stated:

> "The only circumstances in which the MPTS has a role in determining voluntary erasure applications are those set out in Regulation 3(8) of the GMC (Voluntary Erasure and Restoration following Voluntary Erasure) Regulations 2004 (as amended) ('the Regulations'). This is where, at the time a voluntary erasure application is made, an allegation regarding fitness to practise has been referred to the MPTS and the Medical Practitioners Tribunal ('MPT') hearing (convening under Rule 17 of the GMC Fitness to Practise Rules 2004 (as amended)) has commenced. In practice, where an application for voluntary erasure is made very shortly before a MPT hearing opens, this is sometimes determined by the MPT where the parties to the hearing agree this is the best use of time and resources, especially where an application is likely to be restated during the MPT hearing, if it is refused by GMC decision makers."

[28] The court takes this opportunity to state that neither the GMC nor the MPTS are permitted to cut corners and flout clear and unambiguous statutory requirements in this manner. The GMC and MPTS are invested with an important public trust, and having been invested with that trust, they are required to perform their respective roles in accordance with and in compliance with a bespoke legislative scheme. The decisions that the GMC and MPTS take in the disciplinary sphere are matter of utmost public importance and the procedural rules governing those decision-making functions are not to be flouted or ignored. Where the GMC and its various Committees are given decision-making powers in this area by Parliament and are required to operate the trust imbued in them in a particular manner, then they must operate in the manner dictated by Parliament. Clearly neither the GMC nor the MPT can be provided with 'jurisdiction' to embark on an enquiry into a matter that Parliament has not authorised them to embark upon. Moreover such 'jurisdiction' cannot be provided for by the consent of the parties, where jurisdiction does not otherwise exist.

[29] That the GMC is invested with an important public trust is evident given its role in overseeing and regulating the medical profession. The MPTS provides core adjudicatory functions in respect of the fitness of medical practitioners to work and operate with the public. That the functions of such bodies directly impact upon the public, the public interest and the public good is exemplified by the following sub-sections of section 1 of the Medical Act 1983:

> "1-(1A) The over-arching objective of the General Council in exercising their functions is the protection of the public.

> (1B) The pursuit by the General Council of their over-arching objective involves the pursuit of the following objectives—
>
> (a) to protect, promote and maintain the health, safety and well-being of the public,
>
> (b) to promote and maintain public confidence in the medical profession, and
>
> (c) to promote and maintain proper professional standards and conduct for members of that profession."

[30] Whilst the strong public interest elements at play in any substantive decisions that the GMC and MPT are tasked with making might be said to be obvious, the importance of the type of decisions that are taken by the MPTS is clearly demonstrated by the facts of the present case. The recall process regarding Dr Watt involved the recall of 2,500 patients in May 2018; a further 1,044 patients being recalled in November 2018; and a third recall of 209 patients in April 2021. The third recall related to patients seen by Dr Watt between 1996 and 2012. In addition to Dr Watt's NHS patients, 67 private patients of Dr Watt seen at the Ulster Independent Clinic and Hillsborough Private Clinic were also recalled. A review of 927 of Dr Watt's high-risk patients found that 181 of those patients received a diagnosis that was described by Robin Swann, the then Health Minister as "not secure." In a separate review, the Belfast Trust examined case notes of 66 patients who had undergone blood patch procedures under Dr Watt's care and found that for 45 of those patients (68.1%) there was no clinical evidence supporting the need for such a procedure. For 46 of the 66 patients (69%) care was deemed unsatisfactory and fell below expected standards. The Belfast Trust issued a statement which included the following:

> "We are deeply sorry for this and for the undue hurt these patients experienced."

[31] It is no exaggeration to state that the announcement that Dr Watt had been granted VE in a private hearing without any analysis of the quality of care and treatment he had provided to his patients over many years was greeted by widespread dismay, if not outrage. The GMC itself publicly stated that Dr Watt's patients had suffered "immense harm" and that it was "extremely disappointed" by the MPTS decision, stating that it "felt it was in the public interest for allegations" against Dr Watt "to be heard by the tribunal in an open and transparent way." The then Minister for Health stated that it was:

> "another distressing day, in what has been a long sequence of distressing days for the former patients of Dr Watt and their families…There was an expectation of a full GMC hearing and there will be profound disappointment that this is not happening. I very much share that disappointment… I can assure patients and families that I am determined to do everything in my power to repair the damage inflicted on public confidence by the neurology recall."

[32] Dr Watt's VE application was the subject of a hearing before the Health Committee of the Northern Ireland Assembly on 4 November 2021 when Mr Massey of the GMC attended and was questioned by members of the Committee. An exchange between Mr Alan Chambers MLA and Mr Massey is illustrative of the mood of the Committee.

> "Mr Chambers: I thank the witnesses for attending. They say that this situation – a doctor being allowed to deregister of his own volition – is rare. They also mentioned legislation. I assume that all this is contained in parliamentary legislation. We all accept, I think, that this was an abuse of that legislation. In view of that will the General Medical Council lobby Parliament to have that unacceptable loophole closed? Do the witness accept that this case, fairly or unfairly, has totally undermined public confidence in the ability of the GMC to hold clinicians to account, certainly in this part of the United Kingdom? Had Dr Watt not deregistered, where would you have taken the case? What would have been the timescale of your actions, and would they have been taken in the public domain?
>
> Mr Massey:… You ask about public confidence. One of the things that makes me anxious is that this case and the decision that the Medical Practitioners' Tribunal Service has made have had a drastic effect on trust, confidence and regulation in Northern Ireland. I genuinely feel distressed on behalf of the patients who feel that they have been left unable to get answers about what happened, the deficiencies of clinical performance and why their lives have been changed so terribly. We are a creature of statute and I want to make sure that we rebuild that trust and confidence. I do not in any way take it as a trivial matter. I recognise that we have work to do, because the case will have led to a loss of confidence."

[33] As a matter of general principle, when the GMC and MPTS take decisions of such importance and such magnitude as in the present case, or in any case involving the fitness of a medical practitioner to work with the public, and where Parliament has stipulated that the public interest is served by the GMC and the MPTS conducting themselves in a particular manner, it does not fall to either body, as creatures of statute, to operate in an *ultra vires* fashion which legislation does not allow for by cutting corners in the manner indicated above. It is the court's firm conclusion that in the events that occurred surrounding the VE decision that was taken in this instance, the GMC and MPT both engaged in *ultra vires* action which led to a VE decision being taken which the MPT had no jurisdiction to take.

Relevant Statutory Provisions and Inter-relationship of VE and FTP Proceedings

[34] The relevant parent or umbrella Act providing for the existence and purpose of the GMC and its committees, including the MPTS, is the Medical Act 1983 (the 'Act'), which as noted above, places the protection of the public as the GMC's over-arching objective. Section 2 of the Act requires the Registrar of the General Council of the GMC to keep a register of medical practitioners containing their names and specialisms.

[35] Sections 29A and 29B make provision about licences to practise. A licence to practise is a licence granted under and in accordance with Part IIIA of the Act to a medical practitioner by a licensing authority. Licensing authorities include the Registrar, and such other committees of the General Council as may be prescribed. The detail of the issuing and withdrawal of licences is left by the Act to be prescribed by rules under rule-making power provided for under these sections. The issuing and holding of a licence to practise medicine is separate from the question of registration. Section 30(3) of the Act requires the Registrar to maintain details not only of the registration of medical practitioners, but also details of whether they hold a licence to practise or not.

[36] Part V of the Act provides for Fitness to Practise and Medical Ethics. Section 35A therein gives the GMC extensive powers to obtain information relating to fitness to practise.

[37] Section 35C is headed "Functions of the Investigation Committee" and it applies where an allegation is made that a registered person/medical practitioner's fitness to practice is impaired. Impairment of fitness to practise is defined as including misconduct and deficient professional performance. Generally, the Investigation Committee is required to investigate the allegation and decide whether it ought to be considered by a Medical Practitioners Tribunal, and have the Registrar refer the allegation where it does so decide. The Registrar then refers the allegation to the MPTS under S.35C(5)(b).

[38] By section 35D (1), where an allegation is referred to the MPTS under section 35C (5) (b), the MPTS "must arrange for the allegation to be considered by a Medical Practitioners Tribunal." Section 35D (2) provides for an MPT to make a finding of impaired fitness to practise and to erase a practitioner's name from the register, direct his registration to be suspended, or direct that his registration shall be conditional on his compliance with conditions. Section 41C provides for any erasure or suspension of registration to have the effect of withdrawing the practitioner's licence to practise.

[39] Section 43 of the Act provides that Schedule 4 to the Act shall have effect. Schedule 4 contains broad rule-making powers in respect of various tribunals and proceedings including the MPT.

[40] Rules have been issued regulating procedure before the MPT in the General Medical Council (Fitness to Practise) Rules Order of Council 2004 as amended.

[41] Rule 4 provides that an allegation regarding impairment of fitness to practise shall initially be considered by the Registrar and where it is considered to fall within section 35C(2) of the Act (which defines impairment) the matter shall be referred to Case Examiners for it to be considered under rule 8. Rule 7 allows for the Registrar to carry out investigations. Rule 8 requires that the allegation be considered by the Case Examiners who may decide that the allegation should either be referred to the Investigation Committee or the MPTS. Where Case Examiners do not agree, the allegation will be referred to the MPTS. The Investigation Committee's powers under rule 9 also include the power to refer the matter to the MPTS.

[42] In can be seen from the above summary of the relevant legislative provisions that there is a distinct and elaborate case management and decision-making architecture in the GMC and its Committees and the GMC and its Committees, thereby, become involved with and knowledgeable about the case long before the case is ever referred to the MPT.

[43] Ultimately, where the matter is referred to the MPTS, the hearing is conducted in accordance with rule 17. Prior to hearing, however, rule 16 allows for a "pre-hearing meeting" at which directions may be given. The pre-hearing meeting is specifically pre-hearing and is not a hearing before the MPT but is a hearing before a designated "Case Manager." Rule 17 provides for the order of proceedings which includes at rule 17(2)(a) that the first order of business shall be the hearing and determining of any preliminary legal arguments.

[44] In addition to the GMC having the regulatory/Fitness to Practise function, the Act also provides for the making of Voluntary Erasure decisions. In the parent Act, this is essentially provided for by a rule-making power in section 31A. This rule-making power is found in Part IV of the Act which provides for "General Provisions Concerning Registration" rather than in Part V which concerns "Fitness to Practise and Medical Ethics."

[45] This rule-making section however emphasises the essential requirement that an application for VE is made in accordance with the rules. Where relevant section 31A states:

> "**31A Voluntary removal from any of the registers**
>
> (1) The General Council may make regulations—
>
> (a) providing for the erasure by the Registrar from any of the registers of the name of any person who applies, in the manner prescribed by the regulations, for his name to be erased from any of the registers;
>
> (b) providing for the refusal by the Registrar of applications under paragraph (a) above in such cases and circumstances as may be prescribed by the regulations;"

It is clear that section 31A envisages that the Registrar shall be the principal decision-maker in respect of VE.

[46] Rule-making powers provide for the operation of the VE jurisdiction in the General Medical Council (Voluntary Erasure and Restoration following Voluntary Erasure) Regulations Order of Council 2004 ("the 2004 VE Regulations") as amended. The 2004 VE Regulations again emphasise the need for VE applications to be made in accordance with the legislative scheme as demonstrated in the interpretation section at regulation 2 where an "erasure application" is defined as follows:

> "erasure application" means an application for voluntary erasure made in accordance with regulation 3;"

[47] The core provision relating to the processing of such applications is regulation 3 which, where most principally relevant, provides as follows:

> "3(1) A practitioner may apply in writing to the Registrar in accordance with this regulation for his name to be erased from the register.
>
> (2) An erasure application shall include the following—

(a) the practitioner's name and GMC Reference Number;

(b) the practitioner's registered address or, if post is unlikely to reach him there, an address to which the Registrar is able to send to the practitioner written communications relating to the application;

(c) the name and address of—

(i) any person, body or organisation by whom the practitioner is employed to provide medical services, and

(ii) any person, body or organisation with whom the practitioner has an arrangement to provide medical services;

(d) where paragraph (c) does not apply and save where the practitioner provides a statement under sub-paragraph (f), the name and address of the person, body or organisation which most recently employed the practitioner to provide medical services or with whom he most recently had an arrangement to do so;

(e) a statement by—

(i) the practitioner,

(ii) save where the practitioner provides a statement under sub-paragraph (f), any person or an officer of any body or organisation named in accordance with sub-paragraph (c) or (d), and

(iii) an officer of any regulatory body other than the General Council with which the practitioner has been registered within the period of 5 years ending with the date of the erasure application,

which—

(aa) states that the person making it is not aware of any proceedings, act or omission on the

part of the practitioner which might render him liable to be referred to the General Council for investigation or consideration of his fitness to practise, or

(bb) gives particulars of any proceedings, act or omission on the part of the practitioner which might render him so liable; and

(f) where the practitioner has not been employed or had an arrangement to provide medical services at any time during the period of 5 years ending with the date of the erasure application, a statement confirming that this is the case.

(3) On receipt of an erasure application, the Registrar shall, as soon as is reasonably practicable—

(a) erase the practitioner's name from the register;

(b) refer the application to a medical and a lay Case Examiner under paragraph (4) for determination in accordance with paragraphs (5) to (7);

(c) refer the application to the MPTS for them to arrange for it to be determined by a Medical Practitioners Tribunal under paragraph (8); or

(d) where the application does not comply with paragraph (2), reject the application.

(4) The Registrar shall refer an erasure application to a medical and a lay Case Examiner for determination where any of the following apply—

(a) the Registrar receives information (including any information provided in accordance with paragraph (2)), that the practitioner is subject to any proceedings or has committed any act or omission that might render him liable to be referred to the General Council for investigation or consideration of his fitness to practise;

(b) an allegation against the practitioner is being investigated in order to decide whether it should be referred to the MPTS for them to arrange for it

to be considered by a Medical Practitioners Tribunal under the Fitness to Practise Rules;

(c) an allegation against the practitioner has been referred to the MPTS for them to arrange for it to be considered by a Medical Practitioners Tribunal under the Fitness to Practise Rules but the hearing before that Tribunal has not yet commenced.

(5) Upon consideration of an erasure application referred under paragraph (4), the Case Examiners may unanimously—

(a) grant the application, and notify the Registrar who shall erase the practitioner's name from the register accordingly; or

(b) reject the application.

(6) If the Case Examiners fail to agree as to the disposal of an erasure application under paragraph (5), the Registrar shall refer the application for determination by the Committee, and the Committee shall determine the application as soon as is reasonably practicable.

(7) Upon consideration of an erasure application, the Committee may—

(a) grant the application, and notify the Registrar who shall erase the practitioner's name from the register accordingly; or

(b) reject the application.

(8) Where, on the date the Registrar receives an erasure application, an allegation against the practitioner has been referred to the MPTS for them to arrange for it to be considered by a Medical Practitioners Tribunal under the Fitness to Practise Rules and the hearing before the Medical Practitioners Tribunal has commenced, the Registrar shall refer the application to the MPTS for them to arrange for it to be determined by the Medical Practitioners Tribunal, and the application shall be determined by the Medical Practitioners Tribunal accordingly."

[48] The general theme of the Regulations is that applications once received are determined either by the Registrar, Case Examiners, an Investigation Committee or an MPT arranged by the MPTS. The particular body that in fact determines the VE application is largely dictated by the question of whether there are outstanding FTP investigations or proceedings involving the medical practitioner involved. In the first instance where such investigations or proceedings exist, the VE application is referred by the Registrar to Case Examiners for decision, who might then refer it to an Investigation Committee in the event that the Case Examiners do not agree.

[49] Case Examiners (or the Investigation Committee) retain jurisdiction to determine the VE application save in very limited circumstances, and save where these very limited circumstances pertain, the decision on whether to grant VE or not remains within the operational gift of the GMC. This remains the position even where an allegation against a medical practitioner has been referred to the MPTS for them to arrange for it to be considered by an MPT, but the hearing before that MPT has not yet commenced. Thus, the intention of the rules is that the decision-making power in respect of VE is retained within the investigatory and decision-making architecture of the GMC which has knowledge of the case up until the point that the MPT become properly seized of the matter.

[50] Having considered the legislative framework which deals with Voluntary Erasure applications I am convinced that the clear meaning of the legislation which transparently reflects the will of Parliament is that where, on the date that a VE application has been referred to the Registrar, an FTP allegation has previously been referred to the MPTS for hearing under the Fitness to Practise Rules, and FTP hearing has actually commenced, then, and only then, has the Registrar jurisdiction to refer the VE application received on that date to the MPTS for that application to be determined by the MPT.

[51] The clear policy intent underlying regulation 3 of the 2004 VE Regulations is that the decision-making body considered best placed to take the decision on the basis of its current knowledge of the case is the one to take the relevant decision. Generally, and up until the point of an MPT hearing taking place, this will be the GMC bodies within its investigatory architecture such as the Case Examiners or Investigation Committee. It is only once an MPT hearing commences that the 2004 VE Regulations presume that the MPT might be better sighted on the issues to take the VE decision. That presupposes that there should have been a hearing of substance before the MPT, so that it is better sighted of all relevant facts and circumstances, at the time that the VE application is in fact made.

[52] It, furthermore, follows that where an MPT hearing is commenced with "preliminary arguments" being the first order of business as indicated above, it can never be the position that a VE application can be the first order of business before an MPT or dealt with as a "preliminary argument.' By definition, in order for a VE application to arrive with the MPT at all, it must be the position that on the date that

the VE application is filed with the Registrar, the MPT hearing has already commenced. That being the case, at the point in time that a VE application would be filed, the hearing would have commenced with such preliminary arguments, none of which can have included an argument around VE.

[53] Where, as in this instance, the MPT convened a hearing to determine a VE application as a preliminary issue and before the actual substantive hearing commenced, it is clear that the MPT breached both the letter and the spirit of these jurisdictional rules.

[54] It is readily apparent from even a cursory consideration of the facts of this case that prior to any substantive hearing commencing before the MPT, the tribunal adopted a jurisdiction in respect of Dr Watt's VE application (in that the MPT gave directions for the hearing of that application) even though the MPT could not have acquired jurisdiction to deal with any VE application until such time as such an application was made to the Registrar and then referred on to the MPT, which in itself could not have happened until such times as the MPT had actually commenced Dr Watt's Fitness to Practise hearing. No such FTP hearing had commenced on 27 September 2021. Certainly, no such FTP hearing had commenced when the MPT case manager made the direction on 30 July 2021 which is referred to in paragraph [15] of this judgment.

[55] It follows that the entire process of fixing a hearing to determine VE before any third VE application was made was a device, or an exercise in corner-cutting that the MPT had no power to adopt. Whilst the affidavit of Ms Crook dated 21 March 2022 refers to the ability of the MPT to consider preliminary legal arguments in accordance with rule 17(2)(a) of the FTP Rules, that power is clearly a power related to the hearing of arguments relative to the substantive hearing. It is not a power to hear free-standing and essentially factual applications on a VE, which bear no relation to the substantive hearing function. The fixing of a preliminary hearing so that the MPT can hear a VE application is clearly barred by the provisions of regulation 3(8) of the 2004 VE Regulations themselves, which prevent a VE being referred to the MPT at all until such time as the MPT have commenced their hearing proper in accordance with rule 17 of the FTP Rules. As noted above it can never be the case that a VE application is dealt with by an MPT as the first order of business as by definition the first order of business must be something other than the VE for the hearing to have commenced in the first place.

[56] In circumstances where no VE application had in fact been made to the Registrar at that time, and in circumstances where the FTP hearing had not commenced, and the only listing of the MPT that had occurred was to deal with a VE application that the MPT had no jurisdiction to hear as of yet, it seems to have appeared to no one that the entirety of the proceedings on 27 September 2021 were *ultra vires* and a nullity.

[57] Having regard to the factual matters dealt with in paragraph [16] above, it would appear that Dr Watt's representatives were either unaware of the jurisdictional restrictions of regulation 3(8), or, alternately, were aware of them, but were deliberately attempting to flout those jurisdictional restrictions in order to have a third VE application heard by the MPT instead of GMC Case Examiners before the hearing commenced in circumstances where no such application could be entertained either by the Registrar or the MPT until the MPT hearing had actually commenced.

[58] With specific reference to the quotation from the transcript of the purported hearing that took place on 27 September 2021, which is set out in paragraph [16] above, the court considers that it is unfortunate to say the least that Mr Garside, counsel for the GMC, did not expand upon what the "appropriate circumstances" were in which the Registrar could refer an application to the MPT. It is indeed unfortunate that counsel did not advise the Tribunal that by dealing that day with an application that did not exist gave rise to an *ultra vires* exercise that could not be considered to be the commencement of the MPT hearing at all, so that even then, if a formal VE application had been made on that date, there could be no compliance with regulation 3(8) so as to allow the Registrar to refer that VE application to the MPT.

[59] With specific reference to the facts set out in paragraph [17] above, it is also very unfortunate indeed that the legally qualified and experienced chair of a specialist Tribunal failed to appreciate that in addition to a fresh VE application being necessary, such a fresh application could only be referred to the Tribunal if the Tribunal was at hearing, and the Tribunal could not be regarded as being at hearing if the hearing was convened solely to deal with a VE application which at that time did not even exist. Such is the obvious and serious nature of this error that this judgment could be pared down to this and the six preceding lines.

[60] The purported hearing on 27 September 2021 was a nullity because it had been convened to deal with a VE application that did not exist. As is described in paragraph [18] above, following on from that nullity of a hearing of 27 September 2021, Dr Watt's representatives submitted a referral for his third VE application, relying on the proceedings before the MPT on that date as having constituted a hearing before the MPT that had actually commenced. This application was forwarded to the GMC Registrar at 5:56pm on 27 September 2021. The GMC Registrar then referred that application at 9:03am on 28 September 2021 to the MPT in purported compliance with regulation 3(8) on the basis that the MPT hearing had in fact commenced.

[61] Sadly, and somewhat inexplicably, it did not occur to anyone involved in this fiasco that what had taken place on 27 September 2021, ie a meeting to hear a VE application that did not exist yet and which the MPT had had no jurisdiction to consider and no jurisdiction to convene for, was not a proper commencement of anything for the purposes of regulation 3(8). What is rather shocking is the

acceptance by the Registrar that in dealing with the request from Dr Watt's legal representatives, the application was forwarded to the Tribunal without assessing any of the information contained in the application. Having regard to the clear language of regulation 3(8), it is incumbent upon the Registrar to be satisfied that the Tribunal is properly at hearing before forwarding a VE application to the Tribunal. There was an abject abdication of this duty by the Registrar on this occasion.

[62] Having received this referral, the MPT then proceeded to consider the VE application as if the VE application was one it had jurisdiction to hear. As noted above the MPT appear to have been influenced in this regard by the fact that the parties did not dispute its jurisdiction to hear the application. The MPT then subsequently granted the application on 1 October 2021.

Conclusions in relation to the MPT's Jurisdiction

[63] The MPT has engaged in an excess of jurisdiction, which excess appears to have been influenced by its tendency to cut corners and convene hearings to deal with Voluntary Erasure applications prior to the actual hearing commencing, when in fact no statutory authority exists for it to deal with VE applications outside the parameters of a properly commenced FTP hearing. The MPT further appears influenced in this regard by a view that the consent of the parties can provide it with jurisdiction where statute does not.

[64] The excess of jurisdiction resulted in a VE application being made which was not an erasure application made in accordance with regulation 3 of the 2004 VE Regulations.

[65] In particular, on the date when the third VE application was received by the Registrar, ie 27 September 2021, whilst there had been an allegation referred to the MPTS for them to arrange a hearing before the MPT, no valid hearing before the MPT had in fact commenced, contrary to regulation 3(8) of the 2004 VE Regulations.

[66] A hearing within regulation 3(8) of the 2004 VE Regulations clearly implies a lawful hearing. It is a necessary precondition for the operation of regulation 3(8) and for the Registrar to lawfully refer a VE application received on a particular date to the MPT that on the date of receipt of the application, a lawful Fitness to Practise hearing has already commenced before the MPT.

[67] The purported hearing that took place before the MPT on 27 September 2021 was not a lawful hearing before the MPT; it was a nullity which had been unlawfully convened and conducted to deal with a VE application that had not even been made.

[68] The hearing had been unlawfully convened by the direction of 30 July 2021 to deal with Voluntary Erasure as a preliminary issue when no VE application existed at that time, and none could in fact be lawfully referred to the MPT for decision until

such time as the substantive FTP hearing in fact commenced. The purported hearing had been convened specifically to deal with non-FTP matters, ie the VE application.

[69] The nullity of a hearing was then unlawfully conducted on 27 September 2021, in excess of jurisdiction because the hearing itself was a purported exercise in considering the VE application that had not been made yet and had not been referred to the MPT by the Registrar.

[70] It followed that the Registrar of the GMC had not acquired jurisdiction as of 27 September 2021 to refer the VE application to the MPT as there had been no lawful hearing before the MPT and such hearing as had purportedly taken place had not been an FTP hearing. The Registrar had no power to refer the application and the MPT had no power to accept it.

[71] The GMC, the MPT and Dr Watt cannot rely upon a purported hearing taking place on 27 September 2021 to consider a Voluntary Erasure application that Dr Watt had not even made at that stage, in order to constitute the commencement of a hearing that was required to have already commenced in order for the MPT to acquire jurisdiction to consider the VE application that Dr Watt wished to make.

[72] The proposal that the MPT convene a hearing at all, preliminary to the FTP hearing, to consider a VE application that requires the FTP hearing to have commenced before the MPT can have a VE application referred to them involves an impossible circularity.

[73] As stated above at paragraph [51], the clear policy intent underlying regulation 3 of the 2004 VE Regulations is that the decision-making body considered best placed to take the decision on the basis of its current knowledge of the case is the one to take the relevant decision. In this regard, I refer to the transcript and the Chairman's introductory remarks made at the start of the purported hearing on 27 September 2021. He made the following statement:

> "Obviously the hearing has been listed specifically to deal with preliminary matters. Perhaps I can indicate where the Tribunal are positioned at present in that respect. Up until this morning we have had the opportunity to see certain of the pre-hearing decisions that have been recorded, but we haven't received a bundle. I understand that a bundle has now been uploaded to GMC Connect this morning. I can indicate that we haven't had an opportunity to consider that bundle at all at this stage. Perhaps what might be helpful, first of all, if I ask first Mr Garside and then Mr McDonagh what you envisage to be the preliminary issues that are likely to arise this week."

[74] It would appear that the Tribunal's knowledge of the case at that time was rather sparce. If the intention of regulation 3(8) is to withhold VE applications from the Tribunal until such time as it can be reasonably assumed that the Tribunal is better sighted on all the relevant issues in order to determine the VE application, then the intention of Parliament was clearly flouted in this case. It is the court's considered view that, following the commencement of a hearing of substance, the Tribunal would have been much better sighted of all the facts and circumstances, relevant to the FTP allegations and the public importance of the same. It is only when the Tribunal had acquired that degree of knowledge of and familiarity with the facts and circumstances of the case (as a result of the case being at hearing) that any application for VE should have been made to the Registrar who then following proper consideration of the matter should have forwarded that application to the Tribunal.

[75] At all times the GMC and the MPTS must never lose sight of the primary objective of protecting, promoting, and maintaining the health, safety, and well-being of the public. In order to do so, these bodies must act at all times to promote and maintain public confidence in the medical profession, and to promote and maintain proper professional standards and conduct for members of that profession. In this instance, I consider that both bodies clearly lost sight of that primary objective.