CO/6302/2015

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

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 17 March 2016

B e f o r e:

MR JUSTICE HOLROYDE

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Between:
PROFESSIONAL STANDARDS AUTHORITY FOR HEALTH AND SOCIAL CARE
Appellant

v

NURSING AND MIDWIFERY COUNCIL
First Respondent

JOSELO SILVA
Second Respondent

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David Bradly (instructed by Browne J Robson) appeared on behalf of the **Appellant**
Ms Alice Hilken (instructed by the Nursing and Midwifery Council) appeared on behalf of the

First Respondent
Ms Jessica Russell-Mitra (instructed by AB Mackenzie Solicitors) on behalf of the **Second Respondent**

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J U D G M E N T

1. MR JUSTICE HOLROYDE: On 5 November 2015 a panel of the Conduct and Competence Committee of the Nursing and Midwifery Council found that the second respondent, Mr Silva, was guilty of misconduct, but that his present fitness to practise as a nurse was not impaired. This is a reference by the Professional Standards Authority for Health and Social Care pursuant to section 29 of the National Health Service Reform and Health Care Professions Act 2002, brought on the ground that the decision of the Panel was unduly lenient. For convenience, I shall refer to the Panel of the Conduct and Competency Committee as "the Panel". I shall refer to the Nursing and Midwifery Council as "the Council" and I shall refer to the appellant as "the PSA".
2. Mr Silva has been a nurse for a number of years. In 2013, he was employed as the deputy manager at a particular care home in Croydon. In October 2013, his employers needed to deploy the manager of that care home to work for a time at a different care home. In those circumstances, Mr Silva was asked at very short notice to take over as acting manager of the home at which he worked. Although there is an issue as to whether or not he was subsequently formally promoted, it is I think common ground that he acted in the role of manager of that home for the ensuing months, during which period the relevant events occurred.
3. The residents at the home were, or at any rate included, elderly persons, at least some of whom had the misfortune to suffer from dementia. One of Mr Silva's colleagues was an employee at the home who was referred to before the Panel, and to whom I shall refer, as "Mr 1". Mr 1 and his wife shared a house with Mr Silva. In February and March of 2014, Mr 1 received complaints from three of the elderly residents of the home about the conduct of a member of staff towards them. By reference to duty rosters and the like, it was subsequently possible for those responsible for the home to determine that all these

complaints related to one particular employee referred to as "Mr 4".

4. The chronology of relevant events, at any rate according to the evidence of Mr 1, can be summarised as follows: on 15 February 2014, Resident A reported that overnight Mr 4 had pushed him, had been rough with him and had been rude to him. Resident B independently reported that Mr 4 had been rough with him. Mr B said that the two of them had fought and that he, Mr B, had suffered a cut to his nose. Mr 1 did indeed observe a cut to Resident B's nose. Mr 1 reported these complaints to his team leaders, ladies referred to in the proceedings below as "Ms 2" and "Ms 3". It should be noted that Resident A, in addition to suffering from dementia, was also partially blind.
5. About two days later, Mr 1 saw that there was a cut on Resident B's wrist. He asked about it. Resident B said that he had been in a fight with a member of staff. Mr 1 reported this matter to Mr Silva. He took the opportunity to ask what action had been taken in respect of the earlier complaints. Mr Silva said that no action had yet been taken.
6. Some three weeks later in March 2014, Resident A reported to Mr 1 that Mr 4 had thrown a zimmer frame at him, which Resident A had thrown back. Resident A said that Mr 4 had then pushed Resident A onto the bed and had refused to let him leave his room. A team leader told Mr 1 that he should obtain a statement about this incident. Mr 1 did so. He took the statement to Mr Silva.
7. At around this time a third resident, Resident C, told Mr 1 that he did not want to be left with Mr 4 because Mr 4 had been rough with him.
8. A few days later, Mr 1 asked Mr Silva whether he had taken any action about the complaints. Mr Silva said that he had shown Resident A photographs of the male members of staff, but Resident A had not been able to identify the person about whom he

was complaining. According to Mr 1, although this allegation was denied, Mr Silva told Mr 1 to stop enquiring into the allegations made by residents A and B, because Mr 4 could take them to court for making allegations that he had abused Resident A.

9. A short time later, at the house which they shared, Mr 1 reported Resident C's complaint to Mr Silva. According to Mr 1's account, Mr Silva made an offensive remark in response. Mr 1's evidence was that Mr Silva's words were, "Fucking leave it. They have fucking dementia and don't know what they are talking about." The making of this offensive remark has always been denied by Mr Silva.
10. Mr Silva at some point in this chronology moved Mr 4 to duties in another part of the home.
11. In about mid-April 2014, Care UK, who ran the home and employed Mr Silva, began an investigation into Mr Silva's conduct. In the course of this investigation, a regional support manager spoke to Mr Silva in early May 2014. Her evidence included the following two matters. First, she said that Mr Silva told her that he had moved Mr 4 to another unit of the home in order to protect Mr 4 from the risk of Resident A making further allegations.
12. Secondly, the regional support manager found that a note which had been left for Mr Silva by the team leader to whom I have referred had been written on by Mr Silva. The note was to the effect that the team leader was reporting the complaints made as summarised above by one of the residents. The note ended with the words, "Should this be a safeguarding?" That note occupied the top half of what appears to have been an A4-sized sheet of paper. The bottom half was taken up with manuscript notes by Mr Silva which appear to have been miscellaneous jottings in connection with his other duties. The evidence of the regional support manager on this point was that she pointed

out to Mr Silva that he had used the note left for him as notepaper on which to record sundries. She added, "To me this indicated that [Mr Silva] had not taken the concerns raised by [the team leader] seriously."

13. In the course of the investigation, Mr Silva was suspended from work. He later resigned from that employment. Subsequently, as the evidence showed, he took up employment in another care home.

14. The hearing before the Panel took place between 3 and 5 November 2015. The charges against Mr Silva were in the following terms:

> i. "That you, whilst acting as the home manager of [the care home] between an unknown date in October 2014 and 28 April 2014:
>
> (2) Between 13 February 2014 and 15 April 2015 failed to submit one or more referrals to Safeguarding in respect of any or all of the following residents:
> 1.1 Resident A;
> 1.2 Resident B;
> 1.3 Resident C.
>
> (3) Upon receiving one or more allegations that Colleague 1 [Mr 4] had been physically abusive to Resident A and/or B and/or C you:
> i. 2.1 conducted an inappropriate investigation, in that you asked Resident A to review pictures of members of staff in order to try and identify [Mr 4];
> ii. 2.2 failed to remove [Mr 4] from the clinical environment in that you moved [Mr 4] to another clinical area with access to residents,
>
> iii. And, in light of the above, your fitness to practise is impaired by reason of your misconduct."

15. At the outset of the proceedings, Mr Silva through his counsel Ms Russell-Mitra admitted those charges subject to a qualification. It is to my mind clear that the effect of what was said was that Mr Silva admitted the factual allegations contained in the charges, but denied that his fitness to practise was impaired by reason of misconduct.

16. The Panel heard evidence from Mr 1, from the regional support manager, from the team

leader and from two other witnesses employed by Care UK. Mr Silva himself gave evidence. He called witnesses who gave evidence as to his entirely satisfactory work at the care home in which he was by then employed. He also adduced evidence from a close relative of one of the elderly persons then in his care at that other home, praising the way in which Mr Silva had dealt with her grandfather.

17. It is fair to say that the witnesses called on behalf of Mr Silva spoke in very flattering terms of his work following his return to work after his period of suspension from the care home with which I am most particularly concerned. It is also right to record, this being a point on which reliance is placed on behalf of Mr Silva, that in cross-examination of two of the witnesses called by the Council Mr Silva's attitude towards residents was also spoken of in flattering terms.

18. At the conclusion of the hearing, the Panel gave its decision. In summary, it concluded that Mr Silva was guilty of serious professional misconduct. It referred to the terms of the Council's Code of Standards for Conduct, Performance and Ethics for Midwives. It found that that having been informed of three separate incidents of alleged abuse against vulnerable patients reported to him by three different colleagues Mr Silva had been under a clear duty to refer the allegations to Safeguarding but had:

    i. "... failed to do so due to your poor and personally biased assessment of the facts which should have had no bearing on your obligation to immediately refer the allegations to Safeguarding."

19. I should note in passing that my understanding is that "Safeguarding" is an independent body to which in accordance with the policy in force at the home matters of this nature should have been reported.

20. The Panel went on to find that Mr Silva had failed to consider the safety of the residents and that his actions had shown an intention to protect his colleague rather than to

safeguard the vulnerable residents. Thus, the Panel found serious professional misconduct. The Panel then went on to consider the issue of impairment. It reflected in some detail on the evidence upon which Mr Silva relied as showing that he had now recognised and acknowledged his failings and had taken substantial and successful steps to remedy those matters which called for remediation.

21. The Panel considered, it said, the public interest in the case. It said in the course of its judgment:

    i. "The panel had some concern regarding your professional opinion as to the behaviour of dementia patients. In particular, you stated that some residents with dementia had a tendency to constantly assert matters that were not true, such as not being fed when they had been. You stated that you would address this by making a note of what they had a tendency to allege in the care plan. The panel considered that, in all the circumstances, this was not sufficient. However, it was satisfied from your evidence that you will ensure that two members of staff will always attend a resident who makes such allegations.

    ii. The panel concluded that you have demonstrated adequate insight.

    iii. The panel has carefully considered the public interest in this case. The panel noted that it would not be appropriate in this case to find impairment solely on a public interest basis and that public confidence in the profession will not be undermined by a finding of no impairment, given the specific circumstances of this case and the lack of any subsequent fitness to practise issues."

22. The Panel then referred to the evidence supportive of Mr Silva's recent work and concluded that:

    i. "Although your fitness to practise was impaired at the time of the incidents, given all of the above, your fitness to practise is not currently impaired."

23. On behalf of the PSA, the following grounds of appeal are advanced by Mr David Bradly. They are comparatively lengthy, but must, I think, be set out in full:

    i. "1. The decision of the Conduct and Competence Committee of

the First Respondent that the Second Respondent's fitness to practise is not impaired arose from a serious procedural irregularity, in that the first respondent had failed:

(a) to allege that the Second Respondent ordered the member of staff reporting allegations of abuse of residents at the Home of which he was manager to stop making inquiries into those allegations;

(b) to allege that the Second Respondent told the member of staff reporting allegations of abuse of residents at the Home of which he was manager to 'fucking leave it' as the residents 'are fucking dementia and do not know what they are talking about';

(c) to allege that when a team leader at the Home of which he was manager left him a written note concerning abuse of a resident at the Home by a member of staff, including the words 'should this be safeguarding', the Second Respondent used the paper upon which the note was written as notepaper for other purposes;

(d) make any allegation as to the Second Respondent's motivation, or his reasons, for:

(i) the actions described at (a) to (c) above;

ii. (ii) the actions referred to in the Head of Charge 2.

iii. 2. By reason of the serious procedural irregularity described in Ground 1 above or in any event, the Conduct and Competency Committee failed to make adequate findings as to the nature and seriousness of the Second Respondent's misconduct, in that the committee:

(a) took no account of the matters set out at (a) to (c) under Ground 1 above;

(b) had carried out no enquiry into the matter set out at (d) under Ground 1 above;

(c) in any event failed adequately to identify the seriousness of the Second Respondent's misconduct, in that:

(i) it took no account of the fundamental importance of safeguarding in the care of vulnerable residents in nursing homes;

iv. (ii) it took no account of the fact that reports of possible abuse of residents of the nursing home came from more than one member of staff, including team leaders;

v. (iii) in respect of Head of Charge 1, it took inadequate account of the risk posed to the residents of the Home during the period when no safeguarding report had been made but allegations of abuse had been and were being made;

vi. (iv) it took no account of the fact that, in relation to the residents of the Home the Second Respondent was in a position of trust and his actions amounted to a breach of that trust;

vii. (v) it failed to take account of the fact that the Second Respondent put the interests of the employee complained about ahead of those of the residents for whom he was responsible;

viii. (vi) it failed to consider whether the facts admitted and found proved demonstrated a deep-seated attitudinal problem on the part of the Second Respondent;

ix. (vii) it failed adequately to identify the extent to which the Second Respondent was in breach of *The Code: Standards of Conduct, Performance and Ethics for Nurses and Midwives*.

x. 3. By reason of its failure to identify the seriousness of the Second Respondent's misconduct adequately and/or in any event, the Conduct and Competence Committee was wrong to determine that the Second Respondent's fitness to practise was not impaired, as:

(a) in the absence of an adequate identification of the nature and seriousness of the Second Respondent's misconduct, it was not able to undertake an adequate assessment of his fitness to practise;

(b) given the concerns it expressed in respect of the Second Respondent's level of insight, it was wrong to find that the Second Respondent had demonstrated adequate insight;

(c) it failed to have adequate regard to:

(i) the nature and the seriousness of the Second Respondent's

misconduct, including in the respect described at (c) under Ground 2 above;

xi. (ii) the risks posed to residents by a Home manager who had made, or may have made, the statement set out at (a) to (c) under Ground 1 above;

xii. (iii) given the concerns it expressed in respect of the Second Respondent's level of insight, the risk the Second Respondent continues to pose to those in his care;

xiii. (iv) having regard to (i) to (iii) above, the need to protect patients;

xiv. (v) having regard to (i) to (iv) above, the public interest in maintaining confidence in, and the declaration of standards for, the profession of nursing;

xv. (d) it gave undue weight to:

(i) the steps which the Second Respondent had taken to remediate the deficiencies in his practice;

xvi. (ii) a letter from the daughter of a resident at the home at which he is now employed;

xvii. (iii) the references he produced.

xviii. 4. In the circumstances described at each of Grounds 1 to 3 above the determination of the Conduct and Competence Committee that the Second Respondent's fitness to practise as a nurse is not impaired is unduly lenient.

xix. 5. The Appellant respectfully asks the Court to allow this appeal, quash the decision of the Conduct and Competence Committee and (i) remit the matter to the Committee with a direction to the First Respondent that it include the matters set out at (a) to (d) under Ground 1 above in the allegation to be addressed to the Second Respondent; alternatively (ii) determine that the Second Respondent's fitness to practise is impaired by reason of his misconduct; (iii) either impose the appropriate sanction upon the Second Respondent or remit the matter to a differently constituted Committee to impose the appropriate sanction; and in any event (iv) make provision for the Respondents to pay the Appellant's costs of this appeal."

24. On behalf of the Council, Ms Alice Hilken supports the grounds of appeal in the sense that she accepts that they are well founded and that the appeal should succeed. On behalf of Mr Silva, Ms Russell-Mitra, appearing here as she did below, has vigorously resisted the appeal.

25. It is necessary to begin by considering the nature of a review by this court pursuant to Section 29 of the 2002 Act. So far as is material for present purposes that section is in the following terms:

> i. "29. Reference of disciplinary cases by Council to Court.
>
> 1. This section applies to —
>
> ii. ...
>
> (i) any corresponding measure taken in relation to a nurse, midwife or health visitor
>
> iii. ...
>
> 2. This section also applies to —
>
> (a) a final decision of the relevant committee not to take any disciplinary measure under the provision referred to in whichever of paragraphs (a) to (h) of subsection (1) applies
>
> (b) any corresponding decision taken in relation to a nurse, midwife or health visitor...
>
> iv. ...
>
> (2) The things to which this section applies are referred to below as 'relevant decisions'.
>
> (3) If the Council considers that—
>
> (a) a relevant decision falling within subsection (1) has been unduly lenient, whether as to any finding of professional misconduct or fitness to practise on the part of the practitioner concerned (or lack of such a finding), or as to any penalty imposed, or both, or

(b) a relevant decision falling within subsection (2) should not have been made,

ii. and that it would be desirable for the protection of members of the public for the Council to take action under this section, the Council may refer the case to the relevant court.

iii. ...

iv. (7) If the Council does so refer a case—

(a) the case is to be treated by the court to which it has been referred as an appeal by the Council against the relevant decision (even though the Council was not a party to the proceedings resulting in the relevant decision)...

v. ...

vi. (8) The court may—

(a) dismiss the appeal

(b) allow the appeal and quash the relevant decision

(c) substitute for the relevant decision any other decision which could have been made by the committee or other person concerned, or

(d) remit the case to the committee or other person concerned to dispose of the case in accordance with the directions of the court, and may make such order as to costs ... as it thinks fit."

26. The effect of section 29(7) is that the review is treated as an appeal subject to the provisions of CPR 52. 52.11(3) states:

i. "The appeal court will allow an appeal where the decision of the lower court was —

(a) wrong; or

(b) unjust because of a serious procedural or other irregularity in the proceedings of the lower court."

27. The first ground of appeal alleges a failure by the Council to make allegations against Mr Silva which it is submitted ought to have been made so that the Panel could consider them and could assess the full seriousness of Mr Silva's conduct before deciding the issue of impairment.

28. In this regard, it is important to note that the role of a disciplinary body, such as this Panel, considering issues such as fitness to practise is very different from that of a criminal court considering allegations brought by a prosecuting authority. One very significant difference is the importance of the disciplinary body having regard to the imperative need for protection of the public rather than punishment of the "offender". Another difference, important for present purposes, was expressed in the following terms at paragraph 80 of the judgment of the court delivered by Lord Phillips in Ruscillo v Council for the Regulation of Health Care Professionals and General Medical Council [2004] EWCA Civ 1356:

    i. "The disciplinary tribunal should play a more proactive role than a judge presiding over a criminal trial in making sure that the case is properly presented and that the relevant evidence is placed before it."

29. Mr Bradly's submissions on behalf of the PSA relied heavily on the decision of Ruscillo and, in particular, to those passages in the judgment which considered the effect of section 29(4) of the 2002 Act.

30. The Court of Appeal emphasised that the reference to the "High Court" is to be treated as an appeal against the decision of the disciplinary tribunal. Thus, if the court were to conclude that the tribunal's decision as to penalty was correct, it would dismiss the appeal even if it concluded that some of the findings which led to the imposition of that penalty were inadequate. If, however, the court were to decide that the decision as to penalty was wrong, its duty was to allow the appeal, quash the decision and then take one of the

courses permitted by Section 29(8). It is appropriate for me to cite some passages of Lord Phillips' judgment:

i. "72. It may be that the Court will find that there has been a serious procedural or other irregularity in the proceedings before the disciplinary tribunal. In those circumstances it may be unable to decide whether the decision as to penalty was appropriate or not. In such circumstances the Court can allow the appeal and remit the case to the disciplinary tribunal with directions as to how to proceed, pursuant to CPR 52.11(3)(b) and section 29(8)(d) of the Act.

ii. 73. What are the criteria to be applied by the Court when deciding whether a relevant decision was 'wrong'? The task of the disciplinary tribunal is to consider whether the relevant facts demonstrate that the practitioner has been guilty of the defined professional misconduct that gives rise to the right or duty to impose a penalty and, where they do, to impose the penalty that is appropriate, having regard to the safety of the public and the reputation of the profession. The role of the Court when a case is referred is to consider whether the disciplinary tribunal has properly performed that task so as to reach a correct decision as to the imposition of a penalty. Is that any different from the role of the Council in considering whether a relevant decision has been 'unduly lenient'? We do not consider that it is. The test of undue leniency in this context must, we think, involve considering whether, having regard to the material facts, the decision reached has due regard for the safety of the public and the reputation of the profession.

iii. ...

iv. 76. ... We consider that the test of whether a penalty is unduly lenient in the context of section 29 is whether it is one which a disciplinary tribunal, having regard to the relevant facts and to the object of the disciplinary proceedings, could reasonably have imposed."

31. Mr Bradly submits that references in the passages which I have cited to "the relevant facts" must mean, in the light of the passage I have quoted from paragraph 80 of the judgment, those facts which either have been put before the disciplinary tribunal or should have been put before the tribunal if the tribunal had properly exercised its duty to

be proactive in that regard. I agree.

32. Mr Bradly also relied in support of his submissions on two decisions which provide support for the proposition that a failure to include relevant allegations in the heads of charge against a practitioner may in itself be a serious procedural irregularity: R (on the application of Council for the Regulation of Health Care Professionals) v General Medical Council and Rajeshwar [2005] EWHC 2973 and R (on the application of Council for the Regulation of Health Care Professions) v Nursing and Midwifery Council and Kingdom [2007] EWHC 1806.

33. All parties also relied upon the recent decision of Andrews J in The Professional Standards Authority v The Nursing and Midwifery Council and Macleod [2014] EWHC 4354 (Admin). Her Ladyship at paragraph 25 of her judgment in that case gave a helpful summary of the key principles to be distilled from Ruscillo. She too referred to the cases of Rajeshwar and Kingdom.

34. It follows that in considering the grounds of appeal the PSA is in principle entitled to argue, as it does here, that the decision of the Panel not to find impairment was unduly lenient, because the Council had failed to put appropriate allegations before the Panel in the heads of charge and the Panel had failed to consider those uncharged allegations.

35. The specific matters which Mr Bradly submits should have been charged but were not charged are the three allegations set out in sub-paragraphs (a) to (c) of the first ground of appeal. For convenience, I shall from now on refer to these collectively as "the three allegations".

36. Against that background, I turn to consider the submissions as to the issue of a serious procedural irregularity. The PSA submits that the three allegations are highly relevant and significant matters which should have been considered by the Panel. They should

therefore have been included in the heads of charge. They were not so included. Mr Bradly submits they were not in the event considered by the Panel. He accepts, as is abundantly clear from the full transcript of the proceedings, that the relevant evidence was given, because the allegations were made in the witness statements read by the relevant witnesses in the course of their evidence-in-chief. He acknowledges that if evidence is properly before the Panel and is properly considered, it may not be essential that it is formally referred to in a charge, though he submits that it is preferable that it should be; but in this case, argues Mr Bradly, it is clear from the transcripts that the Panel did not in fact consider the three allegations. Instead, submits Mr Bradly, the Panel confined itself to a consideration of the admitted facts in the charge. Those facts relate, as Mr Bradly points out, simply to omissions on the part of Mr Silva to take action which he should have taken. Those pleaded allegations are silent as to the reasons why he failed to take the appropriate action.

37. In the event, submits Mr Bradly, the basis on which the Panel was reaching its decision was incomplete and inadequate. He helpfully took me through a number of passages in the transcripts to make good his submission that the Panel had not in fact considered the three allegations.

38. Ms Hilken, on behalf of the Council, similarly submits that the Panel did not in fact consider the three allegations. She suggests that the primary cause of that failure on the part of the Panel was the initial failure on the part of the Council to include any reference to the three allegations in the heads of charge.

39. Ms Russell-Mitra, however, submits to the contrary. She argues that all of the relevant evidence was heard and she submits it was all in fact considered and taken into account by the Panel in reaching its decision. Ms Russell-Mitra argues that the approach of the

Panel was to treat the whole of the evidence adduced on behalf of the Council as being admitted. That, she says, was the effect of the exchange between her and the chairman of the Panel at the outset of the hearing as to what was admitted.

40. Ms Russell-Mitra readily acknowledges that in truth not all the factual allegations were admitted. Mr Silva denied that he had told Mr 1 to stop making enquiries; he denied that he made the offensive remark; and he put forward an explanation for why he had written on the sheet of paper which raised the issue of safeguarding. Ms Russell-Mitra therefore acknowledges that on her approach to the matter the Panel fell into error in treating as admitted allegations which were not in fact admitted. But, she says, that error could only ever work to the disadvantage of Mr Silva. Given that the Panel in any event concluded that his fitness to practise was not impaired, she therefore argues that she is entitled to rely on the approach taken by the Panel.
41. From that starting point, Ms Russell-Mitra submits that if the appeal were to be allowed and the case remitted for a fresh hearing before a different panel, that panel would be in exactly the same position as the Panel whose decision is under appeal. No further evidence would or could be adduced, she submits. The case against Mr Silva could not be any stronger than it was at the hearing below.
42. Ms Russell-Mitra accordingly submits that this appeal is not a principled application to ensure that matters which should have been considered but were not considered are in the end considered. She submits it is an inappropriate attempt to deny the Panel its jurisdiction to assess all the evidence before it and to reach its considered conclusion in favour of Mr Silva.
43. More generally, Ms Russell-Mitra emphasises the importance of the evidence she was able to adduce both from Mr Silva and from witnesses called on his behalf as to his work

and standards whilst employed at the current care home. This is an aspect of the case, she argues, to which both the PSA and the Council have given insufficient weight.

44. Ms Russell-Mitra points to a number of authorities to support the submission that the Panel was entitled to have regard to the excellent record of Mr Silva both before and after the matters complained of in reaching its finding that his present fitness to practise was not impaired. It is sufficient for me to mention in this regard two of the cases upon which she relies: R (on the application of Zygmunt) v the General Medical Council [2008] EWHC 2643 (Admin) and Cheatle v the General Medical Council [2009] EWHC 645 (Admin).

45. I have reflected upon those competing submissions. My views are as follows. First, the importance of the three allegations is to my mind obvious. If it be true that Mr Silva ordered a cessation of enquiry into the allegations made by vulnerable residents and/or that he made the offensive remark and/or that he treated the note raising safeguarding issues as a bit of scrap paper to be used for any purpose, those are all matters which could be regarded as shedding important light on why Mr Silva failed to act in the respects charged against him and admitted by him. If true, the three allegations, individually and collectively, were capable of providing valuable assistance to the Panel in determining whether there was or was not a serious underlying attitudinal problem on the part of Mr Silva which could affect his ability to care for elderly, and in particular elderly and demented, persons.

46. In the circumstances of this case, it was in my view plainly important to establish, for example, whether the offensive remark attributed to him was in fact made and, if so, whether it was evidence of what might be called a generic view on his part about the unreliability of complaints made by elderly or elderly and demented residents. For

my part, I do not see how it would be possible to consider the issue of remediation and current fitness to practise without first establishing the reasons for the acknowledged past unfitness to practise, so as to see whether remediation had indeed been accomplished.

47. Secondly, given the importance of the three allegations, they should in my view have been pleaded in a charge or charges. It may well be that it is not absolutely necessary for every allegation to be included in a specific charge. One can well see why a disciplinary tribunal may perfectly properly proceed on the basis of a general charge, within which were subsumed a number of specific allegations, all of which were agreed by the parties to be relevant matters calling for consideration. Moreover, I accept the submission of Ms Russell-Mitra that there must be a limit to how far the disciplinary body has to go in particularising every single criticism of a professional in the form of a specific charge. But there is an obvious risk that even if there appears superficially to be agreement between the parties as to what is and what is not in issue, there may subsequently emerge a difference of opinion in that regard. Moreover, as Andrews J pointed out in her judgment in Macleod, the laying of a specific allegation in a charge has the benefit that it will focus attention upon that allegation, enable the parties to address it in their submissions and assist the tribunal to consider it in reaching their decision.

48. The three allegations were not in fact pleaded in a charge. Were they, nonetheless, all taken into account by the Panel? The answer in my view is plainly in the negative.

49. I accept Mr Bradly's submission that the clear tenor of the various observations by the chairman of the Panel, to which he took me in the transcripts, is that the Panel was considering only the allegations which were set out in the charges and which had been admitted by Mr Silva. I do not think it necessary to go through all of the passages to which Mr Bradly invited my attention, but I should mention two or three of them. In

the transcript of the second day's proceedings at page 18G the chairman said this:

i. "We are at the stage of misconduct and impairment where we have to consider whether in the light of the facts found proved as to whether Mr Silva's fitness to practise is impaired, and I think evidence at this stage must be related to that."

50. Given that that observation was made in the course of the hearing rather than at the end of it, I agree with Mr Bradly that reference to the facts found proved must be a reference to those facts which had been admitted by Mr Silva. His admission related only to what was set out in the charge.

51. Later in the transcript of that day's proceedings the point is made still clearer in these observations by the chairman addressed to the advocate then presenting the case for the Council:

i. "Mr McLean, I think the Panel is very aware that actually what has been admitted to is a failure to submit referrals and that is what the Panel in due course will have to decide whether or not that is misconduct."

52. I would mention also in this regard what was said in the Panel's decision:

i. "Having heard submissions on misconduct and impairment, the Panel then went on to consider whether the facts found proved, by way of admission, amount to misconduct and if so whether your fitness to practise is currently impaired."

53. Conversely, I am unable to accept Ms Russell-Mitra 's submissions to the effect that the Panel did in fact take into account all of the evidence. There are, in my view, a number of substantial difficulties with that submission. First, at no point did the Panel say that was what they were doing. On the contrary, in the passages to which I have referred above, they said the opposite.

54. Secondly, it seems to me that the submission implies that the Panel simply rode roughshod over the clear identification of there being some factual matters which were

not admitted. I am not prepared to assume that a responsible panel did any such thing.

55. Thirdly, on the basis put forward by Ms Russell-Mitra, it would be an extraordinary feature, that having indicated at the outset that all factual matters asserted on behalf of the Council were taken to be admitted, the Panel nonetheless went on to hear the evidence on each side as to those matters which were not admitted, but made no comment about the pointlessness of that exercise. It would be still more remarkable that the Panel would on this argument have come to the conclusion that Mr Silva had lied to them in his evidence on these disputed matters, but nonetheless, without any reference to those lies, concluded that he had a sufficient appreciation of and insight into his failings and was fit to practise.

56. Lastly, in the decision which was handed down, the Panel referred only to "the admitted facts", by which, as I have indicated, they must have meant the admitted facts set out in the charge. At no point in their decision did they even refer to the three allegations; still less did they set out any reasoning about those allegations or any finding which they had reached or any explanation of why those findings did not lead to a different conclusion on the issue of impairment.

57. I recognise of course that when considering the decision of a disciplinary tribunal of this nature it would be wholly unrealistic and unfair to expect them to express themselves in the way in which a panel of three professional judges might express themselves in a court judgment; but, even allowing for that latitude, I cannot think that the Panel could have adopted such an attitude to these important allegations if, as Ms Russell-Mitra submits, they really did consider them all.

58. If it really were the case that the Panel treated as admitted facts which were not truly admitted, ignored the fact that Mr Silva then told what the Panel must have regarded as

lies on those issues, and then reached a finding of no impairment without a word of explanation as to their reasoning, then the decision would, in my view, be unduly lenient for other reasons. In short, it is my view that Ms Russell-Mitra's submission on this point involves ascribing to the Panel failings which I do not think it right to ascribe to them.

59. That then brings me to this question: applying the principles set out in Ruscillo, does the failure of the Panel to consider the three allegations render the Panel's decision unduly lenient? In my judgment, it does.

60. Mr Silva admitted failing to act in ways which amounted to serious professional misconduct, but having regard to the public interest, both in regard to the safety of patients and with regard to the maintenance of public confidence in the profession, it does not seem to me to be sufficient merely to declare that Mr Silva failed to act when he should have acted.

61. In order to assess his fitness to practise, it seems to me necessary in a case such as this to go on to consider why he failed so to act. Mr Silva did undoubtedly give his explanation in the course of his evidence, but that explanation should be considered by the Panel in light of all the other available evidence. Evidence was available, which, to put it at the very lowest, was capable, if accepted as true, of suggesting that the true explanation for the omissions to act lay in a serious underlying attitudinal problem.

62. Without addressing the three allegations and making findings of fact as to whether or not they were true and without then addressing the significance of those findings, the Panel in my view could not properly address the issue of impairment. It could not understand fully the reasons why Mr Silva's fitness to practise was previously impaired. Without identifying the true nature of his past impairment, the Panel could not properly assess whether he had successfully remediated his past failures and was now fit to practise.

63. For those reasons, it seems to me that the Panel in the circumstances of this case was required to address and decide the three allegations so that it could properly discharge its duty of considering the public interest. For those reasons, the appeal must, in my judgment, be allowed on the ground of a serious procedural irregularity.

64. On behalf of the PSA, it was further submitted that this court could in any event conclude that the decision as to impairment was unduly lenient, even if one leaves out of account altogether the three allegations. Mr Bradly, as I have indicated, was critical of certain aspects of the Panel's approach and findings.

65. I have considered carefully whether I should reach a conclusion about this alternative submission. I do not think it would be right for me to do so. First, I would be determining the issue without myself considering those matters which I have just decided the Panel should have considered. However much that was put into the context of dealing with the merits of the present reference, it seems to me that I would be storing up difficulties for any future panel considering any issue of impairment or any sanction. Moreover, since it would in any event be for a panel to determine sanction, I do not think it would be right for me to say anything in the course of this judgment which might inadvertently influence the view of that Panel. The submissions which Ms Russell-Mitra made below and in this hearing as to the importance of the past and subsequent good conduct of Mr Silva and the importance of the evidence adduced on his behalf are points which will undoubtedly have to be given very careful attention by any panel determining any issue of impairment or sanction. The Panel should be free to approach the matter without any unconscious influencing by anything I might say.

66. I therefore make my decision solely on the basis of the serious procedural irregularity. On that basis, my order is as follows:

1. The appeal is allowed.
2. The decision of the Panel of the Conduct and Competence Committee on 5 November 2015 is quashed.
3. The matter is remitted to a differently constituted panel for rehearing.
4. I direct that the Nursing and Midwifery Council draft a new charge or charges which include the matters referred to in paragraphs (a) to (d) of the first ground of appeal.

67. MR BRADLY: My Lord, the appellant, PSA, in light of your Lordship's judgment, seeks an order that its costs be paid by the respondents.
68. Concentrating on the principle, both respondents are in effect responsible for all of the appellant's costs. Your Lordship has seen the terms of my learned friend Ms Hilken's written submissions. There is reference there to the first respondent paying the appellant's costs up until 20 January 2016, because that was when the first respondent conceded that the appeal ought to be allowed.
69. MR JUSTICE HOLROYDE: 27 January.
70. MR BRADLY: 20th. Forgive me.
71. MR JUSTICE HOLROYDE: This says 27th.
72. MR BRADLY: In those circumstances, I am very sorry.
73. MR JUSTICE HOLROYDE: Yes.
74. MR BRADLY: So far as the costs after that date are concerned, of course it remains the position that it was the first respondent's error which has needed to be corrected by way of a court order, which has to a degree resulted in this appeal being effective.
75. Of course the first respondent having conceded the appeal with effect from

27 January 2016, it is Mr Silva's continued opposition to it which has resulted also in the hearing also taking place.

76. MR JUSTICE HOLROYDE: The communication was to Mr Silva's advisors as well as to your side, was it?

77. MR BRADLY: Yes, of course.

78. That, my Lord, is really a matter as between these two respondents. The PSA's costs must, in my respectful submission, be met. Both respondents are responsible for all of the costs and both ought to be liable for them.

79. MR JUSTICE HOLROYDE: All right. Are you seeking a summary assessment or a detailed assessment?

80. MR BRADLY: My Lord, I have certainly spoken to my learned friend Ms Hilken, but I think not my learned friend Ms Russell-Mitra. The position is that given the difficulty of precisely identifying what has been incurred by way of costs after the date your Lordship has, although it is a case of a day or less, it may be more sensible here for there to be a direction for a detailed assessment, subject of course to an agreement between the parties, which is what one would hope would happen.

81. MR JUSTICE HOLROYDE: Yes. Thank you.

82. MS HILKEN: My Lord, I do propose to address you briefly, but can I just have one minute to speak to my learned friend?

83. MR JUSTICE HOLROYDE: Yes. Is it going to be easier for everyone if I just rise for five minutes?

84. MS HILKEN: My Lord, I think we have already spoken about the issue of costs informally. So, I do not think we are going to reach any agreement. It is just about another matter.

85. MR BRADLY: My Lord, without confusing the costs issue now, it may be that we will ask your Lordship to allow us to address you briefly in respect of the precise terms of the order. Given the fact that we have embarked upon the argument in principle as to costs, shall I complete that for the moment?
86. MR JUSTICE HOLROYDE: Yes, but I will take the opportunity to give advance warning that I will, predictably enough, be inviting you to draw up an order in the end.
87. MR BRADLY: Absolutely. I am in the process of doing that. It may well be that we will address the issue that my learned friend is concerned about in a moment.
88. MS HILKEN: Yes, my Lord. Your Lordship will have seen from my skeleton argument our position as to costs. I have here the letters that were sent to both parties setting out our position on 20 January.
89. The way matters played out in this case was this appeal was listed very shortly after the appeal was lodged. By 20 January, we already had a hearing date. Evidently, the NMC wanted to try to resolve matters as expeditiously as it could, which is why it wrote to Mr Silva's solicitors giving them effectively seven days grace. It would normally be 14. In fact, the letter effectively says we are willing to concede. These are the terms on which we wish to concede. Please take legal advice. If you seek to defend, then the costs of that fall upon you.
90. The matter is obviously in this court's hands. The position we take is that it should not be a matter between all parties, because obviously that is not something that we could easily enforce. Were the court to take the position advocated by my learned friend, then obviously all of the costs would fall on the NMC.
91. Whilst from one perspective one can see that the fault in this appeal lies with the NMC, Mr Silva was put on notice that it was open to all parties to wrap this up by way of

consent. He chose to mount a positive defence, which, as your Lordship has said, has been very vigorously put forward by his counsel today.

92. MR JUSTICE HOLROYDE: Yes.

93. MS HILKEN: That is on principle. My Lord, there is obviously the question of assessment, but perhaps I will leave that. Would your Lordship like to see the letters?

94. MR JUSTICE HOLROYDE: I better had, yes. (Handed) Thank you.

95. MS HILKEN: My Lord, for the avoidance of doubt, although that was sent to Mr Silva, by the time it was sent in fact he had engaged solicitors. They were on board on that date.

96. MS RUSSELL-MITRA: I will double-check that. The decision has been clear for Mr Silva's solicitor's throughout that they intended to defend.

97. MR JUSTICE HOLROYDE: Yes. Thank you.

98. MS RUSSELL-MITRA: Just to rectify that last point, there have throughout this case been funding issues. Whilst Mr Silva's solicitors who were instructed for the NMC proceedings were assisting him, they were not in funds to give any positive views as to whether he would be defended. They were not in funds until this week.

99. MR JUSTICE HOLROYDE: I see, yes.

100. MS RUSSELL-MITRA: There is, as your Lordship will know, no funding whatsoever for nurses in front of the Panel. Those costs that the Council have caused Mr Silva to incur in the lower court can never be recovered. The three days that it is accepted by the NMC are the NMC's error can never be recouped, because there is no costs provision in the Panel proceedings.

101. MR JUSTICE HOLROYDE: He bore the costs of instructing --

102. MS RUSSELL-MITRA: Whether he wins or loses in front of the Panel, he bears

those costs no matter what.

103. MR JUSTICE HOLROYDE: I know he was represented by you. Was there a solicitor involved at all?

104. MS RUSSELL-MITRA: There was. He bore the entire costs of the three-day proceedings in front of the Panel. Although at the end of it effectively he had won -- if one can win or lose in these proceedings. It is not quite like any other civil jurisdiction -- he could not recoup any of those costs.

105. MR JUSTICE HOLROYDE: Because there is no power to order them.

106. MS RUSSELL-MITRA: There is no costs power at all in front of the Panel. His position then is that he is forced to be the second respondent in the appeal.

107. I concede the fact that after 27 January in any other normal civil jurisdiction the choice of the second respondent to continue with these proceedings would be one which would be met, rightly, with paying costs from that date. The only difficulty is that whatever happens to Mr Silva after this hearing risks again the loss of his profession and the loss of his ability to sustain himself with his livelihood.

108. Effectively, it is not like any other sort of civil appeal where one can decide to concede it or one can decide to negotiate or one can decide to settle it in some way. There is no way of settling it. The only way of settling it is to remit it back and to re-do all that he had done before.

109. Of course, the costs implications of that, if he is going to instruct counsel and solicitors or one or the other for the next set of proceedings, it is likely to take longer than three days, because there will be more charges. The whole of those costs again will be borne by Mr Silva. It does not fit neatly into any of the CPR principles. I think that may be why section 29 is drafted to allow this court latitude to deal with costs as it deems fit.

110. The reason for that is twofold. There is no costs recovery in the lower court. There is also this difficulty that upon going back he will have to incur further costs. The error in this case is not an error that Mr Silva could have done anything about. It was for the Panel or for the Council to have done it. There is no onus on him to say, "You have not charged me right." Even if he had said, "You have not charged me right," and no criticism can be made of him, because all matters which my learned friend for the PSA have brought to your attention were brought to their attention by Mr Silva in that hearing.

111. MR JUSTICE HOLROYDE: I said in the course of Mr Bradly's submissions that it seemed to me from the transcript that you were making your position pretty plain, but you were put I think in what for any advocate is a difficult position.

112. MS RUSSELL-MITRA: The difficulty is that Mr Silva was not in any position to change the charges. The Panel and the Council both were. Mr Silva cannot draft his own charges. He could not have rectified the position. It is not really like any other jurisdiction.

113. MR JUSTICE HOLROYDE: I understand the point. What order do you invite the court to make?

114. MS RUSSELL-MITRA: That the second respondent bears none of the costs, because of the nature of that. If the costs of the PSA must be met, that is a public authority doing its duty and they must be met. I do not entirely know how the PSA is funded, but it cannot be funded solely by recovering costs.

115. MR JUSTICE HOLROYDE: You are not arguing that you should obtain your costs from anybody else; you are simply saying you should not have to pay anybody else's.

116. MS RUSSELL-MITRA: Absolutely.

117. MS HILKEN: Can I just briefly respond on one point. The NMC's costs are paid by registrants. All of the NMC is funded by nursing and midwifery registrants.

118. The difficulty, in my respectful submission, with Ms Russell-Mitra's submission is that were her principles to be adopted by this court, there is effectively no incentive for registrants to settle these appeals, which leaves both the Authority and Council in a difficult position in that effectively it means that all of these appeals would trundle their course to full conclusion, whereas it is fairly common for them to be settled by way of consent.

119. MR JUSTICE HOLROYDE: All right. Thank you.

120. MR BRADLY: I am sorry, my Lord. May I just make one final observation and go last please? A side issue perhaps, but the PSA is not a public body. It is funded from other regulators and, insofar as these proceedings are concerned, by orders of the costs it receives.

121. My submission is that the PSA's costs of the appeal must be paid. Given my learned friend Ms Russell-Mitra's submissions, the right order might be for the NMC, the first respondent, to pay the costs of the appeal, but to allow it some opportunity to recover some of those costs from the second respondent. The risk of those costs never being recovered ought not, in my respectful submission, be borne by the appellant.

122. MR JUSTICE HOLROYDE: Yes. Thank you.

123. Section 29(8) of the 2002 Act gives this court the power to make such order as to costs as it thinks fit. No one doubts that the Professional Standards Authority's costs should be paid by one or both respondents.

124. The Nursing and Midwifery Council concede that they should pay the PSA's costs at least up to and including 27 January 2016. After that date, however, and in the light of

letters sent to the other parties on 20 January, Ms Hilken submits that the costs of the PSA, and it may be also of the Council, should be paid by Mr Silva. In summary, as from 20 January Mr Silva was on notice that the counsel was willing to concede the appeal and on notice that if he continued to contest the appeal he was at risk as to costs.

125. Ms Russell-Mitra acknowledges that in many jurisdictions those are considerations which would result in an order that Mr Silva pay at least some of the costs. She points, however, to the particular circumstances of this case. There being no provision for any orders as to costs below, Mr Silva has already borne the costs of his legal representation at a three-day hearing before the Panel. He has done so on the basis that the Panel considered the charge put before it by the Council and, ultimately, reached a conclusion which was substantially in Mr Silva's favour. This appeal has then been brought.

126. To my mind, the specific facts of this case are important. Nothing I am about to say in this short ruling should be regarded as either an encouragement or a discouragement to any other party in any other proceedings which may arise in the future. I see the force of the submissions which Ms Hilken makes, but there is, to my mind, a strong argument on Mr Silva's side.

127. Without intending any unkindness to any of those concerned, but merely to speak in abbreviated terms so as to make clear the reason for my decision, the circumstances come to this: the Council in one capacity brought the wrong charge, or an incomplete charge; the Council in another capacity considered the wrong charge or the incomplete charge and did not consider the complete charge.

128. In the exchange at the start of the proceedings to which I have referred more than

once, Ms Russell-Mitra, as it seems to me, endeavoured to make clear and did make clear that there were some matters of fact still in issue between the parties. She was not able to deflect the Panel from the course which it chose to take. The Council at that stage did not intervene either to confirm that there were matters of fact still in issue between the parties or to assist the Panel to come to the conclusion that those matters should properly be identified and dealt with.

129. It was in those circumstances that Mr Silva conducted the proceedings below at his own expense. He faces further expense, because the matter is now to be remitted for a fresh hearing. True it is that on, or shortly before, 20 January he could have chosen to take a different course, but one of the consequences of the history which I have summarised in those abrupt terms is that he must have parted with a good deal of his money in order to fund his broadly successful appearance below.

130. In my mind, overall justice will be done if I make an order which has the effect that the Council will pay the costs of the PSA up to and including the hearing of the appeal, but that there shall be no other order as to costs between the parties, with the result that Mr Silva will bear his own costs of this appeal.

131. Subject to any further submissions, I will achieve that end by making the following order only: the appellant's costs of this appeal will be paid by the first respondent, such costs to be the subject of detailed assessment if not agreed.

132. Mr Bradly, I would be grateful for your assistance, and indeed the assistance of other counsel if they wish to contribute, as to whether that order achieves the purpose which I have just identified.

133. MR BRADLY: Yes, my Lord. Certainly on this side of the room.

134. MR JUSTICE HOLROYDE: Thank you. Could I then ask you to agree a draft

order with your learned friends and email it to my clerk?

135. MR BRADLY: Of course.

136. My Lord, I did mention one possible other issue. I think I can confirm we do not need to trouble your Lordship with anything else.

137. MR JUSTICE HOLROYDE: Very good. My thanks again to all counsel.